FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 6, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 94-719-M
	:	A.C. No. 42-02086-05503
v.	:	
	:	Monroc Pit
WISER CONSTRUCTION, Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Paul Ronald Lewis, *pro se*, Wiser Construction, Moapa, Nevada, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Wiser Construction, L.L.C., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $10,000.00.

A hearing was held on May 9, 1996, in Las Vegas, Nevada. For the reasons set forth below, I affirm the citations and assess a penalty of $7,500.00.

Background

On December 7, 1993, MSHA Mine Inspector James V. Skinner issued 107(a) Order and 104(a) Citation No. 2653620, 30 U.S.C. §§ 817(a) and 814(a), to Wiser Construction for a violation of section 56.3131 of the regulations, 30 C.F.R. § 56.3131.[1] Miners

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[1] Section 56.3131 requires that:

> In places where persons work or travel in performing their assigned tasks, loose or

were withdrawn from the southeast section of the pit and the citation issued because the inspector found that loose, unconsolidated material and large rocks found at the top and upper section of the 300 feet high highwall posed an imminent danger to the operator of a front-end loader working at the foot of the highwall.

Discussions with the company resulted in an agreement that starting at the top of the highwall, the company would

> begin to bench that down so it became a multiple bench mine, rather than just a large highwall. It would be a series of stair steps, maybe to illustrate, where the mine would be benched with a smaller highwall and then a bench, and then just stair-stepping it down until it became manageable. The agreement was that -- the crushers were at the base of that highwall, a safe distance away, but what had to be done was to maintain a slope nearly at the angle of repose, which was approximately 37 degrees, with the material being pushed from the upper benches and maintain a slope, so that the material could be safely loaded from the toe of that broken rock pile.

(Tr. 9-10.) The "angle of repose" is "approximately the angle at which broken or loose, unconsolidated material will come to rest, just on a natural angle, just as it's piled or pushed into the pile." *Id.*

On June 8, 1994, MSHA Inspector Richard R. Nielsen was inspecting a mine adjacent to the Monroc Pit when his attention was directed to Wiser Construction's operations. It appeared to him that the angle of repose was not being maintained and that there was no margin of safety for the loader operators. Consequently, he interrupted the inspection that he was performing and went to the Monroc Pit.

After inspecting the pit, he issued Order/Citation Nos. 4332892 and 4332893, under sections 107(a) and 104(a). Both alleged violations of section 56.3131 of the regulations.

Order/Citation No. 4332892 stated:

> unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard shall be corrected.

> On June 8, 1994 at about 1515 hours a front-end loader loaded material from the toe of the highwall at the southeast section of the pit. Loose ground was hanging on the highwall which was about 37 meters (120 feet) high. Order No. 2653620 was issued on 12/7/93 and remained outstanding, was modified on 12/08/93 "to allow excavation on the outer perimeter of the broken material toe in the southeast section of the pit. . . . this modification allows for outer perimeter excavation if a safety margin (horizontal distance) is maintained between the vertical solid highwall and the excavation area." The safety margin of sloped material and horizontal distance was not maintained as required by Order No. 2653620. This constitutes working in the face of Order No. 2653620.

(Govt. Ex. 1.)

Order/Citation No. 4332893 stated:

> Two front-end loaders were extracting material from the toe of the highwall at the middle section of the pit. There was loose ground on the highwall which was about 37 meters (120 feet) high. The mined material had been extracted from the toe of the highwall to the extent that the rock face of the highwall was exposed and the wall was sloped much steeper than the angle of repose. Loose ground on the highwall was of sufficient size to cause fatal injury to the loader operator if it were to strike the loader cab or come through a cab window.

(Govt. Ex. 4.)

Findings of Fact and Conclusions of Law

During the hearing, the Respondent's representative was asked if he was contesting the citations or just contesting the penalty. He stated: "I'm more in opposition to the penalty. I felt like the citations the way they understood them and the way we understood them were a little different. But to say that's a 100-percent safe operation on that highwall, I'd be lying to you and I'm not going to do that." (Tr. 55.) I agree with his assessment of the case.

Based on the evidence presented by the Secretary, I conclude that the Respondent twice violated section 56.3131 on June 8, 1994, by failing to slope its loose and unconsolidated material to the angle of repose. I further conclude that the large boulders and other loose material located on the highwall made it reasonably likely that the front-end loader operators working at

the foot of the highwall, instead of at the toe of the sloped material as they should have been, would be seriously injured if work continued in that manner. Finally, I conclude that the company's failure to maintain the proper slope on the highwall resulted from "high" negligence in view of the previous order/citation and discussions with MSHA inspectors.

Civil Penalty Assessment

The Secretary has proposed a civil penalty of $10,000.00 for these two violations. The company argues that the penalty is unreasonable when its safety record and financial condition are taken into account. It is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the six criteria, the pleadings indicate that this is a small mine and that the company is a small operator. The company's history of assessed violations is good. On the other hand, these were both serious violations as the operator's negligence was high and the likelihood of death or serious bodily injury resulting from the violations was also high.

The Respondent claims that if the "penalty is not abated it will severely hamper our cash flow capabilities for continuing as an ongoing business." (Resp. Ex. A at p. 4.) The burden of establishing that payment of a civil penalty would adversely affect a company's ability to stay in business is on the company. *Sellersburg Stone Co.* at 1153 n.14. As evidence of its financial situation, the company has submitted a balance sheet, a statement of operations and a schedule of work in progress, all dated September 30, 1995. (Resp. Ex. A at pp. 12-14.)

While these documents, which do not purport to be either audited or certified, apparently show a loss of $35,919.00, they do not show that payment of a penalty of $10,000.00 would adversely affect the company's ability to continue in business if it chose to do so. *Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994). In fact, the company's representative admitted as much at the hearing when he stated: "I mean, I wouldn't say that I wouldn't be able to remain in business, just not at the same degree of integrity that I can right now." (Tr. 52.) Consequently, I conclude that imposition of the proposed penalty will not adversely affect the company's ability to remain in business.

These violations were specially assessed at $5,000.00 each. The special assessment justification for Citation No. 4332892 includes the statement that the violation was the result of intentional conduct on the part of management. This is apparently because the citation stated that the violation resulted from the operator's "reckless disregard." However, at the hearing it was revealed that the parties agreed at the close-out conference that the negligence would be reduced to "high." Accordingly, the Secretary moved to amend the citation to reduce the level of negligence to "high" and the motion was granted. (Tr. 32-33.)

Because of the reduction in the degree of negligence, the penalty should be reduced accordingly. Therefore, considering all of the criteria in section 100(i), as discussed above, I conclude that a penalty of $3,750.00 for each citation, for a total penalty of $7,500.00, is appropriate.

ORDER

Accordingly, Order/Citation Nos. 4332892 and 4332893 are **AFFIRMED**. Wiser Construction, L.L.C., is **ORDERED TO PAY** a civil penalty of **$7,500.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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