FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 30, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 94-504-M A.C. No. 42-01975-05507
v.	:	
LAKEVIEW ROCK PRODUCTS, INC., Respondent	:	Docket No. WEST 94-614-M A.C. No. 42-01975-05508
	:	Docket No. WEST 95-49-M A.C. No. 42-01975-05511
	:	Docket No. WEST 96-88-M A.C. No. 42-01975-05519
	:	Docket No. WEST 96-89-M A.C. No. 42-01975-05520
	:	Docket No. WEST 96-209-M A.C. No. 42-01975-05523
	:	Mine: Lakeview Rock Products

DECISION

Appearances: Ann Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gregory M. Simonsen, Esq., Kirton & McConkie, Salt Lake City, Utah, for Respondent.

Before: Judge Amchan

These cases involve three inspections conducted by MSHA at Respondent's sand and gravel pit in Salt Lake City, Utah. The first three dockets concern inspections made by Richard Nielsen

in November, 1993, and May, 1994. The last three dockets concern an inspection made by Ronald Pennington in August 1995. At the commencement of the hearing Respondent withdrew its contest to 14 penalties proposed by the Secretary. These are recounted in the transcript of this proceeding at pages 21-25. The citation/ orders and penalties that were litigated are discussed below.

Citation 4120703, November 3, 1993 (Docket No. WEST 94-504-M)

On November 3, 1993, Inspector Nielsen arrived at Respondent's mine accompanied by his supervisor William Tanner. During the inspection there was a confrontation between Inspector Tanner and Glenn Hughes, Respondent's President. Respondent also contends that there were confrontations between Mr. Tanner and Scott Hughes, the manager of the sand and gravel pit. This is denied by Mr. Tanner.

While I need not reconcile the vastly differing accounts of what transpired, the enmity that resulted has at least some relevance to what has transpired between MSHA and Respondent since that date. Several citations and penalties from that inspection were litigated in front of me in late 1994 and were decided on January 30, 1995, 17 FMSHRC 83.

On November 3, 1993, Inspector Nielsen asked Scott Hughes on several occasions to show him Respondent's quarterly employment report. Each time Hughes told him that he would have to make an appointment to see these reports at Respondent's headquarters office, which was located less than five miles from the pit (Tr. 35-48)[1]. At about 1:20 p.m. Nielsen issued Lakeview a citation alleging a violation of 30 C. F. R. § 50.40(b), which requires copies of this report to be maintained at the mine office closest to mine site for 5 years after submission (Exh. P-6, block 2).

The next evening at the closing conference Hughes produced and allowed Nielsen to inspect the quarterly reports (Tr. 35, 447). The language of the regulation suggests that the quarterly reports need not be kept at the mine site. However, I conclude that when it is read in conjunction with section 109(a) of the Act, which requires that there be an office at every mine, the regulation requires that a mine operator maintain quarterly employment reports at the mine site.

The Secretary proposed a $100 civil penalty for this

[1]I credit Nielsen's testimony in this regard over Scott Hughes' testimony at Tr. 445.

violation. Considering the penalty criteria in section 110(i) of the Act, I assess a $10 penalty[2]. I deem Respondent's negligence to be very low in that the language of the regulation suggests that the quarterly reports need not be kept at the mine site. Moreover, the gravity of the violation was low. Lakeview apparently timely filed the reports with the MSHA Health and Safety Analysis Center as required by section 50.30. Finally, Respondent rapidly abated the violation by bringing the reports to the closing conference.

Citation 4120697: Open Door on Electrical Compartment(Docket WEST 94-614-M)

On his November 1993 inspection, Nielsen observed that the door to an electrical junction box was open to an angle of 45 degrees. After Nielsen called this to the attention of Scott Hughes, Hughes closed the door almost all the way with a wire cable (Tr. 49-55, 108-112)[3].

Section 56.12032 requires that cover plates on electrical equipment and junction boxes be kept in place except during testing or repairs. The door to the compartment observed by Nielsen served as a cover plate. I read the standard as requiring that such doors be completely closed. Otherwise, electrical cables inside the compartment can be damaged by exposure to the elements or someone may inadvertently contact one of the cables (Tr. 54-55). I conclude that consideration of the penalty criteria in section 110(i) justifies assessment of a $50 civil penalty as proposed.

Citation 4332839: No Office At The Mine Site

On May 2, 1994, Inspector Nielsen issued Lakeview a citation for violation of section 109(a) of the Act. Respondent did not maintain an office at the pit as required by that provision. Afterwards, Respondent abated by designating its scale house as the mine office and erecting a bulletin board.

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[2]With regard to all the violations discussed herein I have considered that Respondent is a small mine operator and that there is no indication in the record that the proposed penalties will compromise its ability to stay in business. After considering its history of past violations of the Act, I see no reason to raise or lower any of the penalties, except as specifically noted.

[3]I find Inspector Nielsen's testimony regarding the size of the opening more credible than that of Mr. Hughes at Tr. 449.

There is no question that Respondent was in violation of section 109(a). I assess a $25 civil penalty rather than $50 as proposed. The cited requirement is one of the more obscure provisions of the Act. The Lakeview pit had been inspected on several occasions previously without any of the inspectors making an issue of the lack of a mine office. I deem this to be evidence of extremely low negligence on the part of Respondent, who appears to have been unaware of this requirement.

Citation 4332903: Alleged Ungrounded Portable Heater

On May 2, 1994, Inspectors Nielsen and Tanner saw an unplugged portable heater sitting on a chair in the control room of the pit (Tr. 60, 168). The plug on the heater was a three-prong plug, from which one of the prongs had been removed (Tr. 60-62, 454). Nielsen issued Respondent a citation alleging a violation of section 56.12025, which requires that all metal which encloses or encases electrical circuits be grounded or provided with equivalent protection.

Respondent contends that the heater was double-insulated and thus was provided with protection equivalent to the grounding of the metal frame (Tr. 453-4, 522-24). While the inspectors insist that the heater was not double insulated, they have not persuaded me that they are correct. Nielsen conceded that he would have to look at the heater again in order to determine whether or not it was double-insulated (Tr. 121). Tanner conceded that he and Nielsen did not inspect the heater to determine whether it was marked as double-insulated (Tr. 169). I therefore conclude that the Secretary has not met his burden of proving that equivalent protection was not provided. I therefore vacate this citation and the corresponding proposed penalty.

Citation 4332838: Unsecured Drill Hose Sections

Inspector Nielsen found a drill, above the pit, connected to an air compressor by a hose which consisted of sections. At two points where the hose sections came together they were not secured by locking devices. Also, the drill itself was not secured to the hose (Tr. 67-73).

Nielsen issued citation 4332838 alleging a violation of section 56.13021. That standard provides:

> Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger and between high pressure hose lines of 3/4-inch inside diameter or

larger, where a connection failure would create a hazard.

Neither Inspector Nielsen nor Inspector Tanner saw the drill in use (Tr. 69-70, 161-62). Respondent's pit manager Scott Hughes contends that the drill was not operational and had not been used in approximately 8 months prior to the inspection. He kept the hoses hooked together to prevent dirt from getting inside them and to prevent small animals from damaging the hoses (Tr. 451-52, 521-22). The drill was not tagged out to indicate that it was defective (Tr. 177).

If the drill is operated without sufficient locking devices there is a danger that the sections will separate and the loose ends will whip violently and injure someone (Tr. 69-70). Although I credit Mr. Hughes' testimony with regard to the condition of the drill, I affirm the violation and assess the $50 penalty proposed by the Secretary.

Even though the drill had not been used, it was accessible to miners and could be started by jump starting it with other equipment (Tr. 162-63). Thus, without being tagged out the condition of the drill was at least potentially hazardous to miners.

Citation 4332911: Inadequate Landing Below Ladder to Jaw Crusher

Inspector Nielsen concluded that there was insufficient room at the base of a ladder on one of Respondent's jaw crushers to provide safe access or egress (Tr. 73-75). He also concluded that if one fell getting on or off the ladder, there was a sharp drop of 8 feet below them (Tr. 73-74, Exhs. P-20 & 21). He therefore issued Respondent citation 4332911, alleging a violation of section 56.11001. The standard requires that a safe means of access be provided and maintained to all working areas.

Scott Hughes contends that there was a 3 to 4 foot ledge below the ladder and that there was a gradual slope below it (Tr. 455-57). I conclude that the testimony of inspectors Nielsen and Tanner is too imprecise to affirm this citation. They did not testify as to size of the ledge below the ladder or the degree of the slope below that ledge. All I am left with is their subjective view that access to the ladder was unsafe. That does not provide a sufficient basis on which I can determine whether section 56.11001 was violated as alleged. The citation and proposed penalty are therefore vacated.

Citation 4332912: Ungrounded Lamp Post

During his May 1994 inspection, Mr. Nielsen observed a

portable lamp post which had a plug that had two prongs instead of three (Tr. 78-79). From this he concluded that the metal frame was not guarded. He therefore issued citation 4332912 alleging a violation of section 56.12025.

The record establishes that the lamp post was available for use and could have posed hazards to miners. Therefore, citation 4332912 is affirmed and a $50 civil penalty is assessed.

Citation 4332913: Maintenance Truck with Inoperative Horn and No Back-up Alarm

Inspector Nielsen observed a 2-ton Ford service truck parked in the pit area. The truck had been backed into its position. Welding equipment sat in the rear cargo area. The truck was not equipped with a reverse signal alarm and its horn did not work (Tr. 80-85, 132-35, 457-461).

Nielsen cited Respondent for a significant and substantial ("S&S") violation of section 56.14132(a). That standard requires that horns and other audible warning devices provided on such vehicles be maintained in a functional condition. It is clear that the standard was violated with regard to the horn, but there is no evidence on which I can conclude that the condition of the horn was a "S&S" violation.

There was no violation of section 14132(a) with regard to the reverse signal alarm as I have concluded that the truck was not equipped with one. I also conclude that the evidence does not establish that the truck was required to have such a device under section 56.14132(b). Scott Hughes' testimony indicates the truck did not have an obstructed view to the rear (Tr. 458-9). The Secretary's testimony is much too imprecise to credit over that of Mr. Hughes.

I affirm the citation with respect to the horn only and assess a $25 civil penalty for a non-"S&S" violation. The record does not establish the gravity of the violation and the Secretary has conceded that Respondent's management was unaware that the horn did not work (Exh. R-4). I therefore conclude that its negligence, if any, was very low.

AUGUST 1995 INSPECTION

Shortly after the May 1994 inspection, Glenn and Scott Hughes consented to a judgment, which among other things, prohibited them from participating in any MSHA inspections at Lakeview Rock Products (Exh. P-68). When Inspector Ronald Pennington arrived to conduct an inspection on August 29-30, 1995, Scott Hughes left the site (Tr. 473-75); other company officials accompanied Pennington.

Order 3908553: Missing Railings at the Edge of the Opening for the Jaw Crusher

On August 29, 1995, Pennington inspected the top deck of the primary jaw crusher. No miners were working on the top deck at this time. On the deck was a 49-inch by 45-inch opening situated above the jaw. Inspector Pennington found the cover to the opening fixed in an upright position and two of the four railings around the opening missing. These were the railings on the East and West side of the opening (Tr. 215-220).

Pennington concluded that there was a danger that miners could fall into the opening. He therefore issued section 104(d)(2) Order 3908553 alleging a violation of section 56.11002. The standard requires that elevated walkways be provided with handrails and be maintained in good condition.

The inspector characterized Respondent's negligence as "high" and therefore an "unwarrantable failure" to comply with the Act for two reasons. First, Respondent had been cited for failure to protect an opening of a jaw crusher by Inspector Nielsen in May, 1994 (Exh. P-1). Secondly, Pennington recalled being told by members of the inspection party that the crusher had operated "this way" for some time (Tr. 228).

Inspector Pennington also concluded the miners were regularly exposed to this unguarded floor opening. He found a hammer and a pry bar near it (Tr. 220). He also testified that either miner Daren Bowman or miner Darin Paris told him that the jaw is unjammed manually, if possible (Tr. 229-30, 317).

At the hearing both these miners testified to the contrary, as did pit manager Scott Hughes. All three said that the jaw is never cleared manually. Instead, Respondent always uses an air hammer attached either to a Kobelko excavator or John Deere backhoe to unjam the crusher (Tr. 386-389, 436, 462-63). I credit this testimony and find that employees were not exposed to the open-sides of the jaw opening while clearing rock jams.

Respondent, however, goes further and contends that miners almost never go to the top deck of the crusher. Scott Hughes, for example, testified that the only reason to be on the deck was to inspect the manganese liner to the jaw, which he does every six months or so (Tr. 469). Bowman (Tr. 393-94) and Paris (Tr. 435) also testified that there is no reason for a miner to go up on the top deck.

However, Respondent's witnesses were not particularly consistent with regard to use of the top deck. Bowman at one point testified that miners go up on the deck 2 to 3 times a week to do greasing and maintenance (Tr. 387). Scott Hughes explained the presence of the pry bar by testifying that he instructs his miners to store tools on the platforms to avoid the possibility that they may be scooped up by a front-end loader and fed through the plant (Tr. 466).

I therefore conclude that miners were in the vicinity of the jaw opening on a regular basis. However, it has not been established that they were ever exposed to the hazard of falling into this opening. The railings around the jaw opening were easy to remove and reinstall. On some occasions, the railings were removed to facilitate the work of the air hammer. When the air hammer operated, there was no reason for miners to be on the top deck. Respondent contends that the rails were reinstalled when miners went to the top deck to do other tasks (Tr. 467-68). There is no evidence establishing that this was not the case.

Therefore, I vacate Order 3908553.

Order 3908554: Missing Top Rail on the Top Deck of Jaw Crusher; Hole in the Deck Floor

The top handrail guarding the eastern edge of the deck of the jaw crusher was not in place on August 29, 1995. For a distance of 75 inches horizontally, this edge was protected only by a midrail. The deck was 13 to 14 feet above the adjacent ground level (Tr. 248-253). Additionally, there was a hole in a corner of this edge of the deck with dimensions of approximately 24 by 18 inches (Tr. 250-52). The hole was immediately above the bullwheel that serves as a counterweight for the jaw crusher (Tr. 332-34, Exh. P-30).

Inspector Pennington issued another section 104(d)(2) order for these conditions. The characterizations of "high" negligence and "unwarrantable failure" are predicated on a notation in the body of the order that an employee told Pennington that he had reported the hole in the floor to the pit manager (Scott Hughes) on a couple of occasions (Exh. P-28, block 8). Mr. Pennington testified that he received this information from either Mr. Bowman or Mr. Parris (Tr. 253).

At hearing, however, Darin Parris testified that he did not know anything about the hole until the day of the inspection and that he thought he was on the walkaround with Pennington when he noticed it (Tr. 434). Scott Hughes testified that he was unaware of the hole until 5 minutes before he left the pit on the day of the inspection and that he ordered it be fixed immediately (Tr. 474-75). He testified that he was not aware of the missing toprail until the day after the inspection (Tr. 472-73). It appears that the railing could have been knocked off and the hole created on the morning of the inspection by the air hammer mounted on the Kobelko excavator (Tr. 543-44).

In summary there is insufficient basis on which I can conclude that Respondent's management knew of the cited conditions for any appreciable period of time before they were noticed by Inspector Pennington. I therefore conclude that "high" negligence and "unwarrantable failure" have not been established.

I affirm this violation as a "S & S" violation of section 104(a) of the Act. The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is as follows:

> In order to establish that a violation of a mandatory safety standard is significant and

> substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission, in United States Steel Mining Co., Inc., FMSHRC 1573, 1574 (July 1984), held that S&S determinations are not limited to conditions existing at the time of the citation, but rather should be made in the context of continued normal mining operations. I conclude that in the continued course of normal mining operations it is reasonably likely that a miner would fall into the unprotected hole in the deck or off the inadequately protected deck perimeter. It is also reasonably likely that he would be seriously injured by the fall.

I also conclude that a $500 civil penalty is warranted under section 110(i). The deck of the jaw crusher was visible from the control shed (Tr. 472) and Respondent's employees should have reported the damage to the railing and floor if they had been properly trained and supervised. I therefore conclude that Respondent was to some extent negligent in the creation and persistence of this violation. Although Mr. Hughes testified that he ordered the hole repaired immediately, it was not repaired until Mr. Pennington required its repair (Tr. 474-75).

Order 3908602: Records of Workplace Examinations

Section 56.18002(a) requires that a competent person examine each working place at least once each shift for safety hazards. It also requires that the mine operator immediately initiate action to correct such hazards. Section 56.18002(b) requires that records of such examinations be kept for a period of one year and be made available to the Secretary of Labor.

On August 30, 1995, Inspector Pennington asked to see Lakeview's daily workplace examination records. Respondent gave him one report for each day in August 1995 signed by Daren Bowman, who operated equipment such as front-end loaders (Tr. 372-76, 383-4). No other reports for the month of August were produced at the inspection or anytime since, including at the hearing.

George Miles, the control room operator, then brought Pennington inspection reports for a few more dates in March,

April and May 1995. Respondent has never produced any records for other dates in these months nor any for all of June and July (Tr. 269, Exh. R-3). There are no records for this time period other than those contained in Exhibit R-3 (Tr. 538).

Respondent's employees Bowman and Miles, and pit manager Scott Hughes testified that the daily inspections were done, recorded and maintained as required. Obviously, the records produced suggest otherwise. At a minimum the record establishes that records were not kept for a period of a year and made available to MSHA as required by section 56.18002(b).

Although the Secretary alleged a violation of section 56.18002(a), I amend the pleadings pursuant to Rule 15(b) of the Federal Rules of Civil Procedure and find an unwarrantable failure to comply with section 56.18002(b). I assess a $1,500 civil penalty.

It is obvious from the record that Respondent was very cavalier about compliance with the daily inspection report requirement. Not only should there be reports for every date, but there should also be several reports, some covering the plant and some covering vehicles, such as front-end loaders.

At the November 1993 inspection Lakeview was cited for its failure to provide workplace examination records to the Secretary. This order was litigated before me and affirmed as a section 104(d) order, 17 FMSHRC 83 at 88-89. The prior adjudication occurred prior to the time period covered by the instant order. For Respondent to be unable to produce many of the required records in August 1995 is aggravated conduct worthy of the appellation "unwarrantable failure".

The gravity of the violation is unclear. However, Respondent's negligence or intentional disregard of the record keeping requirement, in light of its prior history of violations of the same requirement, warrants a substantial civil penalty. I conclude $1,500 is an appropriate figure taking into consideration all the factors in section 110(i).

Citation 3908545: Unguarded Tail Pulley

Inspector Pennington also discovered a tail pulley on a conveyor belt that was not protected with a guard (Tr. 273-277, Exh. P-37). The fins of the tail pulley were 40 inches above ground level and several water pipes partially shielded these fins from contact by employees. Debris falling from the conveyor was normally cleaned up with a rake projecting from a front-end loader (Tr. 494).

Pennington issued a citation for a "S&S" violation of section 56.14107(a) of MSHA's regulations, which requires guarding of moving machine parts. I affirm the citation and assess a $100 civil penalty.

I credit the opinion of Inspector Pennington that the water pipes did not block access to the unguarded fins of the tail pulley to the extent that a guard was not necessary. I also find that in the continued course of mining operations it was reasonably likely that an accident would occur and that the accident would result in a serious injury. Although Respondent's normal practice was not to clean spills from the conveyor manually, there is no reason why a miner might not approach the unguarded pulley if it was more convenient to shovel a spill rather than obtain the assistance of the front-end loader.

Citation 3908560: Miners Wearing Tennis Shoes

On August 30, the inspector observed two miners wearing tennis shoes on the site (Tr. 281-85). Pennington cited Respondent for an "S&S" violation of section 56.15003 which requires "suitable protective footwear" when working in an area in which hazards could cause injury to the feet.

Pennington considers the wearing of a hard leather shoe to constitute compliance with the standard. Respondent's safety policy requires the wearing of leather work boots (Tr. 495-96). Since the parties appear to agree that "suitable protective footwear" at the Lakeview mine excludes the wearing of tennis shoes I affirm the citation.

On the other hand there is not enough evidence in the record regarding the normal activities of the two employees to warrant finding a "S&S" violation. I therefore affirm the citation as non-"S&S" and assess a $25 civil penalty.

In assessing the penalty I place particular weight on the lack of evidence that Lakeview management was aware of the violation and that the violations appear to be contrary to company policy. Further, Scott Hughes appears to have taken appropriate steps to prevent a recurrence of this violation (Tr. 496).

Citation 3908601: Lack of Berm on Ramp Leading to the Primary Crusher

Pennington observed a front-end loader feeding the primary crusher at a time when a horizontal distance of 12 feet on the ramp leading to the crusher was unguarded by a berm (Tr. 286-296). The tires of the loader were only 12 inches from the edge of the ramp. There was a drop-off of between 10 to 12 feet from the side of the ramp.

The inspector issued a citation alleging an "S&S" violation of section 56.9300(a). This regulation requires berms or guardrails on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn. I conclude that a violation has been established and that it was "S&S" under the Mathies test. In the course of continued mining operations it is reasonably likely that a vehicle would overturn due to the lack of a berm and that the driver would be seriously injured.

Although the Secretary proposed a $69 penalty for this violation, I assess a civil penalty of $300 pursuant to the

criteria in section 110(i) of the Act. Given the gravity of this violation, I believe a penalty of $100 would be appropriate if Respondent's negligence was low and this was the first berm citation received by Lakeview. However, Pennington cited Respondent for two berm violations in virtually identical circumstances in 1992. These were affirmed by Judge Cetti in August 1995, 17 FMSHRC 1413 at 1415-16. In view of this prior history of violations a much higher civil penalty is warranted. It also affects my view of Respondent's negligence with regard to the instant violation.

Once a mine operator has been cited for a violation of this nature, prudence would dictate more attention to assuring compliance with the berm regulation. There is no evidence that Lakeview took any steps to insure future compliance after the 1992 inspection. Therefore, I conclude that a $300 civil penalty is appropriate in view of the company's prior history of violations and its lack of demonstrated prudence in attempting to prevent recurrences.

Citation 3908549 (Docket WEST 96-209-M): Safe Access to El-Jay Head Cone & Screen

Upon observing the El-Jay Head Cone & Screen, Inspector Pennington determined that there was no safe way to access this equipment for maintenance (Tr. 297-303, 349-356). Pennington was primarily concerned that miners could fall while accessing this machine by climbing on an unsecured ladder and the railing above the conveyor running to the El-Jay Cone & Screen. The record establishes that miners did on some occasions access this equipment in this fashion (Tr. 426-431).

Pennington cited Lakeview for an "S&S" violation of section 56.11001 which requires that safe means of access be provided to all working places. I conclude that the fact that miners at times found it convenient to climb onto the El-Jay cone crusher via the unsecured ladder establishes a violation of the standard. However, the Secretary has not established that the violation was "S & S". Employees climbed on the crusher only when the plant was turned off (Tr. 426-428). The only hazard established is that of falling a few feet onto dirt.

I conclude that it has not been established that the likely result of an accident due to this violation would be serious injury. In view of this record, I assess a $50 civil penalty rather than the $270 proposed by the Secretary.

ORDER

Respondent is hereby ordered to pay to the Secretary the following civil penalties within 30 days of this decision:

Citation	Penalty
4120703	$ 10
4120697	$ 50
4332839	$ 25
4332838	$ 50
4332912	$ 50
4332913	$ 25
3908545	$ 100
3908560	$ 25
3908601	$ 300
3908554	$ 500
3908602	$1,500
3908549	$ 50

Respondent is also directed to pay at the same time, if it has not done so already, the penalties for the 14 violations for which it withdrew its contest at the commencement of the hearing (Tr. 21-25). The total penalty for all 27 violations is $3,553.

Arthur J. Amchan
Administrative Law Judge

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