

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

February 3, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-137-M
Petitioner	:	A.C. No. 05-02357-05516
	:	
v.	:	
	:	Whitewater #81.
WHITEWATER BUILDING	:	
MATERIALS CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Edward Falkowski, Esq., Jennifer A. Casey, Esq.,
 Office of the Solicitor, U.S. Department of Labor, Denver, Colorado,
 for Petitioner;
 Nathan A. Keever, Esq., Dufford, Waldeck, Milburn & Krohn,
 Grand Junction, Colorado;
 for Respondent.

Before: Judge Cetti

 This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Whitewater Building Materials Corporation with the violation of five mandatory safety standards. Two of the violations were alleged to be S&S. The total proposed penalty was \$393.00.

 In the prehearing conference that preceded opening the record for the requested hearing, the parties advised the judge that they were unable to reach a settlement of any of the citations, thus confirming their negative response to the judge's prehearing order instructing the parties to attempt to negotiate a settlement.

 At the hearing, the parties were able to agree on the following stipulations which Secretary's counsel read into the record.

1. Respondent is engaged in the mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.
2. Respondent is the owner and operator of the HM2 Crusher mine, I.D. #390315.
3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.* ("the Mine Act").
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.
6. The exhibits to be offered by the parties are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The proposed penalties will not affect the ability of Respondent's ability to continue in business.
8. Respondent is a mine operator with 1,327 hours worked at the HM2 Crusher mine (I.D. #3901315) in 1997 and 7,452 total hours worked by Respondent in 1997.
9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

The issues were the existence of each of the five violations and the inspector's S&S designation of two of the alleged violations.

There were a large number of potential witnesses in the courtroom so the Judge, off-the-record, inquired as to who would be testifying. Secretary's counsel stated that he would be presenting the testimony of two MSHA inspectors. Inspector George Rendon would be testifying as to the violative conditions he observed as set forth in the two citations Inspector Rendon wrote. Inspector Gary Grimes would testify as to his observations of the violative conditions he observed as set forth in the three citations he wrote.

Respondent's Vice-President, Edward M. Gardner, indicated he would testify to the facts and contentions he set forth in his letter of April 30, 1999, which reads as follows:

Whitewater requests that the following citations, under the above Docket No., be vacated.

Citation Nos. 7921947 and 7921949 (lights for caterpillar truck and front-end loader). These citations do not violate Section 56.14100b, Title 30 CFR. Non-use or non-operating lights do not affect safety during daylight hours. Whitewater does not operate and has not operated during hours of darkness or low visibility. A safety hazard is not created as the lights were not required to be used at the time of the inspection.

Citation No. 7921948 (pulley belt guards for haul truck, alternator and condenser). The area cited is in an area that is isolated and accidental contact can not happen. The left front wheel and the truck frame isolate this item from contact. It is not in the normal work area of the operator and is not in arm's reach of any one checking the engine fluids. The only time this area would be entered by workmen would be during shut down for maintenance of the item. Fan guards were in place at the time of inspection. See enclosed photo exhibits Nos. 1 and 2.

Citation No. 4669758 (side panels for tail pulley). Whitewater believes that it had this area guarded properly at the time of inspection and that accidental contact could not have happened. The Inspector so notes that a person would have to reach in to make contact. Guards were so placed as to allow spill clean-up to be accommodated and still protect the workmen from accidental contact with the danger area. Also we believe that even if the guards did not satisfy the inspector that the citation was not an S & S citation. If the citation is upheld we request that the S & S designation be removed. See enclosed photo exhibits No. 3 and 4.

Citation 4669383 (hand railings on haul truck); We are not sure what the inspector saw or intended with this citation. This (haul truck) unit is equipped with handholds and guards rails in all areas above the ground and utilized by the operator to mount, dismount and check the unit. These safety rails were installed by the manufacturer and have not been altered, removed or changed by Whitewater. The cab door will not open beyond hand rail. See enclosed photo exhibits No. 5 and 6.

Having reviewed the entire file and participated in off-the-record discussions of the issues, I told the parties that the proposed penalties were quite modest and that they should be able to negotiate a settlement that would resolve all issues satisfactorily to both parties. With the assistance and recommendations of the Judge, the parties, off-the-record, negotiated an agreed disposition of all issues.

The agreement did not reduce the MSHA proposed penalty of \$393.00. It did, however, provide for a modification of Citation Nos. 4669758 and 4669383 by deleting the S&S designation of the two violations charged in those citations. Having considered the entire record, the essence of the proposed testimony and contentions of the parties and the statutory criteria in section 110(i) of the Mine Act, I found the agreed disposition of the issues appropriate and approved the settlement on the record.

ORDER

Citation Nos. 7921947, 7921948 and 7921949 are **AFFIRMED**; Citation No. 4669758 and 4669383 are **MODIFIED** by deleting the "significant and substantial" designation and, as so modified, are **AFFIRMED**.

Whitewater Building Materials Corporation is **ORDERED TO PAY** a civil penalty of \$393.00 to the Secretary of Labor within 30 days of the date of this decision. Upon receipt of timely payment, this case is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

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