

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

April 29, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-89-M
Petitioner	:	A.C. No. 48-00533-05545
	:	
v.	:	Basins Mill
	:	
GEORGIA MARBLE COMPANY, formerly	:	
BASINS INCORPORATED,	:	
Respondent	:	

DECISION

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Georgia Marble Company (“Georgia Marble”), formerly “Basins Incorporated,” pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The petition alleges three violations of MSHA’s safety standards.

The parties filed a joint motion requesting that I assess civil penalties for the three alleged violations based on their joint stipulation of facts and the existing record in this case. Georgia Marble does not dispute that the conditions described in the three citations existed and that these conditions violated the cited safety standards. It contends, however, that the proposed penalties for the violations are too high, taking into consideration the six penalty criteria in section 110(i) of the Mine Act. Determination of the amount of the penalty that should be assessed for a particular violation is committed to a judge’s discretion, bounded by proper consideration of the penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293-94 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984).

I. STIPULATED FACTS

The parties stipulated to the following facts:

1. The Assessed Violation History Report attached to the motion is accurate. This report shows that 26 citations were issued at the Basins Mill in the 24 months preceding November 3, 1998. All of the citations were issued under section 104(a) of the Mine Act; 9 of them were designated as being of a significant and substantial nature (“S&S”), and 17 were not S&S.

2. Georgia Marble stipulates to the facts set forth in the three citations, including but not limited to the MSHA inspector's designations as to the nature of the violation and gravity.

3. For the purpose of this case only, the Secretary stipulates to all the statements set forth in Georgia Marble's answer dated March 9, 1999, except to the extent that any statement may contradict the citations at issue.

4. Georgia Marble is subject to the jurisdiction of the Mine Act.

5. The administrative law judge has jurisdiction in this case.

6. Georgia Marble demonstrated good faith in abating the violations.

7. Georgia Marble operates a non-coal mine. The number of hours worked at the mine in calendar year 1997 was 90,847 and the number of hours worked by the controlling entity in calendar year 1997 was 1,090,900.

8. The payment of the penalties proposed by the Secretary in this case would not impair Georgia Marble's ability to continue in business.

The answer filed by Georgia Marble provides some general information about this case as well as specific information about each of the violations. In pertinent part, the general information is as follows:

Georgia Marble has made a concerted effort to focus on safety at the Basins Mill. Significant changes to the management structure have been made, most significantly with the replacement of Mr. ... with the writer [Howard Scotland]. The receipt of twenty-one citations during the course of the February 1998 inspection indicated not only that greater attention to safety was required but that the administration of the safety program needed improvement. As the new plant manager, I have enjoyed the complete support of Georgia Marble's upper management in this regard and I have been able to substantially improve the safety program at the Basins Mill. I believe that my assertion is not hollow but in fact [is] illustrated by the results of the 11/4/98 inspection. The receipt of three citations in lieu of a repetition of past events demonstrates that tangible change has occurred.

[T]he improvement made to better the cited condition has extended well beyond those noted by the [MSHA] inspector upon the close of his inspection. Each item has been reviewed and actions taken, which in two cases involved costs more than three times the amount of the proposed assessment.

In summary, Georgia Marble has made a considerable effort at the Basins Mill to improve the administration of the safety program and to eliminate conditions that might lead to future citations. Cited deficiencies were promptly corrected, but more importantly additional funds have been spent to preclude their re-occurrence and facilitate better protection. In keeping with our demonstrated effort and visible reduction in the quantity of citations received during our last inspection, Georgia Marble requests that the proposed penalties be reduced to reflect a clear and conscious safety effort.

II. STIPULATED FACTS CONCERNING THE CITATIONS

Georgia Marble operates the Basins Mill in Platte County, Wyoming. On November 4, 1998, the mill was inspected by MSHA and three citations were issued under section 104(a) of the Mine Act.

1. Citation No. 4338681

Citation No. 4338681 alleges a violation of 30 C.F.R. § 56.12013(b), as follows:

At the south bagger area stairway, a cable tray. In this tray are electric cables that the outer jacket that is pulled back exposing the inner wires. Outer jackets are designed to provide damage protection for electric cables. No exposed copper observed.

Under gravity, the inspector determined that an injury was unlikely, that if an injury occurred it would likely be fatal for one person, and that the violation was not S&S. He also determined that Georgia Marble's negligence was moderate. Section 56.12013(b) provides, in part, that "[p]ermanent splices and repairs made in power cables ... shall be: insulated to a degree at least equal to that of the original, and sealed to exclude moisture." The citation indicates that Georgia Marble abated the violation by taping up the cables and providing damage protection where needed. The Secretary proposes a penalty of \$1,122 for the violation.

In its answer, Georgia Marble states:

The subsequent action document states that the cables were taped and protected from damage. I would like to note that the trays in question have been removed completely and

replaced with [a] new tray and protected wires. The cables in question no longer exist and the new installation provides for the protection of the wiring from dust, dirt, and any impacts that might damage the conductor insulation. The approximate cost of the new installation was \$4,000 and I believe it illustrates our desire to not only correct the deficiency but also take the extra step to preclude a re-occurrence.

2. Citation No. 4338682

Citation No. 4338682 alleges a violation of 30 C.F.R. § 56.12016, as follows:

Upon inspection of the south feed belt. This belt is under repairs at this time the guards on the head are removed. When checked at the mcc it was found that the belt was not locked out to prevent an unwanted start up.

Under gravity, the inspector determined that an injury was reasonably likely, that if an injury occurred it would likely be fatal for two people, and that the violation was S&S. He also determined that Georgia Marble's negligence was moderate. Section 56.12016 provides, in part, that "[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment" and that "[p]ower switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it." The citation indicates that Georgia Marble abated the violation by locking out the power switch. The Secretary proposes a penalty of \$1,771 for the violation.

In its answer, Georgia Marble states:

The citation ... has been followed up with a thorough review of proper lock out and tag out procedures with all hourly and salaried employees. This review has been incorporated into multiple Part 48 training sessions and documented. Additionally, this procedure is thoroughly reviewed with any contractors doing work on our site.

3. Citation No. 4338683

Citation No. 4338683 alleges a violation of 30 C.F.R. § 56.12008, as follows:

At dust area the platform scale. This scale when inspected it was found that the 110v power cable was not properly entered into the electrical compartment of the scale.

Under gravity, the inspector determined that an injury was unlikely, that if an injury occurred it would likely be fatal for one person, and that the violation was not S&S. He also determined that Georgia Marble's negligence was moderate. Section 56.12008 provides, in part, that "[p]ower wires and cables shall be insulated adequately where they pass into or out of electrical compartments" and that "[c]ables shall enter metal frames of ... electrical compartments only through proper fittings." The citation indicates that Georgia Marble abated the violation by taking the scale out of service. The Secretary proposes a penalty of \$1,122 for the violation.

In its answer, Georgia Marble states:

The scale in question is in the process of being replaced. The new installation has been designed to better protect the connection cited by the inspector. The cost of the new scale and welded structure [is] approximately \$3,500.

III. APPROPRIATE CIVIL PENALTIES

In assessing appropriate penalties in this case, I assume that the violations of the Secretary's safety standards occurred as set forth in the citations. Although the citations were not drafted using complete sentences, they are clear enough to understand what conditions were cited by the MSHA inspector. I also accept the inspector's gravity and negligence determinations, as well as his S&S characterizations. Finally, based on the parties' stipulation, I accept as fact the information presented by Georgia Marble, as set forth above. I find that this information does not contradict the conditions described in the citations.

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The penalties proposed by the Secretary in this case are higher than the penalties proposed for previous violations at the Basins Mill in 1998 as evidenced by the Assessed Violation History Report. The Secretary's proposed assessment attached to her petition for assessment of penalty shows that MSHA assigned the maximum number of points for history of previous violations under her penalty formula at 30 C.F.R. § 100.3(c) for the three violations in this case. The penalties are higher in this case because of the

relatively high history of violations at the Basins Mill. In essence, Georgia Marble is asking that I give more weight to the other penalty criteria, including the good faith criterion, when I assess penalties in this case.

Under the Mine Act, the Secretary's penalty proposals are not binding on the Commission's administrative law judges. Penalties assessed by a Commission judge can be greater than, less than, or the same as those proposed by the Secretary so long as the judge properly considers all of the penalty criteria. The criteria need not be given equal weight. My analysis of the penalty criteria is as follows:

1. The Operator's History of Previous Violations

As stipulated, Georgia Marble was issued 9 S&S citations and 17 non-S&S citations during the 24 months preceding the issuance of the citations in this case. This history is high given the size of the Basins Mill.

2. The Appropriateness of the Penalty to the Size of the Business

As stipulated, the number of hours worked at the Basins Mill in calendar year 1997 was 90,847 and the number of hours worked by all employees of the controlling entity in calendar year 1997 was 1,090,900. The mine and the controlling entity are moderate in size.

3. Whether the Operator was Negligent

As stipulated, Georgia Marble's negligence was moderate for all citations.

4. The Effect on the Operator's Ability to Continue in Business

As stipulated, the penalties proposed by the Secretary will not adversely affect Georgia Marble's ability to continue in business.

5. The Gravity of the Violation

Based on the stipulations, I find that Citation No. 4338682 was serious and was S&S. The other violations were not S&S and were not as serious.

6. Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

Based on the stipulations, I find that Georgia Marble demonstrated good faith in achieving rapid compliance with the cited safety standards after issuance of the citations.

7. Determination of Appropriate Civil Penalties

In determining appropriate penalties, I take into consideration all of the penalty criteria, as discussed above. The assessed penalties are lower than those proposed by the Secretary because I gave more weight to the gravity of the violations, Georgia Marble's negligence, and Georgia Marble's efforts to abate the underlying conditions cited by the inspector. I gave less weight to the history of previous violations criterion. As stated in the stipulations, the Basins Mill was under new management at the time of the inspection and management was taking steps to improve the safety conditions at the facility. As a consequence, I believe that it is appropriate to place less emphasis on the history of previous violations criterion than would normally be the case.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4338681	56.12013(b)	\$400.00
4338682	56.12016	800.00
4338683	56.12008	400.00

Accordingly, the parties' motion to assess appropriate civil penalties for the citations in this case based on stipulated facts and the existing record without a hearing on the merits is **GRANTED**. The citations listed above are **AFFIRMED** as issued and Georgia Marble Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,600 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Howard Scotland, Plant Manager, Georgia Marble Co., P.O. Box 845, Wheatland, WY 82201 (Certified Mail)

RWM