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SOL (MSHA) V. MULZER STONE  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

v.

MULZER CRUSHED STONE COMPANY,  
RESPONDENT

Civil Penalty Proceeding

Docket No. LAKE 80-375-M  
A/O No. 12-00083-05004 I

Eckerty Quarry

DECISION

Appearances: Steven E. Walanka, Esq., Office of the Solicitor, U.S.  
Department of Labor, Chicago, Illinois, for the Petitioner.  
Philip E. Balcomb, Manager, Mulzer Crushed Stone Company,  
Tell City, Indiana, for the Respondent

Before: Judge Cook

I. Procedural Background

On August 27, 1980, the Secretary of Labor (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act), charging Mulzer Crushed Stone Company (Respondent) with a violation of mandatory safety standard 30 C.F.R. 56.9-55. The Respondent filed an answer on September 24, 1980.

The hearing was held on January 29, 1981, in Louisville, Kentucky. Representatives of both parties were present and participated. Both parties made closing arguments following the presentation of the evidence.

At the conclusion of the hearing, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, difficulties experienced by counsel resulted in a revision thereof.

Posthearing briefs were received from the Respondent and the Petitioner on March 23, 1981, and April 27, 1981, respectively. The Respondent's reply brief was received on May 1, 1981. The Petitioner did not file a reply brief.

II. Violation Charged

Citation No.	Date	30 C.F.R. Standard
365911	April 23, 1980	56.9-55

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### III. Witnesses and Exhibits

#### A. Witnesses

The Petitioner called Federal mine inspector Gene Upton as a witness.

The Respondent called as its witnesses Clifton Cook III, a stockpile truck driver, Gordon Ray Eckert, the supervisor in direct charge of operations at the Eckerty Quarry, and Robert Scheible, the assistant safety director.

Both the Petitioner and the Respondent called as a witness John E. Knust, the stockpile truck driver involved in the April 10, 1980, accident.

#### B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

G-1 is a copy of a mine accident, injury, and illness report submitted to the Mine Safety and Health Administration by the Respondent following the April 10, 1980, accident.

G-2 is a copy of Citation No. 365911, April 23, 1980, 30 C.F.R. 56.9-55.

G-3 is an April 22, 1980, photograph of the stockpile where the accident occurred.

G-4 is an April 22, 1980, photograph taken from the top of the stockpile where the accident occurred.

G-5 is an April 22, 1980, photograph of the ramp leading to the top of the stockpile where the accident occurred.

G-6 is an April 22, 1980, photograph taken from the top of the stockpile where the accident occurred.

G-7 is an April 22, 1980, photograph showing the stockpiling method in use on the day of the accident investigation conducted by the Mine Safety and Health Administration.

G-8 is an April 22, 1980, photograph showing the stockpile after the departure of the truck shown in G-7.

G-9 is an April 22, 1980, photograph of the truck involved in the accident.

G-10 is an April 22, 1980, photograph of the truck involved in the accident.

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G-11 is an April 22, 1980, photograph of the truck involved in the accident.

G-12 is a copy of the accident investigation report prepared by the Mine Safety and Health Administration following its investigation of the April 10, 1980, accident.

G-13 is a copy of the inspector's statement pertaining to G-2.

G-14 is a copy of a "fatalgram" dated May 5, 1980.

G-15 is a copy of a "fatalgram" dated June 19, 1980.

G-16 is a copy of a "fatalgram" dated July 15, 1980.

G-17 is a copy of a mine accident, injury, and illness report of an accident occurring at the Respondent's Eckerty Quarry on April 28, 1978.

G-18 is a copy of the mine identification.

2. The Respondent introduced the following exhibits in evidence:

O-1 is a diagram depicting the general conditions existing at the stockpile at the time of the accident.

O-2 is a copy of the "narrative findings for a special assessment" prepared by the Office of Assessments.

#### IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of mandatory safety standard 30 C.F.R. 56.9-55 occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

#### V. Opinion and Findings of Fact

##### A. Stipulations

1. The parties filed a partial stipulation on January 29, 1981, which states, in part, as follows:

[a.] This shall be a partial stipulation of some of the facts and issues involved in the above-captioned case and shall not be construed as precluding either party from presenting additional evidence to the Court.

[b.] That the Administrative Law Judge has jurisdiction in matters related to the Federal Mine Safety and Health Act of 1977.

[c.] That the inspectors who issued the Citation and Order were duly authorized representatives of the Secretary of Labor.

[d.] That the size of the company as to production tons or manhours per year is 469971, as shown in Exhibit A.

[e.] That the size of the mine as to production tons or manhours per year is 101812, as shown in Exhibit A.

[f.] That the previous assessed penalty for Citation 365911 was \$2,000.00, as shown in Exhibit B.

[g.] That the proposed assessment of penalty for Citation 365911 is \$1,200.00, as shown in Exhibit C.

[h.] That respondent issued a notice of contest to the Mine Safety and Health Administration on July 24, 1980.

[i.] That the Proposal For Penalty was filed on August 25, 1980.

[j.] That respondent received the Proposal For Penalty on August 28, 1980, as shown in Exhibit D.

[k.] That respondent filed an answer to the Proposal For Penalty on September 22, 1980.

[l.] That the proposed assessment will not harm respondent's ability to continue its operations.

[m.] That Citation 356911 has been terminated as shown in Exhibit E.

[n.] That respondent owned and operated a 1967 model Ford - L-800 SN F 80 FUA45485, single axle, 8-ton capacity dump truck.

[o.] That respondent operates a limestone (crushed and broken) type facility.

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2. The parties also stipulated that the Respondent is engaged in interstate commerce and that the Respondent is subject to the provisions of the 1977 Mine Act (Tr. 7).

#### B. Occurrence of Violation

Citation No. 365911 was issued to the Respondent on April 23, 1980, by Federal mine inspector Gene Upton. The citation charges the Respondent with a violation of mandatory safety standard 30 C.F.R. 56.9-55 in connection with a nonfatal accident which occurred at its Eckerty Quarry on April 10, 1980, in that:

The loose unconsolidated ground at the dumping point of the agricultural lime stockpile was not sufficient to support the weight of the Ford L 800 Serial No. F80FUA45485. The agricultural lime was approximately 45 feet in height and 90 feet in width at the dumping point. The Ford stockpile truck L 800 Serial No. F80FUA45485 overtraveled at this dumping point on [April 10, 1980] and approximately 7:30 a.m. was the time of the accident.

(Exh. G-2).

The agricultural lime stockpile was roughly 45 feet in height and was roughly 100 feet in width across the top. (FOOTNOTE 1) It had sloping sides and a berm around the edge at the top except in the area directly affected by the activities of the front-end loader in use at the base of the stockpile. The front-end loader was removing agricultural lime from the stockpile and loading it onto customers' trucks (Exh. O-1). (FOOTNOTE 2) The activities of the front-end loader had caused in that area both the formation of a vertical face on the side of the stockpile and the destruction of the berm. Both conditions developed as a result of material caving off from the side of the stockpile.

Mr. John E. Knust, one of the Respondent's stockpile truck drivers and the individual involved in the accident, reported for work at the Eckerty Quarry at approximately 7 a.m. on April 10, 1980. He acquired a load of agricultural lime from the bins and drove up the ramp leading to the top of the stockpile. (FOOTNOTE 3) Upon reaching the top, he backed his truck into position to dump his load. He stopped approximately 10 feet from the edge in an area directly above the vertical face of the stockpile created by the activities

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of the front-end loader working below (Exh. O-1). For the reasons noted previously, there was no berm behind the truck. (FOOTNOTE 4) As the truckbed began to rise, the ground beneath the truck gave way causing the truck to slide down the side of the stockpile and overturn as it neared the bottom demolishing the cab (Exhs. G-9, G-10). The accident occurred at approximately 7:30 a.m. after Mr. Knust transported what was to have been his first load of material to the stockpile that day.

Mandatory safety standard 30 C.F.R. 56.9-55 provides that "[w]here there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped back from the edge of the bank." The regulation thus requires that where there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped at a sufficient distance from the edge of the bank to prevent a ground collapse.

The fact that the accident occurred indicates that dumping was not being performed at a sufficient distance from the edge of the stockpile to prevent a ground collapse. The evidence presented, as set forth in the testimony of Inspector Upton and as confirmed by the testimony of other witnesses, demonstrates that ample evidence was present on April 10, 1980, to show that the ground beneath the truck may have been inadequate to support its weight.

The ground was moist on April 10, 1980, as a result of recent rainfall. Inspector Upton testified as an expert in the field of mine safety and health that agricultural lime is partially dust and partially a granular material which is affected by rainfall. The inspector further testified that rainfall causes an erosion effect and washes away the finer dust leaving the granular material, which would be unconsolidating. According to the inspector, this would cause the agricultural lime pile to become "softer". Additionally, he testified that loading out material from the side of the stockpile would cause the ground atop the stockpile to be unstable, and that such instability could be detected by examining the edge of the pile in that the material would be caving off and causing different types of faces at different times. In the inspector's opinion, the accident was caused because the loose, unconsolidated ground was insufficient to support the weight of the truck. The moisture, the type of ground and the vertical face were the physical factors upon which his opinion was based.

Mr. Knust gave testimony at one point which supports the conclusion that the rainfall had adversely affected the agricultural lime stockpile. He testified that the ground was damp as a result of the recent rainfall and that the ground "was usually harder" than it was on April 10, 1980 (Tr. 16-17). (FOOTNOTE 5

Messrs. Knust and Eckert gave testimony which supports the conclusion that the load-out activities underway at the base of the stockpile and the associated vertical face on the side of the stockpile were evidence that the ground at the dumping place could fail to support the weight of the truck. When asked whether he observed any ground condition which would have indicated that it was unsafe "to put your truck where it was," Mr. Knust testified that the "only thing is that I seen that they were loading out at that particular place on the pile". Mr. Eckert testified that the worst hazard in stockpiling is associated with the load-out operation because loading-out causes the remaining material on the side of the pile to slide downwards.

The Respondent has placed great emphasis on its purported requirement that loads be dumped at least 10 feet from the edge of the stockpile where berms are absent in arguing that no violation occurred. The Respondent maintains that "[s]ince the cited standard does not specify a distance, but only requires that loads be dumped 'back from the edge,' the distance of ten feet established by the company and adhered to by Mr. Knust is reasonable and in compliance" (Respondent's Posthearing Brief, p. 3). The Respondent's argument is not well founded. Mr. Robert Scheible, the Respondent's assistant safety director, testified only that in his opinion dumping 10 feet from the edge would be sufficient in most cases. He conceded that under some circumstances dumping 50 feet from the edge would be insufficient and maintained that a driver must use his own judgment as to "whether 10 feet, 20 feet, 30 feet or 40 feet, or maybe not at all is sufficient" (Tr. 174). He further testified that "[w]e dump every day on these piles and there is certainly a lot of them being dumped closer than 10 foot" (Tr. 174-175). In summary, Mr. Scheible's testimony establishes that a fixed distance requirement is not adequate under all circumstances to assure the requisite protection against the hazards associated with ground failure, and that loads at the Eckerty Quarry are in fact dumped at distances less than 10 feet from the edge of the stockpile. It is clear beyond any doubt that 10 feet was inadequate in view of the conditions existing on April 10, 1980.

In view of the foregoing, I conclude that a violation of mandatory safety standard 30 C.F.R. 56.9-55 has been established by a preponderance of the evidence.

#### C. Negligence of the Operator

Mr. Gordon Ray Eckert, the supervisor in direct charge of operations at the Eckerty Quarry, arrived at the facility at approximately 6:30 a.m. on



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April 10, 1980 (Tr. 139-140). It was customary for Mr. Eckert to make a series of rounds upon reporting for work which entailed driving first through the quarry area and thereafter examining the stockpiles (Tr. 121, 140). His customary practice was to drive atop the stockpile and perform an examination so as to detect any hazards (Tr. 121). On the morning of April 10, 1980, he drove around the subject stockpile passing within 45 feet of it. However, for some unexplained reason, he did not drive atop it (Tr. 120-122, 140, 145).

In view of the activities of the loader operator and the readily visible condition arising as a consequence of his activities, Mr. Eckert was under an affirmative obligation to perform a more thorough examination of the stockpile, which would have included driving atop it, designed to detect the hazardous condition developing and to thereafter undertake effective steps designed to prevent the occurrence of the type of accident involved herein.

It should be noted that the Respondent had given Mr. Knust some initial training in stockpiling which included instructions that he get out of the truck and examine the ground atop the stockpile prior to backing the truck into position to dump a load of agricultural lime. Mr. Knust was negligent in that he failed to perform such an examination on April 10, 1980. However, when viewed in context, it is clear that the Respondent was under an obligation to provide additional instructions to Mr. Knust on April 10, 1980, because he had been working as a full time stockpile truck driver for only approximately 1 week prior to the accident. As stated in the preceding paragraph, Mr. Eckert was under an affirmative obligation to perform a more thorough examination of the stockpile designed to detect the hazardous condition developing and to thereafter undertake effective steps designed to prevent the occurrence of the type of accident involved herein. In view of Mr. Knust's relative inexperience, such effective steps would have included either giving Mr. Knust additional instructions in stockpiling specifically tailored to the hazards then existing or instructing the loader operator to establish a berm atop the stockpile in the affected area.

In view of the foregoing, it is found that the Respondent demonstrated a high degree of ordinary negligence in connection with the violation.

#### D. Gravity of the Violation

The ground beneath the truck gave way causing the truck to slide down the side of the agricultural lime stockpile, overturn and land upside down demolishing the cab (Exhs. G-9, G-10). The driver was knocked unconscious and received bruises to the chest, right shoulder and hip, and received lime dust in his eyes (Exh. G-12). The driver lost 6 to 8 workdays as a result of the accident.

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Although the injuries sustained were not more severe, it is clear that Mr. Knust was exposed to potentially fatal or potentially permanently disabling injuries. In view of all of the circumstances surrounding the accident, it is found that the violation was extremely serious.

E. Good Faith in Attempting Rapid Abatement

The citation was terminated within the time period specified for abatement (Exh. G-2). Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. Size of the Operator's Business

The parties stipulated that the Respondent's size is rated at 469,971 annual production tons or man-hours, and that the size of the Eckerty Quarry is rated at 101,812 annual production tons or man-hours.

G. History of Previous Violations

No evidence was presented to establish that the Respondent has a history of previous violations for which assessments have been paid. (FOOTNOTE 6) Accordingly, it is found that the Respondent has no history of previous violations cognizable in this proceeding.

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#### H. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

The parties stipulated that the payment of a \$1,200 civil penalty will not harm the Respondent's ability to continue its operations. Additionally, no evidence was presented by the Respondent to show that the assessment of a civil penalty greater than \$1,200 will affect its ability to remain in business.

In *Hall Coal Company*, 1 IBMA 175, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), the Federal Mine Safety and Health Review Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty.

In view of the foregoing, I conclude that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to remain in business.

#### VI. Conclusions of Law

1. Mulzer Crushed Stone Company and its Eckerty Quarry have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Gene Upton was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 365911, April 23, 1980, 30 C.F.R. 56.9-55.

4. The violation charged in Citation No. 365911, April 23, 1980, 30 C.F.R. 56.9-55, is found to have occurred.

5. All of the conclusions of law set forth in Part V, *supra*, are reaffirmed and incorporated herein.

#### VII. Proposed Findings of Fact and Conclusions of Law

Both parties delivered closing arguments on January 29, 1981. The Respondent and the Petitioner filed posthearing briefs. The Respondent filed a reply brief. Such closing arguments and briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.



~FOOTNOTE\_SIX

6 Exhibit B attached to the partial stipulation filed on January 29, 1981, contains the statement that the Respondent had a total of seven assessed violations during the preceding 24 months. However, in view of the wording of the stipulation, it is clear that the parties did not stipulate this figure into the record.

However, assuming for purposes of argument that this figure is properly part of the record in this case, it cannot be determined therefrom that the Respondent has a history of previous violations which is cognizable in this proceeding. First, it appears that the 24 months was measured with reference to April 23, 1980, and not with reference to the date of the violation. The appropriate point of reference for determining the Respondent's history of previous violations is the date of the violation, April 10, 1980, and not the date when the citation was issued, April 23, 1980. It cannot be determined how many, if any, of the seven assessed violations occurred prior to April 10, 1980. Second, there is no indication that the Respondent has actually paid civil penalties for any or all of the seven assessed violations. It is well settled that paid assessments are the only assessments properly included in a mine operator's history of previous violations. See Peggs Run Coal Company, Inc., 6 IBMA 212, 83 I.D. 245, 1976-1977 CCH OSHD par. 20,839 (1976); Peggs Run Coal Company, Inc., 5 IBMA 144, 148-150, 82 I.D. 445, 1 BNA MSHC 1343, 1975-1976 CCH OSHD par. 20,001 (1975); Old Ben Coal Company, 4 IBMA 198, 217-218, 82 I.D. 264, 1 BNA MSHC 1279, 1974-1975 CCH OSHD par. 19,723 (1975); Corporation of the Presiding Bishop, Church of Jesus Christ of Latter Day Saints, 2 IBMA 285, 80 I.D. 633, 1973-1974 CCH OSHD par. 16,913 (1973); Valley Camp Coal Company, 1 IBMA 196, 203-204, 79 I.D. 625, 1 BNA MSHC 1043, 1971-1973 CCH OSHD par. 15,385 (1972).