

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 18, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-251-M
Petitioner	:	A.C. No. 35-03624-77741 01
	:	Portable #2
	:	
v.	:	Docket No. WEST 2006-252-M
	:	A.C. No. 35-03624-77741 02
	:	Portable #2
	:	
WESTERN ROCK REDUCTION CO.	:	Docket No. WEST 2006-255-M
Respondent	:	A.C. No. 35-03280-77570
	:	Portable

**DECISION**

Appearances: Jeannie Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;  
Robin Weathers, President, Western Rock Reduction Co., Shady Cove, Oregon, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Western Rock Reduction Company (“Western Rock”), 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 cases involve 35 citations issued at the Portable and Portable #2 Plants operated by Western Rock in Jackson County, Oregon. The Secretary proposes a total penalty of \$7,155.00 in these cases. The parties introduced testimony and documentary evidence at a hearing held in Medford, Oregon.

At the hearing, the parties requested that I first take evidence on whether Western Rock’s mines were operating on the dates of MSHA’s inspection. They also requested that, if I ruled in the Secretary’s favor on that issue, the parties be given time to try to settle the citations. I granted the parties’ request. (Tr. 4-6).

The parties stipulated that MSHA has jurisdiction over the Portable and Portable #2 Plants. (Ex. J-1). They also stipulated that the Commission has jurisdiction to hear the cases. *Id.* MSHA Inspector Denis Karst testified that on September 14, 2005, he traveled to Western Rock’s Portable Plant to conduct an inspection. He met with the foreman, Russ Clark. (Tr. 13).

He also discussed the inspection with Robin Weathers, President and General Manager of Western Rock, and Tracy Packebush, Western Rock's office manager. Karst testified that when he asked them if there were any problems at the plant, or if they had any concerns about the inspection, they did not indicate that they had any concerns. (Tr. 14). When Inspector Karst first entered the plant area, it was operating. He could see that the conveyor belts were moving and rock was coming off the ends of the belts. (Tr. 15, 19). He also observed either a loader or an excavator operating. As the inspection began, Mr. Clark shut down the plant. Karst issued nine citations during the inspection that are at issue in these cases. The inspector testified that no employee of Western Rock indicated that the plant was not operating that day. (Tr. 16-17).

Inspector Karst also testified that a form filed by Western Rock with the MSHA field office in Albany, Oregon, notified MSHA that the portable plant was operating, but no form was filed by Western Rock to notify MSHA that the plant would be closed on or before September 14, 2005. (Tr. 18).

MSHA Inspector David Small testified that he inspected the Portable #2 Plant on September 13-14, 2005. (Tr. 26). When he arrived at the plant on September 13, he talked to a man named Greg who told him that the plant belonged to Western Rock. (Tr. 27). The inspector was not aware of the existence of this plant. (Tr. 40). Inspector Small told Greg that he was there to conduct an inspection of the plant. Small determined that the plant was operating. As he approached the facility, he saw dust coming off the crushing operation. (Tr. 28). When he pulled into the site, the belts and the loader were operating. *Id.* He could see rock on the moving belts. Western Rock shut down the plant when he began his inspection. (Tr. 33). He inspected the plant and issued 23 citations that are at issue in these cases.

Inspector Small returned to the Portable #2 Plant on September 14, 2005, to complete his inspection. The plant was shut down on September 14 because Western Rock's employees were doing repairs on the equipment which Inspector Small cited the previous day. (Tr. 29). A front-end loader was loading trucks with rock from the stockpile. (Tr. 33). On September 14, he issued three citations that are at issue in these cases. Inspector Small testified that he returned to the plant on September 14 because he could not complete his inspection on September 13. (Tr. 36).

Sometime on September 13, 2005, Inspector Small called Ms. Packebush to find out more about the plant he was inspecting because it was not in MSHA's records. (Tr. 42). He was advised that the plant he was inspecting was simply a part of Western Rock's single rock crushing plant. *Id.* Ms. Packebush told the inspector that Western Rock has always operated under a single MSHA identification number although part of the plant may sometimes be in a different location. Inspector Small told her that because the plant was split up, they were actually two separate operations which require separate identification numbers. *Id.* MSHA established the identification number for this plant on September 13, 2005. Small testified that, during this phone conversation, Packebush did not indicate that either plant was closed in September 2005.

Ms. Packebush testified that when Inspector Karst arrived at the Portable Plant, she advised him that the plant had not been running for several days because of electrical problems. (Tr. 46, 49-50). She stated that when the inspector arrived, the generator had just been started and the men were running a little material through the plant to make sure that the electrical repairs, which had been performed by a contractor, were acceptable. *Id.* Ms. Packebush also testified that the plant was not “truly in operation producing materials, because we were under almost a week of maintenance.” *Id.* Packebush testified that a previous MSHA inspector would not issue citations if the plant were being repaired at the time of the inspection. Instead, this inspector pointed out any safety problems needing correction. (Tr. 50).

Ms. Packebush testified that Western Rock owns one complete portable crushing plant. (Tr. 48). On the day that Inspector Small inspected what MSHA now calls the Portable #2 Plant, Western Rock only had a little finishing crusher at that location. *Id.* At one point in time the entire plant was there, but most of it had been moved back to the location inspected by Inspector Karst. This finishing crusher was only present to complete a job that was just about done. Western Rock did not consider the finishing crusher to be a separate plant which required a separate identification number. Mine identification number 35-03624 was assigned to this operation by MSHA as a result of this inspection.

Ms. Packebush testified that Western Rock’s quarries never close because there is always a loader operator loading material at its quarries. (Tr. 49). As a consequence, she never sends MSHA a notice that a plant is closing. She testified that she has always notified MSHA when the company is going to start operating at a new location. (Tr. 45, 49). Western Rock, through Ms. Weathers, also advised me that it received a Certificate of Honor from MSHA’s Joseph A. Holmes Safety Association for “working 54,783 work hours from 07/01/2000 to 12/31/2004 without incurring a lost time injury.” (Tr. 61-63; Ex. A2).

After the parties presented their evidence on this issue, as summarized above, I entered a bench decision. I ruled that both the Portable Plant and the Portable #2 Plant were subject to inspection by MSHA on the dates in question. (Tr. 51-52). A mine is not required to be crushing rock for commercial purposes in order to be subject to an MSHA inspection. The Portable Plant was operating even though it had just been restarted following extensive electrical repairs. In addition, a loader or excavator was operating. The Portable #2 Plant was crushing rock with a finishing crusher. On the second day of the inspection, Western Rock was not crushing rock but its employees were repairing equipment. A front-end loader was also loading product from the stockpile. When an operator is repairing equipment, the mine is still subject to an MSHA inspection. The inspection may, as a practical matter, be more limited if the entire plant is being repaired. For example, citations for unguarded pinch points on moving machine parts may not be appropriate on a piece of equipment which has been torn down for repairs. On the other hand, a citation issued for having an untrained miner working on the property would be entirely appropriate, for example. If a mine will be shut down for a period of time, the operator should notify MSHA of the closure. I confirm my ruling in this written decision and hold that both

plants were subject to MSHA inspections on the dates that they were inspected by Inspectors Karst and Small. Consequently, the citations were validly issued.

After I entered my bench decision, the parties requested that they be given time to try to settle the cases. After the break, the parties announced that they had settled all of the citations. The Secretary agreed to reduce the total penalty for the citations to \$6,469.00, as set out in detail at the hearing. (Tr. 53-61). Western Rock agreed to pay this penalty.

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. I conclude that the proposed settlement is appropriate under these criteria. The Portable Plant has a history of 26 violations in the 24 months preceding September 14, 2005. (S. Exhibit). The Portable #2 Plant did not have a separate identity until this inspection. The operator is small. The citations were abated in good faith. The penalty proposed by the parties will not have an adverse effect on Western Rock's ability to continue in business. The gravity and negligence determinations are set forth in the citations.

Based on the evidence presented at the hearing, the parties' oral motion to approve settlement is **GRANTED** and Western Rock Reduction Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$6,469.00 within 40 days of the date of this decision. Payment should be made to the Mine Safety and Health Administration at: Office of Assessments, Mine Safety and Health Administration, P.O. Box 360250M, Pittsburgh, PA 15251-6250. The "A.C." numbers shown in the caption for these cases should be written on the check(s).

Richard W. Manning  
Administrative Law Judge

Distribution:

Jeannie Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212 (Certified Mail)

Robin Weathers, President, Western Rock Reduction Co., P.O. Box 1269, Shady Cove, OR 97539 (Certified Mail)

RWM