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SOL (MSHA) V. TIMBER LAKES  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 86-250-M  
A.C. No. 42-01423-05503

v.

Triple C Gravel Pit

TIMBER LAKES CORPORATION,  
RESPONDENT

DECISION

Appearances: Margaret A. Miller, Esq., Office of the  
Solicitor, U.S. Department of Labor, Denver,  
Colorado, for Petitioner; Mr. Veigh Cummings,  
President, Timber Lakes Corporation, Murray,  
Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and  
Health Administration, charges respondent with violating safety  
regulations promulgated under the Federal Mine Safety and Health  
Act of 1977, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits took  
place on January 7, 1987 in Salt Lake City, Utah. The parties  
waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the regulations;  
if so, what penalties are appropriate.

Citations

Respondent is charged with violating four safety  
regulations.

Citation No. 2644388 alleges a violation of 30 C.F.R.  
50.20. The regulation, in its pertinent part, provides as  
follows:

SUBPART CÄREPORTING OF ACCIDENTS, INJURIES, AND ILLNESSES

50.20 Preparation and submission of MSHA Report Form 7000Ä1ÄMine Accident, Injury, and Illness Report.

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000Ä1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in 50.20Ä1 through 50.20Ä7. If an occupational illness is diagnosed as being one of those listed in 50.20Ä6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in 50.10 occurs, which does not involve an occupational injury, sections A, B, and items 5 through 11 of section C of Form 7000Ä1 shall be completed and mailed to MSHA in accordance with the instructions in 50.20Ä1 and criteria contained in 50.20Ä4 through 50.20Ä6.

Citation No. 2644389 alleges a violation of 30 C.F.R. 56.18020. The regulation provides as follows:

56.18020 Working alone

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

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Citation No. 2644390 alleges a violation of 30 C.F.R. 56.15002.  
The regulation provides as follows:

56.15002 Hard hats.

All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

Citation No. 2644391 alleges a violation of 30 C.F.R.

56.14029. The regulation provides as follows:

56.14029 Machinery repairs and maintenance

Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

Summary of the Evidence

Richard H. White, a person experienced in mining, has been an MSHA inspector for 10 years. In May 1986 he inspected respondent, a sand and gravel operation (Tr. 8-10).

The inspection occurred because Ray Caillouette, an employee, reported to the MSHA office that an accident had occurred. No report had been filed at the office prior to May 5, 1986 (Tr. 11).

In checking at the site the inspector learned Caillouette had been struck in the head by a 24-inch pipe wrench when he was attempting to restart a tail pulley (Tr. 12, 13). After taking some measurements and photographs the inspector interviewed Caillouette (Tr. 13, 14).

After the interview he contacted Dave Cummings, the foreman of the crusher operation. The inspector and Cummings then checked the equipment. Cummings did not know if the accident had been reported to MSHA. Caillouette was not back at work on May 6th; he was still having problems with his head and still under a doctor's care (Tr. 14, 15).

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The interview between Caillouette and the inspector formed the basis for the citations in the case (Tr. 16).

From his investigation the inspector concluded that on the date of the accident Caillouette, who had 22 years of experience, performed his routine duties. This included running the loader, filling the feed trays and crushing rock (Tr. 21, 54).

During the day Cummings, the foreman, went into Salt Lake City for supplies (Tr. 21). No other person was at the site (Tr. 22). At about 4:00 p.m. the conveyor belt in front of the feed tray stopped (Tr. 22, Ex. P, P4). Caillouette went below the hopper which measures 17 inches from the outside wall to the structure of the conveyor belt. With the aid of a 24-inch pipe wrench and a four-foot cheater bar he tried to get the conveyor belt to move. The conveyor belt was not shut off or blocked; it moved and the pipe wrench struck him in the head (Tr. 23, 24, Ex. P4, P5).

Caillouette said he was unconscious for 15 to 20 minutes. Since his head was hurting he wanted to drive home. When he came to work the next day he again became dizzy and returned home (Tr. 25). Berg, who was present after the accident, is an independent truck driver hauling materials (Tr. 26).

The first citation was written due to the operator's failure to report an accident within 10 days (Tr. 27). MSHA Inspector Wilson had given Form 7001 to the operator two years before this accident occurred (Tr. 27). The citation was abated after the company filled out the MSHA form (Tr. 29). The inspector believed the failure to notify involved a high degree of negligence (Tr. 29).

Caillouette stated he was working alone at the time of the accident; further, he had been working alone most of the day. The inspector also considered the work to be hazardous (Tr. 30). He was running the loader on a built-up bank; also moving parts can be hazardous. In addition, the area below the feed trap was confined and very hazardous (Tr. 31).

There was a telephone in the electrical control trailer van, about 75 feet from the feed trap area (Tr. 32). Caillouette also indicated it was a regular practice to work alone at that pit. The foreman also knew Caillouette was working alone (Tr. 33).

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The inspector considered the "working alone" citation to be an S & S violation. It was reasonably likely to cause an accident; if it happened it was reasonably likely to be serious. Both of these events came to pass (Tr. 34).

Caillouette spent some time in the hospital and he was unable to work for a month (Tr. 35). Accordingly, the inspector felt the violation was reasonably likely to result in a reasonably serious injury (Tr. 35). The "working alone" citation involved a high degree of negligence because the practice was known to management (Tr. 35).

Caillouette also related to the inspector that he was not wearing a hard hat at the time of the accident (Tr. 35). There could be falling objects in the area where he was working (Tr. 36, Ex. P1, P2). The foreman indicated hard hats were available. A hard hat not only protects your head from falling objects but protects your head when going into low areas. Failure to wear a hard hat can cause head injuries, concussions and lacerations. Such injuries are serious (Tr. 37, 38).

The Kolberg conveyor belt equipment had not been turned off (Tr. 39, 40, Ex. P1, P3, P5). He was repairing the equipment to get it to run without turning it off or blocking it (Tr. 40). If the power had been deenergized, locked out, or blocked against movement, the accident would not have occurred. Caillouette and Dave Cummings said it was routine practice to start the conveyor belt by using a pipe wrench on the tail pulley without turning off the power (Tr. 41). The inspector felt this was an S & S violation (Tr. 42). Further, in his opinion the negligence was high (Tr. 43). However, the foreman stated he had instructed the men not to have the power on when they tried to start the equipment (Tr. 43).

Respondent is a three-man sand and gravel operation (Tr. 44). The foreman, who was cooperative, immediately abated the violations (Tr. 45, 47).

The belt stopped because Caillouette placed an excessive amount of material on it (Tr. 51).

David Cummings and Veigh Cummings testified for respondent. David Cummings runs the company and does the excavation work.

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Mr. Caillouette, 37 years old, worked for Timber Lakes about two and a half years (Tr. 76, 77, 79, 80). He was experienced in doing mechanical work and also works in the pit. On the day of the accident the County had been hauling gravel out of the pit all day (Tr. 77, 79).

Cummings talked to Caillouette the morning after the accident. He explained that when the belt stopped he left the power on and tried to restart it with a cheater pipe. Cummings did not see any visible signs of injury on the worker (Tr. 78). However, he did a little complaining; he also worked the next full day.

The company has a strict rule prohibiting anyone from working on equipment with power on. The company's practice is to clean up such a problem with the power off (Tr. 80). Using a pipe wrench does not solve the problem because the buildup remains (Tr. 80).

The company has made it clear to its employees that they do not work alone. Hard hats are available on the property (Tr. 82). They are required to be worn.

The witness did not file a report of the accident. The citations were abated (Tr. 83). The pit has two or three workers most of the time (Tr. 84).

One of the operator's complaints is that the company will have the pit in good shape with one inspector. But another inspector will cite the company for a violation previously passed over (Tr. 84, 85).

Caillouette stated to the witness that he was wearing a hard hat at the time of the accident (Tr. 86). Caillouette was very reckless in the way he handled the situation. He should have first turned the power off before cleaning it out with a shovel (Tr. 87).

Caillouette was hurt on a Wednesday and he received a drunk driving citation on Friday. But he was a good, hard worker (Tr. 90).

The number of workers at the gravel pit varies from two to five (Tr. 93). The gravel is used in the company's cabin development and some is sold to the County.

About 10,000 tons are crushed annually (Tr. 94).

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On previous occasions Caillouette had turned off the power before cleaning rock off of the equipment. Cummings had never seen Caillouette go in by himself without turning off the power (Tr. 100). Caillouette was also wearing a hard hat that morning. The next morning he said he got a bump on the head but it wasn't serious (Tr. 102). The witness told Caillouette he had done a foolish thing (Tr. 103).

Veigh Cummings, the President and owner of Timber Lakes, indicated Ray Caillouette had been shot in the head in Viet Nam. When he was injured at the pit it affected his previous war injury (Tr. 115).

The company felt that Caillouette was a willing worker (Tr. 116).

The payment of a penalty would not make it impossible for the company to continue in business. The company holds safety meetings (Tr. 117).

The company has also received previous MSHA citations.  
Evaluation of the Evidence

MSHA Inspector White indicated that the operator did not report Ray Caillouette's accident. The event was known to the company. Further, David Cummings confirmed that no report was filed. Citation No. 2644388 should be affirmed.

The three remaining citations are mainly based on the hearsay statement of Caillouette to the MSHA inspector.

Concerning Citation No. 2644389 (working alone): the statement of Caillouette confirms that the employee was, in fact, working alone. David Cummings, the foreman, had gone to Salt Lake City for supplies. The company's claim that it had a strict policy against employees working alone was certainly not followed.

Citation No. 2644389 should be affirmed.

Concerning Citation No. 2644390 (hard hats): the statement of Caillouette was to the effect that he was not wearing a hard hat. However, I credit the contrary evidence of David Cummings and Veigh Cummings. Hard hats were available and Caillouette even hunted deer while wearing one. This evidence indicates his dedication to the use of hard hats.

Citation No. 2644390 should be vacated.



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The final citation, No. 2644391, involves the failure to shut off power or block off machinery against motion. The statement of Caillouette establishes the violative condition, and it is apparent that the accident would not have happened if the power had been shut off. Cummings stated that Caillouette's acts were against company policy. However, the operator is strictly liable for violations of the Mine Act. Asarco, Incorporated—Northwestern Mining Department, 8 FMSHRC 1632 (1986).

Citation No. 2644391 should be affirmed.

An issue raised by respondent concerns the fact that one MSHA inspector will give respondent a "clean bill of health." But a later inspector will cite the company for a previously existing violation. Events of this type can occur because MSHA inspectors have varying degrees of expertise. A violative condition may be observed by one inspector but not another. Further, the legal defense of estoppel does not lie against MSHA in these circumstances, Servtex Materials Company, 5 FMSHRC 1359, 1369 (1983).

#### CIVIL PENALTIES

The statutory criteria for assessing a civil penalty is contained in Section 110(i) of the Act, now 30 U.S.C. 820(i). It provides as follows:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Concerning the operator's history of prior violations it appears the company was assessed 10 violations for the two years ending May 5, 1986. But no dollar amount has ever been assessed or been paid. Accordingly, I consider that the operator has

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no adverse prior history (Ex. P6). The company's tonnage and its maximum of five employees causes me to conclude that it is a small operator. Concerning negligence: the company could have reported the accident to MSHA as it knew about the event. The negligence in the "working alone" citation is high since the foreman should have known Caillouette would be alone if he left the site. The company's negligence is low in the last two citations: Caillouette's activities were contrary to company policy. The assessment of a civil penalty, according to the President, will not affect the company's ability to continue in business. The gravity of the violations is high inasmuch as severe injury could occur. Finally, the company demonstrated good faith in rapidly abating the violations.

In view of the statutory criteria, I consider that the penalties set forth in the order of this decision are appropriate.

#### Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, I enter the following conclusions of law.

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. 50.20 and Citation No. 2644388 should be affirmed.
3. Respondent violated 30 C.F.R. 56.18020 and Citation No. 2644389 should be affirmed.
4. Respondent did not violate 30 C.F.R. 56.15002 and Citation No. 2644390 should be vacated.
5. Respondent violated 30 C.F.R. 56.14029 and Citation No. 2644391 should be affirmed.

Based on the findings of fact and conclusions of law I enter the following:

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ORDER

1. Citation No. 2644388 is affirmed and a penalty of \$50 is assessed.
2. Citation No. 2644389 is affirmed and a penalty of \$300 is assessed.
3. Citation No. 2644390 and all penalties therefor are vacated.
4. Citation No. 2644391 is affirmed and a penalty of \$400 is assessed.
5. Respondent is ordered to pay to the Secretary the sum of \$750 within 40 days of the date of this decision.

John J. Morris  
Administrative Law Judge