UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR, Complainant, v. S.A. HEALY COMPANY, Respondent.	OSHRC Docket No. 89-1508

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

This case presents a significant issue of first impression—whether the assessment of penalties against an employer for willful violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") is contrary to the double jeopardy clause of the Fifth Amendment[1] when the employer has previously been criminally convicted and sentenced to criminal fines for the same conduct. Administrative Law Judge James D. Burroughs concluded that the Fifth Amendment does not here bar the Commission from assessing penalties despite the prior conviction and sentence of Respondent, S.A. Healy Company ("Healy"). For the reasons stated below, we affirm that portion of the judge's decision, but we remand for additional factual findings regarding the amount of penalties to be assessed.

[1]The clause states in pertinent part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

INTRODUCTION

Healy was the tunneling contractor for the Crosstown Seven Collector System, part of a water pollution abatement project being constructed for the Milwaukee Metropolitan Sewerage District. After three of its employees died in a methane gas explosion in what was known as the Crosstown North Tunnel, the Secretary cited Healy for sixty-eight willful violations of OSHA standards. The Secretary issued the citation under his so-called "egregious" or "instance-by-instance" policy, which defines each individual instance of noncompliance with a specific standard as a separate and distinct violation with its own penalty. *See Caterpillar, Inc.*, 15 BNA OSHC 2153, 2170, 1991-93 CCH OSHD ¶ 29,962, pp. 41,003-04 (No. 87-922, 1993). Pursuant to section 17(a) and (j) of the Act, 29 U.S.C. § 666(a) & (j), which authorizes the Secretary to propose and the Commission to assess civil penalties for willful violations, the Secretary proposed the then-maximum penalty of $10,000[2] for each alleged violation, for a total of $680,000. Healy contested the citation items, and the matter was heard before Judge Burroughs.

Under section 17(e) of the Act, 29 U.S.C. § 666(e), which provides that an employer may be criminally prosecuted for a willful violation which results in death to an employee, Healy was criminally indicted and convicted on three counts—one count for each deceased employee. Each criminal count alleged that Healy had failed to comply with standards dealing with: (1) employee training (29 C.F.R. § 1926.21(b)(2) and 21(b)(6)(i)), (2) approval of electrical equipment for the hazardous atmosphere inside a tunnel (29 C.F.R. § 1926.407(b)), and (3) cut off of electrical power in an area having an excessive concentration of flammable gas (29 C.F.R. § 1926.800(c)(2)(vi)). Federal District Court Judge Terence T. Evans sentenced Healy to a $250,000 fine on each count, for a total fine of $750,000. This fine was one-half of the maximum possible fine prescribed by statute.[3]

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[2]The maximum civil penalty for a willful violation was increased to $70,000 in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

[3]29 U.S.C. § 666(e) provides for a fine of not more than $10,000. The Comprehensive Crime Control Act of 1984 generally increased the criminal penalties for violations of Federal law; an organization committing a felony or a misdemeanor which results in death may now be fined up to $500,000. 18 U.S.C. § 3571.

The parties agreed that the criminal conviction covered the same conduct that was at issue in forty-nine of the citation items. They also agreed to settle the remaining nineteen citation items which have no relationship to the guilty verdict, and those items are not before the Commission. Healy then argued before Judge Burroughs that the purpose of the civil penalties sought by the Secretary was in fact retribution or deterrence, and since these are characteristics of punishment, assessment of penalties in the Commission proceeding for the forty-nine items covered by the criminal verdict would violate the "double jeopardy" clause.

In rejecting this contention, Judge Burroughs relied on *United States v. Halper*, 490 U.S. 435, 446 (1989), in which the Supreme Court held that an ostensibly civil and remedial penalty in fact is punitive for purposes of the double jeopardy clause if it "does not remotely approximate the Government's damages and actual costs." Judge Burroughs concluded that Healy's penalty liability was not disproportionate to the government's costs of investigation and prosecution. Accordingly, the judge determined that assessment of penalties against Healy in this proceeding would not be punitive under *Halper*. However, the judge also found that a penalty of $6500 was appropriate for each of the forty-nine violations[4] rather than $10,000 as the Secretary proposed, and he assessed a total penalty of $318,500.

I. HEALY DID NOT WAIVE DOUBLE JEOPARDY CLAIM

At the criminal sentencing hearing, Healy raised several factors in an attempt to mitigate the fine. In addition to the potential for OSHA civil penalties, Healy also noted that it faced lawsuits arising out of the fatalities and that it had lost contracts as a result of the criminal proceedings. In sentencing Healy to one-half of the maximum possible fine, Judge Evans regarded all of these as mitigating circumstances, and the judge also found that Healy had cooperated during the investigation and had shown remorse over the fatalities. The Secretary argues that because Healy asked the district court judge to take the possibility of

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[4]After Healy was convicted, the Secretary moved for partial summary judgement on the issues of liability and willfulness on the ground that the criminal proceedings constituted collateral estoppel with respect to the citation items covered by the criminal verdict. Although Healy did not object to the Secretary's motion with respect to these two issues, it initially contended on review before us that it was not estopped from denying that it had committed 49 separate violations as charged in the citation. At oral argument, however, Healy conceded the existence of 49 separate violations.

civil penalties into account in arriving at an appropriate criminal fine, Healy waived any double jeopardy claim.

Judge Burroughs rejected the waiver argument when it was raised before him. In his view, the Secretary's argument incorrectly assumed that the pendency of the civil liability was the only factor that caused Judge Evans to sentence Healy to less than the maximum criminal penalty. Furthermore, Judge Burroughs concluded that Healy had not made a "deal" with the district court judge but rather had simply advised him of the status of the civil actions and that Healy was not asked to give up any of its legal rights in exchange for a reduction in the fine.

The principle regarding waiver of a constitutional right is set forth in such cases as *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), where the Court stated:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

(Footnotes citing cases omitted). *See Boykin v. Alabama*, 395 U.S. 238 (1969) (rejection of right to counsel must be intelligent and understandable). In our view, Judge Burroughs properly determined that the circumstances here do not arise to the level of a knowing and intentional waiver of Healy's right to claim the benefit of the double jeopardy clause.

The Secretary relies on inapposite decisions involving defendants who made express agreements with the government that allowed the government to bring multiple proceedings. *United States v. Broce*, 488 U.S. 563 (1989) (guilty plea); *United States v. Britt*, 917 F.2d 353 (8th Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991) (plea bargain); *United States v. Marcus Schloss & Co.*, 724 F. Supp. 1123 (S.D.N.Y. 1989) (consent order); and *Jeffers v. United States*, 461 F. Supp. 300 (N.D. Ind. 1978) (defendant who requested separate trials could not later object to the second trial on double jeopardy grounds). These cases clearly do not establish that Healy should be prevented from raising the double jeopardy issue in the circumstances here. As Judge Burroughs properly found, there was no bargained-for exchange between Healy and Judge Evans from which we could conclude that Healy knowingly waived its double jeopardy argument.

II. COMMISSION HAS AUTHORITY TO RULE ON DOUBLE JEOPARDY CLAIM

On review before the Commission, the Secretary also renewed his contention that the Commission lacks authority to decide Healy's double jeopardy claim because the Commission cannot entertain a challenge to the constitutionality of the Act. In his decision, Judge Burroughs concluded that the constitutionality of the Act is not in question here. We agree. Arguably, the Commission would not be competent to decide whether an employer may present a double jeopardy claim in a proceeding under the Act or whether the Act would be unconstitutional if interpreted to exclude such a claim. As the *Halper* decision makes clear, however, the double jeopardy clause is not limited to criminal prosecutions only, and a civil proceeding following a criminal prosecution constitutes double jeopardy if the sanction imposed in the civil proceeding is in fact punitive in nature. 490 U.S. at 448-51 & n.10 (1989). *See United States v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993) (mine operator may argue double jeopardy under the Federal Mine Safety and Health Act). The Secretary, moreover, does not contend that an employer in a proceeding under the Act is not entitled to the constitutional protection against double jeopardy. The question presented here is whether an infringement of the Fifth Amendment has been shown on the facts of the case, which is an issue the Commission is empowered to decide. *Chromolloy Am. Corp.*, 7 BNA OSHC 1547, 1979 CCH OSHD ¶ 23,707 (No. 77-2788, 1979).

III. PUNITIVE POTENTIAL OF INSTANCE-BY-INSTANCE PENALTIES

The double jeopardy clause prohibits successive punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Although the Fifth Amendment speaks in terms of "life or limb," it is well-settled that any punitive sanction can implicate the double jeopardy clause even if the sanction does not involve imprisonment, and that a monetary penalty can be considered punitive for purposes of applying the double jeopardy clause. *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct 1937, 1941 n.1 (1994). *See Austin v. United States*, 113 S.Ct. 2801 (1993). Accordingly, the question before us is whether the penalties against Healy at issue in this proceeding are punitive in nature. *See United States v. Tilley*, 18 F.3d 295, 297-98 & n.5 (5th Cir. 1994).

Generally speaking, a punitive sanction is one which satisfies certain criteria, including but not limited to whether it serves "the traditional aims of punishment," that is, "deterrence and retribution." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).[5] However, the courts historically have deferred to Congress, and if a statute plainly states that its penalty provisions are civil in nature, that characterization will be accepted unless "the statutory scheme [is] so punitive either in purpose or effect as to negate [Congress'] intention." *United States v. Ward*, 448 U.S. 242, 249 (1980). As the Court stated in *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938):

> [T]he legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation, and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

There can be little doubt that Congress created a civil penalty structure when it passed the Act. With the exception of the criminal penalties prescribed in section 17(e), the Act otherwise expressly denominates the penalties as civil and provides an administrative mechanism for their assessment. Moreover, it is well-settled that the Act is remedial social legislation whose purpose is the effectuation of safe and healthful working conditions through an administrative mechanism of promulgation and enforcement of mandatory safety and health standards in addition to the statutory duty imposed by section 5(a)(1), 29 U.S.C. § 654(a)(1), to keep a worksite free from "recognized hazards." Section 2(b), 29 U.S.C.

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[5]"[T]he tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character," 372 U.S. at 168-69, include:

1) Whether the sanction involves an affirmative disability or restraint
2) Whether it has historically been regarded as punishment
3) Whether it comes into play only on a finding of scienter
4) Whether its operation will promote the traditional aims of punishment--deterrence and retribution
5) Whether the behavior to which it applies is already a crime
6) Whether an alternative purpose to which it may rationally be connected is assignable to it
7) Whether it appears excessive in relation to the alternative purpose.

§ 651(b); *Brock v. Cardinal Indus., Inc.*, 828 F.2d 373, 376 (6th Cir. 1987); *Phillips 66 Co.*, 16 BNA OSHC 1332, 1335, 1993 CCH OSHD ¶ 30,191, p. 41,540 (No. 90-1549, 1993). Sanctions imposed under such statutes have long been considered to be civil, that is, nonpunitive, in nature. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (upholding validity of statute imposing a civil penalty for the protection of the public health); *Hepner v. United States*, 213 U.S. 103 (1909) (monetary penalty for bringing illegal aliens into the country is enforceable in civil litigation). As the Second Circuit stated in *United States v. J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974):

> In many instances Congress has provided, as a sanction for the violation of a statute, a remedy consisting only of civil penalties or forfeitures; in others it has provided both criminal and civil sanctions. When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word.

As *Ward* indicates, however, the deference normally accorded the intent and determination of Congress to establish a civil penalty is not conclusive, and an ostensibly civil penalty can be found to have in fact a punitive character. *See Mitchell* (discussion of "appropriate" and "reasonable" penalties and obligations). More recently, the Court emphasized in *Halper* that "a civil sanction, *in application*," may become punitive for purposes of applying the double jeopardy clause. 490 U.S. at 443. The Court explained as follows:

> [T]he Government argues . . . that whether a proceeding or penalty is civil or criminal is a matter of statutory construction, and that Congress clearly intended the proceedings and penalty at issue here to be civil in nature. The Government, in our view, has misconstrued somewhat the nature of the multiple-punishment inquiry and, in so doing, has overread the holdings of our precedents. Although, taken together, these cases establish that proceedings and penalties under [civil statutes] are indeed civil in nature . . . they do not foreclose the possibility that in a particular case a civil penalty authorized by [a statute] may be so extreme and so divorced from [a remedial goal] as to constitute punishment.

Id. at 441-42. Thus, the Court reasoned that it would not be bound by the "statutory language, structure, and intent" of Congress but instead would look to the "character of the actual sanctions imposed." *Id.* at 447. The primary purpose to be taken into account under the *Halper* test is whether the sanction is deterrent or retributive in character, rather than

remedial. *Id.* at 448 (citing *Mendoza-Martinez* and *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) ("[r]etribution and deterrence are not legitimate nonpunitive governmental objectives")).

These decisions, however, do not specify precisely what is meant either by "retribution" or "deterrence" in this context. Nevertheless, retribution is generally understood to refer to a sanction that seeks to exact a penalty from a wrongdoer in proportion to the degree of harm caused by the wrongdoer. *See Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1002 & n.41 (5th Cir. 1975), *aff'd on other issues*, 430 U.S. 442 (1977). The court in that decision observed that OSHA penalties have a retributive effect because "gravity," that is, the severity of a violation, is one of the factors to be taken into account in the assessment of penalties under section 17(j) of the Act. Indeed, the Commission has recognized that gravity normally is the most significant element in a penalty assessment. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624, 1994 CCH OSHD ¶ 30,363, p. 41,883 (No. 88-1962, 1994). Therefore, in determining whether and under what circumstances penalties under the Act can assume a punitive character, it is logical to conclude that, generally speaking, an aspect of retributiveness is necessarily present when the amount of the penalty increases with the magnitude of the violation. Clearly, however, a civil OSHA penalty cannot be considered punitive, even if it has a partial retributive character, if the amount of the penalty is reasonable and appropriate to effectuate the remedial purposes of the Act, that is, to achieve the goal of a safe and healthful workplace.

One of the means established by Congress for accomplishing the Act's purposes is the assessment of penalties as a deterrent, that is, a means for inducing employers to comply. Section 2(b)(10). The commonly understood definition of a deterrent is a force which induces or compels a change in conduct, or, as Webster's defines the word "deter," "to turn aside, discourage, or prevent from acting." *Webster's Third New Int'l Dictionary* 616 (1971). Because the Act creates a mandatory enforcement mechanism, it clearly has a deterrent purpose, and Congress expected and intended that employers will seek to comply with the

Act in order to avoid citation and penalty. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-13 & n.16 (1980). As discussed more fully below, however, deterrence has both civil (remedial) and punitive aspects.

It cannot be seriously disputed that even substantial penalties for willful violations such as those in question here may legitimately have a deterrent purpose insofar as such penalties may be required to induce a recalcitrant employer into compliance with the requirements of the Act or standards issued under the Act. For example, in *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1204 (3d Cir. 1974), *aff'd on hearing en banc*, 519 F.2d 1215 (1975), *aff'd sub nom. on other issues Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), the court relied on the corrective nature of a civil penalty in concluding that the constitutional protections accorded a criminal defendant did not apply:

> [C]andor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a "willful" violation, are far more important than any "remedial" features. However, a deliberate and conscious refusal to abate a hazardous condition may bring about a situation where a heavy civil penalty might be needed to *effect compliance with safety standards*. In any event, we have now come too far down the road to hold that a civil penalty may not be assessed *to enforce observance* of legislative policy. [citing *Hepner* and *Stranahan*.]

(Emphasis added). Similarly, there is an extensive line of case law holding that proceedings to hold persons in contempt of court are civil in nature where the intent of the sanction is to afford the defendant an opportunity to conform his behavior to the court's order as opposed to simply punishing him for his disobedience. *E.g.*, *Shillitani v. United States*, 384 U.S. 364 (1966); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). Accordingly, the Commission is faced with the difficult task of determining whether a civil penalty under the Act, which unquestionably serves a remedial deterrent purpose, can nevertheless assume punitive characteristics and if so, under what circumstances.

While both civil and penal sanctions have a deterrent effect in that both are intended to induce a certain type of behavior, normally penal sanctions are for the protection or the benefit of society as a whole whereas a civil sanction functions as an inducement to the

individual employer who is the subject of the enforcement action. As the Court stated in *Trop v. Dulles*, 356 U.S. 86, 96 (1958), "[i]f the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, *to deter others*, etc., it has been considered penal" (emphasis added). See *Kurth Ranch*, 114 S.Ct. at 1946 (where a state imposes a tax on marijuana for the purpose of deterring the general society from possessing marijuana, the deterrent purpose is consistent with a punitive character). Moreover, this distinction is implicit in both the penalty structure set forth in the Act and the case law under the Act. In addition to gravity, section 17(j) directs the Commission, in assessing penalties, to take into account the size of the employer, its prior history of violation, and its good faith. The gravity criterion may be characterized as generic in the sense that it treats violations of similar quality and severity alike regardless, for example, of whether they are committed by a large or small employer. The remaining three criteria, however, require the Commission to consider circumstances pertaining specifically to the individual cited employer. *See Specialists of the South, Inc.*, 14 BNA OSHC 1910, 1987-90 CCH OSHD ¶ 29,140 (No. 89-2241, 1990).

Very early in the history of the Act the Commission recognized that the achievement of the Act's objectives is the overriding goal of a penalty assessment, and it held that indeed no penalty should be assessed if in the circumstances compliance with the Act could be assured without a penalty assessment. *Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1065, 1971-73 CCH OSHD ¶ 15,277, p. 20,370 (No. 881, 1972). Similarly, the Commission considered the deterrent effect on the individual employer alone in *Trinity Indus.*, 15 BNA OSHC 1481, 1991-93 CCH OSHD ¶ 29,582 (No. 88-2691, 1992). In that decision, the Commission concluded that an employer who had substantially eliminated a hazard by the time of the inspection and whose failure to entirely correct the condition was the result of difficulties it encountered rather than lack of diligence was entitled to substantial credit for good faith "in order to encourage a large employer to protect its employees and to cooperate with the Federal occupational safety and health program, by taking voluntary measures to abate . . . hazards." *Id.* at 1489, 1991-93 CCH OSHD at p. 40,039. We reaffirmed this deterrence principle in *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929, 1994 CCH

OSHD ¶ 30,516, p. 42,189 (No. 91-414, 1994), *petition for review filed*, No. 94-3978 (6th Cir. Sept. 19, 1994), where we stated: "The purpose of a penalty is to achieve a safe workplace, and penalty assessments . . . are keyed to the amount an employer appears to require before it will comply" (citing *D & S Grading Co. v. Secretary of Labor*, 899 F.2d 1145 (11th Cir. 1990) and *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978)).

This focus on the deterrent effect of civil penalties is essentially consistent with the law under the Federal Coal Mine Health and Safety Act of 1969, the precursor to the current Federal Mine Safety and Health Act of 1977. Addressing the penalty assessment provision which requires the Secretary of the Interior to assess civil penalties based on penalty assessment criteria similar to those under our Act, the Court held:

> Section 109 provides a strong incentive for compliance with the mandatory health and safety standards. That the violations of the Act have been abated or miners withdrawn from the dangerous area before § 109 comes into effect is not dispositive; if a mine operator does not also face a monetary penalty for violations, he has little incentive to eliminate dangers until directed to do so by a mine inspector. The inspections may be as infrequent as four a year. A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.

National Indep. Coal Operators' Assn. v. Kleppe, 423 U.S. 388, 401 (1976).

In general principle, therefore, an ostensibly civil penalty can nevertheless assume a punitive character to the extent it exceeds the amount warranted in order to effectuate the purposes of the Act, and in particular the objective of deterring or preventing future violations by the cited employer. Thus, a punitive potential, that is, a potential for penalties in excess of what is justified by the purposes of the Act, is inherent in the "egregious" or instance-by-instance penalties at issue here.

The background of the "instance-by-instance" penalty mechanism is set forth in detail in *Caterpillar*. Briefly, it is a practice the Secretary instituted under which individual penalties would be proposed for each "instance" of a violation in situations where the Secretary felt that the employer was acting in a flagrant manner or the violations were particularly severe. The policy is set forth in the Secretary's Field Operations Manual ("FOM"). Although the FOM has been amended several times since the policy was first implemented, the following language is illustrative:

> In egregious cases; i.e., willful, repeated and high gravity serious citations and failures to abate, an additional factor of up to the number of violation instances (number of days since the abatement date for failure to abate) may be applied to the gravity-based penalty . . . .

OSHA Instruction CPL 2.45B, *Field Operations Manual*, Chapter VI, section B.2.i.(4) (June 15, 1989), *reprinted in* 3 BNA OSHR Ref. File 77:2713, 77:2716. Normally, the Secretary issues one single citation item for each standard he alleges to have been violated. When the Secretary acts under the "egregious" policy, however, he sets forth each alleged instance of violation of a particular standard as a separate and distinct citation item. *E.g.*, *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶ 29,964 (No. 87-2059, 1993). In *Caterpillar* the Commission concluded that the Act neither mandated nor prohibited separate penalties with respect to each instance of a violation of a particular standard. The Commission held that such penalties would be permissible where the "unit of prosecution" under the standard was an individual act rather than an overall course of conduct, and it noted that "[n]ot all violations . . . lend themselves to multiple citations." In that case, the Commission determined that multiple instances of the regulation requiring the employer to record occupational injuries and illnesses could be cited because the violation was concerned with the application of the Secretary's recordkeeping criteria to each individual employee. 15 BNA OSHC at 2172-73, 1991-93 CCH OSHD at p. 41,006. In *J.A. Jones*, the Commission reached a similar conclusion where the employer failed to provide fall protection at discrete, individual locations where employees were exposed to a fall hazard. 15 BNA OSHC at 2212-13, 1991-93 CCH OSHD at pp. 41,031-32.

When the Secretary issues a citation that is not based on the instance-by-instance policy, that is, where all the allegations of violation of one particular section or subsection of a standard are combined within a single item, the resulting penalty, as a general proposition, is not likely to have a punitive character. As the foregoing discussion indicates, the Commission has the authority to ensure that a penalty is not unduly burdensome or excessive by evaluating the penalty assessment criteria set forth in the Act and determining a reasonable and appropriate penalty based on that evaluation. *See Colonial Craft* (emphasis

on the "size" criterion in order to avoid a "destructive" penalty). A different situation exists, however, in the case of an "egregious" or "instance-by-instance" penalty proposal.

Depending upon the nature of the violations and the extent to which the Secretary has separated out individual instances of noncompliance, an instance-by-instance citation has the potential to reduce or make extremely difficult to apply the flexibility the Commission would otherwise have to assess a fair and equitable penalty consistent with the objective of ensuring compliance with the Act by the cited employer. When the Secretary issues citations under that policy, he not only increases the absolute number of citation items by multiplying each violation according to the number of individual instances, but he also proposes that a separate penalty be assessed for each individual instance. When the Commission applies the criteria set forth in section 17(j) of the Act, it assesses penalties that are appropriate for each instance of violation. For example, if the occurrences cited separately in the citation are instances of a violation that is of substantial gravity, the Commission will have to assess a penalty commensurate with the gravity factor, *Hern Iron Works*, 16 BNA OSHC at 1624, 1994 CCH OSHD at p. 41,884, even though such an assessment may result in an aggregate penalty which exceeds what is justified for the deterrence of the cited employer. Accordingly, there is a punitive potential, or possibility of a punitive effect, inherent in the Secretary's instance-by-instance penalty policy. Moreover, while deference ordinarily is due to Congress' intention to establish civil penalties, the "egregious" or instance-by-instance violation formula is not provided for in the Act but rather is an administrative policy adopted by the Secretary. The fact that Congress generally enacted a civil penalty structure carries less weight than it would had Congress also indicated a specific legislative intent with respect to instance-by-instance penalties. *See Halper*, 490 U.S. at 447 ("in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, *not the underlying nature of the proceeding giving rise to the sanction*, that must be evaluated") (emphasis added).

The Secretary's own directives acknowledge that the purpose of the instance-by-instance penalty is to provide a deterrent effect on employers in general. The section of the FOM addressing penalties contains a section entitled "General Policy" which states as follows:

> OSHA has always taken the position that the penalty structure implemented under section 17 of the Act was not designed as a punishment for violations nor as a source of income for the agency. Rather, the penalty is designed primarily to provide an incentive toward correcting violations voluntarily, *not only to the offending employer but, more especially, to other employers who may be guilty of the same infractions of the standards or regulations.* Large proposed penalties, therefore—e.g., where penalties are proposed on a violation-by-violation basis in egregious cases—serve this public purpose; and criteria guiding approval of such penalties by the Assistant Secretary are based on meeting this public purpose. (See B.2.i.(4).)

FOM, Chapter VI, section A, 3 BNA OSHR Ref. File at 77:2713 (emphasis added). Similar language appears in the current version of the FOM. OSHA Instruction CPL 2.45B CH-4, *Field Operations Manual,* Chapter VI, section A (Dec. 13, 1993), *reprinted in* 3 BNA OSHR Ref. File 77:2701. Nevertheless this policy statement asserts that such penalties are not punitive. However, the Secretary has also issued another directive specifically addressing instance-by-instance penalties which uses somewhat different wording:

> 1. In the context of the Act, penalties are intended to provide an incentive to employers to prevent safety and health violations in their workplaces and to correct such violations which do exist voluntarily.
>
> 2. The Act intends that this incentive be directed not only to an inspected employer but also to any employer who has hazards and violations of standards or regulations.
>
> a. The large proposed penalties that accompany violation-by-violation citations are not, therefore, *primarily* punitive nor exclusively directed at individual sites or workplaces; they serve a public policy purpose; namely, to increase the impact of OSHA's limited enforcement resources.

OSHA Instruction CPL 2.80, *Subject: Handling of Cases To Be Proposed for Violation-By-Violation Penalties*, section G (Oct. 1, 1990) (emphasis added). Furthermore, Leo Carey, a Director of Field Programs for OSHA, testified in a Commission proceeding as follows:

> That policy [instance-by-instance penalties] was instituted because of . . . concern about whether or not existing OSHA policy for proposing penalties offered a deterrent from what the Act envisioned.
>
> There was a congressional concern in a report by the Office of Technology Assessment concerning the adequacy of OSHA's penalties to serve the purpose of the intent of the Act, *and* a deterrent intent.

Sanders Lead Co., 91 OSAHRC 29/C9, p. 35 (No. 87-260, 1989) (ALJ) (emphasis added), *remanded on other grounds*, 15 BNA OSHC 1640, 1991-93 CCH OSHD ¶ 29,690 (No. 87-260, 1992)). Consequently, the Secretary must act cautiously when seeking instance-by-instance penalties, since whenever one employer is highly penalized to deter or induce other employers in their actions, such penalties border on being punitive.

While the foregoing discussion focuses on the issue of deterrence, the same reasoning applies equally to the factor of retribution. In *Halper*, the Court reaffirmed the long-standing principle that "civil proceedings may advance punitive as well as remedial goals," but it also held that "a civil sanction that cannot fairly be said to serve a remedial purpose, but rather can *only* be explained as also serving either retributive or deterrent purposes, is punishment." 490 U.S. at 448. *See Trop*, 356 U.S. at 96 (a sanction which otherwise would appear punitive in nature will be considered non-penal if its purpose is not to punish but to accomplish some other legitimate governmental purpose). The Secretary therefore is not precluded from taking the deterrent effect on employers generally into account in proposing a penalty, but the resultant penalty must nevertheless be of an amount appropriate to effectuate the purpose of deterring the cited employer. Similarly, the penalty assessed against the cited employer cannot be so large that it loses any connection with the legitimate remedial purposes of the Act and becomes *only* a means for exacting retribution from the employer. As the court noted in *Atlas Roofing*, 518 F.2d at 1002 n.41, criminal sanctions, and the retributive element of such sanctions, are reserved for the most severe infractions. The Commission implicitly recognized this point in *Caterpillar*, cautioning that "although the Secretary may cite separate omissions to record injuries as separate violations, he may not exact a total penalty that is inappropriate in light of the four factors listed in section 17(j) of the Act." 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,007. The Commission in *Caterpillar* also concluded that the Secretary's reasons for proposing higher penalties, including one which extended beyond the individual employer's circumstances—a policy to focus resources on the most hazardous industries—were not factors that are usually taken

into account in penalty assessment. 15 BNA OSHC at 2179, 1991-93 CCH OSHD at pp. 41,012-13. *See Hern Iron Works*, 16 BNA OSHC at 1622, 1994 CCH OSHD at p. 41,882 (Commission assesses an appropriate penalty based solely on the facts of each case).

In *Caterpillar*, the instance-by-instance violation policy did not preclude the Commission from assessing a penalty appropriate on the facts of that case because the Commission concluded that the violations, although cited as willful, were neither willful nor serious in nature, and it found them to be of low gravity. Thus, the Commission assessed a total penalty of approximately $25,000 whereas the Secretary had sought a penalty of $4000 for each affirmed citation item, a total of $668,000. A similar situation occurred in *J.A. Jones*, where the Secretary originally sought penalties totalling $258,000 for seventy-seven instances of violation of the Secretary's fall protection standard, section 1926.500. The Commission affirmed the judge's decision finding that Jones had committed forty-five instances of violation of that standard and that those violations were not willful in nature. Following a remand from the Commission, the judge assessed a total penalty of $14,600. No. 87-2059 (Sept. 23, 1993).

In the case now before us, however, the Commission's flexibility to adjust the aggregate penalty amount is severely constrained. As indicated, *supra* note 4, Healy has in effect conceded that the violations are willful. In discussing the penalty assessment criteria, Judge Burroughs noted that Healy was a large employer with a history of prior violations of similar standards,[6] and he concluded that Healy had not demonstrated good faith prior to the accident which resulted in the inspection in question. Although as discussed *infra* we remand for more particularized findings on the gravity of the various citation items, we cannot conclude that the violations are of low or inconsequential gravity in view of the fact

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[6]The judge did not consider prior history to be a significant factor in the penalty assessment because he concluded that prior violations would not be unexpected in the high-hazard industry in which Healy was engaged. By the same token, however, Healy is not entitled to have the penalties mitigated based on prior history.

that three deaths occurred. Nor do we see any basis to reduce substantially the overall penalty from the amount the Secretary sought, as we did in *Caterpillar* and *J.A. Jones*.[7]

Moreover, the circumstances of this case demonstrate the potential of the instance-by-instance policy to inflate the total penalty through the compounding of multiple violations. Forty-three citation items dealt with Healy's failure to use electrical equipment approved for the conditions inside the tunnel. Generally speaking, each of these items alleges noncompliance with the electrical standard, 29 C.F.R. § 1926.407(b), with respect to a specific piece of electrical equipment or an electrical device at a specific location in the tunnel. For example, thirteen light fixtures are alleged as deficient, each one set forth in a separate citation item. Each of these items is identical except for the location where it is alleged to have occurred.[8] There is one item for a 440-volt electrical panel and a separate item for a 110/208-volt panel at the same location. In at least one instance, a single piece of equipment is itself further subdivided: one item alleges that an electric locomotive was not approved for the hazardous location whereas another item alleges that a component on that locomotive, its flasher light, was unapproved. While our precedents recognize the discretion of the Secretary to propose penalties for individual instances of violative conduct,[9] the particularity with which the Secretary chooses to separate out such instances within an

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[7]There is even more constraint on our ability to adjust the overall amount of the penalty in the case of willful violations under the current penalty structure. As Healy points out, Congress specifically acknowledged the deterrent effect of such penalties when it amended the Act. H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 688-89, *reprinted in* 1990 U.S. Code Cong. & Admin. News. 2393-94, states that "returning OSH Act civil penalties to their original 1970-level will not be enough to *deter violations* and ensure adequate enforcement by [OSHA]" (emphasis added).

[8]Two of these items involve the same location within the tunnel. These two items are addressed at the end of this decision.

[9]There is no contention that the Secretary acted improperly in structuring the citation on an instance-by-instance basis. *See supra* note 4. The issue before us, however, is not whether the Secretary acted properly in defining the unit of prosecution for purposes of the number of citation items issued but rather the amount of the penalty to be assessed, which is a matter solely within the authority of the Commission. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-23, 1994 CCH OSHD ¶ 30,363, pp. 41,881-83 (No. 88-1962, 1994).

overall violative occurrence solely for the purpose of increasing the size of the penalty, and the extent to which he has done so here, underscores again the punitive potential of penalties proposed according to the instance-by-instance policy.

In a case such as this, where penalties in a civil proceeding are preceded by criminal fines, the punitive elements of retribution and general societal deterrence have been satisfied in a constitutionally permissible manner through the imposition of a fine or other punishment in the criminal action. However, the fact that penalties such as the instance-by-instance penalties at issue here have the potential for becoming punitive rather than civil or remedial does not establish that they necessarily violate the double jeopardy clause. In *Halper* the Supreme Court held that a penalty assessed in a civil action following a criminal conviction and punishment would not be considered punitive in nature if it permitted the government to recover its costs. As explained more fully below, *Halper* provides that an action under a civil remedial statute becomes punitive when the amount of money sought is disproportionate to the amount invested by the government in investigating and prosecuting the violator.

IV. THE *HALPER* DECISION

The defendant in the *Halper* case had been fined and imprisoned under the False Claims Act, 18 U.S.C. § 287, for inflating 65 claims for reimbursement under Medicare by $9.00 per claim. Although the total amount of the false claims was $585, the government thereafter sought a civil penalty of over $130,000 under the civil provisions of the False Claims Act, 31 U.S.C. §§ 3729-3731, which at that time prescribed a civil penalty of $2000 for each false claim plus double the amount of the damages sustained by the government.[10] In determining whether the ostensibly civil and remedial penalty was in fact punitive for purposes of the double jeopardy clause, the Supreme Court on review concluded as a general proposition that "whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes

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[10]The False Claims Act has since been amended to increase the penalty to not less than $5000 and not more than $10,000 plus three times the amount of actual damages. The significance of this amendment is discussed *infra*.

that the penalty may fairly be said to serve." 490 U.S. at 448. It expressed concern about what it characterized as "*the rare case* . . . where a fixed-penalty provision subjects a *prolific but small-gauge* offender to a sanction overwhelmingly disproportionate to the damages he has caused," *id.* at 449 (emphasis added), and it announced the following rule for such instances:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Id. The Court held that the district court had acted properly in concluding that the disparity between its estimate of the government's costs and the penalty the government sought was so disproportionate as to constitute a second punishment in violation of the double jeopardy clause. The Court remanded to allow the government to put on specific evidence regarding the actual amount of damages it had sustained.

In relying on *Halper*, Healy notes that recovery of costs to the government is not the purpose of the OSH Act and that the Act provides for a graduated penalty rather than the fixed-penalty provision at issue in *Halper*. It contends, therefore, that because it had already been penalized in the criminal case for the same conduct at issue here, assessment of any penalty in this proceeding would be punitive. In other words, Healy takes the position that the principle underlying *Halper*—a civil proceeding may be punitive if it follows a criminal prosecution for the same conduct—should be applied here but that the cost-proportionality test applied in *Halper* is not relevant under the OSH Act. The Secretary, on the other hand, argues that *Halper* should be strictly limited to its facts and that the decision deals only with exceptional situations in which a penalty is facially so extreme or exorbitant that it appears unjust unless there is a showing that a penalty of that magnitude is warranted by the government's costs.

Following a conference call with the parties, Judge Burroughs scheduled a hearing and directed that the parties present evidence regarding the government's costs. He also

stated that he would resolve the "*Halper* issue" once all relevant evidence had been received. His order does not reflect his reasons for concluding that *Halper* is pertinent to this proceeding.

We recognize that the False Claims Act at issue in *Halper* is fundamentally different from the OSH Act in two respects—its specific purpose is the recovery of out-of-pocket costs the government sustained due to the claimant's conduct and it contained a fixed-penalty provision. Nevertheless, the *Halper* test of whether the government's costs bear a rational relationship to the penalty sought is a legitimate criterion for determining when an ostensibly civil penalty assumes a punitive character under the OSH Act. Taking all the circumstances into account, we do not find the differences between the OSH Act and the False Claims Act to be dispositive, and they are less significant under the amended version of the False Claims Act currently in effect. Additionally, we note that the federal courts have applied *Halper* in a variety of contexts, including a proceeding under the Federal Mine Safety and Health Act.

Although the False Claims Act seeks to reimburse the government for losses directly attributable to the conduct of the individual submitting the false claims, the courts have recognized that violative conduct frequently subjects the government and indeed society as a whole to indirect costs or losses. For example, forfeiture of property belonging to drug offenders has been upheld under *Halper* based upon the costs of investigating and enforcing drug laws generally and the overall societal costs of drug-related crime and drug abuse programs. *Tilley*, 18 F.3d at 298-99; *United States v. Certain Real Property & Premises*, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S.Ct 55 (1992); *United States v. A Parcel of Land*, 884 F.2d 41, 43-44 (1st Cir. 1989). Similarly, forfeiture of a boat after its owner was convicted of violations of fish and game laws was held to be nonpunitive taking into account the damage to wildlife caused by the defendant's conduct. *United States v. United States Fishing Vessel Maylin*, 725 F. Supp. 1222 (S.D. Fla. 1989). Moreover, *Halper* itself observed that the government's expenses include more than just the immediate cost of payment on a fraudulent claim. In discussing *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), which involved a civil penalty for collusive bidding on government contracts following a criminal conviction for the same conduct, *Halper* concluded that the "injuries [to the government],

of course, included not merely the amount of the fraud itself, but also *ancillary costs, such as the costs of detection and investigation*, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse." 490 U.S. at 445 (emphasis added).

Generally speaking, the courts have recognized that the key principle expressed in *Halper*—costs resulting from violative conduct should be taken into account in determining when a monetary sanction becomes so excessive as to approach punitiveness—is relevant regardless of whether the purpose of the statute in question is to reimburse the government for monies which it paid to the violator. Cases that apply *Halper* broadly involve situations as diverse as importation of illegal merchandise, *United States v. Walker*, 940 F.2d 442 (9th Cir. 1991) (district court properly took judicial notice of the costs of maintaining check points and administering the customs system), trading practices in violation of the Commodity Exchange Act, *United States v. Furlett*, 974 F.2d 839 (7th Cir. 1992) (costs attributable to the brokers' conduct include losses suffered by their customers), civil action under the Racketeer Influenced and Corrupt Organizations Act, *United States v. Barnette*, 10 F.3d 1553, 1558 (11th Cir. 1994) (government's total loss includes investigation and prosecution costs) and violations of the Federal Mine Safety and Health Act, *United States v. WRW*, 731 F. Supp. 237, 239 (E.D. Ky. 1989), *aff'd*, 986 F.2d 138 (6th Cir. 1993), in which the court stated as follows:

> While it is difficult, if not impossible[,] to ascertain the United States' actual loss due to the defendant's mine safety and health violations, its losses include the ancillary costs of detection, investigation, and prosecution, that routinely occur as a result of the United States' enforcement of the Act.

See also Helvering, 303 U.S. at 401, in which the Court held that an additional deficiency assessment for filing a fraudulent tax return is remedial in nature because it reimburses the government for the expense of investigation as well as the loss resulting from the fraud itself. The Court there cited a much earlier decision, *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871), in which it upheld a penalty of double the value of goods illegally imported and concealed on the ground that those acts obstructed government seizure and therefore "impair[ed] the value of the government right."

Turning to the matter of the fixed penalty provision at issue in *Halper*, we note that courts have distinguished *Halper* in situations involving statutes which, like the OSH Act, provide for a graduated penalty with the specific amount left to the discretion of the assessing authority. *E.g.*, *WRW*, 986 F.2d at 140 (Mine Safety and Health Act); *United States v. Valley Steel Prods. Co.*, 729 F. Supp. 1356 (Ct. Int'l Trade 1990) (Tariff Act of 1930). We also note, however, that the false claims at issue in *Halper* arose before the False Claims Act was amended. That amendment prescribed a graduated civil penalty of between $5000 and $10,000 rather than a fixed penalty of $2000. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153 (1986). This amendment reflected congressional intent to provide for discretion in the determination of an appropriate penalty. *United States v. Fliegler*, 756 F. Supp. 688, 694 (E.D.N.Y. 1990); *United States v. Hill*, 676 F. Supp. 1158 (N.D. Fla. 1987). In this respect, the penalty structure under the False Claims Act as amended is analogous to that set forth in the OSH Act, which likewise places discretion in the assessing authority, the Commission. *Hern Iron Works*, 16 BNA OSHC at 1622, 1994 CCH OSHD at p. 41,882. In both *Fliegler* and *United States v. Pani*, 717 F. Supp. 1013 (S.D.N.Y. 1989), the courts, citing *Halper*, weighed the government's costs of investigation and prosecution against the penalties prescribed by those courts under the amended False Claims Act in resolving a double jeopardy argument.[11] Indeed, even though the court in *WRW* distinguished *Halper* as involving a fixed penalty provision, it nevertheless affirmed the district court's holding that "[u]nder *Halper*, the civil assessment must be rationally related to the goal of making the United States whole" and that "[t]he penalty assessment in this

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[11]Although the government in *Fliegler* sought a penalty of up to the statutory maximum of $10,000 for each false claim, the court imposed the minimum penalty of $5000 for each of 23 false claims, a total penalty of $115,000, and concluded that the *Halper* test was satisfied because the government's costs of approximately $110,000 bore a "rational relation" to that penalty. 756 F. Supp. at 697. In *Pani* the court granted the government's motion for summary judgment in the amount of $10,000 for each of three false claims and similarly applied the *Halper* criteria to that amount for which it had granted judgment. 717 F. Supp. at 1019. While *Pani*, unlike *Fliegler*, does not explicitly acknowledge that the amendment to the False Claims Act creates a discretionary penalty adjudication procedure analogous to that in the OSH Act, it is clear that both apply the *Halper* test to the penalty determined by the tribunal in the adjudicative process.

action is not so extreme and divorced from the United States' expenses incurred in the investigation and prosecution of the defendants' violations to constitute punishment . . . ." *WRW*, 986 F.2d at 142 (quoting 731 F. Supp. at 239). Accordingly, we conclude that there is ample authority for applying the *Halper* test to civil penalties assessed under the OSH Act.[12]

V. EVIDENCE ON THE *HALPER* TEST HERE

Although the judge directed the parties to submit evidence at the hearing on the government's costs relating to this matter, the Secretary instead submitted four affidavits, as follows: (1) Compliance Officer Patrick M. Ostrenga stated that OSHA's costs in investigating the accident and assisting in the criminal litigation were slightly more than $200,000; (2) Eric J. Klumb, the Deputy United States Attorney who handled the criminal trial, estimated that his office spent between 1000 and 1500 hours on the case; (3) Richard J.

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[12]In *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), the Court concluded that a state tax on the possession of dangerous drugs was punitive on its face and that the *Halper* analysis based on the recovery of costs attributable to a criminal defendant's conduct was not appropriate. In reaching this conclusion, the Court relied heavily on the fact that the tax in question was imposed *only* after a crime had been committed and the taxpayer had paid any state or federal fines or forfeitures resulting from a criminal conviction. The Court concluded that the fact that the tax liability was conditioned on the commission of a crime "is 'significant of penal and prohibitory intent rather than the gathering of revenue.'" *Id.* at 1947 & n.19 (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935) "(concluding that a tax was motivated by penal instead of revenue-raising intent in part because the taxpayer had to pay an additional sum based on his illegal conduct)" *id.* at 1947 n.19. The Court also noted that the state had already seized the illegal drugs in question, and it reasoned that a tax on the ownership of goods which the taxpayer no longer retained and never legally possessed "has an unmistakable punitive character." *Id.* at 1948.

Whether the behavior to which it applies is already a crime is one factor in determining if an ostensibly civil penalty is in fact punitive in nature. *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1009 (5th Cir. 1975), *aff'd on other issues*, 430 U.S. 442 (1977). *See supra* note 5. *Kurth*, however, deals with a situation in which the tax in question was not owed *unless* there had been a previous criminal conviction. A prior criminal conviction, however, is not a precondition to assessment of penalties under OSHA. Accordingly, *Kurth* is distinguishable and does not compel the conclusion that the *Halper* analysis is inapplicable in the situation presented here.

Fiore, Deputy Regional Solicitor for the Department of Labor; averred that his office had spent 4320 hours; and (4) Sally Mitchell, Office Manager for the Regional Solicitor, documented travel costs of approximately $20,000. Based on a figure of $100 per hour for attorney time, *see, e.g.*, *Napier v. Thirty or More Unidentified Agents*, 855 F.2d 1080 (3d Cir. 1988); *United States v. Kirksey*, 639 F. Supp. 634 (S.D.N.Y. 1986), the Secretary argued that his total costs of investigation and prosecution were approximately $795,000. Judge Burroughs accepted that figure and concluded that both the penalty he found appropriate and the amount the Secretary originally proposed were justified under *Halper* because they were "rationally related" to the government's costs.

We agree with the judge. Although Healy argues that the Secretary's affidavits are not entitled to weight because they are speculative and hypothetical, we find that the affidavits set forth a sufficient foundation to support most if not all of the costs claimed by the Secretary. All of the affidavits reflect that their figures are based on either personal knowledge, discussion with others having personal knowledge, documents (travel vouchers and work logs), or a combination of these sources. The weakest affidavit is Klumb's, in which he admits that his office does not maintain records of the number of hours devoted to specific cases and that he has "little, if any" experience in estimating such time. He stated, however, that he does keep monthly "resource summaries" which estimate the time devoted to particular categories of cases. He arrived at a figure for the number of hours spent on the Healy matter based on those summaries as well as his own personal recollection and consultation with his associate. Healy did not depose the affiants or otherwise seek to introduce any rebuttal to the affidavits. *See Fliegler*, 756 F. Supp. at 697 (affidavits are competent evidence of the government's costs requiring opposing affidavits from the adverse party). Moreover, even assuming the affidavits do not reflect with certainty the actual costs incurred by the government, the Court in *Halper* expressly declined to require such exactitude: "[T]he Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas." 490 U.S. at 446. The Court explained,

> the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain. . . . Similarly, it would be difficult if not

> impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the government whole, but beyond which the sanction takes on the quality of punishment. In other words, as we have observed above, the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice.
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> . . . the defendant is entitled to *an accounting of the government's damages and costs* . . . . We must leave to the trial court the discretion to determine *on the basis of such an accounting* the size of the civil sanction the government may receive without crossing the line between remedy and punishment. . . .While the trial court's judgment in these matters may often may amount to no more than an approximation, even an approximation towards ensuring both that the Government is fully compensated . . . and that . . . the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment.

Id. at 449-50 (emphasis added). In the absence of any contrary evidence, we find that the affidavits submitted here are sufficient to meet the standard of proof announced in *Halper*. As the court held in *Furlett*, 974 F.2d at 844, affidavits need not specify the exact costs to the government; general approximations of the amount of time spent are acceptable under *Halper*. Nevertheless, while the government may legitimately estimate its cost figures, as *Halper* indicates, there must be some reasonable and tangible basis for those estimates. The case law does not obligate us to accept nor would we accept cost estimates which are merely conjecture or incapable of verification.

Since the costs established by the Secretary are well in excess of the statutory maximum penalty of $490,000 for the forty-nine citation items at issue ($10,000 for each item), we conclude that the "rough justice" standard of *Halper* has been met even assuming Healy were to be assessed the maximum penalty permitted under the Act. It necessarily follows that any penalty we might assess up to the statutory maximum similarly would satisfy the *Halper* criteria.[13] We now turn to the assessment of an appropriate penalty.

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[13]The phrase "civil penalty sought" used in *Halper,* to which the Chairman refers in his separate opinion, merely characterizes the nature of the statute before the Court and does not constitute a holding that the test the Court announced is available *only* in the case of a fixed penalty statute. As we have noted in the text of our opinion, the post-*Halper* case law consistently applies the *Halper* test to variable-penalty as well as fixed-penalty statutes.

VI. CONCLUSION

For the reasons stated above, we hold that assessment of civil penalties in this proceeding does not subject Healy to double jeopardy contrary to the Fifth Amendment. However, we remand for further factual findings on the appropriate amount of penalties to be assessed against Healy.

Although Judge Burroughs took into account the factors of size, good faith, and prior history in assessing a penalty of $6500, he did not properly evaluate the element of gravity. While his decision does not explicitly so state, he clearly treated each instance of violation as being of equal gravity, and he did not make individual findings as to gravity for each particular instance of violation. Subsequent to his decision, the Commission held in *J.A. Jones* that where, as here, the Secretary acts within his discretion in proposing penalties on an instance-by-instance basis, the judge must base his penalty assessment on specific factual findings relating to the penalty assessment criteria for each individual instance. 15 BNA OSHC at 2214, 1991-93 CCH OSHD at p. 41,033. Unlike *J.A. Jones*, however, in this case there has been no evidentiary record from which findings can be made regarding the gravity of each of the forty-nine instances in question. Accordingly, we remand to the Chief Judge for assignment to another judge[14] to develop an appropriate factual record and to afford the parties an opportunity to file briefs or otherwise present arguments, if they so desire, on the issue of the appropriate penalties considering the gravity of those items and the other factors relating to penalty assessment. The judge shall then make proper individualized findings and assessments in accordance with *J.A. Jones* and consistent with our analysis of the government's costs under *Halper*.

We also direct the judge on remand to address two additional matters. Items 21 and 22 of the citation both allege a non-approved light fixture at segment 479. The judge shall determine whether these two items are in fact duplicative as they appear to be and if so, he shall make an appropriate disposition to ensure that a double penalty is not assessed for a single instance of violation. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH ¶ 25,712, p. 32,056 (No. 76-4765, 1981); *CTM, Inc.*, 4 BNA OSHC 1468, 1470, 1976-77 CCH

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[14]Judge Burroughs is no longer with the Commission.

OSHD ¶ 20,912, p. 25,107 (No. 5106, 1976), *rev'd on other grounds*, 572 F.2d 262 (10th Cir. 1978) (authority of Commission assess a single penalty for separate violations that constitute one single condition). Also, the parties' settlement agreement does not conform to the Commission's requirements. The agreement fails to certify service on the two unions who represent Healy's employees. Such service is required regardless whether the unions have appeared as parties to the proceeding. *National Steel & Shipbuilding Co.*, 14 BNA OSHC 1866, 1867, 1987-90 CCH OSHD ¶ 29,127, p. 38,919 (No. 88-227, 1990) (consolidated); *General Electric Co.*, 14 BNA OSHC 1763, 1764 n.2, 1987-90 CCH OSHD ¶ 29,072, p. 38,849 n.2 (No. 88-2265, 1990).

Finally, we direct that further proceedings be expedited under Commission Rule 103, 29 C.F.R. § 2200.103.

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: April 20, 1995

WEISBERG, Chairman, concurring:

For the reasons set forth in the majority opinion, I agree that Healy did not waive its claim under the Double Jeopardy Clause of the Fifth Amendment and that the Commission is empowered to consider that claim. Accordingly, I join in Parts I and II of the majority opinion. Also, I do not dispute my colleagues' conclusion in Part III that penalties proposed under the Secretary's "egregious" or "instance-by-instance" policy may have a punitive as well as remedial component. Furthermore, assuming arguendo that the test set forth in *United States v. Halper*, 490 U.S. 435 (1989) is appropriate here, I join my colleagues in Part V of the opinion in concluding that Judge Burroughs properly determined that the Secretary's affidavits were sufficient to make a prima facie showing under *Halper* of proportionality or rational relationship between the government's costs and the statutory maximum penalty of $490,000 for these 49 separate violations. I also concur with the remand in Part VI of the lead opinion for more particularized findings on the gravity of the various citation items for purposes of penalty assessment since that is required by the Commission's decision in *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). However, unlike my colleagues, I am not convinced that *Halper* is controlling and should be applied in this case.

In the *Halper* case, a medical doctor was convicted under the False Claims Act, 18 U.S.C. § 287, for inflating 65 claims for reimbursement under Medicare by $9 per claim. The doctor was seeking $12 in reimbursement for medical services worth only $3. After Halper was sentenced to two years in prison and fined $2000, and notwithstanding that Halper had defrauded the government of the total amount of only $585, the government thereafter sought a civil penalty of over $130,000 under the civil provision of the False Claims Act, 31 U.S.C. §§ 3729-3731, which at the time prescribed a civil penalty of $2000 for each false claim. The Supreme Court in *Halper* announced the following rule:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its

> loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

In my view, *Halper* should be limited to its facts. The *Halper* court appeared to expressly limit its holding by stating "What we announce now is a rule for the *rare case*, the case such as the one before us, where a *fixed-penalty provision* subjects a *prolific but small-gauge offender* to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449 (emphasis added).[1] *Halper* involved an exceptional situation in which the penalty on its face was so extreme and exorbitant and so divorced from a remedial goal as to constitute punishment.

There are significant and fundamental differences between the OSH Act and the fraudulent claims statute at issue in *Halper*. The purpose of the OSH Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," not to protect the government against financial loss. Under the OSH Act the damage is not to the government but to the workers who are injured and killed on the job and their families. The instant case involves nonobservance of safety standards, not violations of a statute dealing with fraud against the government.

Since the offenses at issue in *Halper* were activities which resulted in direct financial loss to the government, it was reasonable and logical in that case to condition the validity of very high civil penalties on the recovery of the government's out-of-pocket costs. Indeed, both the original version of the False Claims Act at issue in *Halper* and the amended version to which the majority refers explicitly provide that the government is entitled to recover its

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[1]*See United States v. Barnette*, 10 F.3d 1553 (11th Cir. 1994) where the court found that "the *Halper* Court carefully limited its holding, which it called 'a rule for the rare case.'" The circuit court noted: "Here, unlike in *Halper*, the civil penalty is not exponentially exaggerated by a fixed penalty disproportionate to the defendant's actual fraud." *Id.* at 1559.

litigation costs.[2]

Halper was not intended to apply in a situation where the amount of the penalty is discretionary and the statute sets forth criteria for the assessment of a penalty. Unlike the fixed-penalty provision of the False Claims Act under consideration in *Halper*, the OSH Act provides for the assessment of civil penalties according to a statutory range based on prescribed criteria. Under section 17(j) of the Act, the Commission must give "due consideration" to four factors when assessing penalties: the size of the employer's business, gravity of the violation, good faith of the employer, and prior history of violations. Gravity is normally the most important element in the penalty assessment. *Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 4, 1972). The litigation or other costs to the government is not one of the factors to be considered in assessing an appropriate penalty.

The majority concedes that the courts have found *Halper* distinguishable in cases involving a graduated civil penalty scheme like that of the OSH Act. In *United States v. Valley Steel Prods. Co.,* 729 F. Supp. 1356, 1359 (Ct. Int'l Trade 1990), which involved a statute providing for a civil penalty in an amount up to the value of illegally imported merchandise, the court expressly held as follows:

> Unlike the situation in *Halper*, the remedial formula authorized under 19 U.S.C § 1592 does not fix a civil penalty; rather, it establishes the maximum penalty which is the domestic or dutiable value of the merchandise, and gives the Court discretionary authority to determine the size of such penalty. Therefore, the rule in *Halper* cannot serve as the basis for dismissing this action; the amount of civil penalty remains to be assigned by the Court consistent with its sound discretion.

Although, as the majority observes, this case and *WRW* nevertheless used the *Halper* cost-

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[2]The original version of the statute states, in pertinent part, that "[a] person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2000 . . . *and costs of the civil action* . . . ." 31 U.S.C. § 3729 (emphasis added). The amended statute provides that "[a] person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty . . . ." 31 U.S.C. § 3729(a).

proportionality test in determining that the penalties in question were not punitive, neither decision explains why the court did so in light of the admitted significant differences between the False Claims Act and the statutes at issue in those cases. In the absence of any direct analysis of this point, and considering the fact that the *Halper* approach simply corroborated the courts' conclusion that the civil penalties in issue were not punitive in nature, I conclude that these decisions are not compelling authority to support a proposition that *Halper* is the appropriate measure of the punitive or remedial nature of penalties assessed by the Commission.

Similarly, I do not find it persuasive that decisions of two district courts, *United States v. Fliegler*, 756 F. Supp. 688, 694 (E.D.N.Y. 1990) and *United States v. Pani*, 717 F. Supp. 1013 (S.D.N.Y. 1989) weighed the government's costs of investigation and prosecution against the penalties sought by the government under the amended False Claims Act in resolving a double jeopardy argument. In addition to the fact that the False Claims Act as amended is itself a cost recovery statute, the range of discretion in its civil penalty provision—between $5000 and $10,000—is considerably more limited than the much broader authority given the Commission under the OSH Act to assess a penalty for a civil willful violation of any amount up to $10,000 and, under the amendment to section 17(j) now in effect, from $5000 to $70,000. Moreover, while the district court in *Pani* held that the amendment to the False Claims Act which increased the penalty to not less than $5,000 and not more than $10,000 plus three times the amount of actual damages applied retroactively, neither *Pani* nor *Fliegler* specifically discussed the impact of this amendment in terms of *Halper*. These courts merely assumed that the *Halper* test was relevant without specifically addressing the point. Accordingly, it cannot be said that they attribute any significance to the discretionary penalty provision in terms of *Halper*.[3]

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[3]As the majority noted in footnote 11, in *Fliegler* the court imposed the minimum penalty of $5000 for each of 23 false claims, a total penalty of $115,000. The court found that "the Government's cost of $110,564.90 bears a rational relation to the $115,000 civil penalty the

(continued...)

There is an element of punitiveness and deterrence in any penalty situation. Similarly, an element of retributiveness is necessarily present when the amount of the penalty under the OSH Act increases with the gravity or severity of the violation. See *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975). However, a civil penalty under the OSH Act cannot be considered punitive, even if it has a partial retributive character, if the penalty is reasonable and appropriate to effectuate the remedial purpose of the Act, that is, to achieve the goal of providing a safe and healthful workplace.

In this regard, I note that in addressing the question of whether civil penalties for violation of the Federal Mine Safety and Health Act were remedial or punitive, the Sixth Circuit concluded that *Halper* "did not abandon earlier analytical framework." *United States v. WRW Corp.*, 986 F.2d 138, 140 (6th Cir. 1993). Thus the court applied the traditional criteria set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). In particular, the Sixth Circuit reasoned that "imposing a civil penalty for health and safety violations which varies in amount based on the severity of the violation and the [mine] operator's attempts to come into immediate compliance may as readily be ascribed to the remedial purpose of promoting mine safety." 986 F.2d at 141-42. Because the court relied on the traditional concept that a penalty of an amount appropriate to deter the violator and induce him to future compliance is civil in nature, it is clear that the *Halper*-type of analysis in which the court also engaged was not the principal focus of its decision.

Therefore, in my view civil penalties under the OSH Act, as a general proposition, are not likely to have a punitive character for purposes of applying the double jeopardy clause. I specifically reject Healy's contention that where there has been a criminal fine, any

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[3](...continued)
Court imposes in its discretion pursuant to 31 USC section 3729(a) ($5000 for each of the 23 Laser Modification Kit false claims), and therefore the civil penalty does not violate the Double Jeopardy Clause." 756 F. Supp at 697. There was no discussion or reasons given by the court for assessing the minimum penalty. It appears that the court may have tailored the amount of the penalty to the government's costs to satisfy *Halper*.

subsequent civil penalty for the same conduct, whether it be a penalty of $45 or $350,000, would constitute an impermissible second "punishment." However, I recognize that penalties proposed under the Secretary's "egregious" or "instance-by-instance" policy have the potential to be "punitive" for purposes of double jeopardy analysis. "Egregious" civil penalties proposed by the Secretary in a particular case "may be so extreme and so divorced from [a remedial goal] as to constitute punishment." *Halper*, 490 U.S. at 443. Similarly, the multiplier effect of the Secretary seeking individual penalties for each "instance" of a violation may in a given case make the aggregate penalty punitive simply based on its magnitude. This does not mean, as Healy argues, that any time the Secretary seeks instance-by-instance civil penalties following a criminal conviction and fine, it is a form of punishment and *per se* violates the Double Jeopardy Clause. In a double jeopardy claim inquiry, we have an obligation to examine whether the instance-by-instance penalties proposed by the Secretary are in excess of what is justified by the remedial purpose of the OSH Act, and are so punitive in nature as to violate the multiple-punishments component of the Double Jeopardy Clause. A close scrutiny is necessary to insure, as suggested by Healy's counsel during the oral argument, that the Secretary doesn't "throw the kitchen sink at the respondent." (Tr. 18).

However, the *Halper* test is not the appropriate yardstick for determining whether a civil penalty under the OSH Act constitutes "punishment" for the purpose of double jeopardy analysis. The cost-proportionality test applied in *Halper* is not relevant to the OSH Act. *Halper* simply does not fit in the case of a worker protection health and safety statute. Further, applying the *Halper* test in this case to determine whether a disparity exists between the Secretary's costs in investigating and prosecuting the case and the Secretary's proposed penalty would be at odds with the Commission's authority to assess penalties *de novo* in contested cases which was recently reaffirmed in the Commission's decision in *Hern Iron Works*. In *Hern Iron Works*, we held that the Act expressly grants to the Commission the sole authority to determine the amount of the penalty to be assessed. By focusing on the

penalties that the Secretary seeks rather than the penalties assessed *de novo* by the Commission, the Commission would be giving undue weight and influence to the Secretary's proposed assessment of penalty.

My colleagues, however, have excised reference to the penalty proposed by the Secretary and frame their holding to reflect that since the costs established by the Secretary are well in excess of the statutory maximum penalty of $490,000 ($10,000 for each of 49 citation items), any penalty the Commission might assess would satisfy the rough justice standard of *Halper*. This further illustrates the inappropriateness of applying *Halper* as the Supreme Court there specifically based the test on the "penalty sought" [by the government] and not in terms of the penalty assessed by the court or adjudicative agency:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. (emphasis added) 490 U.S. at 449.

The majority takes the position that the phrase "civil penalty sought" used in *Halper* merely characterizes the nature of the statute before the Court. Irrespective of whether this phrase by itself could be read to limit the Court's holding in *Halper* to the case of a fixed penalty statute, the Court explicitly limited its holding by stating, "What we announce now is a rule for the rare case, the case such as the one before us..."

My colleagues have eschewed taking a position on whether the cost-proportionality test in *Halper* should be based on the penalty sought by the Secretary or the penalty assessed by the Commission. The former is inconsistent with the Commission's authority to assess penalties *de novo*. The latter is contrary to the Supreme Court's express language in *Halper*. Either way, it demonstrates why the test set forth in *Halper* is inappropriate to determine whether a specific civil penalty under the OSH Act is punitive and constitutes a second punishment in violation of the Double Jeopardy Clause of the Fifth Amendment.

Rather than resort to external criteria such as the test set forth in *Halper*, I would look to the section 17(j) factors to determine whether the instance-by-instance civil penalty sought by the Secretary is so disproportionate as to constitute a second punishment in violation of the Double Jeopardy Clause.

The Secretary proposed a civil penalty of $10,000 for each of the 49 citation items covered by the criminal conviction. Judge Burroughs found that a penalty of $6500 per violation was appropriate, and he assessed a total civil penalty of $318,500. I join my colleagues in remanding this case for additional factual findings regarding the amount of penalties to be assessed based on *J. A. Jones*.

Judge Burroughs found that Healy is a large company with approximately 1,000 employees. It has a history of prior violations of similar standards and in the instant case committed an extensive number of willful violations[4] resulting in the deaths of three workers. This is clearly not the *rare case* of a prolific but small gauge offender within the meaning of *Halper*. Although the particular gravity of each individual violation cannot be ascertained from the existing record, the majority correctly notes that the violations present at least a significant level of gravity. Additionally, as the judge found, Healy exhibited a lack of good faith before the explosion:

> Healy's conduct leading up to the explosion was far from exemplary. There is no excuse for not devoting more time and resources to safety. The company did not have a safety officer or anyone performing those duties. . . . The company obviously paid little attention to the safety of its employees.

There is ample authority to establish that in situations of this nature, a substantial penalty is warranted under section 17(j) to accomplish the civil, remedial purpose of inducing the cited employer to satisfy its statutory obligation to provide a safe workplace. For example, in a very recent decision, *Valdak Corp.*, No. 93-239, 1995 OSHRC No. 16, the Commission doubled the $14,000 penalty assessed by the judge in view of the employer's blatant

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[4]Healey conceded that it had committed 49 separate violations.

disregard for the safety of its employees and the high gravity of the violations. *See also Wheeling-Pittsburgh Steel Corp.,* 16 BNA OSHC 1780, 1785, 1994 CCH OSHD ¶ 30,445, pp. 42,040-41 (No. 91-2524, 1994)(large size, lack of good faith, and high gravity as factors in assessing a penalty of high magnitude); *Hern Iron Works, Inc.,* 16 BNA OSHC 1619, 1625, 1994 CCH OSHD ¶ 30,363, pp. 41,884-85 (No. 88-1962, 1994)(lack of good faith as a significant factor in penalty assessment). As the Commission recognized in *Quality Stamping Prods. Co.,* 16 BNA OSHC 1927, 1929, 1994 CCH OSHD ¶ 30,516, p. 42,189 (No. 91-414, 1994), penalties must be assessed in an amount sufficient to preclude their being assumed by the employer as "simply another cost of doing business." The Commission reached a similar conclusion in *E.L. Davis Contrac. Co.,* 16 BNA OSHC 2046, 2053, 1994 CCH OSHD ¶ 30,580, p. 42,343 (No. 92-35, 1994), where, acting under the enhanced penalty provision now in effect, it assessed a penalty of $60,000 for a single willful violation on the ground that a penalty of this magnitude was necessary to cause the company to "[appreciate] the vital importance of complying with OSHA regulations."

The circumstances of this case are comparable. Given the number and severity of the violations and the undisputed fact that even though Healy was engaged in an inherently high hazardous industry, the company paid little attention to the safety of its workers before the explosion, penalties of the magnitude sought in this proceeding are hardly outlandish or excessive under the criteria of the OSH Act. Rather, substantial penalties are reasonable and appropriate for the remedial purpose of ensuring Healy's future compliance with the Act. Accordingly, I conclude here, as I did in *R.G. Friday Masonry, Inc.,* 17 BNA OSHC 1070, 1076 n. 14 (No. 91-1873, 1995) (consolidated), that the Commission's authority to determine an appropriate penalty de novo by applying the facts to the section 17(j) criteria ensures the assessment of a penalty in an amount adequate to effectuate the purposes of the Act.

While the actual amount of the penalty to be assessed in this case will be determined on remand, I am satisfied based on the section 17(j) criteria that substantial penalties in the case would not be inappropriate or unreasonable. Accordingly, I would find that civil

penalties in the range recommended by Judge Burroughs and to be assessed with particularity on remand effectuate the Act's remedial objectives, are not punitive, and therefore do not subject Healy to double jeopardy contrary to the Fifth Amendment.

Stuart E. Weisberg

Stuart E. Weisberg
Chairman

Dated: April 20, 1995

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR, Complainant, v. S.A. HEALY CO., Respondent.	Docket No. 89-1508

NOTICE OF COMMISSION DECISION AND REMAND

The attached Decision and Remand by the Occupational Safety and Health Review Commission was issued on April 20,1995. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

April 20, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-1508

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

John H. Secaras, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Room 844
230 South Dearborn St.
Chicago, IL 60604

James L. Fox, Esq.
Abramson & Fox
One East Wacker Drive - Ste. 3800
Chicago, Il 60601

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR Complainant, v. S. A. HEALY COMPANY Respondent.	OSHRC DOCKET NO. 89-1508

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 9, 1992. The decision of the Judge will become a final order of the Commission on August 10, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 29, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 9, 1992

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-1508

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

John H. Secaras, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Room 844
230 South Dearborn St.
Chicago, IL 60604

James L. Fox, Esq.
Abramson & Fox
One East Wacker Drive
Chicago, IL 60601

James Johnson, Esq.
Michael, Best & Friedrich
100 East Wisconsin Ave.
Milwaukee, WI 53202

James D. Burroughs
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS 257-4086

FAX:
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR, Complainant, v. S. A. HEALY COMPANY, Respondent.	OSHRC Docket No. 89-1508

APPEARANCES:

Kevin Koplin, Esquire
Richard J. Fiore, Esquire
Joan E. Gestrin, Esquire
Susan Bissegger, Esquire
Office of the Solicitor
U. S. Department of Labor
Chicago, Illinois
For Complainant

James Fox, Esquire
Thomas P. Carney, Esquire
Abramson and Fox
Chicago, Illinois
For Respondent

Before Administrative Law Judge James D. Burroughs

DECISION AND ORDER

S. A. Healy Company, Inc. ("Healy"), contested a willful citation issued to it on May 1, 1989. The citation contained a total of 68 allegations cited on an instance-by-instance basis pursuant to the Secretary's egregious policy. The Secretary proposed a penalty of $10,000 for each item. Items 1 through 5 alleged a violation of § 1926.21(b)(2), for failure to instruct each employee in the recognition and avoidance of

unsafe conditions. Items 6 through 50 pertain to alleged violations of § 1926.407(b), for the installation of equipment in hazardous locations that was not approved as intrinsically safe for use in a hazardous location. Item 51 alleges a violation of § 1926.800(c)(1)(i), for failure to maintain a record of air quantity and quality. Items 52 and 53 involve an alleged violation of § 1926.800(c)(2)(i), for failure to provide mechanically induced primary ventilation in all work areas. Items 54 through 67 pertain to alleged violations of § 1926.800(c)(2)(vi), for failure to cut off power and withdraw employees from an area endangered by flammable gas (methane). The last allegation, item 68, pertains to a violation of § 1926.800(e)(1)(iii), for failure to prohibit matches and other flame-producing smoking materials.

Healy is a corporation with an office and place of business at 9600 West 47th Street, McCook, Illinois. It is engaged in the business of construction and related activities. At all times relevant to this proceeding, it maintained a workplace at 1596 West Spruce Street, Milwaukee, Wisconsin, where it was engaged in constructing an underground tunnel for the Milwaukee Metropolitan Sewerage District ("MMSD"). In 1977 the MMSD began a 2.1 billion dollar effort, known as the Water Pollution Abatement Program, to improve its sewerage collection and treatment system. The program was directed primarily toward abatement of polluted discharges into Lake Michigan during periods of heavy rain. During March of 1987, MMSD entered into a contract with Healy to construct the Crosstown Seven North Tunnel, known as the CT-7 project. This particular tunnel was designed as a sloping collector tunnel that leads to an already completed storage tunnel.

On November 10, 1988, a methane explosion occurred within the tunnel work site of Healy in Milwaukee. This explosion resulted in the death of three Healy employees. An investigation of the explosion was conducted by the Occupational Safety and Health Administration ("OSHA"). On May 1, 1989, after an investigation, OSHA issued Healy the willful citation that is the subject of this proceeding.

Subsequent to the issuance of the willful citation, OSHA referred its investigative findings to the United States Attorney's office for consideration of possible criminal prosecution. On June 26, 1990, a Federal grand jury returned a twelve-count indictment charging Healy with willful criminal violations of four safety and health regulations which independently or in combination resulted in the death of three employees. On

December 11, 1990, the grand jury returned a superseding indictment containing three, rather than twelve, counts. The superseding indictment was obtained in response to a ruling by the United States district court that the proper "unit of prosecution" in OSHA criminal matters is "per death" and not "per violation" as is appropriate in civil proceedings. The ruling limited Healy's potential criminal fine to $500,000 per death as opposed to $500,000 per regulation violated.

On February 20, 1991, after a three-week trial, a jury found Healy guilty of violating three standards which pertain to 49 of the 68 allegations at issue in this proceeding. The Secretary sought a total of $1,500,000 in criminal fines. United States District Court Judge Terrence T. Evans imposed a fine of $250,000 on each of the three counts. Healy did not appeal the jury's verdict.

Subsequent to the criminal conviction,[1] the Secretary filed a motion for partial summary judgment with the Commission on April 18, 1991. The Secretary alleged that Healy was collaterally estopped from litigating the facts and legal issues determined by the court in the final judgment in the criminal case. She inferred that the district court case involved the same facts and elements of proof necessary for adjudication of 49 of the violations alleged in this proceeding, and precluded Healy from relitigating those issues in this proceeding. The Secretary concluded that the criminal proceeding decided the issues of liability and willfulness which are set forth in subparagraph (c)(2) of the complaint, paragraphs 12 through 39, 41 through 55, and 66, 67 and 68.

On October 3, 1991, a document entitled "Response and Memorandum of Law of S. A. Healy in Opposition to Motion for Partial Summary Judgment" was received from Healy.[2] Despite its title, the document does not argue the inapplicability of the doctrine of collateral estoppel. The document goes beyond being a response to the Secretary's motion. It is in itself a motion that raises an affirmative defense based upon the

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[1] Aside from the filing of the complaint and answer, no action was taken in the civil proceeding until the criminal proceeding had concluded. The complaint was received by the Commission on October 17, 1990. An answer was received on November 16, 1990.

[2] New counsel for Healy entered an appearance in the civil proceeding. Because the new counsel needed extra time to familiarize himself with the voluminous criminal record, extensions of time to file a reply were granted.

constitutional privilege of double jeopardy. The penalties sought in this case, according to Healy, are punitive in nature and a violation of the double jeopardy clause.

Healy interprets the Supreme Court decision in *United States v. Halper*, 109 S. Ct. 1892, 1897 (1989), to hold that the double jeopardy clause protects against three distinct abuses: (1) a second prosecution for the same offense after conviction, (2) a second prosecution for the same offense after acquittal, and (3) multiple punishments for the same offense. *Halper* involved the third category, *i.e.*, multiple punishments. The Supreme Court in *Halper* made clear that a civil penalty assessed in a subsequent civil proceeding may violate the double jeopardy clause.

Healy stated that it "was admittedly prosecuted for the same violations which are the subject of the current proceeding." It admits that it was found guilty of some of the charges and was punished by a $750,000 fine and that this amount is being paid by it to the U. S. Treasury. On the basis of the conviction, it notes that the Secretary asserts that it is collaterally estopped from denying 49 of the allegations raised in the current proceeding. On page 9 of Healy's memorandum, the following statement is made: "There can be, therefore, no question that the fines sought in the current proceeding is [*sic*] for the same conduct that served as the basis for the criminal conviction." It points out that *Halper*, in its opinion, applies to the factual situation presented by this case; that the penalties are punitive in nature and a violation of the double jeopardy clause.

Subsequent to the filing of the memorandum in opposition to the Secretary's motion for partial summary judgment, the Secretary asked and was granted permission to file a response. The Secretary considered the double jeopardy defense to be an important development. On November 25, 1991, the Secretary filed a response in which she alluded to the fact that the memorandum filed by Healy was not filed in opposition to her motion for partial summary judgment, that her motion for partial summary judgment was unopposed, and that Healy did not dispute that it was collaterally estopped from litigating the issues of liability and willfulness. The Secretary regarded the memorandum of Healy to be a motion to dismiss based on the belief that the penalties sought violated the double jeopardy clause of the fifth amendment. She concluded that Healy's claim regarding double

jeopardy is without merit and raised the point that Healy is estopped from relying upon the defense as a result of litigating strategy it pursued during the sentencing hearing in the criminal case.

Order of January 7, 1992, Granted
The Secretary's Motion for Partial Summary Judgment
Based on the Doctrine of Collateral Estoppel

The doctrine of collateral estoppel was held to be applicable by order dated January 7, 1992. This Judge proceeded on the representation by the Secretary and conceded by Healy that there was a final judgment against Healy that afforded Healy a full and fair opportunity to litigate the issues in dispute in the criminal proceedings. "It is well-settled that a criminal conviction, by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978).

The Secretary and Healy separately agreed that the final judgment in the criminal case involved the same facts and elements of legal proof necessary for the adjudication of 49 of the violations alleged in this civil proceeding. Healy did not dispute that it was collaterally estopped from litigating the issues of liability and willfulness and tacitly concurred with the Secretary's position. It expressly stated that "the same conduct that served as a basis for the criminal conviction" is at issue in the current proceeding. The motion for summary judgment on the issues of liability and willfulness was determined to be meritorious and was granted by order dated January 7, 1992.

The January 7, 1992, order reserved ruling on the amount of the penalties to be assessed, pending development of established facts, and on the double jeopardy defense. The matter was set for hearing on April 6, 1992. The hearing was to "include all issues before the Commission, including the Secretary's damages and costs which were alleged to rebut Healy's double jeopardy defense."

Secretary's Second Motion for Partial Summary Judgment

On March 20, 1992, a motion for partial summary judgment on the issue of penalties and a motion to postpone the hearing scheduled for April 6 was received from the Secretary. The Secretary argued that the only issue remaining for adjudication was the appropriateness of the proposed penalties. In the Secretary's opinion, the double jeopardy defense was a constitutional challenge which was beyond the jurisdiction of the Review Commission and could not be decided in this proceeding. The Secretary urged affirming the $10,000 penalty for each violation. The memorandum focused its discussion on the four penalty factors, the deference to be given the Secretary's proposed penalties, and whether the Commission has jurisdiction to address the constitutional question of double jeopardy.

On March 26, 1992, this Judge held a conference call regarding the motions with Thomas P. Carney, Jr., attorney for S. A. Healy Company, and Richard Fiore and Kevin Koplin, counsel for the Secretary. The motions filed by the Secretary were discussed with the parties. The postponement was denied. No ruling was made on the amount of penalties to be assessed. After some discussion, a written order was issued on March 26, 1992, which stated, among other things:

(1) That the hearing scheduled for April 6, 1992, would proceed as scheduled;

(2) That the hearing would be held to afford Healy an opportunity to submit information relevant to the amount of penalties that should be assessed for the issues involved in the criminal case;

(3) That after Healy submits its relevant evidence on the amount of penalties that should be assessed, a bench ruling would be made on the Secretary's motion for partial summary judgment;

(4) That after the matter of the penalties was resolved, evidence would be received on the issue presented in *United States v. Halper*, 109 S. Ct. 1892 (1989), involving double jeopardy. Costs incurred by the Government would be relevant. Once all relevant evidence had been received on the *Halper* issue, a bench ruling would be made to resolve that issue.

A hearing was held in Chicago on April 6 and 7, 1992. Evidence was received from both parties, and bench rulings were made on the amount of penalties to be assessed and the double jeopardy defense. Several preliminary issues had to be decided prior to a determination being made on the primary issues. The written opinion details the disposition of all issues before the Commission.

Determination of Appropriate Penalties

Preliminary Issues

A. Collateral Estoppel Revisited

The issues of liability and willfulness were determined for the Secretary on the basis of her motion for collateral estoppel. After hearing the evidence presented on April 6 and 7, 1992, the Judge, in answer to his own rhetorical question, concluded that the motion for collateral estoppel should not have been granted. The jury decided there was a violation of the standards and not whether the 49 allegations existed. All of the allegations were not presented to the jury. The allegations actually presented to the jury were not established (Tr. 340).[3]

The doctrine of collateral estoppel acts as a bar to relitigation of only those issues actually raised and determined. It means that when an issue of ultimate fact has been once determined by a final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *U. S. v. Rogano*, 520 F.2d 1191 (5th Cir. 1975). It could be applicable to this type of case--

> [B]ut that doctrine only means that matters *actually litigated* in the first action may not be retried in the subsequent action; *it does not mean that questions which were not, but might have been, raised in the former action cannot be litigated in the second action*, or that the subsequent action is barred. (Emphasis in original)

Speed Products Co. v. Tinnerman Products, 222 F.2d 61, 67 (2d Cir. 1955).

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[3] The jury did not have to find but one of the allegations listed for each standard was true to determine a violation of the standard. The jury could have determined a violation of the three standards and not considered 46 of the allegations.

Absent agreement of the parties, the trial judge needs to examine the record of the antecedent case to determine the issues decided by the judgment. *See Emich Motor Corp. v. General Motors Corp.,* 71 S. Ct. 408, 415 (1951). This procedure did not seem necessary in view of the representations made by the Secretary and Healy's subsequent acquiescence.

The Secretary fails to distinguish the fact that the criminal case placed emphasis on a violation of the standards, whereas the civil proceeding places emphasis on the number of instances the standard was violated. It was not necessary to prove all of the allegations prior to finding a violation of the standard. Healy would be collaterally estopped from litigating only those allegations actually litigated in the criminal case.

Having granted the motion for collateral estoppel, the chosen course was to go forward with the initial decision (Tr. 340). While reliance on the initial legal ruling is of doubtful validity based on facts later gleaned from the hearing, Healy is deemed estopped from challenging that order since it must bear primary responsibility for acquiescing in the Secretary's representations. Healy chose to accept collateral estoppel as a bar to facilitate its reliance on the double jeopardy defense. It cannot now sweep clean its initial conduct and insist on a ruling contrary to its acquiescence in the Secretary's motion.

The memorandum filed in opposition by Healy did not dispute that it was collaterally estopped from litigating the issues of liability and willfulness. Healy readily accepted the Secretary's position. In support of its motion, Healy stated: "There can be, therefore, no question that the fine sought in the current proceeding is for the same conduct that served on the basis for the criminal conviction" (Healy Response, pgs. 9-10). Healy further referred to and acquiesced in the following statements made by the Secretary:

> The issues involved in parallel, civil and criminal prosecutions [*sic*] of an OSHA violation are identical . . . . (Healy Response, pg. 3, quoting Secretary's memorandum)

> The indictment in the criminal case charged that respondent violated the same training standards regarding the same employees on the same date . . . . (Same reference as above)

> Identical to the civil proceeding here, the criminal trial addressed the entry of the three employees into the northbound tunnel on November 10, 1988. (Healy Response, pg. 4)
>
> In the criminal proceeding the jury determined that respondent willfully violated the identical standards at issue here. (Healy Response, pg. 4)

Healy further points out that the jury in the criminal case determined that it willfully violated the identical standards at issue in this case.

B. Egregious Policy

Healy contends the Secretary is without authority to propose penalties on an instance-by-instance basis. It is the position of Healy that the allegations should have been combined under the applicable standard and one penalty assessed for the violation of the standard. The Secretary charged Healy with instance-by-instance violations pursuant to her egregious policy. Supposedly, this policy is one that is utilized in cases of flagrant violations of ignoring the Act or failure to abate the violations.

The Occupational Safety and Health Act of 1970 ("Act") grants the Secretary the sole responsibility for its enforcement, including the authority to decide whether, and in what manner, an employer is to be issued a citation for violations of the Act. *Cuyahoga Valley Railway Co. v. United Transportation Union*, 106 S. Ct. 286 (1985). The Act authorizes the use of broad discretion by the Secretary in fulfilling the Act's goal "to ensure so far as possible . . . safe and healthful working conditions" for "every working man and woman in the Nation." *Martin v. OSHRC (C.F.& I. Steel)*, 111 S. Ct. 1171 (1991); *Donovan v. OSHRC*, 635 F.2d 544 (6th Cir. 1980). Generally, "[a]n agency has wide latitude in setting up an enforcement scheme that will best serve the convenience of the agency as long as the scheme is a rational one in light of the statute's overall purpose." *George Hyman Construction Co. v. OSHRC*, 582 F.2d 834, 838 (4th Cir. 1978), citing *Udall v. Tallman*, 85 S. Ct. 792 (1965).

The egregious policy essentially consists of separately citing, rather than grouping, all violations of a particular standard. The Secretary's interpretation of her enforcement authority, as permitting her to cite instance-by-instance violations in this case, is consistent

with accomplishing the goal of the Act to assure, insofar as feasible, "that no employee will suffer material impairment of health or functional capacity." 29 U.S.C. § 655(b)(5). This purpose is advanced by increasing the maximum penalties to deter employers from violating safety and health standards and to increase their compliance with the standards. The Secretary's interpretation of her enforcement discretion is consistent with broad policy concerns articulated during the passage of the Act. Congress intended the Secretary's enforcement policies to encourage compliance through the penalty-setting process. The Senate Committee believed that within the framework of the Act, the penalty assessor "should have as much flexibility as possible to enable him to assess the amount of civil penalty which he determines is appropriate to the violation in question." Leg. Hist. at 156. The Secretary finds it necessary in certain cases to issue a citation for separate violations (with separate penalties) to promote broad compliance with the Act.

A ruling that instance-by-instance violations are impermissible would destroy the Secretary's authority to individually cite and penalize violations of the Act. This is not to imply that the Secretary may exercise her prosecutorial authority without due regard for the underlying goals of the Act. The Secretary must be free to utilize limited investigative and prosecutorial resources in whatever manner and priority she deems essential for achieving the stated goal of the Act.

Where an employer has an extensive history of prior violations, has intentionally disregarded its safety and health responsibilities, or has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health programs in place, it is within the Secretary's discretion to consider charging the employer with separate violations of the Act for each occasion that a requirement of a standard has been violated. The Secretary has the responsibility to use all of her authority, if necessary, and to develop the best enforcement policy calculated to attain the goal of the Act as established by Congress. As long as that authority is used in a fair and impartial manner, the Secretary has broad discretion, including the right to issue instance-by-instance violations.

In the Omnibus Budget Reconciliation Act of 1990, Congress increased sevenfold the maximum amounts of civil penalties that can be assessed for violations of the Act. The stated purpose of the increase was to keep pace with inflation and to ensure the prospect

of penalties effectively deterring violations and enhancing enforcement. The litigation history of the amendment offers strong evidence that Congress was aware of the Secretary's highly publicized egregious policy and tacitly approved it.

The Commission has on prior occasions recognized the right of the Secretary to charge multiple violations of a single standard. In *Hoffman Construction Co.* 6 BNA OSHC 1274, 1978 CCH OSHD ¶ 22,489 (No. 4182, 1978), the judge concluded that, as a matter of general policy and in accordance with provisions of OSHA's *Field Operations Manual*, multiple violations of a single standard disclosed during the inspection of a single establishment should constitute one alleged violation. He combined two violative conditions into one. The Commission reversed, stating:

> We agree that the Secretary was justified in issuing separate citations. The two citations involve entirely different and separate scaffolds. Thus, the charges are not duplicative. *Compare Stimson Contracting Co.*, 77 OSAHRC 38/A2, 5 BNA OSHC 1176, 1977-78 CCH OSHD para. 21,675 (No. 13812, 1977). The Secretary chose to cite Hoffman for separate violations of the same standard, and under these circumstances, it is within his discretion as the prosecutor under the Act to do so.

The case of *RSR Corporation*, 11 BNA OSHC 1163, 1983 CCH OSHD ¶ 25,207 (Nos. 79-3813, 5062, 6392, 80-1602, 1983), involved, in part, an employer's failure to comply with the medical removal protection provisions of the lead standard. The Secretary issued a separate proposed penalty of $10,000 for each terminated employee entitled to medical removal protection benefits. The issue of separate citations and penalties was discussed by Commissioners Cottine and Cleary; Commissioner Rowland did not address the issue. Commissioner Cottine, citing *Hoffman*, concluded that "the Secretary has the discretion to seek separate penalties for separate instances of the same violation." 11 BNA OSHC at 1181. Based on the individual nature of the violations and the fact that separate penalties would serve to promote compliance, Commissioner Cottine concluded that he would affirm the twelve willful violations as charged and assess separate penalties for each violation.

The decision to seek instance-by-instance penalties for the willful violations in this case is within the Secretary's mandate to enforce the Act and is a valid exercise of statutory authority.

C. C.F.& I. Steel Is Not Applicable

The Secretary contends that since she "determined the penalties pursuant to the exercise of her prosecutorial discretion," the Commission should not dictate the penalties in this case, citing *Martin v. OSHRC (C.F.&I. Steel)*, 111 S. Ct. 1171 (1991), in the absence of an express finding that her penalty proposals are unreasonable.

The Secretary's reliance on *C.F. & I.* is misplaced. That case involves interpretation of nebulous regulatory language. The holding in *C.F. & I.* states the general rule "that an agency's construction of its own regulation is entitled to substantial deference." It applies this rule in favor of the Secretary rather than the Commission in a case which involved the determination of the division of powers under the Act between the Secretary and the Commission.

The assessment of penalties in contested cases involves no division of powers between the Secretary and the Commission. Section 17(j) of the Act states unequivocally that "[the] Commission shall have authority to assess all civil penalties." The Secretary has the responsibility to propose penalties, but the Commission has the authority to assess all penalties for contested violations. The authority to assess penalties for contested violations must be the responsibility of the Commission since the actual facts established by trial may differ from those on which the Secretary based her proposed penalty. The penalties assessed have to be based on established facts and not on what the facts are deemed to have been. The Commission need not grant deference to the penalties proposed by the Secretary.

Section 17(j) specifies that the Commission is to give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." It is the Secretary's responsibility to establish the facts. The Commission has a responsibility to be fair and impartial. The amount of penalty assessed must be based on a fair and reasonable analysis of the evidence rather than granting deference to the Secretary. A policy of deferring to the Secretary would impede the independence of the Commission and interfere with a fair and impartial determination of

an appropriate penalty. The Commission must not afford one party an advantage over the other when it analyzes the facts to assess a penalty.

Appropriate Penalties

Ultimate authority for assessment of penalties lies with the Commission in all contested cases. *RSR Corporation*, 11 BNA OSHC 1163, 1180-81, 1983 CCH OSHD ¶25,207 (Nos. 79-3813, Et Al., 1983). The Secretary is a proposer of penalties under the Act, while the Commission is the assessor in contested cases. Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

Healy argues that there have been no facts established to prove the seriousness of the violations. Evidence was not necessary to establish the violations or the fact that they were willful. Since the motion for collateral estoppel was granted, facts alleged in the citation were assumed to be true as to liability and culpability. Evidence was established as to size, prior history, good faith and gravity.

Healy is a large corporation and is engaged in an inherently high hazardous industry. It has approximately 1,000 employees. Healy has been issued 15 citations in its nationwide operations that contain violations of standards similar to those in this case (Exh. C-10). It would be unreasonable to draw an inference of bad conduct as a result of the issuance of the prior citations. The record does not establish the facts surrounding the prior violations and whether they were abated. Since Healy engages in inherently dangerous construction activities, it is not surprising that it has previously been issued citations. As Judge Evans observed, "Healy is not a stranger to OSHA violations;" however, Judge Evans did not consider prior history to be a major factor in determining a penalty.

Healy failed to exhibit good faith before the explosion, but the evidence indicates good faith was displayed by Healy subsequent to the explosion. Judge Evans stated in the sentencing proceeding that the company had displayed good faith during the investigation

and had not attempted to hide any facts. Judge Evans made findings that the company engaged in no deliberate falsehoods or destruction of evidence, and displayed no uncooperative attitude in producing any employee concerning the investigation. He indicated that if there had been any such evidence, he would have weighed it against the company. Good faith is also displayed by the new managerial changes and safety procedures instituted since 1989. Healy exhibits a new attitude.

While Healy contends it has financial problems, the Secretary believes that Healy is economically sound and that its financial status should have no bearing on the amount of the penalty. The financial status of the company is superficially sound. There have been substantial losses in the past five years. Arrangements had to be made to pay the criminal fine in monthly payments of $50,000 a month. Future contracts are shown on the balance sheet as assets, but the expenses are not shown as a liability. It is impossible to ascertain whether there will be a profit on those jobs when the contracts are fulfilled. While the corporation is viable in the short term, some apprehension must be felt toward its operations on a long term basis.

The Secretary makes much out of the fact that the parent corporation of Healy expresses an intention to meet the liabilities of Healy to its creditors. This is not a binding statement and cannot be considered as a financial strength of Healy. It is simply an expression on the part of the parent corporation. There is no evidence that the parent corporation has entered into any separate contract with any company to assume Healy's liability. Since there is no evidence to pierce the corporate veil, the parent corporation cannot be held responsible for Healy's liabilities. The evidence reflects that the parent invested in Healy as a profit-making venture and that it is concerned about the losses.

Healy's conduct leading up to the explosion was far from exemplary. There is no excuse for not devoting more time and resources to safety. The company did not have a safety officer or anyone performing those duties. Patrick Freeman, the present corporate safety director, testified that prior to 1989 he was shown as a safety director for the purpose of securing a bid, but that he did not perform those duties. He was safety director in name only. This procedure was followed because he was the only person with the company who

had a resume reflecting safety training. The company obviously paid little attention to the safety of its employees. The criminal case caught their attention.

There was usually a total of eight to ten employees working in the tunnel. At any given time there were as many as fifteen Healy employees that would have occasion to work in the tunnel. In view of the fact that three deaths resulted from the explosion and the violations were willful, the gravity must be considered high.

After consideration of the four factors required by section 17(j) of the Act, a penalty of $6,500 is deemed appropriate for each of the 49 violations.

Double Jeopardy

Preliminary Issues

A. The Defense Was Properly Allowed Even If Not Pleaded in Answer

The Secretary raised three objections at the hearing to the double jeopardy defense asserted by Healy. All the objections are without merit. First, the Secretary argued that double jeopardy is an affirmative defense and that Healy had an obligation to raise the issue in its answer to the complaint. The Secretary contends that raising the defense in the answer would have placed the issue properly before the Commission. The Secretary expresses the opinion that the issue was not pleaded because Healy wanted to use the civil case as leverage in the sentencing proceedings. According to the Secretary, Healy waited to raise the defense of double jeopardy until after it had used the threat of civil penalties to gain an advantage in the criminal case.

As a result of its criminal conviction, it is ludicrous to assume, as the Secretary does, that the civil case constituted leverage which Healy skillfully utilized to gain a reduction of the fines. It had no leverage. The status of the civil case was a factor that Judge Evans took into consideration in setting an appropriate fine. He was certainly aware that the civil case was pending and would have given it consideration before establishing the fine. The Secretary alleges that to permit the defense would "irreparably prejudice" the Government. This is pure hyperbole. The Secretary recognized its fallacious argument since it failed to present any facts showing it was prejudiced by the ruling.

The failure to plead double jeopardy as a defense in the answer is viewed as a harmless technicality. The parties expressly or impliedly consented to the trial of the unpleaded issue. The defense was first raised in the context of a defense to the Secretary's Motion For Collateral Estoppel. It was raised by new counsel who assumed direction and responsibility of the case after the criminal proceeding was completed. The answer had already been filed by prior counsel.

The double jeopardy defense is a novel argument in an OSHA case. This Judge has not seen the issue raised and discussed in an OSHA case. It is doubtful Healy was aware of the defense at the time its answer was filed. The defense was raised in the memorandum filed on October 3, 1991, in opposition to the Secretary's motion for partial summary judgment, and no objection was filed against the defense. Instead, the Secretary sought permission and additional time in which to file a response. The Secretary filed an opposition on November 25, 1991, but, again, did not object to the defense but directed her remarks primarily toward establishing there was no merit to the defense. The Secretary's failure to timely object constituted acquiescence. The parties at all times treated the matter as a viable issue, and it was so considered by this Judge.

An amendment of the answer would have been allowable if advocated by Healy. Rule 15(b) of the Federal Rules of Civil Procedure deals with the situation that arises where there is an objection to the introduction of evidence at the trial on the grounds that it is not within the issues set forth by the pleadings. The Commission has permitted amendment of the pleading under Rule 15(b) where an employer, who objected at the hearing to evidence supporting an unpleaded charge, failed to establish that it would have been prejudiced by the amendment to include the unpleaded charge. *Morgan and Culpepper, Inc.*, 9 BNA OSHC 1533, 1981 CCH OSHD ¶ 25,293 (No. 9850, 1981), *appeal filed*, No. 81-4203 (5th Cir. 1981); *Frank Briscoe Co.*, 4 BNA OSHC 1706, 1976-77 CCH OSHD ¶ 21,191 (No. 12136, 1976); *General Electric Co.*, 3 BNA OSHC 1031, 1974-75 CCH OSHD ¶ 19,567 (No. 2739, 1975), *rev'd on other grounds*, 540 F.2d 67 (2d Cir. 1976). "The essential determinants of prejudice under the second part of Federal Rule 15(b) are whether the party opposing the amendment was denied a fair opportunity to prepare and present its case on the merits, and

whether it could offer additional evidence if the case were tried again on a different theory." *Morgan and Culpepper, supra*, 9 BNA OSHC at 1537. Absent a showing of prejudice, leave to amend will be freely granted by the Commission. The Secretary had a full and fair opportunity to challenge the defense on its merits.

The hearing was commenced on April 6, 1992. No objection was interposed to the defense until the hearing. The Secretary was aware of the defense as an issue no later than October 3, 1991. She had sufficient notice and time to prepare for the issue. The Secretary has not been prejudiced by allowing the issue to be decided on the merits.

B. The Review Commission Has Authority to Hear and Decide Healy's Double Jeopardy Defense

The Secretary's argument that the Judge and Commission lacked jurisdiction to decide the double jeopardy defense was unexpected. The difficulty with the Secretary's argument is that it makes no distinction between constitutional applicability of legislation to particular facts and constitutionality of the legislation. The Commission has decided a multitude of cases, as the Secretary's erudite lawyers well know, involving constitutional challenges by employers to particular circumstances which have been alleged to have violated some constitutional right, *e.g.*, violations of due process. The defense in this case is not directed towards challenging the constitutionality of the Act. It is directed towards a particular act of the Secretary.

The Judge and Commission have the jurisdiction to hear the facts on the issue and to resolve the question based on the facts of record. The law on the issue is succinctly stated in 3 K. Davis, *Administrative Law Treatise*, § 20.04, at 74 (1958) as follows:

> A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation. When a tribunal passes upon constitutional applicability, it is carrying out the legislative intent, either express or implied or presumed. When a tribunal passes upon constitutionality of the legislation, the question is whether it shall take action which runs counter to the legislative intent. We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body.

Even as to those issues challenging the constitutionality applicability of the Act, the Commission is the proper and only tribunal available to the parties to develop a factual record. The court in *Babcock and Wilcox Co. v. Marshall*, 610 F.2d 1128, 1136-37 (3d Cir. 1979), considered Babcock's insistence that it was entitled to adjudication by an Article III court of its constitutional rights and that the factual record for constitutional claims must be developed by an Article III district court rather than by the Article I Review Commission and concluded:

> The crux of the matter, then, is a claim by Babcock that the factual record for constitutional claims must be developed by an Article III district court rather than by the Article I Review Commission. But that proposition has been decisively rejected by the courts, because it would seriously impede the use and effectiveness of administrative tribunals in the many statutory schemes in which they operate.

Citing *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871 (3d Cir. 1979), the court in *Babcock* further states (610 F.2d at 1136-37):

> Conceding, arguendo, that an administrative agency is not ordinarily considered the appropriate forum for the resolution of constitutional claims, we think there are compelling reasons for insisting that fourth amendment claims for the suppression of evidence in OSHA enforcement cases be tendered first to the Commission. Those claims in most cases, if not all, require the development of a factual record concerning such issues as consent, waiver, and emergency. *Under the enforcement and review scheme of the Occupational Safety and Health Act . . . the Commission is the only tribunal available for the development of a factual record.* If we were to hold that these *constitutional arguments* need not be presented to the Commission, the alternative would be either separate litigation in a district court, which has facilities for making a record, or fact-finding in this court, which lacks such facilities. Assuming we could find a statutory justification for either course, neither is attractive. Thus we hold that fourth amendment claims must be presented, in the first instance, to the Commission. (Emphasis added)

The court in *Babcock* (610 F.2d at 1139), indicated the Review Commission has a limited role under the Constitution since it cannot review the constitutionality of the Act. However, the court recognized the fact that the Commission has the responsibility to interpret the Act and to apply constitutional principles to specific facts. Professor Davis is

recognized by the court in footnote 40. In recognizing the fact that all factual and statutory defenses must be presented to the Review Commission, the court stated (582 F.2d at 1124):

> Congress established the Review Commission as a forum independent of the Secretary of Labor for the adjudication of all factual and statutory defenses to the Secretary's enforcement actions. See the statutory provisions cited *supra*. Its final orders are reviewable as of right in the Courts of Appeals and by writ of certiorari in the Supreme Court. 29 U.S.C. § 660(a); 28 U.S.C. § 1254. That review can include consideration of any viable constitutional defenses to enforcement.

There is no merit to the Secretary's argument. The issue is one which does not involve any ruling on the constitutionality of the Act. The defense does not challenge the right of the Secretary to propose penalties. The defense is directed towards a particular act of the Secretary.

C. Defense Not Prohibited by Litigation Strategy During Sentencing

The Secretary asserts that the defense of double jeopardy is not absolute and that a defendant's conduct is always at issue when the defense is raised. Even if the Commission has jurisdiction to hear and decide the question, the Secretary contends Healy, as a result of an alleged litigation strategy pursued during the sentencing hearing, forfeited the right to rely upon the defense. The facts do not support the argument that Healy waived or forfeited any of its rights.

During the sentencing hearing before Judge Evans, Healy urged the court to assess a fine of no more than $10,000 per count instead of the maximum $500,000 per count under the statute. In so doing, it pointed out that it still faces a potential fine of $680,000 in a civil proceeding. As Healy's counsel stated to Judge Evans, "There is a civil OSHA matter pending before an administrative law judge, Judge Burroughs, in which OSHA has filed a 68-count complaint against Healy. And the potential penalties there are $10,000 per count. So that's a potential $680,000 that the company is still facing." The Secretary states that Judge Evans found Healy's argument persuasive in arriving at the eventual fine and gave Healy credit for the fact that it faced OSHA civil violations.

The Secretary contends that Healy's litigating tactic should not be rewarded. It submits that when Healy consciously chose to pursue its litigating strategy and supposedly gained a potential $750,000 windfall reduction of criminal fines, it forfeited its right to use the double jeopardy issue. The Secretary contends that the argument against the application of the defense is especially compelling since she cannot undo the effect of Healy's strategic decision in the criminal proceeding. The Secretary's argument is based on the fact that a reduction was allowed in the assessing of penalties in the criminal case. Healy still faced civil penalties. The Secretary contends that allowing the defense would somehow prejudice her. It is assumed that the Secretary theorizes that it would be unfair to allow Healy to escape civil penalties since Judge Evans did not impose the maximum penalty. It is true that the maximum penalty which could have been imposed was $1,500,000, and that Healy was only fined $750,000. The pending civil proceeding was only one factor considered in establishing the penalty. The Secretary assumes the maximum penalty was not imposed because Healy referred to the civil case.

The statement by Healy's counsel to Judge Evans was simply advising him as to the status of the civil actions against it. The statement in no way misled the Judge. Healy's counsel's actions were proper. The Secretary's characterization that Healy consciously chose to embrace the civil proceedings as a shield against the criminal fine is pure supposition. If Judge Evans considered the pending civil case in determining the penalties, there is no evidence to suggest that he demanded any legal rights of Healy in return. The Secretary has failed to show that Healy exchanged any of its legal rights for a reduction of criminal penalties. The Secretary's argument is without merit.

Double Jeopardy Defense Is Inapplicable

Healy argues that the purpose of the penalties is retribution and deterrence, which are concepts of punishment and are barred by the double jeopardy defense.[4] This argument is based on the decision of the Supreme Court in *United States v. Halper*, 109

[4] The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offenses to be twice put in jeopardy of life or limb."

S. Ct. 1892 (1989).[5] Halper had been criminally convicted for submitting false claims for reimbursement under Medicare from the U. S. Treasury. The Federal Government was overcharged in the amount of $585 as a result of Halper's false claims. Halper was prosecuted, convicted and sentenced to imprisonment for two years and fined $5,000. In a subsequent action brought by the Government under the Civil False Claims Act, a civil penalty of $130,000 was sought. The Supreme Court concluded that the civil remedy was tantamount to a second punishment since the penalties bore no relationship to the damages suffered and the expenses incurred by the Government. The Supreme Court held that "a defendant who already has been punished in a criminal proceeding may not be subjected to additional civil sanctions to the extent that the second sanctions may not fairly be categorized as remedial, but only a deterrent for retribution." 109 S. Ct. at 1902.

The Court in *Halper* held that the Government may not proceed civilly against a defendant already criminally convicted for the same offense if it seeks a punitive rather than a remedial sanction. The Court found that a statutory penalty constitutes "punishment" when the amount sought is entirely disproportionate to any reasonable amount that the Government could claim for damages and costs incurred because of the defendant's acts. The Court stated:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to quality as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought, in fact, constitutes a second punishment. 109 S. Ct. at 1902.

The Secretary considers the proposed penalties to be remedial in nature and not imposed as a punishment. Healy asserts that the penalties are punitive and that they are in essence another "punishment." A "civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." 109 S. Ct. at 1902. A punitive purpose is implicated

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[5] Liability was not an issue in *United States v. Halper*, 109 S. Ct. 1892 (1989). The district court granted summary judgment for the Government on the issue of liability. 660 F. Supp. 531-533 (1987).

when ". . . .[t]he sanction [is] overwhelmingly disproportionate to the damages [the defendant] has caused."

In *United States v. Hess*, 63 S. Ct. 379 (1943), Justice Frankfurter indicated that a penalty becomes punishment when it exceeds what could reasonably be regarded as the equivalent of compensation for the Government's loss. The Secretary, citing statutory authority in support of her belief that the Act is remedial in nature, and Healy, citing authority to support the opposite conclusion, imply that the determination is a matter of statutory construction. The Court discounted such argument, stating (109 S. Ct. at 1901):

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and conversely, that both punitive and remedial goals may be served by criminal penalties.

The Court concluded that the determination of whether a given civil sanction "constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." 109 S. Ct. at 1901. Regardless of how the penalty is classified, "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment." 109 S. Ct. at 1902. Clearly, this indicates that the courts must determine, on a case-by-case basis, whether a given penalty is reasonably calculated to achieve and actually does achieve the non-punishment goals of recompense and regulation.[6]

Healy contends that the imposition of the total penalty is clearly for the purpose of deterrence and retribution and can in no way be characterized as remedial or compensatory. The amount of the penalty, according to Healy, is sought solely to deter Healy from violating OSHA standards and to punish it for having done so. It states that the Secretary's intent is not to reimburse the Government for lost revenue since she has suffered no direct harm and has lost no money to a fraudulent act. It points out that in spite of the Secretary's

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[6] In footnote 7, the Court adds that "in determining whether a particular civil sanction constitutes criminal punishment, it is the purpose actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction that must be evaluated." The Court concludes that "a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."

assertion of collateral estoppel, she has not incurred any significant investigating expenses in connection with the current proceeding. It makes a distinction between the expenses incurred in connection with the criminal prosecution and those incurred in connection with the current proceeding. Finally, Healy makes the point that the penalty asserted in the civil proceeding is indistinguishable from punishment. According to Healy, the Secretary was not satisfied that the district judge meted out enough punishment. Healy submits that it already has been punished and that the Constitution demands an end to these proceedings and that it could have no better defense against the nature of the penalty assessed in this case than its defense of double jeopardy under the fifth amendment.

To insure that *Halper* would be narrowly construed and selectively applied, the court stated (109 S. Ct. at 1902):

> What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.

The impact of the decision was limited further by announcing a rule of reason that the issue of double jeopardy is not broached unless the penalty sought "bears no rational relation to the goal of compensating the Government for its loss . . . ." 109 S. Ct. at 1902. Since Healy has had a separate criminal penalty imposed on it and in view of the fact that proposed civil penalties are high and are construed as punishment by Healy, it was determined that Healy was entitled to an accounting of the Government's damages and costs. Costs in this instance include not only court costs, narrowly defined, but include "the Government's investigative and prosecutorial costs." 109 S. Ct. at 1900, n. 5.

While Healy emphasizes proposed penalties aggregating $680,000, the full amount of the penalties in this case has not been established. The Act authorizes the Commission to assess civil penalties and, pursuant to that authority, $318,500 has been assessed for 49 of the 68 items. There are still 19 items for which penalties must be assessed. Assuming

$10,000 was assessed for the remaining 19 items, the assessed penalties would total $508,500.[7]

Four affidavits (Exhs. C-14, C-15, C-16, C-17) were introduced by the Secretary to support the costs incurred for investigation and prosecution. The figures were based on a reconstruction of the Government's costs. Exhibit C-14 is an affidavit of Compliance Officer Patrick Ostrenga estimating total investigative costs of $201,434.01. Exhibit C-16 is an affidavit of Eric Klumb, Deputy U. S. Attorney, who tried the criminal case. He estimated that he and his assistant, Patrick Gorence, spent 1,500 hours prosecuting the case. Exhibit C-16 is an affidavit of Richard Fiore, Deputy Regional Solicitor of Region 5, who estimated a total of 4,320 hours incurred by attorneys in his office in the investigation and prosecution in this matter. The affidavit attaches considerable supporting data. Exhibit C-17 is an affidavit of Sally Mitchell, Office of the Regional Solicitor, Chicago, Illinois. She reviewed the travel vouchers submitted by the attorneys working on this case. The total amount expended for travel was $11,946.30.

Exhibit C-14 reflects $201,434.01 expended by the Secretary in investigating this matter. The affidavits of Klumb and Fiore (Exhs. C-16 and C-17) indicate that a total of 5,820 hours of attorney time was devoted to the investigation and trial of the criminal and civil cases. The Secretary takes the position that $100 an hour is an appropriate hourly rate for the attorneys working on the case (Tr. 370). Exhibit C-15 supports a total amount of $11,946.30 in travel expenses. The affidavits show a total cost of $213,380.31, plus the cost to be allocated to 5,820 hours of attorney time. The total cost to date, according to the Secretary, is $795,380.31 (Tr. 370).

Healy objects to the costs claimed by the Secretary since the total cost would include several related matters. Healy submits that some of the costs and hours expended were devoted to the ventilation standard for which a violation was not determined and the charge against Patrick Doick, which was dismissed. It is argued that the costs reconstructed by the Secretary are only approximations and are unreliable. The Secretary does not claim that the

[7] As a practical matter, this Judge would not have assessed penalties in excess of those previously determined. Since the settled items were not included in the criminal case, there may have been mitigating factors which would have justified in assessing less than $6500 per violation.

cost figures submitted by her are completely accurate and that they do not include some matters not germane to the issues here. The Secretary has simply reconstructed as closely as possible the costs of investigating and prosecution that were incurred as a result of Healy's conduct.

The Secretary need not be precise in submitting costs. The Court in *Halper* indicated that the Government is entitled to rough remedial justice, *i.e.*, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment. In so stating, the Court acknowledged "that the precise amount of the Government's damage and costs may prove to be difficult, if not impossible, to ascertain." 109 S. Ct. at 1902. "[T]he process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice." 109 S. Ct. at 1902. The Court in *Halper* further stated (109 S. Ct. at 1902):

> We acknowledge that this inquiry will not be an exact pursuit. In our decided cases we have noted that the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain. See, *Rex Trailer*, 350 U.S., at 153, 76 S. Ct., at 222. Similarly, it would be difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment. In other words, as we have observed above, the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice.

This was a long and complex case which involved a considerable amount of time and expenditures by the Government. While costs in excess of $700,000 may not be cast in stone, the figures are a good rough estimate.

There is no tremendous disparity in the damages suffered and the civil penalty assessed. The double jeopardy clause offers protection against those civil penalties that do not remotely approximate the Government's damages and actual costs, and which bear no relation to the goal of compensating the Government for its loss. The disparity between the approximations of the Government's costs and Healy's liability are not sufficiently disproportionate so as to constitute a second punishment. The penalties proposed by the

Secretary are justified since they are rationally related to the Government's costs of investigation and prosecution. They serve to further the remedial purposes of the Act. They must be viewed as reasonable in view of the loss of life and property which resulted from Healy's conduct. The defense is denied.

Subsequent Settlement of Remaining Issues

On May 6, 1992, a partial settlement agreement was received from the Secretary which disposed of all issues that were not addressed at the hearing in Chicago, Illinois, on April 6 and 7, 1992. Healy agreed to affirm the violations and consented to penalties for the violations as follows:

Item No.	Agreed Penalty
1	$2,975
5	2,975
6	2,975
35	2,975
51	2,975
52	2,975
53	2,975
54	2,975
55	2,975
56	2,975
57	2,975
58	2,975
59	2,975
60	2,975
64	2,975
65	2,975
66	2,975
67	2,975
68	2,950

Personal Observation

The judge would like to thank counsel for the parties for their diligence in pursuing this matter to a conclusion. You were always focused toward disposition of the matters in issue without the procrastination that usually unduly prolongs litigation. You were cooperative with the judge and with one another, and amicably resolved all conflicts that invariably arose. Your professionalism and competence transformed a difficult case into one that this judge found to be a pleasure to handle. Thanks for a job well done.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

In view of the foregoing, and good cause appearing in support of the determinations, it is

ORDERED: (1) That the willful violations are affirmed and the following penalties, determined by trial and settlement, are assessed:

Item No.	Assessed Penalty
1	$2,975
2	6,500
3	6,500
4	6,500
5	2,975
6	2,975
7	6,500
8	6,500
9	6,500
10	6,500
11	6,500
12	6,500

Item No.	Assessed Penalty
13	6,500
14	6,500
15	6,500
16	6,500
17	6,500
18	6,500
19	6,500
20	6,500
21	6,500
22	6,500
23	6,500
24	6,500
25	6,500
26	6,500
27	6,500
28	6,500
29	6,500
30	6,500
31	6,500
32	6,500
33	6,500
34	6,500
35	2,975
36	6,500
37	6,500
38	6,500
39	6,500
40	6,500
41	6,500
42	6,500
43	6,500
44	6,500
45	6,500
46	6,500
47	6,500
48	6,500
49	6,500
50	6,500
51	2,975
52	2,975

Item No.	Assessed Penalty
53	2,975
54	2,975
55	2,975
56	2,975
57	2,975
58	2,975
59	2,975
60	2,975
61	6,500
62	6,500
63	6,500
64	2,975
65	2,975
66	2,975
67	2,975
68	2,950

(2) That the double jeopardy defense is denied.

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: July 2, 1992