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SOL (MSHA) V. NEW HAVEN TRAP ROCK-TOMASSO
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. WILK 79-63-PM A/O No. 06-00345-05001
v.	Southington Pit and Mill
NEW HAVEN TRAP ROCK-TOMASSO, RESPONDENT	Docket No. WILK 79-92-PM A/O No. 06-00012-05001 North Branford Plant #7 Docket No. WILK 79-93-PM A/O No. 06-00013-05001 Plant #1 Quarry and Mill Docket No. WILK 79-101-PM A/O No. 06-00271-05001 Helming Brothers Plant

DECISION

Appearances: Ronald C. Glover, Esq., Office of the Regional Solicitor, Department of Labor, Boston, Massachusetts, for Petitioner MSHA
Robert B. Smith, Esq., and Edward Kutchin, Esq., Boston, Massachusetts, for Respondent

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against New Haven Trap Rock-Tomasso, heard on May 15, 1979.

At the outset of the hearing, the operator's counsel challenged MSHA's assessment procedures. I held that the hearing before me is de novo in all aspects, and that MSHA's assessment procedures are not involved and that it is not my function to reapply MSHA's point system stating in this respect as follows (Tr. 12-14):

I hold that I have no authority to review the manner in which the Secretary of Labor arrives at proposed penalty amounts, whether by a point system or otherwise. I further hold that I am not bound in any way to follow or apply the point system or any other system the Secretary of Labor uses to arrive at a proposed penalty amount. Section 105(d) of the Act sets forth that when an operator disagrees with the proposed assessment, the Secretary of Labor shall notify the Commission, and the Commission shall afford an opportunity for a hearing under section 554 of the Administrative Procedure Act.

Section 110(a) of the Act provides that the operator of a mine shall be assessed a civil penalty by the Secretary which shall not be more than $10,000 for each violation. Thereafter, section 110(i) provides that the Commission has the authority to assess all civil penalties provided in this Act. Further, section 110(i) provides that in assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Part 100 of 30 CFR contains a so-called point system which apparently is used by the Department of Labor in determining the amount of proposed civil penalty. In my view, Part 100 has nothing whatsoever to do with the Commission. Part 100 only concerns the Department of Labor. This is made clear by section 100.2 of Part 100 which refers only to the Office of Assessments, Mine Safety and Health Administration, Department of Labor. Section 100.6 of 30 CFR makes clear that if an operator disagrees with a proposed assessment arrived at under the point system, it can then request a hearing before the Federal Mine Safety and Health Review Commission.

Accordingly, it is clear to me that when a case comes to the Commission and its administrative law judges, the point system is left behind and is no longer a factor. The administrative law judge is to apply the six criteria set forth in section 110(i) solely in his own judgment, based upon the evidence presented before him in the hearing which as already noted is given in accordance with section 554 of the Administrative Procedure Act. I have no authority to express any views with respect to how the

> Secretary of Labor reaches his proposed penalty amount, and I am not bound in any way to even consider that system when I determine what should be an appropriate penalty amount.
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> The Act makes clear that my task is to give an operator who disagrees with the actions of the Secretary of Labor the opportunity to have a de novo hearing. In my opinion, a de novo hearing is one in which the entire slate is wiped clean. Indeed, the Commission and its administrative law judges would not be independent if they were forced to follow some system devised by the Secretary of Labor in determining penalty amounts, and any hearing that was held on such a basis would not in my opinion truly be a de novo hearing. Therefore, based upon the evidence which I hear, I will determine for myself whether a violation exists in each instance, and where I determine that a violation does exist, then I will determine in my judgment in light of the six criteria set forth in section 110(i) what the appropriate amount of civil penalty should be.

At the hearing, counsel for both parties agreed to the following stipulations: (1) the operator is the owner and operator of the subject surface mine which is an open quarry; (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977; (3) I have jurisdiction in these cases; (4) the inspector who issued the subject notices was a duly authorized representative of the Secretary; (5) true and correct copies of the subject notices were properly served upon the operator; (6) imposition of penalties in these matters will not affect the operator's ability to continue in business; (7) all the alleged violations were abated in good faith; (8) the operator is medium in size; (9) the operator has no history of prior violations; (10) all the witnesses who will testify are accepted as experts generally in the field of mine health and safety (Tr. 4).

Citation No. 212801

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator regarding this item. At the conclusion of the taking of evidence, the parties presented oral argument (Tr. 44-46). A decision was then rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation as follows (Tr. 46-48):

> I find the violation occurred. The mandatory standard requires that cab windows shall be in good condition. There is no dispute that the side vent window had a crack of approximately 3 inches. I find therefore that the

> window was not in good condition and accordingly, that a violation existed.
>
> I further find that the violation was of moderate gravity. I recognize that the inspector testified that the occurrence of an injury was likely, whereas his written statement completed at about the time of the inspection indicated the opposite. However, it is clear to me from the testimony that it was possible that the 3-inch cut could have gone across the vent entirely and could have cut the operator of the cab, when the glass fell out. On this basis, I find the violation was of moderate gravity. If the major part of the window had been involved, this would have been a much more serious violation. I further find that the operator was negligent and that the degree of negligence was moderate. This truck was inspected on Saturday and the inspection took place on Tuesday. Either the inspection on Saturday missed this crack or the crack occurred between 6 a.m. Monday morning when work began for the week and the time the inspection took place. In any event, however, the crack on Tuesday was visible and the cab was being operated over roads at least part of which were rough and caused vibrations. Accordingly, I find the operator was guilty of moderate negligence.
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> I further incorporate the stipulations with respect to the operator's ability to continue in business, good faith abatement, no history of prior violations and medium size. In light of all the foregoing factors and in accordance with the mandate of section 110(i) of the Act, a penalty of $75 is hereby imposed.(FOOTNOTE 1)

The foregoing bench decision is hereby affirmed.

Citation No. 212802

This violation is based upon a failure to have an audible warning device on a piece of mobile equipment. The penalty originally assessed was $106. The parties recommended a settlement of $86. The Solicitor advised at the hearing that the equipment in question had been checked previously on the day the violation was found and that when it was checked it was found to be in appropriate working order. In addition, the Solicitor advised that the area in question was not heavily traveled. Accordingly, neither negligence nor gravity was as great as originally was thought. On this basis, I accepted from the bench the recommended settlement of $86.

Citation No. 212803

This violation was for a cracked safety glass in the window of a cab. Since the Solicitor advised at the hearing that the circumstances of this violation were the same as those in Citation No. 212801, an assessment of $75 was agreed to by counsel for both parties. I accepted the Solicitor's representations and a penalty of $75 was assessed for this item.

Citation No. 212804

This violation is based upon the failure to provide a "no smoking" sign in an area where explosion hazards might exist. The penalty originally assessed was $60. The parties recommended a settlement of $32. The Solicitor advised at the hearing that he had recently received information that the sign was in an area subject to inclement weather, that for 4 days previous to the date of the citation there had been a major storm in the area which blew the sign down and that the operator, even with the exercise of due diligence, could not have replaced the sign any faster. Accordingly, it appears that the operator's negligence was minimal. On this basis, I accepted from the bench the recommended settlement.

Citation No. 212805

This violation is based upon the failure to provide berms for a portion of a roadway. The penalty originally assessed was $114. The parties recommended a settlement of $84. The Solicitor advised at the hearing that the roadway in question was not well-traveled and that immediately prior to issuance of the citation the road had been washed out by inclement weather so that the operator was not negligent. Based upon the foregoing factors, I accepted from the bench the settlement of $84.

Citation No. 212806

This violation is based upon the failure to provide a cover for an electrical junction box. The penalty originally assessed was $122. The parties recommended a settlement of $105. The Solicitor advised at the hearing that although the cover was not present all the wires involved were thoroughly and properly insulated, thereby reducing the hazard of electrical shock. The Solicitor further advised that this was an area where employees did not usually work. On the basis, therefore, that gravity was less than had originally been evaluated, I accepted from the bench the settlement of $105.

Citation No. 212807

This violation is based upon the failure to guard a 5-foot crusher motor. The penalty originally assessed was $122. The parties

recommended a settlement of $85. The Solicitor advised at the hearing that the machine in question did have a railing but that because of vibrations the railing recently had become loose. Because of this, the Solicitor advised that the operator was less negligent than had originally been thought because the Office of Assessments did not know that there had been any railing at the time they proposed the initial assessment. On this basis, I approved from the bench the settlement of $85.

Citation No. 212808

This violation is based upon the failure to have guards around an item that was being welded. The penalty originally assessed was $90 and the parties recommended a settlement of $80. The Solicitor advised at the hearing that the operator has a very adamant policy instructing its employees that guarding is required and that this policy is strongly enforced. The employee disregarded this policy and in accordance with the operator's strong policy a letter regarding his failure to follow instructions was placed in his file and was sent to the union steward. On this basis, the Solicitor took the position that the operator was guilty of only minimal negligence. In light of the circumstances presented, I accepted from the bench the settlement of $80.

Citation No. 212815

The Solicitor moved to withdraw the citation on the ground that it had been improperly issued and his motion to do so was granted from the bench.

Citation No. 212817

The Solicitor moved to withdraw this citation on the ground that it had been improperly issued and the motion was granted from the bench.

Citation No. 212833

The alleged violation was for a failure to provide a midrail on a conveyor walkway. The cited mandatory standard, 30 CFR 56.11-2 provides that such walkways be of substantial construction and provided with handrails. Admittedly, the walkway in question had a handrail. Accordingly, I held that it satisfied the cited standard. The Solicitor then moved to amend the citation to reflect a violation of another mandatory standard. From the bench I denied the motion to amend because the operator was not afforded sufficient notice. Accordingly, no penalty was assessed with respect to this item.

Citation No. 212834

This violation is for a failure to provide guarding on moving machinery. The penalty originally assessed was $78 and this is the amount of the recommended settlement. The Solicitor advised at the hearing that just prior to the inspection the guarding in this case had been taken off for repair and maintenance purposes. In addition, the Solicitor advised that the area in question was not well-traveled and there were no employees in the general area. Based upon these factors, I approved from the bench the recommended settlement of $78.

Citation No. 212835

This violation is based upon the failure to provide a guard for a balance wheel. The original assessment was $90 and this is the amount of the recommended settlement. The Solicitor advised at the hearing that the balance wheel was not located in a well-traveled portion of the plant. Accordingly, gravity was only moderate. Therefore, I approved from the bench the recommended settlement of $90.

Citation No. 212836

This violation is based upon the failure to provide a handrail on a portion of the platform for the sandplate. The initial assessment was $56 and the recommended settlement was for this amount. The Solicitor advised at the hearing that there were several mitigating factors. He stated that the total distance from the walkway to the ground level was only 5 to 6 feet and that a great deal of sand had fallen on this walkway so that any employee involved would only have fallen 3 or 4 feet into soft material. In addition, the Solicitor stated that the violation was the result of the action of one of the operator's employees which was contrary to the operator's own stated policy. In light of the foregoing circumstances, I accepted from the bench the recommended assessment of $56.

Citation No. 212838

This citation is for failure to provide a fire extinguisher on a fuel truck. The initial assessment was $60 and this is the amount of the recommended settlement. The Solicitor advised at the hearing that the cited truck without a fire extinguisher was parked between two other trucks each of which was equipped with an operating fire extinguisher and that therefore gravity was only moderate. In light of these circumstances, I accepted from the bench the recommended penalty of $60.

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Citation No. 215486

The Solicitor moved to withdraw this citation on the grounds that it had been improperly issued. The motion was granted and no penalty was assessed for this item.

Citation No. 215487

The violation in this case was based upon the fact that the emergency brake on the front-end loader was not adjusted properly. The initial assessment was $32 and the recommended settlement was for this amount. The Solicitor advised that the primary braking system was in proper working order and that therefore gravity was greatly mitigated. I pointed out that I was not bound by the original assessment amount which appeared to me to be low, but that in view of the fact that the primary braking system was operating satisfactorily, the recommended penalty was accepted.

ORDER TO PAY

The operator is hereby ORDERED to pay $938 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. The original assessment had been $32.