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SOL (MSHA) V. DAVID CABRERA INC.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. DAVID CABRERA, INC.,	PETITIONER	Civil Penalty Proceedings Docket No. SE 79-2-M A/O No. 54-00036-05003 Docket No. SE 79-53-M A/O No. 54-00036-05006 Cantera Dorado
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DECISION

ORDER TO PAY

Appearances: Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor, Santurce, Puerto Rico, for Petitioner Tadeo Negron Medero, Esq., Rafael Castro, Esq., Santurce, Puerto Rico, for Respondent, David Cabrera, Inc.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against David Cabrera, Inc. A hearing was held on January 8, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 3-5):

1. The legal name of the respondent is David Cabrera, Inc.
2. The identification of the mine where the inspection was conducted is Cantera Dorado.
3. The location of said mine is Dorado, Puerto Rico.
4. David Cabrera, Inc., is the operator of said mine.
5. During the period from June 29, 1978, to January 8, 1979, a duly authorized representative of the Federal Mine Safety and Health Administration, namely Pedro Sarkis, conducted inspections at respondent's aforesaid Cantera Dorado Mine under the Federal Mine Safety and Health Act of 1977, hereinafter referred to as the Act.

6. As a result of an inspection conducted on January 5, 1979, Citation Number 94112 was issued to respondent for failure to comply with an order of withdrawal previously issued to respondent on September 26, 1978, in relation to its bulldozer Komatzu D-155.

7. The parties stipulate that all orders, citations, extensions and notifications attached to the Solicitor's petition in the Commission's files are true and accurate with respect to the facts set forth therein.

8. Respondent employs approximately 27 employees at Cantera Dorado.

9. Respondent employs 10 employees during one shift daily, six days per week, 52 weeks per year.

10. Each of the employees of respondent works approximately 44 hours per week.

11. The parties stipulate that respondent has a small history of previous violations.

12. The annual manhours worked at respondent's Cantera Dorado Mine in 1978 and 1979 were approximately 52,000 manhours respectively.

13. Respondent was the owner and had control of bulldozer Komatzu D-155 and Caterpillar D-8.

14. The payment of the penalty as assessed will not affect respondent's ability to continue in business.

15. The parties stipulate that citation numbers 93314, 93315, and 94112 correctly cited violations of the Act.

16. The parties stipulate that MSHA Exhibit 1 is true and accurate respecting the facts stated therein.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 1-29). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 29-30). A decision was rendered setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 32-37).

Bench Decision

The bench decision (which was simultaneously translated in Spanish for the benefit of respondent) is as follows:

These two consolidated cases involve noise violations on two bulldozers for which two citations were issued.

The operator has admitted the violations. The parties also have agreed that the facts as set forth in the inspector's citations, extensions and orders, all of which have been admitted into the record or are attached to the pleadings, are true and accurate with respect to the facts set forth therein. Both citations were originally issued on June 29th, 1978. Numerous extensions were given simultaneously on both bulldozers with respect to both citations until September 6, 1978.

Thereafter, citation 93315 on the D-8 bulldozer was eventually abated on October 10, 1978, within the time allowed. The Solicitor has recommended a penalty of \$40, the originally assessed amount for this violation. I conclude this is a reasonable penalty for this violation. Accordingly, a penalty of \$40 is assessed for this citation.

The story with respect to citation number 93314 issued with respect to the 155 bulldozer is unfortunately much different. The record reflects that on September 6, 1978, the inspector gave an extension until September 11, 1978. The inspector also testified that on September 12 and September 20 he spoke with the operator's brother who is the plant manager and with the operator's son who is the plant supervisor, and that although the materials for abatement were present, the operator did not abate the violation. The inspector issued a withdrawal order on September 26, 1978.

The Solicitor recommends a penalty of \$370, the originally assessed amount for this citation for which a withdrawal order was issued. Under the circumstances, including repeated advice from the inspector to the operator, despite which there was a failure to abate, I cannot agree with operator's counsel that this amount is excessive. On the contrary, I conclude this amount to be reasonable on the facts presented.

If the operator cannot abate the citation within the time allowed, particularly where many extensions have been given and substantial time has elapsed, then the operator has a responsibility to inform the inspector why abatement has not been accomplished and, moreover, to justify to the inspector why a further extension should be given. It is not the inspector's function to chase after the operator.

This, however, is not the end of the matter. These consolidated cases also contain a petition for the assessment

of a civil penalty based upon Citation 94112, dated January 5, 1979, issued for failure to comply with the withdrawal order on the 155 bulldozer. It appears from the inspector's testimony and from MSHA Exhibit No. 1 that another citation not at issue in these proceedings was issued on November 28, 1978, also for failure to comply with the subject withdrawal order. Apparently, after the withdrawal order was issued, the operator continued to use the machine in defiance of the withdrawal order. However, the inspector also testified that after the November 28 citation was issued, the operator did some work on November 29 and November 30 with respect to abating the noise violation but that this abatement had not been completed.

The operator must understand that it cannot ignore withdrawal orders issued by inspectors of the Mine Safety and Health Administration, especially where, as here, the inspector's uncontradicted testimony demonstrates he told the operator what the effect of the withdrawal order was, i.e., that the equipment in question must not be used until the withdrawal order is terminated by an inspector no matter what work has been done on the equipment for abatement. If the operator believes the inspector is wrong, he can go to the inspector's superiors or he can request and obtain a hearing before a Judge within four days or even less if the parties agree. The operator has avenues of relief against erroneous actions by inspectors. What the operator does not have is the right to disregard these orders as if they did not exist. If an inspector removes a piece of equipment from service, then it cannot be used until the operator obtains the proper permission to do so.

The operator must understand that by acting as it has done in this case, it is subjecting itself to very severe penalties indeed. Section 110(b) of the law provides that an operator who fails to correct a violation within the period permitted may be assessed a penalty of up to \$1,000 for each day during which the violation continues. In addition, Section 110(d) provides that any operator who willfully violates the law shall, upon conviction, be punished by a fine of not more than \$25,000 or by imprisonment for not more than one year or by both.

After listening to the testimony and conferring with the Solicitor and counsel for the operator, I have reached the conclusion that the operator's unfamiliarity with the Act played a part in its misconduct in this case. Upon questioning from the bench, the inspector's testimony indicated that the circumstances occurred during early inspections of this facility under the Act.

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I also bear in mind the operator's small size and small prior history. However, the operator's actions cannot be excused and an appropriate civil penalty must be assessed. What the operator must realize is that recurrence of such conduct in the future will result in much harsher and severer punishment.

After much deliberation, I determine that \$1,800 is an appropriate civil penalty for this violation. Accordingly, penalties of \$40, \$370 and \$1,800 are assessed in this case.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay \$750 within 30 days from the date of this decision; \$750 within 60 days from the date of this decision; and \$710 within 90 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge