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SOL (MSHA) V. SUPERIOR SAND & GRAVEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. LAKE 79-231-M A.C. No. 20-01047-05003 W
v.	Docket No. LAKE 79-232-M A.C. No. 20-01047-05004
SUPERIOR SAND AND GRAVEL, INC., RESPONDENT	Docket No. LAKE 79-297-M A.C. No. 20-01047-05005 A
AND	Superior Wash Plant
PATRICK K. THORNTON, RESPONDENT	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner, Secretary of Labor Norman McLean, Esq., McLean and McCarthy, Houghton, Michigan, for Respondents, Superior Sand and Gravel, Inc. and Patrick K. Thornton

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The petition charges that on September 8, 1978, an employee of Superior Sand and Gravel, Inc., operating a portable crusher was exposed to airborne contaminants exceeding the threshold limit values (TLV) adopted by the American Conference of Governmental Industrial Hygienists (ACGIH) in violation of the mandatory standard in 30 C.F.R. 56.5-1(a). A citation for the alleged violation was served upon Patrick Thornton, the company's vice president, on october 20, 1978. Seven days were allowed for abatement, which could be accomplished by eliminating the dust hazard or by requiring the crusher operator to wear an approved respirator. The inspector returned on October 30, 1978, and found Respondent had not abated the condition. A withdrawal order was issued pursuant to section 104(b) of the Act. The inspector was informed by Mr. Thornton that neither

the citation nor the order would be honored and the company continued to operate until late November when it closed for the winter. The order was not terminated until June 12, 1979.

The Respondent operator contends that it was selectively and discriminatorily singled out for inspections under the Act. It complains that it was denied an opportunity to prove this, since its request for production of all records of inspections of sand and gravel operations within the jurisdiction of MSHA's Marquette, Michigan, Field Office, including all citations and notes prepared by the inspector who issued the present citation, Bruce Haataja was rejected. Respondent's counsel moved at the commencement of the hearing for a "mistrial" because he did not receive the notice of hearing which was issued by me on February 20, 1980, and was not aware of the hearing date until March 17, 1980, when he discussed the case with counsel for Petitioner, and because ("more importantly") of my denial of his request for a subpoena requiring the production of all records of all inspections made of sand and gravel mining operations within the geographic jurisdiction of the Marquette, Michigan MSHA office on or before September 8, 1978, and all field notes of Inspector Bruce E. Haataja pertaining to inspections of sand and gravel operations while he was an employee of MSHA on or before September 8, 1978. Counsel for Respondents further moved for continuance because of the failure of Petitioner to supply the field notes of Inspector Haataja related to Respondent's mine in accordance with my order of January 31, 1980. Although Petitioner's counsel stated that copies of the notes were sent to Respondent's counsel in February, 1980, they were apparently not received. Respondent's counsel received a copy on April 8, 1980, and was shown the originals on the day of hearing.

Pursuant to the aforementioned notice, the hearing was held at Houghton, Michigan, on April 9, 1980. Bruce Haataja, a Federal mine inspector; Diane Brayden, a health specialist at MSHA's Duluth, Minnesota Office; Kathleen Hazen, lead chemist at MSHA's office in Denver, Colorado; Aurel Goodwin, Chief of the Health Division, Metal/Nonmetal Mines, at MSHA's Arlington, Virginia, Office; and William Carlson, head of MSHA's field office in Marquette, Michigan, testified for Petitioner. Thomas Thornton, Superior's president; Patrick Thornton, the vice president and individual Respondent herein; and Matthew and Gerald Tchida, two of their employees testified for Respondents. On motion by Respondent Patrick K. Thornton, the cases were consolidated for the purposes of hearing and decision. The parties have waived their rights to file written proposed findings of fact and conclusions of law and are agreeable to having the case decided on the basis of the record and transcript of the hearing.

ISSUES

1. Was Respondent operator in violation of 30 C.F.R. 56.5-1(a) on September 8, 1978?

2. Did Respondent operator fail to abate the alleged violation within the time set in the citation?

3. Did the Respondent operator fail to obey the withdrawal order issued on October 30, 1978?

4. Did Respondent Patrick K. Thornton knowingly authorize, order or carry out any violation of Respondent Superior Sand & Gravel, Inc., as the agent of the corporation?

5. If the violations alleged occurred, what is the appropriate penalty for each?

6. Were Respondents prejudiced by denial of their request for discovery into records relating to the enforcement activities of MSHA's office in Marquette, Michigan?

7. Were the Respondents prejudiced by denial of a continuance of the hearing?

FINDINGS OF FACT

1. At all times relevant to these proceedings, Superior Sand and Gravel, Inc., was the corporate operator of a sand and gravel pit in Houghton County, Michigan; Patrick K. Thorton was its vice president.

2. The operator's business produces between 1,400 and 1,500 tons of sand and gravel per shift. It operates one shift per day for approximately 6 months of the year. It is a relatively small operator.

3. There is no evidence that penalties assessed herein will have any effect on the operator's ability to remain in business, and therefore, I find that they will not.

4. On September 8, 1978, the company's crusher operator was exposed to levels of respirable silica dust in excess of the limits prescribed in 30 C.F.R. 56.5-1(a).

5. The operator failed to abate the cited violation within the time set for abatement, because of the refusal of Patrick Thornton to comply.

6. The operator ignored a withdrawal order issued on October 30, 1978, because of Patrick Thornton's refusal to comply.

7. No prejudice resulted to Respondents' case from denial of motions to produce or subpoena all records of MSHA's Marquette Field Office relating to sand and gravel enforcement activities.

8. Respondents were not prejudiced by denial of a continuance at the hearing.

DISCUSSION

In its answer, Superior Sand and Gravel, Inc., denied that its crusher operator was on September 8, 1978, exposed to levels of respirable dust in excess of those prescribed in 30 C.F.R. 56.5-1(a). At the hearing, Respondent had the opportunity to examine all persons involved in determining the violation. Exhaustive testimony was assembled regarding the preinspection calibration of the testing devices, controls used during testing, and weighing, measurement and analysis of the samples obtained. The credentials of the witnesses for Petitioner were not challenged and Respondent never questioned the accuracy of their testimony. The evidence is clear that the crusher operator was exposed to respirable dust in excess of the limits set out in the mandatory standard, and I so find.

Superior Sand and Gravel, Inc., is a company of moderate size with an average history of prior violations. The standard violated seeks to minimize the risk of a multitude of ailments caused by inhaling respirable dust. Silica dust was the respirable dust found by laboratory analysis in this case. Exposure to silica dust can cause silicosis. This is a serious disease. However, under the circumstances of this case, the probability of one of the operator's employees contracting it is slight. The operator's negligence is mitigated by the fact that, under all the circumstances, it had no reason to believe, prior to the citation, that a violation existed. However, as will be discussed later, there was a total absence of good faith on the operator's part in abating the violations.

Respondents failed to abate the violation within the 7-day period provided in the citation. A withdrawal order was therefore issued. This, too, was ignored. Bruce Haataja, the Federal inspector, testified that he explained the violation to Patrick Thornton, Superior's vice president, along with the consequences of failure to abate. He stated that Mr. Thornton was furnished copies of the regulation and ACGIH standards upon which it is based. He also stated that he explained the alternative measures available to the operator to bring itself into compliance. Mr. Thornton denied this and claimed that when he called William Carlson at MSHA's Marquette, Office, he received no help in understanding the violation. This asserted lack of an adequate explanation of the violation is the prime reason why Mr. Thornton and his company refused to abate the violation. Mr. Carlson testified that he explained the violation to Mr. Thornton. It was not shown to their satisfaction, say the Respondents, that the violation posed a risk to their employees. They point to the fact that neither they nor any of Petitioner's witnesses are aware of a single case of silicosis ever occurring in the region. I accept as accurate the testimony concerning these conversations of Inspector Haataja and Mr. Carlson.

Respondents misconceive the nature and purposes of the Act. Its aim is to prevent health and safety hazards. A "body count" or some similar showing of present adverse effects as a prerequisite to enforcement would undermine the legislative purpose. Cf. Society of the Plastics Industry v. OSHA, 509 F.2d 1301, 1308 (2nd Cir. 1975), cert. denied, 421 U.S. 992 (1975).

Respondents chose to proceed in a manner outside and contrary to the law. No lawful excuse has been offered for the operator's failure to fulfill its plain duty under section 2(g) of the Act to comply with the order. I find the failure to comply with the terms of the citation and the order to be a very serious violation.

Respondent, Patrick Thornton, acting as the agent of the corporate respondent, knowingly refused to comply with that order. He therefore is liable under section 110(c) of the Act for a violation of section 104(b). I consider the refusal to comply with a closure order a very serious violation. It was intentional and there was no attempt to abate the violation.

Respondents urge in their defense that the operator was singled out for enforcement of the Act by the Marquette Office of MSHA, in violation of its right to due process. Respondents do not claim any bias or enmity on the part of MSHA personnel. Rather, the gist of this defense is that other operators were probably violating the law but were not being inspected or fined. This bare allegation, even if true, affords no grounds for relief:

> [The agency's] mere inability does not render such enforcement as it accomplished wrongful. The fact that others violated the law with impunity is no defense. It is only when the enforcement agency is vested with a discretionary power and exercises its discretion arbitrarily or unjustly that enforcement of a valid regulation [violates the law].

Thompson v. Spear, 91 F.2d 430, 433-34 (5th Cir. 1937), cert. denied, 302 U.S. 762 (1938).

Respondents' claim of prejudice from denial of broad-ranging discovery into the enforcement activities of the Marquette Office must be denied. At no time was the claim supported by factual allegations of any substance.

The claim of prejudice from denial of a continuance fails for the same reason. The record is barren of anything apart from the request for a continuance. Counsel for the Respondents did not indicate how or why it would be prejudiced by denial of a continuance. It is clear that counsel received actual notice of the hearing at least 2 weeks in advance. Copies of the inspector's field notes

pertinent to the case were made available in advance of the hearing. His motion does not explain how the failure to receive the notes at an earlier date prejudiced his ability to prepare for the hearing. The motion was made after the hearing commenced, and after counsel, witnesses and the judge had travelled many miles to the hearing site.

CONCLUSIONS OF LAW

1. Respondent operator on September 8, 1978, was in violation of 30 C.F.R. 56.5-1(a). The appropriate penalty for this violation, taking into consideration the criteria in section 110(i) of the Act, is $250.

2. Respondent operator was in violation of section 104(b) of the Act because of its failure to comply with the order of withdrawal issued October 30, 1978. The appropriate penalty for this violation, taking into consideration the criteria in section 110(i) of the Act, is $2,000.

3. Respondent Patrick K. Thornton, as agent of the corporate operator, deliberately refused to comply with the withdrawal order. This constitutes a violation of section 104(b) of the Act. A penalty in the amount of $2,000 will be assessed under section 110(c) of the Act for this violation, based on my finding that the violation was deliberate and very serious.

4. Respondents failed to show prejudice from denial of broad-ranging discovery into the enforcement activities of the Marquette, Michigan office of MSHA or from denial of a continuance at the hearing.

ORDER

Within 30 days of the issuance of this decision, Respondents are ORDERED to pay the following civil penalties: Superior Sand and Gravel, Inc.: $2,250; Patrick K. Thornton; $2,000:

James A. Broderick
Chief Administrative Law Judge