

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

JUN 19 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 79-40-M  
Petitioner : A.O. No. 14-00521-05002  
v. :  
OATVILLE SAND & GRAVEL COMPANY, : Oatville Sand & Gravel Dredge  
VIC'S SAND & GRAVEL COMPANY, : Docket No. CENT 79-41-M  
Respondents : A.O. No. 14-00550-05002  
: Vic's Sand & Gravel Co. Pit

DECISIONS

Appearances: Robert J. Lesnick, Attorney, U.S. Department of Labor,  
Kansas City, Missouri, for the Petitioner;  
Victor B. Eisenring, pro se, Wichita, Kansas, for the  
Respondents.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for a total of 19 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

Respondent filed timely answers in these proceedings contesting the citations and requesting a hearing. Hearings were convened pursuant to notice in Wichita, Kansas, on April 22, 1980, and the parties appeared and participated fully therein. With regard to Docket No. CENT 79-41-M, testimony and evidence was taken on the record and pursuant to Commission Rule 65, 29 C.F.R. § 2700.65, and at the request of the parties, a decision was rendered from the bench and is herein reduced to writing as required by section 2700.65(a) of the Rules. With regard to Docket No. CENT 79-40-M, the parties proposed a settlement of the citations in question, and pursuant to Rule 30, 29 C.F.R. § 2700.30, were afforded an opportunity to present their supporting arguments on the record, settlement was approved, and my decision in this regard follows herein.

Docket No. CENT 79-41-M

This docket concerns four citations issued by MSHA inspector David P. Lilly on August 8, 1978, all alleging violations of the provisions of 30 C.F.R. § 56.9-87, which provides as follows:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The conditions or practices cited by Inspector Lilly in each of the citations in question are as follows:

Citation No. 181495

The stockpile 966 front-end loader was not equipped with a working audible backup alarm to warn persons in the area when the unit was backing up.

Citation No. 181498

The heavy haul truck, a new International dump, was not equipped with an audible backup alarm to warn persons in the area when the unit was backing up.

Citation No. 181499

The heavy haul truck, a Mack No. A-4, was not equipped with a working audible backup alarm to warn persons in the area when the unit was backing up.

Citation No. 181500

The heavy haul truck, a 1972 Mack dump, was not equipped with a working audible back-up alarm to warn persons in the area when the unit was backing up.

Stipulations

The parties stipulated that the mines in question were sole proprietorships owned and operated by Mr. Victor Eisenring at the time the citations were issued, that the sand and gravel pit in question employed six employees and had an annual production of 16,416 man-hours, and that the mine had no Previous history of prior citations under the 1977 Act.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector David P. Lilly, testified that he has 14 years' **experience** in surface and underground mining, has taken several MSHA training courses at the **Beckley**, West Virginia, Academy, and indicated that his prior experience includes the operation of heavy-duty mobile equipment. He confirmed that he inspected respondent's sand and gravel mining operation on August 8, 1978, and while mine operator Victor Eisenring was not on the premises during his inspection, he was accompanied by his representative.

Inspector Lilly confirmed that he issued the citations in question after determining that the equipment cited was not equipped with audible backup alarms. With regard to the front-end loader (Citation No. 1814951, he stated that the loader had an alarm installed, but it was inoperative and would not sound when the loader operated in reverse. With regard to the remaining citations concerning respondent's haulage trucks, he testified that he inspected the trucks and could find no backup alarms installed. In addition, he indicated that he observed the trucks in operation, and that when they were operated in reverse during the loading process, he heard no audible sounds.

Inspector Lilly stated that he believed the respondent was negligent because he was aware of the requirements for audible backup alarms and admitted as much **to** him. The inspector also testified that he granted extensions for the abatement of the citations after being advised that the backup alarms had been ordered. The citations were subsequently abated by another MSHA inspector after the mining property and equipment were sold by operator Victor Eisenring. Mr. Lilly did not know whether the alarms were actually installed on the cited equipment since Mr. Eisenring sold the property.

Inspector Lilly testified that he determined **that there** was an obstructed view to the rear of **all** four vehicles cited through observation, inspection, and the fact that he had operated identical equipment in the past. He also indicated that the size and configuration of the vehicles contributed to his determination that the view to the rear was obstructed, and he saw no one present acting as an observer.

With regard to the gravity of the loader citation, Mr. Lilly testified that in addition to the loader operator, one truck driver was nearby sitting in his truck, and another driver was out of the truck standing around. He observed no one else in the vicinity of the loading operations, but did indicate that the hazard presented by the Lack of backup alarms is the fact that someone could be seriously injured or killed if a vehicle backed over him without sounding a warning alarm. Although Mr. Lilly alluded to similar hazards being present with respect to the three truck citations, he indicated that one of the trucks was away from the loading area ready to drive in when he inspected it, and a second truck was parked nearby the loading area awaiting its turn to be loaded. He candidly conceded that the chances for a serious injury to occur on the day in question was somewhat remote due to the fact that he observed no miners in the immediate vicinity of the

loading operations other than the truck drivers. As a matter of fact, he testified that the mine employed a total of six employees, and in addition to the drivers, two employees were in the mine office.

#### Testimony and Evidence Adduced by the Respondent

Victor Eisenring, testified that at the time the citations were issued he was the owner and operator of the mine in question, but sold the land and equipment in November 1978, and that he is no longer in the sand and gravel mining business. He testified that he was not present when Inspector Lilly conducted his inspections, and while conceding that the loader had an inoperable backup alarm, Mr. Eisenring contended that the three trucks cited by the inspector were factory-equipped with alarms which **were** activated when the truck transmissions were placed in reverse. He confirmed the circumstances surrounding the granting of the extensions of the abatement time by the inspector on the ground that alarms were ordered for the trucks, but attributed that to someone from his office. He also indicated that it was possible that Mr. Lilly could not hear the audible alarms since at times they are rendered inoperable by mud and dirt which may clog the **alarm-**sounding device.

Mr. Eisenring disputed the inspector's contention that the view to the rear of the trucks was obstructed and he indicated that the operator can see to the rear by using the rear-view mirrors installed on the trucks, and he contended that the chances of someone being run over were remote.

#### Findings and Conclusions

##### Fact of Violations

I conclude and find that the petitioner has established by a preponderance of the evidence the fact that the equipment cited was not provided with audible backup alarms as required by section 57.9-87. I find the testimony of the inspector to be credible and respondent has presented no evidence to rebut the inspector's findings as to the conditions which he found and cited on the day in question. Mr. Eisenring was not present during the inspection. and he produced no additional evidence or testimony to rebut the inspector's findings or testimony concerning the facts and circumstances surrounding the issuance of the citations. Under the circumstances, the citations are AFFIRMED.

In addition, considering the entire record adduced in these proceedings, I make the following findings and conclusions.

Respondent is a small operator with no prior history of violations issued under the Act.

Although respondent is no longer in the mining business, I cannot conclude that he is unable to pay the civil penalties assessed by me in these proceedings, or that the penalties will adversely affect his ability to remain in business.

The violations resulted from ordinary negligence. That is, I conclude that respondent failed to exercise reasonable care to prevent the conditions cited and that he should have been aware of those conditions,

The evidence and testimony adduced in these proceedings reflects that respondent exercised normal good faith attempts at compliance once the citations issued.

Although I consider the lack of workable backup alarms on heavy-duty equipment to be serious, on the facts presented in this case, I am not convinced that anyone was exposed to any serious injuries by the lack of backup alarms on the day the citations were issued, and the inspector candidly admitted as much.

Taking into account the totality of the circumstances presented on the day the citations issued, and in particular respondent's size, no prior history of violations, and the fact that he is no longer in the mining business, I believe that the following civil penalty assessments are warranted in this proceeding:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
181495	08/08/78	56.9-87	\$ 25
181498	08/08/78	56.9-87	30
181499	08/08/78	56.9-87	25
181500	08/08/78	56.9-87	20
		Total	<u>\$100</u>

ORDER

Respondent is ordered to pay civil penalties in the amount of \$100 for each of the citations which have been affirmed in this proceeding, as indicated above, payment to be made within thirty (30) days of the date of this decision, upon receipt of payment by MSHA, this proceeding is dismissed.

Docket No. CENT 79-40-M

The citations, standards cited, initial proposed assessments, and the proposed settlement amounts in this docket are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
181530	09/07/78	56.12-47	\$ 44	\$ 30
181532	09/07/78	56.12-8	38	20
181533	09/07/78	56.12-8	38	20
181534	09/07/78	56.12-8	38	20
181539	09/07/78	56.4-10	32	30
181540	09/07/78	56.12-a	38	20
181543	09/07/78	56.12-8	38	20
181544	09/07/78	56.4-2	28	25

<b>181545</b>	09/07/78	<b>56. 12- 8</b>	<b>38</b>	<b>20</b>
<b>181546</b>	09/07/78	<b>56. 12- 8</b>	<b>38</b>	<b>20</b>
<b>181547</b>	09/07/78	<b>56. 12- 8</b>	<b>38</b>	<b>20</b>
<b>181548</b>	09/07/78	<b>56. 9- 87</b>	<b>60</b>	<b>20</b>
181549	09/07/78	56.9-87	60	20
181550	09/07/78	56.15-1	40	30
181553	09/07/78	109(a)	<u>20</u>	<u>10</u>
			<b>\$588</b>	<b>\$325</b>

Discussion

In support of the proposed settlement disposition of this matter, petitioner's counsel furnished information concerning the size of the respondent's mining operation, gravity, good faith compliance, prior history of violations, negligence, and asserted that the payment of the proposed settlement amounts will not adversely affect respondent's ability to continue in business.

Size of Business

At the time the citations were issued, respondent was operating a sand and gravel operation known as the Oatville Sand and Gravel Dredge and that its annual production man-hours was 22,605. I conclude and find that this constitutes a relatively small mining operation.

Prior History of Violations

Petitioner asserted that respondent has no prior history of violations under the Act, and I adopt this as my finding in this matter.

Negligence

Petitioner argued that each of the violations resulted from the failure by **the** respondent to exercise reasonable care to prevent the conditions cited and that respondent knew or should have been aware of the requirements of the cited safety standards. petitioner concluded that all of the citations resulted from ordinary negligence, and I adopt this as my finding in this matter.

Good Faith Compliance

Although the record reflects that MSHA terminated the Citations on November 22, 1978, when the **respondent** sold his mining property, Petitioner **asserted** that respondent exhibited good faith attempts at Compliance and **there** is no evidence to the contrary. **In** the circumstances, I cannot conclude that there was a lack of good faith compliance on the part of the **respondent** with respect to the periods subsequent to the issuance of the citations in question.

Gravity

Petitioner asserted that the gravity factor was overevaluated by MSHA when the citations were initially assessed. After consulting with the inspector who issued the citations and who was present in the courtroom, counsel asserted that on the day the citations were issued the mine was not at full-operating capacity, that mining of sand and gravel *wasnot* taking place, and that only routine maintenance functions were being performed. Under these circumstances, counsel asserted that any miner exposure to the hazards resulting from the conditions cited was minimal.

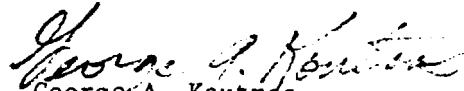
In conclusion, petitioner argued that the proposed settlement is reasonable and appropriate, is in the public interest, and will serve to effectuate the deterrent purposes of the Act. Respondent expressed accord and agreement with the proposed settlement disposition advanced by the petitioner and expressed a desire to pay the settlement amounts in satisfaction of the citations in question.

Conclusion

After careful review and consideration of the arguments advanced by the petitioner in support of the proposed settlement and taking into account the fact that the respondent is no longer in the mining business, I conclude and find that the proposed settlement is reasonable, and pursuant to 29 C.F.R. § 2700.30, it is APPROVED.

ORDER

Respondent is ordered to pay a civil penalty in the amount of \$325 in satisfaction of the 15 citations issued in this matter as enumerated above, payment to be made within thirty (30) days of the date of this decision. Upon receipt of payment, this matter is dismissed.

  
George A. Koutras  
Administrative Law Judge

Distribution:

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