

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2. 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

27 JUN 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No, YORK 79-104-M
Petitioner : A.C. No. 30-01696-05003
v. :
: Noto Excavating, Inc., Mine
NOTO EXCAVATING, INC., :
Respondent :

DECISION

Appearances: William M. Gonzales, Esq., Office of the Solicitor, U.S.
Department of Labor, New York, New York, for Petitioner;
Joseph Noto, Jr., Marlboro, New York, for Respondent.

Before: Administrative Law Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter referred to as the "Act"). Petitioner filed a proposal for assessment of civil penalty on November 2, 1979, alleging three violations on June 19, 1979, of mandatory safety standards. An evidentiary hearing was held on May 28, 1980, in Kingston, New York.

Respondent (Noto) admits the violations and contends only that the civil penalties proposed by MSHA for those admitted violations were too high. In determining the amount of a civil penalty that should be assessed for a violation, section 110(i) of the Act requires that six factors be considered: (1) the history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect of the penalty on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's good faith in attempting to achieve rapid abatement of the violation.

Citation No. 204196 charges a violation of 30 C.F.R. § 56.11-12 (requiring that openings above, below or near travelways through which men or materials may fall shall be protected by railings, barriers or covers) because a 3-foot square opening existed at the bottom of a ladder used by employees several times daily. It is undisputed that there was a drop of 52 inches through the opening and that the hazard was in plain view.

There is no question that as a result of a slip or loss of balance by an employee injuries could be expected that would result in lost work days or restricted duty, The condition was corrected within the time specified for abatement by the operator placing a cover over the hole.

Citation No. 204197 charged a violation of 30 C.F.R. § 56.9-11 (requiring that cab windows be of safety glass or equivalent and be kept in good condition) in that the front-end loader being used by one of the owners had a badly shattered windshield, Since one of the owners himself was using the loader the operator in fact knew of the violative condition. It is undisputed that the windshield in that condition could result in glass falling onto the machine operator causing lacerations resulting in lost work days or restricted duty. The condition was corrected the same day as cited when the operator replaced the windshield with a \$46 sheet of plexiglass.

Citation No. 204918 charged a violation of 30 C.F.R. § 56.9-22 (requiring berms or guards on the outer banks of elevated roadways) in that there was no berm along the outer portion of the main haul road to the plant. There was a high risk of a vehicle going over the 15-foot drop-off from the unbermed portion of the roadway. Resulting injuries from such a drop could be fatal or permanently disabling. The operator explained that he had difficulty maintaining the berms because of heavy rainfall and wash-outs. The condition was abated within the time specified.

The operator in this case is quite small in size having only five employees, All but one are family-related. It has a history of only one violation and that was of a minor nature, The operator admitted that the proposed penalties totaling \$222 "are not going to break me" but he nevertheless submitted an unaudited financial statement as of March 31, 1979, for consideration in mitigation of penalties. While the weight that can be given to unaudited financial statements is minimal, even assuming, arguendo, the accuracy of the statements, it is clear that the penalties herein would have no impact on Respondent's ability to continue in business. I consider in this case, however, the extraordinary good faith shown by the operator in abating these violations almost immediately. I also give consideration to the fact that this is essentially a family business and therefore there is additional motivation to see that the employees are protected from health and safety hazards. Under the circumstances, I find that the following penalties are appropriate and Respondent is ordered to pay these amounts within 30 days of the date of this decision: Citation No. 204196: \$50; Citation No. 204197: \$50; Citation No. 204198: \$70


Gary Melick
Administrative Law Judge

Distribution:

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