

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

1 ' 8 JUL 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. CENT 79-171-M
: A.O. No. 23-00981-05002
v. :
: Gooden Quarry and Mill
MARTIN MARIETTA AGGREGATES, :
Respondent : Docket No. CENT 79-108-M
: A.O. No. 13-00120-05002
: Klein Quarry

DECISIONS

Appearances: Rochelle G. Stern, Attorney, Office of the Solicitor,
U.S. Department of Labor, Kansas City, Missouri, for the
petitioner;
Charles A. Bliss, Cedar Rapids, Iowa, for the respondent.

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), charging the respondent with two alleged violations of certain mandatory safety standards set forth in Part 56, Title 30, Code of Federal Regulations. Respondent filed timely answers contesting the citations and requested hearings. Hearings were held pursuant to notice on May 20, 1980, in Kansas City, Missouri, and the parties appeared and participated therein. The parties waived the filing of posthearing proposed findings, conclusions, and briefs and were given an opportunity to present oral arguments on the record with regard to their respective positions. Further, at the request of the parties, bench decisions were rendered and the decisions are herein reduced to writing as required by Commission Rule 65, 29 C.F.R. § 2700.65(a).

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed,

and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

Stipulations

The following stipulations were agreed to by the parties in these dockets:

1. Respondent's mining operations are subject to the provisions of the Act.
2. Payment of the assessed civil penalties will not affect respondent's ability to continue in business.
3. Respondent demonstrated good faith by achieving rapid compliance after notification of the cited violations.
4. Respondent's size is 8,368,785 production tons or man-hours per year.
5. Respondent's size with respect to the Klein Quarry is 19,049 production tons or man-hours per year.
6. The gravity factor was properly assessed for the citations in question.

Findings and Conclusions

Independent Contractor Defense

In these dockets, respondent asserted that the violations which prompted the issuance of the citations resulted from actions by certain independent contractors. Further, respondent asserted that it exercised no control over the work or safety of the contractors' employees and that petitioner's attempts to penalize the respondent by imposing civil penalties for violations committed by the contractors is an abuse of discretion.

The parties stipulated that Citation No. 190840 is attributable to the activities by an independent contractor hired by the respondent to perform work at its limestone quarry in **Gooden**, Missouri. Further, after taking testimony and evidence concerning Citation No. 178827, petitioner conceded that this citation is also attributable to an independent contractor (Tr. 52).

Respondent's assertion that the Secretary abused his enforcement discretion by proceeding against the respondent mine operator is rejected. It is clear from the present state of the law that an owner-operator of a mine subject to the provisions of the Act can be held responsible for any violations committed by its contractor* MSHA v. Old Ben Coal Company, VINC 79-119 (October 29, 1979); MSHA v. Monterey Coal Company, HOPE 78-469 and 78-476 (November 13, 1979).

Docket No. CENT 79-171-M

104(a) Citation No. 190840, issued on February 27, 1979, cites an alleged violation of 30 C.F.R. § 56.4-2, and states as **follows**: "Signs warning against smoking and open flames were not posted at the contractor (stripping crew) fuel storage area."

30 C.F.R. § 56.4-2 provides as follows: "Signs warning against smoking and open flames shall be posted-so they can be readily seen in areas or places where fire or explosion hazards exist."

Fact of Violation

In support of the citation in question, petitioner presented the testimony of MSHA inspector Darrell L. **Ragsdale** who confirmed that he issued the citation after conducting an inspection of the mine. He also testified as to the facts and circumstances which prompted the issuance of the citation (**Tr. 79-85**), was cross-examined by respondent's representative, and responded to several questions **posed** by me (**Tr. 85-104, 133-134**).

In defense of the citation, respondent presented the testimony of Mr. Dwight Dozier, one of its sales representatives. He testified as to the activities of the independent contractor loader operators who were working around the fuel storage area (**Tr. 104-115**).

I find that the Secretary has established the fact of violation by a preponderance of the evidence. It is clear from the testimony and evidence presented by the petitioner in support of the citation that the required warning sign was not posted and respondent has not rebutted this fact. Failure to post a sign warning against smoking and open flames on the diesel fuel storage tank constitutes a violation of the cited safety standard (Tr. 203-205). The citation is AFFIRMED.

Gravity

The inspector testified that one of respondent's employees and four contractor employees were in the "area" of the diesel fuel storage tank, and that they were approximately 400 to 500 yards away. He assumed that the dozers and scrapers being used by the contractor employees were using diesel fuel from the *storage* tank, but he did not ascertain how much fuel was in the tank and upon inspection of the tank, he found it to be in good condition. The tank was a portable 3,000-gallon capacity tank, and the inspector indicated that a rupture and an ignition would have to occur before any hazard was presented. Based on the good condition of the tank, the fact that there is no indication *or* evidence that anyone was smoking, the fact that the equipment being operated was some great distance away from the fuel tank, and the fact that the inspector observed no fueling taking place, I can only conclude that the failure to post a warning sign was a nonserious violation (Tr. 205-206).

Negligence

Testimony by the inspector reflected that respondent's loader operator obtained his fuel from a source other than the cited fuel tank. Further, it is clear to me that the *citation* resulted from the acts of the independent contractor and that none of respondent's employees were exposed to any hazard. I have also considered the fact that respondent's plant is mobile; that is, it is moved from site to site and that respondent often does not have personnel present while work is being performed by the contractor. Considering all of these circumstances, I find no negligence on the part of the respondent with respect to the citation in question. I conclude that the respondent could not have reasonably known of the condition cited (Tr. 206-207).

Docket No. CENT 79-108-M

104(a) Citation No. 178827, issued *on* February 22, 1979, alleges a violation of 30 C.F.R. § 56.9-11, and states as follows: "The windshield of the JD 644-B front end loader was cracked from top to bottom extending left to right across the entire glass. The vision of the driver was impaired [*sic*]."

30 C.F.R. § 56.9-11 provides as follows: "Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

Fact of Violation

MSHA inspector William L. Worsham testified as to the cracked windshield which he observed and respondent does not dispute the fact that the windshield in question was in fact cracked. As a matter of fact, plant manager Dave Short confirmed the fact that the windshield in question was cracked. Section 56.9-11 requires that cab windows be maintained in good condition. Although the evidence establishes that the loader windshield was safety glass, the fact is that it was cracked and the extent of the crack resulted in the impairment of the vision of the loader operator. Under the circumstances, I conclude that the windshield in question was not in good condition and I find that the petitioner has established a violation (Tr. 21-34, 42-50, 52-61, 65-67, **71-79**). The citation is AFFIRMED (Tr. 194-195).

Gravity

The extent of the crack in the loader windshield in question, and the inspector's testimony that the vision of the loader operator was impaired, supports a conclusion that the violation was serious. Although the evidence reflects that only one truck was loaded on the day in question and that the truck driver was not directly exposed to any hazard of being struck by the loader, the fact is that the evidence and testimony adduced reflected that as many as 12 to 14 trucks may be loaded on any given day, and the operation of a loader with a cracked windshield which impairs the vision of the operator presents a hazardous condition and situation. I conclude that the condition of the windshield constituted a serious violation (Tr. 196).

Negligence

In this case, the evidence establishes that respondent's Plant Manager Short was also in charge of safety at the Klein Quarry. He candidly admitted that he was aware of the cracked windshield 2 days before the citation was issued. However, he immediately advised the loader operator about the condition, but indicated that he had no authority to remove the equipment from service since it was the property of the contractor (Tr. 52, 56, 57-59). Mr. Short also testified that when the plant is operating at the Klein Quarry he is there on a daily basis, and he indicated that he was there the day before the inspection in question and that the windshield was cracked (Tr. 64).

Notwithstanding the fact that the loader in question was the property of the contractor rather than the respondent, the fact is that the quarry manager who was present and aware of the condition of the windshield was respondent's employee. He was at the mine site when he discovered the defective windshield and was aware of it until the day the citation issued. Under these circumstances, I find that the condition cited resulted from ordinary negligence on the part of the respondent (Tr. 200-201).

History of Prior Violations

The parties stipulated that the respondent's history of prior violations at the Gooden Quarry and Mill, Docket No. CENT 79-171-M, was "average" and petitioner asserted that this prior history consists of two citations for the 2-year period prior to the issuance of the citation on February 22, 1979.

The parties stipulated that respondent's prior history of violations at its Klein Quarry, Docket No. CENT 79-108-M, consist of those listed in Appendix A to the signed stipulation offered and received at the hearing. That document is an MSHA computer printout which reflects that respondent has paid \$340 in civil penalties for seven citations issued during the period February 23, 1977, to February 22, 1979.

Based on the size and scope of respondent's mining operations, I cannot conclude that the aforesaid history of prior violations constitutes a poor safety record. To the contrary, I conclude that it indicates a good safety record on the part of the respondent, and this fact is reflected in the civil penalties assessed by me in these proceedings.

Good Faith Compliance

The parties stipulated that the respondent demonstrated good faith by achieving rapid compliance in the abatement of the conditions cited. I accept this as my findings with regard to the citations in issue in these proceedings.

Size of Business and Effect of Penalties on Respondent's Ability Remain in Business

The parties presented information concerning the size and scope of respondent's mining operations stated in terms of annual production tonnage and man-hours. Respondent's representative asserted that respondent operates a number of mining sites nationwide, and the parties agreed that respondent is a large operator. I adopt this as my finding in these proceedings.

The parties stipulated that payment of the assessed civil penalties will have no effect on respondent's ability to continue in business, and I adopt this agreement as my conclusion on this question.

Alleged Failure by the Inspectors to Inform Respondent of Their Inspections and to Afford Respondent's Representative of an Opportunity to Accompany the Inspectors During Their Inspections

During the course of the hearing, respondent, for the first time, asserted that the inspector did not follow the proper procedure because he did not give the respondent's representative an opportunity to accompany him during his inspections (Tr. 36). After careful review of the testimony and circumstances surrounding the inspection at the Klein Quarry (Docket No. CENT 79-108-M) respondent's contention is rejected. The inspector believed that

the loader operator was an employee of the respondent, and at the time of the inspection he specifically advised the employee of the purpose of his visit and afforded him an opportunity to accompany him. He also gave him an opportunity to call respondent's representative (Tr. 23-25, 30-32, 38). The loader operator was the only other person at the mine site (Tr. 43), and the inspector testified that he always attempts to contact mine management during his inspections, and that he has in the past contacted plant manager Dave Short in this regard (Tr. 45-46). On the day in question, the quarry in question was not in operation and the only activity going on was a loading operation with a front-end loader, and the inspector testified that the loader operator advised him that after contacting respondent's office, he was advised that no one wanted to come to the mine site (Tr. 47-49).

With respect to Docket No. CENT 79-171-M, and the inspection which took place at the Gooden Quarry and Mill, the inspector testified that he informed Bill Stevenson, the front-end loader operator, of the purpose of his visit, and Mr. Stevenson accompanied him during his inspection (Tr. 81). He also indicated that an employee of respondent's was at the facility (Tr. 93-94), and respondent's sale representative identified Mr. Stevenson as an employee of the respondent (Tr. 105). Under these circumstances, I conclude that respondent was given a full opportunity to accompany the inspector, and its assertion to the contrary is rejected.

Penalty Assessments

On the basis of the foregoing findings and conclusions, civil penalties are assessed as follows in these proceedings (Tr. 198, 211):

Docket No. CENT 79-108-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
178827	2-22-79	56.9-11	\$95

Docket No. CENT 79-171-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
190840	2-27-79	56.4-2	\$20

ORDER

Respondent is ORDERED to pay civil penalties totaling \$115 within thirty (30) days of the date of these decisions.


 George A. Koutras
 Administrative Law Judge

Distribution:

Rochelle G. Stern, Attorney, Office of the Solicitor, U.S. Department
of Labor, Room 2105, 911 Walnut Street, Kansas City, MO 64105
(Certified Mail)

Charles A. Bliss, Martin Marietta Aggregates Central Division, **P.O.**
Box 789, Cedar Rapids, IA 52406 (Certified Mail)