

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 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 80-105-M
Petitioner : A/O No. 36-00017-05007
v. :
: Millard Quarry & Plant
BETHLEHEM MINES CORPORATION, :
Respondent :

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Steven A. Coppola, Esq., Bethlehem Steel Corporation, Bethlehem, Pennsylvania, for Respondent.

Before: Judge Stewart

This case is a civil penalty proceeding pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820. The hearing in this matter was held on Thursday, May 29, 1980, in Wilkes-Barre, Pennsylvania. The parties negotiated a settlement of two of the violations alleged herein. They entered a motion for approval of this settlement into the record at the hearing. Following the presentation of evidence at the hearing regarding the two remaining alleged violations, decisions were rendered from the bench.

Stipulations

The parties stipulated to the following:

Number one; Millard Quarry and Plant is owned and operated by Respondent, Bethlehem Mines Corporation. Two; the Millard Quarry and Plant is subject to jurisdiction of the Federal Mine Safety and Health Act of 1977. Three; the Administrative Law Judge present has jurisdiction over these proceedings. Four; subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or the relevancy of any of the statements asserted therein. Five; the assessment of a civil penalty in this proceeding

will not affect Respondent's ability to continue in business. Six; the appropriateness of the penalty, if any, to the size of the operator's business should be based on the fact that (a) the Respondent's company's annual production tonnage is 1,317,970, and (b) the Millard Quarry and Plant's annual production tonnage is 536,356. The Millard Quarry and Plant employs 279 workers, approximately. Seven; the Respondent demonstrated ordinary good faith in attaining compliance after the issuance of each citation. Eight; the Millard Quarry and Plant was assessed a total of thirty-six (36) citations and four (4) 107A orders in the twenty-four (24) months immediately preceding the issuance of each citation involved in this case. Nine; the parties stipulate to the authenticity of their exhibits, but not to their relevance or to the truth of the matters asserted therein. The history of the violations are small, the size of the controlling company is medium, and the size of the mine involved is large.

Citation Nos. 308274 and 308279

At the outset of the hearing, the parties proposed to settle Citation Nos. 308274 and 308279. It was agreed that Citation No. 308274, which was originally assessed a total of \$150, would be vacated. Citation No. 308279 would be assessed \$275, the amount proposed by MSHA's Office of Assessments. In support of the settlement, counsel for Petitioner asserted the following:

[A]s a result of settlement negotiations and a thorough discussion of the evidence supporting two of the citations in this matter, the parties have agreed * * * that two of the citations should be settled. The first of these is Citation 308274. Upon review of the evidence regarding Citation 308274, MSHA moves that the citation be vacated. The ground for MSHA's motion is that upon review of evidence which was not available to the MSRA inspector at the time the citation was issued, we have determined that we would be unable to meet our burden of proof for a prima facie case with regard to Citation 308274. * * * The other item which we would move to settle is Citation 308279. The Secretary of Labor moves to dismiss this proceeding insofar as Citation 308279 is concerned. As reasons for his motion, the Attorneys for the Secretary state that they and Respondent's Attorney have discussed the alleged violation; we have agreed, pursuant to those discussions, that they shall settle the case for the amount of the penalty that was originally proposed by the assessment office. The penalty for that item is \$275.00. The proposed settlement for the original penalty amount is appropriate, because a review of the evidence reveals that the violation was serious. The

negligence regarding the violation was ordinary negligence. Normal good faith was demonstrated in abatement of the violation. Accordingly, we would request Your Honor **to** grant the motion to settle Citation 308279 for the amount originally proposed, and for the reasons I've already stated, I would request that Your Honor approve the motion to vacate Citation 308274.

At the conclusion of this statement, the settlement was approved. Citation No. 308274 was vacated and the proceeding with regard to that citation was dismissed. The settlement with regard to Citation No. 308279 was approved and Respondent was ordered to pay \$275.

Citation No. 308278

At the conclusion of the presentation of evidence and oral **argument** regarding Citation No. 308278, a bench decision assessing a penalty of \$100 was rendered as follows:

Section 110 of the Act provides in pertinent part as **follows**: "The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation".

As to the first of the statutory criteria, the parties have stipulated that the operator has thirty-six (36) violations within the past twenty-four (24) months and that this history of previous violations was small. I therefore find that the operator had a small history of previous violations. The parties have stipulated that the annual production of the company was 1,317,970 man hour⁸ and that the Millard Quarry had 536,356 man hours per year and that 279 workers were employed. The parties further stipulated that the mine was large and that the company was medium in size. I therefore find that, as to this statutory criteria, the respondent's mine **was** large and the company size was medium.

The parties have further stipulated that the assessed violations would not affect the operator's ability to continue in business, **so I** therefore find that the penalty that might be assessed in this case would have no effect on the operator's ability to continue in business. The parties have stipulated that the operator exhibited ordinary good faith in abating this

violation. I therefore find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of a violation.

Now as to the issue of whether or not there was a violation in Citation 308278, that citation was issued on 8-8-79 at 21:05. The condition or practice noted in the citation is as follows: "Sufficient illumination not provided at the southeast end of the stripping waste dump. The area was at a lower elevation than the major portion of the dump, which created extremely dark conditions at the corner and rim of the southeast end." This citation alleged a violation of 30 CFR 56.17-I which states as follows: "Mandatory -- Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas".

The record establishes that the illumination at the striping waste dump was not sufficient to provide safe working conditions in this area. **There** was illumination provided by lights in the area; however, they were at some distance from the waste dump where the waste was to be dumped from the trucks. The regulation requires that illumination sufficient to provide safe working conditions shall be provided in such areas. The regulation is general in nature; it does not require that, any specific amount of candle power or lumens be provided in the area, merely that the illumination must be sufficient to provide safe working conditions. Although work was not actually in progress, in that no waste was being dumped at the time, this was due to a temporary discontinuance of operations because of machinery which had become inoperative due to a break-down. It is evident that operations were scheduled to proceed as soon as the machinery became operative again.

After the above findings had been made, the parties were afforded additional opportunity to present oral argument as to the negligence of Respondent in the occurrence of this violation and as to the gravity of the condition.

The parties stipulated "that the negligence in the citation was ordinary and also that the gravity of an accident happening would be a serious one, in that a fatality could **occur**."

These stipulations were accepted and the bench decision continued as follows:

I find that the negligence of the operator was ordinary. I find that, as to gravity, the violation was serious and that a fatality could occur. I find, however, that there was room

for a certain amount of judgment in the issuance of this citation and that it might be possible for inspectors and the operator to differ. The evidence also has not established for what length of time this violation had occurred. In view of the findings I have made, a civil penalty of one hundred dollars (\$100.00) is assessed.

Citation No. 308296

Citation No. 308296 was issued by inspector Robert L. Rough on August 15, 1979, pursuant to section 104(a) of the Act. The inspector cited a violation of 30 C.F.R. § 56.12-16 and described the pertinent condition or practice as follows :

Six employees were removing spillage from under belt conveyors and around tail pulleys at the Pennsy Plant without locking out the power control switches. The door to the control buttons in the primary crusher booth was open as well as the door to the power control switches. All power control switches were in the on position and two locks were hanging on the wall.

30 C.F.R. § 56.12-16 reads as follows:

Electrically powered **equipment** shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked **out** or other measures taken which shall prevent the equipment from-being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work, Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

At the conclusion of the presentation of evidence with respect to Citation No. 308296, counsel for Petitioner moved that the citation be vacated for the following reasons:

The citation as it reads does not say that one (1) of the six (6) employees was actually working on the belt, as required in the regulation secondly,. the testimony as it stands now only clearly establishes that there was one (1) person working in proximity to the belt and not on the belt.

In view of these assertions which were established by the record, Petitioner's motion was granted. **Citation No. 308296** was vacated and the proceeding with respect to that citation was dismissed.

ORDER

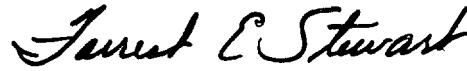
The vacation of Citation No. 308274 and dismissal of the civil penalty proceeding as it related to that citation is AFFIRMED.

The approval of settlement with respect to Citation No. 308279 is AFFIRMED.

The bench decision rendered with respect to Citation No. 308278 is AFFIRMED.

The vacation of Citation No. 308296 and dismissal of the civil penalty proceeding as it related to that citation is AFFIRMED.

Respondent is ordered to pay the sum of \$375 within 30 days of the date of this order, if it has not already done so.



Forrest E. Stewart
Administrative Law Judge

Distribution:

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