

CCASE:

SOL (MSHA) V. J. SANTORA

DDATE:

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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

PETITIONER

Civil Penalty Proceeding

Docket No. WILK 79-103-PM
A.O. No. 37-00065-05002W

v.

J. Santoro Pit & Plant

J. SANTORO, INC.,

RESPONDENT

DECISION

Appearances: Paul J. Katz, Attorney, U.S. Department of Labor,
Boston, Massachusetts, for the Petitioner
Dennis H. Esposito, Esquire, Providence, Rhode
Island, for the Respondent

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding filed by the petitioner against the respondent proposing civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 for two alleged violations of section 104(b) of the Act. The alleged violations were served on the respondent by MSHA inspector George W. Sargent on May 17, 1978, when he issued Citation Nos. 216486 and 216487 charging the respondent with violations of 30 C.F.R. 56.14-1 and 56.9-88. The citations resulted from the respondent's failure to abate the same conditions which were the subject of two section 104(b) orders, and they were issued after the inspector found that the equipment cited continued to be used by the respondent at the mine in violation of the withdrawal orders.

ISSUES

The principal issues presented in this proceeding 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 in this proceeding, 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 this decision.

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 charged, (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

This is the second proceeding brought by the petitioner against the respondent seeking civil penalties for citations issued to the respondent for violations of section 104(b) of the Act. The first proceeding was brought against Mr. Joseph Santoro pursuant to section 110(c) of the Act in his individual capacity as president of the respondent corporation for allegedly knowingly authorizing, ordering, or carrying out the corporate operator's violations of three 104(b) orders issued by Inspector Sargent on May 17, 1978. The case was heard by Judge Stewart on April 6, 1979, but after the testimony of one witness, the parties proposed a settlement in the full amount of \$1,500 as initially assessed by MSHA's Office of Assessments. Judge Stewart approved the settlement by his decision and order dated May 31, 1979, Docket No. WILK 79-46-PM, and respondent's payment of the penalties finally disposed of that case.

This proceeding was initiated by the petitioner against the corporate operator pursuant to section 110(a) of the Act, and the charges are based on two of the orders which were disposed of by the settlement in Judge Stewart's proceeding. The case was docketed for hearing at Providence, Rhode Island on August 21, 1980, and after a prehearing conference prior to the taking of any testimony, the parties proposed a settlement of the case whereby the respondent agreed to pay the full proposed assessment of \$350 for each of the two violations. The parties submitted their proposal on the record, and the petitioner presented oral arguments in support of the proposed settlement for my consideration and approval (Tr. 3-6).

In support of the proposed settlement, petitioner asserted that aside from the violations which were at issue in Judge Stewart's proceeding and in this case, respondent has no other applicable history of prior paid violations. In addition, the record reflects that respondent is a small family owned sand and gravel operator employing five to 10 employees, that the

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violations issued shortly after the effective date of the Act, and that abatement was ultimately achieved in good faith by providing the cited front-end loader with roll-over protection, and by installing a guard on the V-belt drive on the cited secondary crusher. In addition, the parties agreed that the payment of the penalties in question will not adversely affect respondent's ability to remain in business (Tr. 7-9).

In addition to the foregoing arguments, petitioner asserted that it has agreed to a settlement of the case because of the uncertainty concerning a substantial legal issue raised by the fact the initial underlying citations which preceded the section 104(b) withdrawal orders were issued on April 27, 1977, pursuant to the now repealed Metal and Nonmetallic Mine Safety Act, and that the orders issued pursuant to the present 1977 Act were issued in accordance with an MSHA policy directive whereby inspectors were instructed to issue section 104(b) orders of withdrawal when they determined that citations previously issued under the Metal and Nonmetallic-Metal Mine Act were not timely abated. Petitioner asserted that this policy presents a substantial question of law of uncertain legal precedent and validity, and that it has been discussed and taken into account by the parties in their joint proposal for the settlement disposition of this matter (Tr. 9-15).

CONCLUSION

Upon consideration of the arguments presented by the parties in support of the proposed settlement, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to Commission Rule 29 C.F.R. 2700.30, settlement is approved for the following two citations which are the subject of this proceeding:

Citation No.	Date	30 C.F.R. Standard	Assessment	Settlement
216486	5/17/78	56.14-1	\$ 350	\$ 350
216487	5/17/78	56.9-88	350	350
			\$ 700	\$ 700

ORDER

Respondent IS ORDERED to pay civil penalties in the amount of \$700 in satisfaction of the aforesaid citations within thirty (30) days of the date of this decision. Upon receipt of payment by MSHA, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge