

CCASE:

SOL (MSHA) V. HI TENN INC.

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. BARB 79-69-P
A.O. No. 40-01995-03001

v.

Westel Tipple

HI TENN, INC.,

RESPONDENT

DECISION

Appearances: Michael Bolden, Attorney, Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the petitioner

Before: Judge Koutras

Statement of the Case

This proceeding concerns 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 found in Part 77, Title 30, Code of Federal Regulations. The proposals were filed on October 28, 1978, and subsequently on June 4, 1979, Chief Judge Broderick issued an order directing the respondent to show cause why it should not be deemed in default because of its failure to answer the proposals.

By letter dated June 12, 1979, and filed June 18, 1979, respondent filed an answer to the show-cause order explaining the circumstances concerning one of the citations (No. 141646), and stating that it does not contest the second citation (No. 141647), and has made payment to MSHA in the amount of \$72 for this citation, the \$72 being the initial assessment made and proposed by the petitioner in its pleadings.

By notice of hearing issued by me on August 25, 1980, and amended on September 19, 1980, the parties were notified that the matter was scheduled for hearing in Chattanooga, Tennessee, on October 1, 1980. Petitioner appeared at the hearing but the respondent did not. Under the circumstances,

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the hearing proceeded without the respondent and petitioner presented testimony and evidence in support of the citations and its proposal for assessment of civil penalties. A bench decision was rendered, and is herein reduced to writing pursuant to 29 C.F.R. 2700.65(a).

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.

In determining the amount of a civil penalty assessment, section 110 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

I consider respondent's failure to appear at the hearing to be a waiver of any further rights to be heard. The record reflects that respondent received the two notices of hearing issued by me in this proceeding. Under these circumstances, I find that respondent has been given more than an adequate opportunity to be heard, and I conclude that respondent has waived its right to any further hearing and that the issuance of any show-cause order would be a fruitless gesture. I have considered this case de novo and my decision in this regard is made on the basis of the evidence and testimony of record as presented by the petitioner in support of its case at the hearing.

At the hearing, petitioner's counsel was unable to verify respondent's claim that it had paid the initial assessment of \$72 for Citation No. 141647. In addition, counsel failed to bring with him to the hearing any evidence concerning respondent's prior history of violations. Under the circumstances, the record was left open, and petitioner was afforded an opportunity to file

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this information with me at a later date. Subsequently, by letter received October 22, 1980, petitioner filed a copy of an MSHA computer printout reflecting respondent's prior history of paid citations. In addition, petitioner confirmed that the respondent had in fact paid a civil penalty in the amount of \$72 for Citation No. 0141647, and that a check in that amount had been received by MSHA's Office of Assessments on June 20, 1979, some 8 months after petitioner's proposals for assessment of civil penalties were filed with the Commission, and some 2 months prior to the initial notice of hearing was served on the parties.

Since the payment of the initial assessment of \$72 came after the docketing of this case by the Commission, that payment, if in fact accepted by MSHA as payment for Citation No. 0141647, is in effect an offer of settlement for payment of the full assessment made by MSHA. Since petitioner was oblivious to the fact that payment had been made, even though it had apparently been accepted by MSHA, testimony and evidence was taken at the hearing with respect to the facts and circumstances surrounding the violation and I assessed a civil penalty of \$100 for the violation. However, in fairness to the respondent, since the payment of \$72 was obviously made in good faith, I will treat it as an offer of settlement and will affirm and adopt this amount as payment for the citation in question, and my tentative decision made at the hearing assessing a \$100 civil penalty for this citation is rescinded.

Findings and Conclusions

Fact of Violation

Citation No. 141646, April 5, 1978, 30 C.F.R. 77.400(b), states that "The tail pulley and V-belt located on the portable crusher was not provided with a guard while crushing coal at this installation."

MSHA inspector Lee Aslinger confirmed that he issued the citation in question during the course of a regular inspection conducted at respondent's tipple on April 5, 1978. The tail pulley in question was not provided with a guard and if the pulley belt were to break or snap, it would cause a whipping action and possibly cause injury to persons below the pulley location (Tr. 9-12). The crusher was in operation at the time he observed the condition (Tr. 18), and the pulley was located some 8 to 10 feet above the ground (Tr. 19). The belt was approximately 6 to 8 feet long, and the crusher operator would possibly be in the area of the unguarded pulley to oil, adjust, or perform maintenance on the belt (Tr. 25).

I conclude and find that petitioner has established a violation of section 77.400(b) as charged in Citation No. 141646, and it is AFFIRMED (Tr. 39).

Gravity

I find that the violation is nonserious. The inspector

candidly admitted that the lack of a guard was not hazardous unless someone was directly in the

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immediate vicinity of the V-belt (Tr. 17). He also stated that the area beneath the pulley was not an area where employees would travel in the normal course of their duties (Tr. 23), and he conceded that the probability of anyone being struck by a broken belt was remote (Tr. 24-25).

Negligence

I find that the respondent failed to exercise reasonable care to prevent the condition cited by the inspector which resulted in the issuance of the citation in question and that such a failure on respondent's part constitutes ordinary negligence. Inspector Aslinger testified that he had previously advised the respondent about the guarding requirements for the pulley V-belt (Tr. 13-16).

Good Faith Compliance

The citation was abated by removing the crusher from mine property (Tr. 16-17), and I find that respondent exercised normal good faith compliance in this regard (Tr. 42).

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

Petitioner's evidence reflects that respondent's mine production was 100 tons of coal daily on one production shift and that respondent employed from two to four employees at its tippie (Tr. 34-35, Exh. P-1). Petitioner conceded that respondent's tippie operation was small in size (Tr. 35), and I adopt this as my finding in this case.

Since the respondent did not appear at the hearing, there is no information that the civil penalty assessed by me in this case will adversely affect the respondent's ability to continue in business, and I conclude that it will not.

History of Prior Violations

Respondent's prior history of violations as reflected in the computer printout submitted by the petitioner reflects that for the period April 5, 1976, through April 5, 1978, respondent paid \$229 for six assessed violations. I cannot conclude that this record is a bad one, nor can I conclude that respondent's history of prior violations warrants any increase in the civil penalty assessed for the violation which has been affirmed in this case.

Penalty Assessment

Petitioner's counsel asserted that the proposed civil penalty advanced in this case accurately reflects and takes into account an evaluation of all of the statutory criteria found in section 110(i) of the Act, and that it is petitioner's position that as a minimum, the proposed assessment of \$210 should be affirmed (Tr. 43).

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I conclude that the proposed civil penalty of \$210 is reasonable for Citation No. 141646, April 5, 1978, 30 C.F.R. 77.400(b), and I adopt it as my civil penalty assessment in this case.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$210 for the citation which has been affirmed in this case, payment to be made within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge