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SOL (MSHA) V. JAQUAYS MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

JAQUAYS MINING CORPORATION,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-233-M

A/O CONTROL NO. 02-000954-05002

MINE: JAQUAY'S MILL

APPEARANCES:

Mildred L. Wheeler, Esq., Office of the Solicitor,
United States Department of Labor, 450 Golden Gate Avenue, Box 36017
San Francisco, California 94102,
for the Petitioner

H. R. Gannan, Esq., 635 N. Craycroft, Suite 101, Tucson, Arizona 85711,
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with a violation of 30 CFR 57.6-1, (FOOTNOTE 1) a regulation adopted under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et. seq. Respondent denies the violation and contests the appropriateness of the penalty.

Respondent also asserts that the explosives in question did not belong to it and, therefore, MSHA had no jurisdiction over them. Additionally, respondent asserts that the Bureau of Alcohol, Tobacco and Firearms rather than MSHA has jurisdiction over explosives. Jacquays also contends that the MSHA assessment form attached to the petition for civil penalty is prejudicial. Based on these contentions, respondent has moved to dismiss the case.

ISSUES

1. Whether MSHA had the authority to issue a citation concerning explosives which belonged to another but were located on respondent's premises.

2. Whether MSHA had jurisdiction over the explosives in question.

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3. Whether the attachment of the MSHA assessment form to the Secretary's petition was prejudicial to respondent.
4. Whether respondent violated the Act.
5. The determination of a penalty, if a violation is found

FINDINGS OF FACT

Citation No. 379250 was issued because of the alleged failure of respondent to properly store detonator cords in a magazine. The following facts are uncontroverted.

1. Thirty boxes of detonator cords were stacked by the walkway which leads from the mill office to the mill (Tr. 29).
2. The boxes were marked as explosives (Tr. 32, 47).
3. The boxes of detonators were on the premises of respondent (Tr. 29, 92).
4. Miners use the walkway where the detonator cords were stacked (Tr. 30).

DISCUSSION

Respondent states that the explosives were not owned by Jacquays Mining Corporation, but were the property of B. W. Jacquays Equipment Company (Tr. 92). This fact, if true, does not affect the validity of the citation. The explosives were at respondent's mine and were not stored in a magazine. The danger created by the detonators stacked near a walkway was not lessened by the fact that they may not have belonged to respondent. Respondent certainly had control over the activities which took place at its mine and, therefore, could have stored the detonators in a magazine or had them removed from the mine area.

MSHA has jurisdiction to inspect the mine of respondent. The mill office and any walkway leading from it are part of Jacquays' mine. 30 USC 802 3(h)(C). The standard requires that explosives at a mine be stored in a magazine. Respondent failed to comply with the regulation.

Jacquays also asserts that the Bureau of Alcohol, Tobacco, and Firearms (ATF) has jurisdiction over the explosives rather than MSHA. A memorandum of understanding submitted by the Secretary and testimony at trial shows that MSHA has an agreement with ATF which gives MSHA jurisdiction over explosives on mine property (Tr. 111, Exhibit P-3).

Respondent's final contention in support of a motion to dismiss is that the attachment of MSHA's proposed penalty form (Exhibit A) to the proposal for assessment of civil penalty is prejudicial to its case. I disagree. The Secretary is

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required to include a proposed penalty for every citation in issue, 29 CFR 2700.27(c). The MSHA form is merely an attachment to the proposal for assessment of penalty which explains the criteria considered by MSHA in making its penalty determination. The Secretary must still prove at trial the six criteria which must be considered by the Commission before it assesses a penalty. The Commission is not bound by the Secretary's proposal, nor is it required to follow the formula for assessing penalties established by the Secretary. 29 CFR 2700.29(b). Secretary of Labor v. Co-op Mining Co., FMSHRC Docket No. DENV 75-207-P (1980), 1 MSHC 2356.

Respondent contests the amount of the penalty as proposed by MSHA. Having reviewed the Secretary's criteria upon which the penalty was proposed and the record, I find that there is no evidence to support MSHA's calculation of respondent's history of violations. Accordingly, the penalty should be reduced. Further, considering all the criteria in 30 USC 820(i) I assess a penalty of \$100 for the violation.

CONCLUSIONS OF LAW

For the reasons stated above, I conclude that a violation of 30 CFR 57.6-1 did occur. MSHA has jurisdiction to issue a citation for this violation. Respondent's motion to dismiss is denied.

ORDER

Based on the foregoing findings of fact and conclusions of law, I enter the following order:

Respondent's motion to dismiss is denied. Citation No. 379250 is affirmed and the penalty is reduced to \$100.00.

John J. Morris
Administrative Law Judge

~FOOTNOTE-ONE

1 57.6-1 Mandatory. Detonators and explosives other than blasting agents shall be stored in magazines.