CCASE:
SOL (MSHA) V. JAQUAYS MINING
DDATE:
19801216
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 ACTION DOCKET NO. DENV 79-458-M
v.	ASSESSMENT CONTROL NO. 02-00951-05002
JAQUAYS MINING CORPORATION, RESPONDENT	EL DORADO MINE

APPEARANCES:

Mildred L. Wheeler, Esq., Office of the Solicitor, United States Department of Labor, San Francisco, California,
for the Petitioner

H. R. Gannan, Esq., Attorney at Law, Tucson, Arizona,
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) has charged the respondent with a violation of 30 CFR 57.13-21 (FOOTNOTE 1) a regulation issued under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et. seq. (the Act). In addition to denying the violation and the appropriateness of the penalty the respondent moved to dismiss the case on procedural grounds.

Respondent contends that the period of time between the issuance of the citation and the hearing was unreasonable. Respondent also asserts that the petition for assessment of a civil penalty filed by the Secretary failed to allege that respondent's mine affects interstate commerce. Respondent argues that these procedural flaws compel the dismissal of this case. Respondent also asserts that the attachment of MSHA's assessment form to the petition for a penalty is prejudicial, and therefore, the case should be dismissed.

ISSUES

1. Whether the lapse of time between the issuance of the citation and the hearing was unreasonably long and, if so, whether such a delay warrants a dismissal of the case.

2. Whether the failure to include a jurisdictional statement in the petition for assessment of a civil penalty removes this case from the jurisdiction of the Commission.

3. Whether the attachment of the MSHA assessment form is prejudicial to respondent.

4. Whether respondent violated the Act.

5. The determination of a penalty, if a violation is found.

DISCUSSION OF RESPONDENT'S MOTION TO DISMISS

Respondent contends that the lapse of fifteen months between the time the citation was issued and the hearing date is an unreasonable delay in violation of the Act. Respondent asserts that it was the duty of the Secretary to provide a hearing at an earlier date.

There are several procedural steps to review in order to determine if the Secretary is guilty of laches. The interim rules of procedure govern the relevant actions of the petitioner since the petition was mailed to respondent prior to the effective date of the present rules of procedure. See 29 CFR 2700.84 of the present rules of procedure.

Pursuant to the Act, the penalty is to be proposed a "reasonable time" after the inspection. 30 U.S.C. 815(a). The Secretary issued its proposed assessment on March 5, 1979, approximately two months after the date of the inspection.

Interim rule 2700.24(a) required the Secretary to file a petition for assessment of a civil penalty "promptly" after receipt of respondent's notice of its intent to contest the proposed penalty. MSHA received respondent's notice on March 9, 1979. The petition was filed on July 31, 1979, four and a half months later.

It was not the intention of Congress that any delay should prevent the execution of the Act by the Secretary. The discussion by the Senate Committee of the requirement that penalties be promptly proposed provides guidance in the enforcement of filing deadlines against the Secretary.

> To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a

penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding. Senate Report 95-181, 95th Cong. 1st Sess. 34 (1977).

Courts have held that the necessity for enforcement of safety and health standards outweighs any procedural deficiencies concerning filing requirements, unless the operator is prejudiced by such delays. Todd Shipyards Corp. v. Secretary of Labor and OSHRC 566 F.2d 1327 (9th Cir. 1977). Stephenson Enterprises, Inc., v. Secretary of Labor and OSHRC 578 F.2d 1021 (5th Cir. 1978); Jensen Construction Co., v. OSHRC and Secretary of Labor 597 F.2d 246 (10th Cir. 1979). Respondent failed to present any evidence that it was prejudiced by the delay in the proposal of the penalty or in the filing of the petition.

Respondent also asserts that the Secretary had a duty to have the case actually brought to a hearing prior to March 20, 1980. After the Secretary files his petition, it is the duty of the Review Commission to schedule a hearing. Unless a party moves for an expedited hearing, the case is heard at a time convenient to the administrative law judge and the parties. As with all adjudicatory bodies, the caseload does not always allow for the immediate trial of any particular case.

Respondent did not request an expedited hearing, therefore, the trial was set at the earliest convenient date. For the reasons stated above, respondent's motion to dismiss based on laches is denied.

Respondent also asserts that the failure of the Secretary to include a statement of Jacquays' effect on interstate commerce in the petition for assessment of a penalty removes the case from the jurisdiction of the Commission. At the time the petition was prepared and mailed, the interim rules of procedure were in force. These interim rules did not contain a provision comparable to the present rule 2700.5(a) which requires the jurisdictional statement referred to by respondent. The Secretary was in compliance with the rules of procedure. Accordingly, respondent's motion to dismiss based on the above contention is denied.

Respondent's final argument in support of a motion to dismiss is that the attachment of MSHA's proposed penalty from (Exhibit A) to the petition for civil penalty is prejudicial to its case. I disagree. The Secretary is required to include a proposed penalty for every citation. 29 CFR 2700.24(b) (Interim rules). The MSHA form is merely an exhibit 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 2700.27(c). (Interim rules) Sec. of Labor v. Co-op Mining Co., FMSHRC Docket No. DENV 75-207-P (1980), 1 MSHC 2356.

FINDINGS OF FACT

The Secretary charges respondent with a violation of 30 CFR 57.13-21. I find the following facts to be supported by the evidence.

1. The connection between the pressure (bull) hose and compressor machine number five did not have a safety chain (Tr. 53-61, 98).

2. Automatic shutoff valves were not in use (Tr. 66).

3. There was no other suitable locking device being used on the connection (Tr. 66, 128).

4. The air compressor was under pressure of approximately 80 - 90 lbs. per square inch (Tr. 54, 110).

5. The inside diameter of the hose was approximately 2 inches (Tr. 67). The hose itself was 4 1/2 - 5 1/2 feet long (Tr. 61).

6. The connection is inspected daily for air leaks. At this time, the miner is in close proximity to the connection while the compressor is on (Tr. 77, 99).

7. A miner who was servicing the machine was observed by the MSHA inspector near the connection (Tr. 56).

8. The vibration of the compressor and the change in temperature on the connection could cause the hose to disconnect from the machine (Tr. 55, 62, 80, 109, 126).

9. There is a danger that if the connection becomes loose the pressure from the air would cause the hose to whip back and forth which could injure anyone in the area (Tr. 55, 109).

10. The mine operator was aware of the standard requiring the use of a safety chain. Two other compressors had safety chains on the same kind of connection (Tr. 98).

A hazard to the miners was created by respondent's failure to provide a safety chain across the connection on the number five air compressor machine. The standard was violated.

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 U.S.C. 820(i) I assess a penalty of $ 46 for the violation.

CONCLUSIONS OF LAW

For the reasons stated above, respondent's motions to dismiss should be overruled and the citation affirmed.

ORDER

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

Respondent's motions to dismiss are overruled. Citation No. 376110 is affirmed and a penalty of $46 is assessed.

John J. Morris
Administrative Law Judge

~FOOTNOTE_ONE

1 57.13-21 Mandatory. Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch diameter or larger, where a connection failure would create a hazard.