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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	Civil Penalty Proceeding Docket No. CENT 80-276-M A/O No. 41-01330-05003
v.	
PRICE CONSTRUCTION, INC., RESPONDENT	O'Daniel Pit and Plant

DECISION

Appearances: E. Justin Pennington, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner
Bob Price, Vice President, Price Construction, Inc., Big Spring, Texas, for the Respondent

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) (FN.1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (hereinafter the Act), to assess civil penalties against Price Construction, Inc. (hereinafter Price) for violations of mandatory safety standards. A hearing was held in

the 118th Judicial District Courtroom, County Courthouse, Big Spring, Texas, on November 7, 1980. Two witnesses were called by MSHA and one witness was called by Price. The parties entered the following stipulations on the record:

> The parties have stipulated to the jurisdiction of the Review Commission.
>
> We have also stipulated as to the coverage of the Act as related to Price Construction, Incorporated, in that Price Construction operates a mine which has products entering into commerce or affecting commerce.
>
> The parties have also stipulated to the company's history of previous violations, and we have agreed that the company has a good history.
>
> The parties have stipulated to the size of the business. The company, Price Construction, Incorporated, the Respondent, is regarded as a small company. The mine involved, the O'Daniel Pit and Plant, is regarded as a medium sized pit.
>
> We have also stipulated to the effect of this particular penalty proceeding on the ability of the operator to continue in business and we have agreed that this will have little or no effect on the operator's ability to continue in business.
>
> The Secretary has marked Petitioner's Exhibit Number 1, a data printout which reflects the assessed violation history of Price Construction Company and the O'Daniel Pit and Plant, and the parties have stipulated that the printout accurately reflects the history of the company.
>
> With respect to the size of the mine, the parties have stipulated that * * * the size of the company is about 95,000 manhours per year. The size of O'Daniel Pit and Plant is approximately 43,000 manhours per year.

The decision rendered orally from the bench at the hearing, following argument by the parties on the fact of violation and the statutory criteria, is reduced to writing below as required by the Rules of Procedure of the Federal Mine Safety and Health Review Commission, 30 C.F.R. 2700.65.

> In an off-the-record conference, the parties have waived the submission of proposed findings of fact and conclusions of law and supporting briefs.
> Pursuant to the parties' stipulation to the accuracy of an exhibit showing that the Price's history is good with 13 paid violations, I accordingly find that the operator's history of previous violations is good.

The parties have stipulated that the Price Construction Company is a small company with approximately 95,000 manhours of work per year and that the O'Daniel Pit is a medium sized operation with approximately 43,000 manhours per year. There are twelve employees at the O'Daniel Pit. I therefore find that Price Construction Company is a small company, and that the O'Daniel Pit is a medium sized operation.

Pursuant to the parties' stipulation, I also find that the assessed penalty in this case will have no effect on the operator's ability to continue in business.

Citation Number 160687 was issued on February 6, 1980 by Federal Mine Safety Inspector, Kenneth Page, in which he noted the condition or practice to be as follows: "Upon arriving at the primary hopper area, an employee was observed standing atop the grizzly breaking a boulder with a twelve pound sledge hammer without the aid of eye protection. The possibility of flying foreign matter striking employee in the eyes and causing injury existed."

The citation was issued at 0800, and the operator was given until 0815 in order to abate the citation. The citation was terminated by the inspector at 0815 with the action to terminate noted as follows: "employee was instructed to wear eye protection and his goggles were supplied and worn during this procedure."

The citation cited a violation of 30 CFR 56.15-4 which reads as follows: "Mandatory. All persons shall wear safety glasses, goggles or face shields, or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

The evidence establishes that there were two persons working on top of a grizzly, a grate or a sieve-type protection over the hopper opening where one of the employees - Mr. Leslie Coleman - was breaking a boulder by striking it with a sledge hammer. Mr. Coleman was not wearing safety type glasses, goggles, face shield or other suitable protective device, although the other person working on the grizzly was doing so.

In this area on the grizzly where boulders are broken by the use of a sledge hammer, a hazard exists which could cause injury to unprotected eyes. This is an operation normally carried on on top of the grizzly since out of a truckload of material there may be four or five boulders so

large that they will not fall through the opening or openings of the grizzly. These must be broken into smaller pieces, and the normal means of doing so is by striking them with a sledge hammer.

Mr. Coleman had been the object of a prior citation for failure to wear eye protection when working on the grizzly. After this time he had quit the employment of Price Construction Company but had subsequently come back to work for that company. He had been cautioned by Mr. Ed Morris, the plant foreman at the O'Daniel Pit on several occasions for failure to wear his glasses or other protective devices. Normally in the past when he failed to wear protective devices, his goggles were in the control tower, a short distance from the grizzly.

On the occasion when the citation was issued on February 6, 1980, Mr. Coleman had left his goggles in the lab area which is near the plant office, about 100 yards from the grizzly. In order to abate the violation, someone in the employ of Price Construction Company had to go and obtain goggles for Mr. Coleman. That took in the nature of fifteen minutes.

There has been testimony from the safety officer, Mr. Jim Hill, who assumed that position in March of 1980 after citation Number 160687 had been issued. He states that there is now a safety program under which he recalls only one instance where a man was working on a feeder without eye protection and he was not on the grizzly breaking rocks. When Mr. Hill assumed his duties as safety officer, he found a set of safety instructions promulgated by Price Construction company for O'Daniel Pit, but the particular operation of breaking rock on top of this grizzly was not included.

Price Construction Company should have been aware of the propensities of Mr. Coleman concerning his failure to wear safety goggles, and further, more strenuous efforts should have been made in order to insure that safety protection was worn by him when breaking rocks on the grizzly. Although some efforts have been made by Price Construction Company in an effort to prevent violations of this type, I find that a requirement to wear eye protection when working on the grizzly in the process of breaking rocks was not effectively enforced.

The failure of Mr. Coleman to wear his safety eye protection was not controverted. Since Respondent did not take adequate action to insure the use of such equipment through an effectively enforced requirement I find that Price Construction Company is in violation of 30 CFR 56.15-4.

The evidence establishes that as Mr. Coleman was breaking the boulder on top of the grizzly by striking it with a twelve pound sledge hammer. Small pieces of rock were flying from the boulder for a considerable distance. It has been established that this distance and the type of chips from the boulder were sufficient to cause an eye injury. I therefore have found it is probable that the violation would result in serious injury.

Inspector Page has testified that the operation of O'Daniel Pit as compared with the operation of the pits of other similar companies is excellent. Nevertheless, our attention must be directed on this occasion to the particular citation that was issued on February 6th. The evidence establishes that the operator should have known of the violation at the time that it was observed by the inspector. Mr. Coleman had a history of failing to wear eye protective devices, and the operator was aware of that history. He reported to work at about 7:00 a.m. that morning, and the violation was observed at 8:00 a.m. Although the main office was a considerable distance from the hopper, the operator could have prevented this violation by an effectively enforced program.

Although it is possible, as Price Construction Company contends, that the violation would have been observed and corrected within an hour after the time of the citation at 8:00 a.m., the evidence nevertheless shows that the violation was observed at 8:00 a.m. by the inspector and that there was nothing in the operator's safety program to prevent that particular violation at that specific time. Breaking boulders with the consequent flying about of rock particles is a normal part of the operation at the hopper. Since Price Construction Company failed to prevent the practice observed by the inspector, I find that the operator was negligent.

As to good faith, the inspector has testified that the abatement efforts by Price Construction Company were excellent. I therefore find that the respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the statutory criteria prescribed by the Act, I find that the appropriate penalty in this case is $60.00. Respondent Price Construction Company is ordered to pay Petitioner, MSHA, the sum of $60.00 within thirty days of the date of this decision.

ORDER

The decision announced from the bench in the above-captioned proceeding is AFFIRMED.

Respondent is ORDERED to pay2 the amount of $60.00 within 30 days of the date of this order if it has not already done so.

Forrest E. Stewart
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 Sections 110(i), and (k) of the Act provide:

"(i) 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. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.

No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court".

~FOOTNOTE_TWO

2 Section 110(j) of the Act provides as follows:

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order".