

CCASE:  
SOL (MSHA) v. BROWN SAND  
DDATE:  
19810501  
TTEXT:

Federal 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. SE 80-124-M  
A.O. No. 09-00265-05004

v.

BROWN BROTHERS SAND CO.,  
RESPONDENT

Junction City Mine

DECISION

Appearances: Ken S. Welsch, Esq., U.S. Department of Labor, Atlanta,  
Georgia, for petitioner  
Carl Brown, Howard, Georgia, pro se, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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 one alleged violation issued pursuant to the Act and implementing regulation. Respondent filed an answer in the proceedings and a hearing was held on April 13, 1981, in Columbus, Georgia, and the parties appeared and participated therein. The parties waived the filing of post-hearing arguments, were afforded the opportunity to make arguments on the record and those have been considered by me in the course of this decision. With the agreement of the parties, I rendered a bench decision in this matter, and it is reduced in writing herein as required by the Commission Rule 65, 29 CFR 2700.65.

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 proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation 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, (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, P.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 CFR 2700.1 et seq.

#### Stipulations

The parties stipulated that the respondent is engaged in a small sand dredging operation, and the company is a family owned business employing approximately seven individuals, and that the respondent is subject to the Act and to MSHA's enforcement jurisdiction. In addition, the parties agreed that the proposed civil penalty will not adversely affect respondent's ability to continue in business, and that the respondent's history of prior violations is reflected in exhibit P-1, an MSHA computer print-out listing seven prior paid citations.

#### Discussion

The respondent has been charged with a violation of the reporting requirements of 30 CFR 50.30(a), and the citation issued by the inspector, No. 099168, at 11:00 a.m., on June 26, 1980, states as follows:

Operator failed to file MSHA form 7000-2 (Quarterly Manhour Report) for 1st qt. of 1980 (Jan.-Feb.-Mar.). This report should have been filed by 4-15-1980.

The inspector fixed the abatement time as 2:00 p.m., June 26, 1980, and the termination notice reflects that the report was completed and mailed on that date at 1:45 p.m.

#### Testimony and Evidence Adduced by the Petitioner

MSHA Inspector Allene T. Jones confirmed that she issued the citation in question during the course of an inspection conducted at the respondent's operation. She stated that she spoke with Mr. Steven Brown, one of the

~1205

respondent's co-owners, and asked him to produce a copy of MSHA Form 7000-2, since she had information that the form had never been submitted or received for the first quarter of 1980. Either Mr. Brown or his secretary filled out a new form while she was at the mine, and Inspector Jones took it with her and mailed it for the respondent (Tr. 28-32).

Inspector Jones testified that the law requires the form in question to be submitted, and that the information which is filed is used for the compilation of violation and accident frequency rates. She also identified a copy of the form in question (exhibit P-3), and stated that Steven Brown told her that the form was not submitted because his father did not want to file any forms and usually "tossed them in the trash can" (Tr. 32-35). On cross-examination, Inspector Jones explained the various computer codes stated on the fact of the form, and explained the rationale for the requirement that the form be filed with MSHA (Tr. 35-39).

MSHA Supervisory Inspector Reino Matson testified that prior to the issuance of the citation in question, namely, in December of 1978, he discussed the requirements of MSHA Form 7000-2, with both Steven and Carl Brown at their office. Respondent had failed at that time to file the quarterly report, and during the discussion Mr. Carl Brown stated that any correspondence from MSHA usually goes in "file 13", and he pointed at the waste paper basket. Mr. Matson stated further that he explained the results of the failure to file the form, advised Mr. Brown that he would have to issue a citation if he did not file the form, and then went to his car and obtained some blank forms for him. Mr. Brown's son Steven advised Mr. Matson at that time that he would file the form, and it was in fact filed, but Mr. Matson issued no citation at that time (Tr. 40-47). Mr. Matson also explained the rationale for the form and the information that is required to be submitted, and indicated that the information is also used for the scheduling of inspections at those mines which show high accident and violation rates (Tr. 57-59).

#### Respondent's Testimony and Evidence

Respondent was given a full opportunity to present any testimony or information it desired in defense of the citation. Both Mr. Carl Brown and Mr. Steven Brown were afforded an opportunity to state their positions, and with my permission, were afforded an opportunity to record the entire hearing with their own tape recording device. Mr. Carl Brown candidly admitted that he threw the form away (Tr. 37). He also alluded to a recent survey he received from the U.S. Department of Interior solicitor certain information concerning his mining operation (Tr. 40), and throughout the hearing expressed his displeasure with forms in general.

In defense of the citation in question, both Mr. Carl Brown and Mr. Steven Brown stated that they felt coerced by the cautionary statement which appears at the top of the form (exhibit P-3),

~1206

which states the criminal sanctions of fines of \$10,000 and imprisonment for five years for making false or fraudulent statements on the form. And, while the statement distinguishes between civil sanctions under the Act, it is altogether possible that they did not distinguish the civil sanctions from the criminal sanctions. Further, it seems clear to me that respondent still believes that the information required to be submitted has no rational relationship to the safety of its employees (Tr. 42, 53, 54, 59, 62, 64).

#### Findings and Conclusions

##### Fact of violation

Petitioner's evidence establishes that the respondent failed to timely file the required report form in question and the respondent does not dispute this fact. As a matter of fact, Mr. Carl Brown admitted that he threw the form away "in the round file" as so much "junk mail". Aside from his obvious displeasure of Government regulations, his defense to the citation was basically an assertion on his part that the information required by the form has no rational relationship to the safety of his work force. One additional defense made during the hearing by Mr. Brown's son Steven, was that respondent simply does not take kindly to being "coerced or forced" to file any forms by any Governmental authority. Both defenses are rejected. I conclude that the petitioner has established a legitimate need for the information in order to carry out part of its statutory duty pursuant to section 103 of the Act. As for the asserted coercion, while there may have been some initial confusion on the part of the respondent with respect to the ramifications of failing to file the form, particularly with respect to the criminal penalty provisions for making false statements as stated on the face of the form, as well as the cautionary statement regarding civil penalties which could be levied for failing to file the information, I believe that any ambiguity or misunderstanding was cleared up at the time the form was submitted to terminate the citation. Under the circumstances, the citation is AFFIRMED.

##### Size of Business and Effect of the Penalty on Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small family owned sand dredging mine operator, and I find that the penalty assessed in this case will not adversely affect respondent's ability to continue in business.

##### Gravity

I conclude and find that the citation issued in this case is nonserious and the petitioner as well as the inspector's who testified in this case conceded as much.

##### Negligence

Although I do not condone Mr. Carl Brown's act of throwing the form away as so much "junk mail", I can understand his initial frustration

~1207

at being required to execute a form which calls for the submission of a variety of information, and which contains notices regarding serious civil and criminal penalties for failure to file or for filing false information. Further, I have considered the fact that Mr. Brown may not have clearly understood the ramifications of his symbolic act of defiance, and considering the volume and substance of all of the letters or protest from Mr. Brown which are a matter of record, it is obvious that Mr. Brown is not too enchanted with the filing requirements of the cited regulation. Nonetheless, since I have concluded that petitioner has shown a legitimate interest in compiling the type of information required by the form as part of its enforcement of mine health and safety, and since it is a regulatory requirement based on the provisions of the Act, compliance is expected of all mine operators, including this respondent. Hopefully, such compliance will be voluntary, and that in the future respondent will comply with the law.

Petitioner's testimony reflects that Mr. Brown was put on notice as early as 1978, that the form in question had to be submitted. As a matter of fact, the inspector obtained the form for him and helped him fill it out. Therefore, I believe that respondent had prior notice of the requirements of the regulation in question, and while his subsequent failure to file borders on gross negligence, I have considered the fact that respondent may have been confused as to what was required and find that the citation in question here resulted from respondent's failure to exercise a reasonable care amounting to ordinary negligence.

#### Good Faith Compliance

The instant citation was abated with the patient assistance of the inspector, and after some prodding by MSHA. Accordingly, I find that respondent exhibited no extraordinary efforts at compliance. Further, petitioner presented evidence and testimony that while the citation in question was abated by the filing of the form by Mr. Steven Brown, two subsequent forms were returned to MSHA by the respondent and were not completed (Exhibits P-4, P-5). No additional citations were issued for these acts of noncompliance, and Inspector Matson explained that it is his policy not to issue citations in these circumstances while a contest or litigation is pending. Since section 104(a) of the Act mandates that citations be issued with reasonable promptness, MSHA may wish to consider the wisdom of such a policy. My observation in this regard is not intended as criticism of the inspector since I believe he acted with remarkable restraint and good judgment considering the fact that he was dealing with a somewhat recalcitrant operator. Just as Mr. Brown has exhibited his frustration, so too have the inspectors who have to deal with him.

#### History of Prior Violations

Respondent's prior history of violations reflects that for the period August 14, 1978, through August 13, 1980, respondent has paid civil penalties amounting to \$324 for seven violations

of mandatory



~1208

safety standards. Based on this prior record, I cannot conclude that this history warrants any increase in the penalty assessed in this case for the citation which I have affirmed.

#### Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of ten (\$10) dollars is reasonable and appropriate for Citation No. 099168, June 26, 1980, 30 CFR 50.30(a), and respondent IS ORDERED to pay the penalty within thirty (30) days of the date of this decision.

#### Postscript

By letter dated April 22, 1981, Mr. Carl Brown stated that he wished to appeal my decision affirming the citation and imposing a ten dollar civil penalty for the violation. Mr. Brown states that his appeal is based on "public sympathy". While the letter was filed after my bench decision was rendered, it was filed before my decision was reduced to writing as required by the Commission's rules. Under the circumstances, any appeal rights which respondent may have begin to run as of the date of this written decision, and I am enclosing a copy of the pertinent Commission procedural rules for filing such appeals.

George A. Koutras  
Administrative Law Judge