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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. WEST 80-164-M
v.	A/C No. 45-02404-05001 H
LOPEZ REDI MIX COMPANY, RESPONDENT	MINE: Lopez Redi Mix Pit & Plant

DECISION

APPEARANCES:

Ernest Scott, Jr., Esq., Office of the Solicitor
United States Department of Labor
8003 Federal Building, Seattle, Washington 98174,
For the Petitioner

Michael W. Smith., Esq.
1010 Sixth Street, P.O. Box 438
Anacortes, Washington 98221,
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The above-captioned civil penalty proceeding was brought pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 820(a) (hereinafter referred to as "the Act").

Pursuant to notice, a hearing on the merits was held in Seattle, Washington on April 28, 1981. The parties waived filing post-hearing briefs.

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, 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

are identified and disposed of where appropriate 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.

FINDINGS OF FACT

1. Richard Leonard Pickering, Jr., is the owner and operator of the Lopez Redi Mix Company, named as respondent in this case.

2. Respondent operates a sand and gravel pit and concrete redi mix business on Lopez Island, San Juan County, in the State of Washington.

3. Respondent operates the business with the assistance of one part time employee who usually drives the truck.

4. Respondent's gross dollar volume of sales per year is approximately $100,000.

5. The respondent's business involves selling sand, gravel and redi mix cement on Lopez Island and Shaw Island. This is accomplished by the extraction of sand and aggregate from a pit located on property owned by the respondent. This product is mixed with cement purchased from suppliers located in Seattle and Bellingham, Washington. The respondent uses a Caterpiller 922B front end loader to extract the material from his pit, purchases diesel oil and gasoline for use in his equipment from Standard Oil Company, delivers the redi mix cement to its customers traveling on county roads on the island, uses the telephone and United States mail service for business purposes and travels at times to Seattle, Washington via a ferry boat to the mainland and on the highways of the State of Washington looking at machinery and equipment (Tr. 10, 11 and 12).

6. Citation no. 354617 was issued to the respondent on September 20, 1979, for a violation of 30 C.F.R. | 56.3-2.

7. On September 20, 1979, during a regular inspection of respondent's pit, MSHA (FOOTNOTE 1) inspector Vern Boston observed an approximately 80 foot high wall on the east side of the pit with fallen trees and loose brush hanging over the top edge. A roadway into the pit was sloped so that the loader would be facing downhill while it was extracting material from the east wall of the pit (Tr. 31).

8. The east wall of the pit appeared stable but one tree had slid off the top and was laying on the sand where it had apparently fallen from the top.

9. Fresh tire tracks at the face of the east wall of the pit indicated that recent loading of material had been performed there (Tr. 37 and 38).

10. MSHA inspector Boston issued a section 107(a) withdrawal order to respondent closing the east wall of the pit until the material had been stripped back no less than 10 feet at the top.

11. After the inspector issued the citation, respondent "barricaded off" the area and stopped the removal of material from that area.

12. Respondent purchased an additional five acres of land behind the east wall in order to correct the situation and have additional gravel to mine. He hired a contractor to remove the tree stumps and the over burden from this land (Tr. 55).

13. Respondent returned to removing the gravel from the east wall after correcting the condition pointed out in the citation without notifying the MSHA inspector (Tr. 24).

DISCUSSION

Citation no. 354617 (FOOTNOTE 2) charges the respondent with having violated mandatory safety standard 56.3-2. The standard provides as follows:

> 56.3-2 Mandatory. Loose, unconsolidated material shall be stripped for a safe distance, but in no case less than 10 feet, from the top of pit or quarry walls, and the loose, unconsolidated material shall be sloped to the angle of repose.

The respondent does not argue that the condition described in the citation issued by inspector Boston did not exist. Instead, he argues that he, as owner and operator of the front end loader involved herein, was the only person exposed to danger and that he was extremely careful. Further, he did not at the time own the adjacent land next to his pit wall and had to get the material he did own out to supply his customers. He argued that his operation was small and did not involve shipments in interstate commerce and was not covered under the Act. Also, in his answer to the Secretary's petition for assessment of penalty, respondent argues that "Lopez Redi Mix Company" has no capacity to be sued as a Respondent.

Relative to the last argument of the respondent, as described above, Richard Leonard Pickering, Jr., testified that he is the owner and operator of the business designated Lopez Redi Mix Company (Tr. 8). Pursuant to Section 3(d) of the Act an operator of a mine is described as follows:

> "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

In lieu of Mr. Pickering's statements in this case as to his being the owner and operator of the Lopez Redi Mix Company, I find there is no merit to his argument that he cannot be charged with a violation of the Act.

The respondent further argues that his mine is not subject to regulation under the Act as the products produced by the sand gravel pit are not destined for shipment in interstate commerce. The undisputed facts show that respondent sells sand, gravel and concrete to customers on the island where the pit is located and on one other island nearby. Admittedly, the products of respondent's mine do not move across state lines but they do affect Commerce under definition of that term in Section 4 of the Act which states as follows:

> Each coal or other mine, the products of which enter Commerce, or the operations or products of which affect Commerce, and each operator of a mine, and every miner in such mine shall be subject to the provisions of the Act.
>
> Section 3(b) of the Act defines "Commerce" as trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or *** between points in the same State but through a point outside thereof.

I find the law well settled on this question and conclude that respondent's mine operations come within the Commerce coverage of the Act. In Fry v. United States, 421 U.S. 542, 547 (1975), the Supreme Court said "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similar situated, affects commerce among the States or with Foreign Nations." See

Heart of Atlanta Motels, Inc. v. United States, 379 U. S. 241, (1964); Wickard v. Filburn, 317 U.S. 111, (1942). In the oft-quoted case of Wickard v. Filburn, supra, the Supreme Court held that wheat grown by an individual farmer for his own consumption is subject to federal regulations if it exerts a substantial economic effect on interstate commerce. The Court said that, even though the farmer's contribution to the demand for wheat may be trivial, that is "not enough to remove him from the scope of federal regulations where, as here, his contribution taken together with that of many others similarly situated, is far from trivial." At p. 127.

Turning to the merits of the issued citation in this case, the facts show that a violation of standard 56.3-2 occurred. Respondent testified that he knew of the overhang and loose material at the top of the east pit wall and that it was dangerous to work under it. However, he stated that he had to get the gravel out (Tr. 15, 16 and 53). He argued that only his life was endangered and that he was careful (Tr. 17). This, of course, is not enough. There was a part time employee who drove a truck into the pit to be loaded and could, conceivably be endangered while in the pit. Further, the Act provides protection for all miners including the owner-operator herein, in spite of himself.

The remaining question is what penalty should be assessed? This requires an analysis of six criteria. 30 U.S.C. | 820(i). Respondent is a small mine operator, but by his own statement, his ability to continue in business would not be affected by any penalty I may impose.

During testimony, there was mention of a prior violation of a similar type as involved herein. However, no proof was forthcoming on this matter and it was denied by the respondent. Counsel for the Secretary, in final argument, stated that he was unclear as to any prior violations as shown on the statement from the assessment office and therefore, appropriate penalty for this violation should not be increased for this reason. The respondent demonstrated good faith by going ahead and barricading this section of the pit, and purchasing additional land next to the pit in order to facilitate correcting the overhang on the east wall. He spent considerable money on having the land "logged" and for the removal of loose material on the top.

I find that the respondent's failure to notify the inspector when he had corrected the condition involved herein was wrong, but that oversight apparently resulted from a lack of understanding of what was required under the Act. The respondent's operation is small and he is not experienced in matters of this type.

Based on the above findings and discussions, I conclude that the appropriate penalty for the violation found is $150.00.

Conclusions of Law

1. I have jurisdiction over the subject matter and the parties to this proceeding.

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2. Respondent violated 30 C.F.R. | 56.3-2 as alleged by the Secretary of Labor.

3. The appropriate penalty for the violation is $150.00.

ORDER

Respondent is ORDERED to pay the sum of $150.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE

1 Mine Safety and Health Administration.

~FOOTNOTE_TWO

2 The citation reads as follows:

The east wall of the pit was approximately 80 feet high, vertically. It was not stripped back. The over-burden containing loose materials and trees were hanging over the rim. The loader that is used to extract materials from beneath the pit wall is a Cat 922B front end loader.