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SOL (MSHA) V. WASHINGTON CORPORATION
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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 PROCEEDINGS DOCKET NO. WEST 81-63-M A/C No. 10-00556-05010 DOCKET NO. WEST 81-64-M A/C No. 10-01382-05002 DOCKET NO. WEST 81-102-M
v.	A/C No. 10-00556-05012 F
WASHINGTON CORPORATION, D/B/A/ WASHINGTON CONSTRUCTION COMPANY, RESPONDENT	DOCKET NO. WEST 80-285-M A/C No. 10-00556-05008 MINE: State Pit El 109 and Dry Valley DOCKET NO. WEST 81-351-M A/C No. 10-00634-05004 MINE: Monsanto Quartize Quarry (Consolidated)

DECISION

Appearances:

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

Mr. James A. Brouelette, Safety Officer
P.O. Box 8989, Missoula, Montana 59807,
For the Respondent

Before: Judge Virgil E. Vail

These consolidated cases arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979), "hereinafter the Act", involve the same parties, and petitions for assessment of civil penalties by the Secretary against the respondent. A hearing on the above cases was held on July 27, 1982, at Idaho Falls, Idaho. The parties waived filing post-hearing briefs.

DOCKET NOS. WEST 81-351-M and WEST 81-64-M

At the commencement of the hearing, the Secretary moved to dismiss Docket No. WEST 81-351-M involving Citation No. 353269 and Docket No. WEST 81-64-M involving Citation No. 350433. The reason presented for dismissing these two cases was that the principle witnesses, the mine inspectors, could not be located and therefore were unavailable for the hearing.

Counsel for the Secretary stated that reasonable effort had been made to locate the inspectors but due to the release of these men from their duties because of a reduction-in-force he was unable to find them. The Secretary stated that without this testimony, he was unable to prove these cases. The motion was unopposed and based on good cause presented, I granted same.

DOCKET NOS. WEST 80-285-M and WEST 81-63-M

Regarding the above two cases, respondent had stated in the answer in both cases the same defense, that is, the timeliness of the Secretary in issuing its proposal for assessment of a penalty. It was agreed by the parties at the hearing that they would present the facts at that time for a ruling thereon.

In Docket No. WEST 80-285-M, Citation No. 351050 was issued to the respondent on August 4, 1978 and abated on August 9, 1978. Citation No. 349218 was issued on July 18, 1979 and was terminated on January 30, 1980. On May 19, 1980, a petition for the assessment of a penalty was proposed for these two citations by the Secretary and filed with the Commission. On December 10, 1981, the Secretary filed a motion to amend its petition for assessment of penalty by vacating Citation No. 349218 as he did not believe that he could prove this citation. This motion is granted and Citation No. 349218 is vacated.

In Docket No. WEST 81-63-M, Citation Nos. 351056, 351057, and 351059 were all issued to the respondent on August 4, 1978. The date of termination of all citations was August 9, 1978 and the proposal of a penalty was made on November 13, 1980. The Secretary filed its petition for assessment of penalty on August 19, 1981. Respondent argues that Section 105(a) of the Act requires that the operator must be notified within a reasonable time after the termination of such inspection or investigation of the penalty proposed. Respondent points out that in Docket WEST No. 81-63-M, the citations were terminated on August 9, 1978 and penalty was not proposed until November 13, 1980, which is more than two years later. In Docket No. WEST 80-285-M, the Citation No. 351058 was terminated on August 9, 1978 and proposal for a penalty was issued on March 11, 1980 which was over a year and a half later. As to both cases, respondent contends that this delay has prejudiced its ability to present a proper defense as it was not feasible to preserve the necessary evidence and is now difficult to know what witnesses would be required or available for presentation at the hearing (Tr. p. 7 and 10).

The Secretary argues that the respondent must show it has been prejudiced by the delay and also whether it had any defense in the first place for without a defense, the passage of time would not prejudice it. Also, that the respondent was put on notice that the violation existed and

that it was reasonable to assume the respondent would preserve such evidence necessary in defense of its position in these pending cases.

The Secretary stated that the delay in filing the proposal of a penalty in these cases was due to the fact that the department responsible for processing these assessments found its established method was not compatible with the volume of citations issued and they had to change their procedures (Tr. p. 9-10).

In these two cases, I reject the Secretary's arguments. Section 105(a) of the Act states in part as follows:

> If, after an inspection or investigation, the Secretary issues a citation under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under 110(a) for the citation cited * * * (Emphasis added).

Obviously, the words "reasonable time" is crucial here. In a recent decision, the Commission considered a similar defense as that raised by the respondent here. In Secretary of Labor v. Salt Lake Count Road Dept., 3 FMSHRC 1714, (July 28, 1981), the Commission reasoned that consideration of procedural fairness to operators, must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself. The Commission proposes two reasoned excuses to reach a fairness for both parties in such procedural matters and states as follows:

> In order to help strike a proper balance and to insure that the Secretary does not ignore section 105(d)'s injunction to act "immediately", we hold that if the Secretary does seek permission to file late, he must predicate his request upon adequate cause. C.F. Valley Camp Coal Co., 1 FMSHRC 791, 792 (1979) (excusing the late filing of an operator's answer for "adequate cause"). Such a requirement will guard against cases of abuse and also comports with analogous leeway extended to private litigants before the Commission. Valley Camp Coal Co., supra. Nevertheless, cases may arise where procedural justice dictates dismissal. While the requirement of showing adequate cause for a filing delay may guard against administrative abuse, a stale penalty proposal may substantially hinder the preparation and presentation of an operators case.

The Commission therefore has established two tests to determine if the late filing of the proposal is in substantial compliance with the Act and,

therefore, should not be dismissed. The Secretary must show that there was adequate cause for the delay. The mine operator on the other hand must show it has been prejudiced by the delay. These two requirements are balanced against each other with the scales weighing heavily on the side of enforcement.

The above tests can be directly applied here. The delay of over two years in Docket No. WEST 81-63-M and over a year and a half in WEST No. 80-285-M is on its face a serious disregard of the objectives established by Congress for prompt assessment of a penalty for effective enforcement of the Act. A reasonable time to implement the assessment procedures by the Secretary should be condoned, but I am persuaded that the time limits of reasonableness were violated in the above two cases. I also find that the lengthy delay here has been inherently prejudicial to the operator's preparation of a proper defense.

For the above stated reasons, the citations in Docket Nos. WEST 81-63-M and WEST 80-285-M are dismissed with prejudice.

DOCKET NO. WEST 81-102-M

STIPULATION

The parties at the hearing jointly agreed to submit the above case upon a stipulation of the facts. The issue for decision herein is, whether a violation of the Act occurred and, if so, whether a penalty should be assessed, and, if so, what the amount of the penalty should be.

The parties stipulated as follows:

1. Paragraph 1 of the petition for assessment of a penalty is admitted.

2. Respondent for all purposes of this proceeding is covered by the Act.

3. At all times material to this action, the respondent was engaged in the operation of a mine located in Soda Springs, Caribou County, Idaho. The name of such mine is Dry Valley Mine.

4. Respondent admits paragraph III of the petition for assessment of penalty.

5. As a result of an investigation of the aforesaid mine by an authorized representative of the Secretary of Labor on or about September 24 and 25 of 1980, Citation No. 350197 was issued to the respondent.

6. A copy of said citation may be admitted into evidence for the purpose of showing what was issued. (Joint Exhibit No. 6)

7. A total penalty of $5,000.00 was proposed for the aforesaid alleged violation.

8. A copy of MSHA's assessed violation history report may be admitted into evidence. (Joint Exhibit No. 5)

9. Respondent employed approximately 325 full time employees from September, 1980 to November, 1981. From December, 1981 to the present time respondent has employed approximately 75 full time employees.

10. Respondent mined approximately 2.5 million tons of phosphate per year on a contract basis during the years 1980 and 1981.

11. Payment of the proposed penalty would not affect respondent's ability to continue in business.

12. Respondent demonstrated good faith in achieving abatement after notification of the alleged violation.

13. The investigation report of John M. Moore, metal and nonmetal mine inspector, United States Department of Labor, may be admitted into evidence as representative of facts supporting the issuance of Citation No. 350197, and the facts pertaining to the accident which he investigated. (Joint Exhibit No. 4)

14. That it is Washington Construction Company's policy and practice that employees engaged in moving rail cars wear safety belts.

15. Respondent's employees are made aware at safety meetings and in training, of the requirement that they utilize safety belts when engaged in moving rail cars.

16. Joint Exhibit No. 1 is a photograph of a portion of the rail car in which Todd Martindale was standing at the initial time of the accident. The platform has been encircled.

17. Joint exhibit No. 2 depicts a full side view of the type of rail car on which Todd Martindale was standing at the initial time of the accident.

18. Joint exhibit No. 3 depicts, among other things, the tipple which is in the immediate area where Todd Martindale was working on the night of the accident.

19. Joint exhibits 1, 2, and 3 may be admitted into evidence. Each fairly or accurately represents the scenes photographed by Mine Safety and Health inspector John Moore.

DISCUSSION

Following a fatal accident which occurred at respondent's mine at Soda Springs, Idaho, on September 23, 1980, a duly authorized representative of the Secretary conducted an investigation and issued Citation No. 350197 alleging a violation of 30 C.F.R. 55.15-5. The citation alleges as follows:

> Todd Martindale, Social Security No. 518-94-7830, victim of a fatality at the Dry Valley Mine Tipple, was not wearing a safety belt at the time of the accident. The victim was standing on the braking systems work platform of the railroad car. The height of the platform from the ground was approximately 7 feet. The victim was knocked to the ground by cars up track striking the cars being loaded.

30 C.F.R. 55.15-5 provides:

> Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the life line when bins, tanks, or other dangerous areas are entered.

From the facts included in the stipulation and the arguments of the parties at the hearing, it does not appear that there is an issue as to how the accident occurred. Further, respondent has a requirement that employees wear safety belts while moving rail cars. Predicated on this, I find that there was a violation of mandatory safety standard 55.15-5.

The respondent argues that it has an established safety program and that in force in that program is the requirement that men wear safety belts while moving rail cars. That the foreman at the time of the accident was having a problem with start-ups and did not have time to check each individual on the job. The foreman was unaware of the fact that men were not wearing safety belts.

James A. Brouelette, safety officer for respondent, testified at the hearing that they have had problems with miners not wearing their safety belts and have threatened them with firing if they didn't comply. No one had been fired as the operator has a large turnover of employees and firing is the last resort (Tr. p. 23-24). He argued that the operator had not incurred an injury in the past for miners not wearing a belt or been cited for this and that the violation was a result of misconduct on the part of the employee and should not be charged as a violation against the operator.

This argument by the operator has been addressed by the Commission in the past. To prove a violation of the standard involved herein, as with most standards, "noncompliance with the standards terms need only be

shown . . . " Eastern Associates Coal Corporation v. Secretary, 4 FMSHRC 835 (May 3, 1982). The mere occurrence of the infraction of the safety standard constitutes a violation since liability is imposed on the mine operator without regard to fault. El Paso Rock Quarries, 3 FMSHRC 35 (1981).

The failure of the miner in this case to wear the safety belt resulted in his death. This was a violation of the standard. Although the operator had a rule regarding the wearing of such belts, they also knew the men did not always comply and should have foreseen that an accident would result. The Court in Heldenfels Bros. v. Marshall, 636 F. 2d 312 (5th Cir. 1981) (unpublished opinion), involving an accident which also resulted solely from fault on the part of an employee, affirmed the principle of both strict liability and vicarious liability peculiar to the mine safety law and stated as follows:

> Heldenfels claims they were denied due process by the imposition of a civil penalty for this alleged violation. Underlying this due process argument is Heldenfel's assertion that there was nothing they could have done to prevent the accident in question. The Secretary responds by pointing out the fact that the Act imposes strict liability on operators for violation of regulations. This argument misses the mark. Heldenfels is not claiming that it should not be held liable since it was not negligent; Heldenfels argues that it should not be held liable because it did not cause the violation of the regulation. However, Section 110(a)(1) of the Act, 30 U.S.C. 820(a)(1), authorizes assessment of a civil penalty against the operator of a mine when a violation of a mandatory regulation occurs at the mine. Thus, Congress has provided for a sort of vicarious liability to accompany the provision for strict liability. (emphasis added).

Therefore, it is found that respondent is liable for the violation of the mandatory safety standard committed by its employee.

ASSESSMENT OF PENALTY

The remaining issue is the amount of the penalty to be assessed against the respondent. The amount of the penalty must relate to the degree of the operator's culpability in terms of wilfulness or negligence, the seriousness of the violation, the size of the business, number of previous violations and respondent's good faith in abating the violative condition.

The stipulation in this case provided that respondent operates a small to moderate size mine and the imposition of a penalty in this case would

not impair their ability to continue in business. The history of prior penalties as shown in joint exhibit No. 5 did not reflect a large number of violations but did show several violations for which large assessments were made indicating several serious types of violations involved. The respondent demonstrated good faith in achieving abatement after notification of the violation in this case.

The uncontroverted evidence of record shows that the respondent made an effort to enforce safety rules at its mine including the use of safety belts. The Secretary in its argument for a penalty related that the mine inspector represented to him that respondent had a good safety policy. (Tr. p. 20) Further, the accident was such that it inflicted injury resulting in death only upon the employee himself and not upon other employees. However, there can be no shifting of responsibility from employer elsewhere for maintaining strict enforcement of its safety rules and although at times the operator may become discouraged, it must still continue to press for compliance from its employees. Because the record is void of evidence that the respondent was willful or grossly negligent in enforcing compliance with the mandatory standard herein, I believe a penalty less than that originally proposed is in order. However, because a grievous injury resulted from the non-compliance herein, a penalty of $1500.00 is assessed.

ORDER

In Docket No. WEST 81-351-M, Citation No. 353269 is vacated.

In Docket No. WEST 81-64-M, Citation No. 350433 is vacated.

In Docket No. WEST 80-285-M, Citation No. 349218 and 351058 are both vacated.

In Docket No. WEST 81-63-M, Citations Nos. 351056, 351057, and 351059 are vacated.

In Docket No. WEST 81-102-M, respondent is ORDERED to pay the Secretary the sum of $1500.00 as a civil penalty for the violation of 30 C.F.R. 55.15-5 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge