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SOL (MSHA) V. WEST MINING
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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-RESPONDENT	Civil Penalty Proceeding Docket No. PENN 82-176 A.O. No. 36-01048-03009
v.	Contest of Citation
WEST FREEDOM MINING CORPORATION, CONTESTANT-RESPONDENT	Docket No. PENN 82-62-R Citation No. 1143078 12/29/81 West Freedom Strip

DECISIONS

Appearances: James Crawford, Attorney, U.S. Department of Labor,
Arlington, Virginia, for the Petitioner-Respondent
Bruno A. Muscatello, Attorney, Butler, Pennsylvania,
for the Contestant-Respondent

Before: Judge Koutras

Statement of the Proceedings

These consolidated cases were heard on the merits in Pittsburgh, Pennsylvania, on September 15, 1982. Docket No. PENN 82-176, concerns a proposal for assessment of civil penalties filed by the Secretary pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalties for two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. Docket PENN 82-62-R is the contest filed by West Freedom Mining Corporation challenging one of the citations issued in the civil penalty case.

Issues

The principal issues presented in these proceedings are (1) whether respondent violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations 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 these decisions.

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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, Pub. 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, 20 C.F.R. 2700.1 et seq.

Discussion

Section 104(a) Citation No. 1143078, was issued on December 29, 1981, at 11:00 a.m., and it alleges a violation of mandatory safety standard 30 CFR 77.410. The condition or practice cited by the inspector is described as follows on the face of the citation:

The automatic warning device which shall give an audible alarm when such equipment is put in reverse for 980 High life operating at 023-0 pit was not operative.

The inspector fixed the abatement time as 2:00 p.m., December 29, 1981, and the termination notice reflects that the cited condition was abated at 12:40 p.m., December 29, 1981.

Section 104(a) Citation No. 1143079, was issued on December 30, 1981, at 8:55 a.m., and it alleges a violation of mandatory safety standard 30 CFR 77.410. The condition or practice cited by the inspector is described as follows on the face of the citation:

The automatic warning device which shall give an audible alarm when such equipment is put in reverse for 41 B Bulldozer (serial number 7553268) was inoperative operating 023.0 pit.

The inspector fixed the abatement time as 1:00 p.m., December 30, 1981, and the termination notice issued by the inspector reflects that he terminated the citation at 8:00 a.m., December 31, 1981, after the cited inoperative alarm was repaired.

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During the course of the hearing, West Freedom's counsel asserted that he contested the citations because the mine operator had initially indicated that no coal was being mined at the subject West Freedom Strip Mine. Counsel stated further that he was led to believe that the mine was a gravel pit mining operation, and since the citations alleged that the violations occurred while the operator was mining coal, he believed that there was no legal basis for MSHA's issuance of the citations. Subsequently, in preparation for the hearing, counsel learned for the first time from the operator that coal was in fact being mined at the mine in question. Under these circumstances, counsel stated that he has no defense to the citations and agreed that they were properly issued and that the conditions or practices cited by the inspector as violations did in fact occur.

West Freedom's counsel indicated that while his original contest asserted that the inspector made findings that the citations were "significant and substantial", he agreed that this assertion was in error and he conceded that the inspector made no such findings (Tr. 5-12).

Findings and Conclusions

Fact of Violations

West Freedom Mining Company does not now contest the fact of violations in these proceedings and admits that the conditions or practices cited by the inspector in the section 104(a) citations constitute violations of mandatory safety standard 30 CFR 77.410 (Tr. 10, 13-14). Accordingly, the citations are AFFIRMED.

History of Prior Violations

Respondent's history of prior violations is reflected in a computer print-out offered by the petitioner during the hearing (Exhibit P-1). That print-out reflects a total of 44 paid violations by the respondent during an 11-year period beginning on January 1, 1970, and ending December 28, 1981. While there are 11 prior citations of section 77.410, three were issued during the 24-month period prior to the issuance of the citations at issue in this case. On the basis of this information, I conclude and find that the respondent has a satisfactory compliance record and I cannot conclude that any additional increases in the civil penalties assessed in this case are warranted.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

Petitioner asserted that the respondent is a medium sized mine operator employing approximately 30 employees with a daily production of 400 tons (Tr. 18). I adopt this as my finding on this issue, and I also find and conclude that the payment of the penalties assessed in these proceedings will not adversely affect the respondent's ability to remain in business.

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Negligence

The record reflects that the automatic back-up alarms were on the two vehicles in questions but were simply inoperative. A preshift or on-shift examination would have discovered the conditions, and it is altogether possible that the alarms were rendered inoperative after the equipment was put in operation. In any event, I conclude that the respondent failed to exercise reasonable care and that this constitutes ordinary negligence as to both citations.

Good Faith Compliance

The record here reflects that citation 1143078 was abated approximately an hour or so after it was issued and prior to the time fixed by the inspector. I find this was rapid compliance. Citation 1143079 was timely abated and I find that as to both citations, the respondent exercised good faith compliance.

Gravity

The information provided by the petitioner reflects that people were working in the pit area where the cited equipment was operating but that the closest person around the equipment was 300 feet away (Tr. 26).

Respondent's counsel pointed out that in connection with citation no. 1143079, the "inspector's statement" reflects that the area was being back-filled, that no one was in the area when the violation was observed, and that the inspector believed that any accident was "improbable" (Tr. 27). No information was forthcoming regarding the other citation.

Although it is true that no one was in close proximity to at least one of the pieces of equipment cited, it is also true that the equipment could seriously injure someone if it were to back over them. This is precisely what the standard is designed to prevent. I conclude and find that the conditions cited were serious (Tr. 28).

Penalty Assessments

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 the civil penalties assessed and proposed by MSHA in these proceedings are reasonable, and they are AFFIRMED.

ORDER

Respondent IS ORDERED to pay the following civil penalties within thirty (30) days of the date of this decision and order, and upon receipt of payment by MSHA, this case is dismissed:

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Citation No.	Date	30 CFR Section	Assessment
1143078	12/29/81	77.410	\$38
1143079	12/30/81	77.410	\$36
			\$74

In view of my disposition of the civil penalty case, West Freedom's Contest filed in Docket PENN 82-62-R, is DISMISSED.

George A. Koutras
Administrative Law Judge