

CCASE:  
SOL (MSHA) V. GLEN IRVAN  
DDATE:  
19831006  
TTEXT:

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. PENN 83-86  
A.C. No. 36-04596-03503

v.

Bark Camp Strip

GLEN IRVAN CORPORATION,  
RESPONDENT

Docket No. PENN 83-87  
A.C. No. 36-02391-03507

Bark Camp No. 1

DECISIONS

Appearances: David Bush, Office of the Solicitor, U.S.  
Department of Labor, Philadelphia, Pennsylvania,  
for Petitioner Robert M. Hanak, Esq., Reynoldsville,  
Pennsylvania, for Respondent

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties 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 14 alleged violations of certain mandatory safety standards found in Parts 50, 75, and 77, Title 30, Code of Federal Regulations. Respondent filed timely answers and the cases were heard in Pittsburgh, Pennsylvania on July 27, 1983, along with two other cases involving these same parties which were heard that day.

Issues

The principal issue presented in these proceedings 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

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for the alleged violations 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.

#### 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, 29 C.F.R. 2700.1 et seq.

#### Stipulations

The parties stipulated that the respondent is subject to the Act, that I have jurisdiction to hear and decide the cases, that the respondent has a good history of prior citations, and that it is a small operator (Tr. 5; 134-137).

#### Discussion

During a colloquy on the record with counsel for the parties in these proceedings, it was made clear to counsel that the Secretary's Part 100 Civil Penalty Assessment regulations are not binding on the Commission or its Judges. It is also clear to me that under the Act all civil penalty proceedings docketed with the Commission and its Judges are de novo and that any penalty assessment to be levied by the Judge is a de novo determination based upon the six statutory criteria found in section 110(i) of the Act, and the evidence and information placed before him during the adjudication of the case. Sellersburg Stone Company, 5 FMSHRC 287, March 1983.

The fact that the petitioner may have determined that some of the violations in issue in these proceedings are not "significant and substantial", and therefore qualify for the so-called "single penalty" assessment of \$20 pursuant to section 100.4, and are not to be considered by the petitioner as part of the respondent's history of prior violations pursuant

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to section 100.3(c), is not controlling or even relevant in these proceedings. Regardless of the Secretary's regulations, once Commission jurisdiction attaches, I am bound to follow and apply the clear mandate of section 110(i) in determining the civil penalty to be assessed for a proven violation after due consideration of all of the criteria enumerated therein. The fact that Congress chose to include language in section 110(i) which arguably authorizes the Secretary not to make findings on the penalty criteria clearly is inapplicable to the Commission.

Section 110(i) of the Act requires Commission consideration of all six penalty criteria, and the fact that the Secretary chooses to ignore \$20 citations as part of a mine operator's compliance record is not controlling when the case is before a Commission Judge. Accordingly, for civil penalty assessment purposes, I will take into consideration all previously paid citations by the respondent, including any "single penalty" \$20 citations which have been paid.

In the course of the hearings in these cases, the parties advised me that they agreed to a proposed settlement for all of the citations which were originally disputed. However, with respect to one of the citations in PENN 83-66, No. 2000776, December 7, 1982, citing a violation of mandatory standard 77.1710(i), the parties advised that the alleged fact of violation is in dispute and testimony from the inspector who issued the citation and the respondent's safety director was offered for the record.

With regard to Docket PENN 83-87, the parties presented their arguments in support of the proposed settlement on the record (Tr. 88-108), including information concerning the six statutory criteria found in section 110(1). After consideration of the arguments presented in support of the proposed settlement, and pursuant to Commission Rule 30, 29 CFR 2700.30, the settlement was approved, and the citations, initial assessments, and the settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
2016781	11/15/82	75.1702	\$ 20	\$ 20
2016783	11/15/82	75.200	46	46
2016784	11/15/82	75.503	20	20
2016785	11/16/82	75.517	79	79
2016787	11/17/82	75.1100-3	20	20
2016789	11/18/82	75.517	112	90
2016791	11/19/82	75.326	20	20
			\$ 317	\$ 295

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In Docket No. PENN 83-86, the parties proposed a reduction of \$20 in the penalty assessed for Citation No. 2000774. However, after considering the circumstances concerning this violation, the proposed settlement reduction was rejected and I approved payment for the full amount of the \$58 penalty assessment (Tr. 75-84; 86).

With regard to Citation Nos. 2000773, 2000696, 2000775, 2000777, and 2000778, after consideration of the arguments presented by the parties in support of their settlement proposals, including information concerning the six statutory criteria found in section 110(i), I approved the proposed settlements requiring the respondent to pay the full amount of the proposed civil penalty assessments (Tr. 41-57). The MSHA inspector who issued the citations and the respondent's safety director were both present in the courtroom and were in agreement with the disposition made of these citations. The citations, initial assessments, and the approved settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
2000773	12/2/82	77.409(a)	\$ 20	\$ 20
2000774	12/2/82	77.1710(i)	58	58
2000696	12/3/82	50.30	20	20
2000775	12/7/82	77.410	20	20
2000777	12/7/82	77.1605(a)	20	20
2000778	12/10/82	77.208(d)	20	20
			\$ 158	\$ 158

With regard to citation no. 2000776 charging a violation of mandatory safety standard 77.1710(i), there is a dispute as to whether or not the facts and circumstances support a violation of the cited standard. The condition or practice is described by the inspector is as follows:

A functional set of seat belts were not provided for the Caterpillar model D9H bulldozer SN 90 V 5229 on which roll-over protection was provided. The seat belts were not functional in that the right seat belt was not provided. The dozer was operating in pit 008 on terrain where a danger of overturning existed. The bulldozer was operating under the supervision of Orland Gray. (Emphasis added).

Section 77.1710(i) provides in pertinent part as follows:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

\* \* \* \*

(i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.

MSHA Inspector John Brighenti confirmed that he issued the citation in question and he explained that at 9:30 a.m. when he inspected the cited bulldozer he told the operator, Merle Stewart that he wished to check the seat belts. The left part of the belt was visible, but he could not see the right part which contained the buckle. After Mr. Stewart advised him that the buckle end of the belt which was not visible was probably wedged under the seat, he and Mr. Stewart pulled up the seat, and while they both observed the remaining portion of the left side of the belt, they could not find the buckle end and Mr. Stewart exclaimed that "it is not here" (Tr. 59-60). Mr. Brighenti then advised foreman Orland Gray that he was going to issue a citation because he could not see or find the missing end of the seat belt. At approximately 10:55 a.m., Mr. Gray shut the bulldozer down, and he and Mr. Stewart proceeded to work on the seat belts. Later, at 11:30 a.m., Mr. Gray approached Mr. Brighenti and advised him that "That's not a violation because the right strap was in there also" (Tr. 61). Mr. Brighenti advised Mr. Gray that since he couldn't find the missing portion of the belt when he first inspected and observed the bulldozer, as far as he was concerned the belt was not "provided" as required by section 77.1710(i), and that the violation would stand (Tr. 59-61).

In explaining why he refused to change his mind after Mr. Gray had advised him that the missing portion of the belt was finally discovered, Mr. Brighenti stated that it was probably wedged down under the seat between the final machine drives and the vehicle frame. Since he and Mr. Stewart could not see or find it after the seat was raised, and since it obviously took Mr. Gray and Mr. Stewart approximately 35 minutes to locate it, Mr. Brighenti was of the view that it was not "provided", was not functional, and was not available to the driver who should have been wearing it (Tr. 62-64). The bulldozer was provided with rollover protection.

Respondent's defense is that the seat belt portion which was not visible to the inspector was in fact "provided" and on the cited bulldozer, albeit it was discovered wedged under the seat after the foreman and the operator made a search for it (Tr. 65). Since the inspector accepted the foreman's word that the missing portion of the belt was later discovered, and since there is no contention or evidence that the respondent

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here installed a new seat belt to achieve abatement, respondent takes the position that the belt was provided and that it complied with the cited section (Tr. 68). Respondent presented no testimony on the violation.

#### Findings and Conclusions

Respondent's defense to Citation No. 2000776 IS REJECTED. On the facts of this case I conclude that the inspector acted reasonably in the circumstances. Since he and the driver could not find the buckle end of the seat belt after lifting the seat and looking for it, the inspector simply concluded that it was missing and issued the citation. Section 77.1710(i) requires the driver to wear the belt while he is operating the bulldozer, and since the driver couldn't locate one end of it after the vehicle was stopped for inspection it seems obvious to me that he was not buckled into the belt while the vehicle was being operated. Accordingly, the citation IS AFFIRMED.

The lack of a totally functional seat belt at the time the citation issued presented a reasonably serious situation which could have been avoided by the exercise of reasonable care on the part of the driver or a supervisor who should have checked the equipment out before placing it in operation. Accordingly, I conclude that the violation was serious and that it resulted from ordinary negligence. I also conclude that the respondent demonstrated good faith compliance and that the payment of a civil penalty in the amount of \$58 as proposed by the petitioner will have no adverse impact on the respondent's ability to continue in business.

#### ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in Docket Nos. PENN 83-86 and PENN 83-87. Respondent is also ORDERED to pay an additional civil penalty in the amount of \$58 for Citation No. 2000776 which I have affirmed in Docket No. PENN 83-86. Payment for all of the assessed violations shall be made to the petitioner within thirty (30) days of the date of these decisions, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras  
Administrative Law Judge