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SOL (MSHA) V. SCORIA BPANCH
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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 80-293-M A.C. No. 02-00973-05003
v.	Summit Mine
SCORIA PRODUCTS BRANCH, ULTRO, INC., RESPONDENT	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
(Respondent failed to appear).

Before: Judge Vail

STATEMENT OF THE CASE

This civil penalty proceeding was initiated by the Secretary of Labor ("Secretary") against Scoria Products Branch, Ultro, Inc., ("Scoria"), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 8 alleged violations of certain mandatory safety standards. After issuance on May 20, 1980, by the Secretary, of his proposal for assessment of civil penalties, Urban Harenberg answered by letter dated May 29, 1980 denying the Summit Mine facility is a mine subject to the Federal Mine Health and Safety Act in that its products do not enter into or affect commerce.

The first Notice of Hearing issued in this case set the hearing date for February 22, 1982. It was continued at the request of the Secretary due to the United States Congress temporarily suspending expenditures of funds in enforcement of these particular cases. No objection was received from Scoria to this continuance. Congress revoked this suspension.

Pursuant to a second Notice of Hearing dated August 15, 1983, a hearing was convened on November 1, 1983, in Flagstaff, Arizona. The Secretary's Counsel appeared with his witnesses prepared to proceed. No one appeared on behalf of Scoria. Urban Harenberg had answered all prior correspondence and represented himself as owner and operator of Scoria. I attempted to locate a telephone number for Harenberg or Scoria in the Flagstaff telephone

directory and surrounding areas, but was unsuccessful. After a delay of thirty minutes, Counsel for the Secretary moved that he be allowed to present the evidence in his case, which was granted.

On November 7, 1983, an Order to Respondent was sent to Urban Harenberg (Scoria) to show cause why he should not be held in default. A reply was received from Harenberg on November 25, 1983, advising that he forgot the date of the hearing and stating that he was "74 years of age, the duration was too long, and I simply forgot."

I find that Scoria is in default of the Notice of Hearing in this case for failing to appear. Harenberg's admission that he simply forgot does not warrant setting a new hearing date in this case. He admitted receiving the notice and being in the area on the date set. I did not rely on some other person to search for his telephone number that morning, but rather did it myself. That I was unsuccessful in locating a listing is unfortunate; however, the fact remains that an effort was made. Also, the Secretary's Counsel and witness appeared at the time and on the date set, at considerable expense and time, as did the Administrative Law Judge for the Federal Mine Safety and Health Review Commission. These considerations persuade me that the reason for respondent's failure to attend is unjustified.

On July 11, 1979, MSHA inspector Virgil Wainscott inspected a mine called Harenberg Pit No. 1. It was a small cinder mining operation employing two men. One operated a front-end loader with the second employee working around a conveyor belt, screener, and hopper. This mine was located fourteen miles north of Flagstaff, Arizona. Inspector Wainscott issued the following citations in which he alleged eight violations of mandatory safety standards:

Citation No. 383422 was issued for a violation of 30 C.F.R. 55.15-3 for failure by the miners to wear proper footwear. Th proposed penalty in this case was $16.00.

Citation No. 383423 was issued for a violation of 30 C.F.R. 55.15-2 for failure by the miners to wear suitable hard hats The proposed penalty in this case was $18.00.

Citation No. 383424 was issued for a violation of 30 C.F.R. 55.14-1 due to the return roller on the main stacker conveyo not being guarded. The proposed penalty in this case was $28.00.

Citation No. 383425 was issued for a violation of 30 C.F.R. 55.14-1 due to the V belt drive on the roll crusher not bein guarded. The proposed penalty in this case was $28.00.

Citation No. 383426 was issued for a violation of 30 C.F.R. 55.12-28 for failure to have tested and recorded resistance reading of the plant ground system. The proposed penalty in this case was $32.00.

Citation No. 383427 was issued for a violation of 30 C.F.R. 55.14-1 due to the tail pulley on the main stacker conveyo being unguarded. The proposed penalty in this case was $28.00.

Citation No. 383428 was issued for a violation of 30 C.F.R. 55.14-1 due to the V belt on the generator being unguarded. Th proposed penalty in this case was $28.00.

Citation No. 383429 was issued for a violation of 30 C.F.R. 55.12-32 due to a lack of a cover plate on the electric moto junction box for the return conveyor belt. The proposed penalty for this violation was $24.00.

ISSUES

The issues 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 penalties filed in this proceeding; 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.

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.

DISCUSSION

The evidence in this case shows that the plant cited here had been in operation for over a year prior to the regular inspection on July 11, 1979. Inspector Wainscott testified that Inspector Rayes Bender had been there in 1978 to explain the new Mine Safety and Health Act of 1977 to the operator. Also, Wainscott and his supervisor stopped three weeks prior to this regular inspection and talked to Ray Harenberg, son of Urban Harenberg, who was in charge of the mine. Again, an explanation of the Act and guarding of equipment was given to Harenberg (Transcript at 27, 28).

Wainscott testified that the miners required the protection of hard hats and safety shoes when working around the plant as they would be exposed to hazards from maintenance work and clean-up in that area (Transcript at 22, 23). A hazard existed from the tail pulley being unguarded, even though it was only two feet above ground, to anyone cleaning up around that area (Transcript at 23). No test had been made of the ground system at the plant as the operator had not obtained the equipment to do this. The obvious hazard here was from not knowing whether it worked and possible electrocution of a miner. Similar electrical hazard existed with the missing cover plate to the junction box (Transcript at 18).

I find from the testimony of Inspector Wainscott that the violations alleged in the 8 citations he issued did exist as described therein.

I further find that any defense raised by Urban Harenberg to jurisdiction is misplaced. The evidence shows that the product from this mine was sold for a commercial use. Whether the product crossed the State of Arizona line is not controlling as this issue has been considered and resolved in numerous cases concluding that sale in intrastate still "affects commerce." Marshall v. Meridith Mining Co. Inc., 483 F.Supp. 737 (1980), W.D.Penn., Marshall v. Kilgore, 478 F.Supp. 4 (E.D.Tenn.1979).

Penalty

In regard to the mine operator cited in these 8 citations, the Secretary has indicated that his evidence shows that this is a small mining operation employing two miners. There is no prior history of violations. However, on two earlier visits, the mine inspectors had explained to the operator what the Act required for the health and safety of the miners employed.

It was also explained that the cited operator had sold the mine shortly after the inspection on July 11, 1979 and did not do the work to abate these citations. The new owner performed this work.

I find that the operator was negligent in allowing the violations contained in the above 8 citations to exist. Prior notice was given on two occasions relative to what the Act required. Apparently, these visits and explanations were ignored.

As to the gravity, I do not find this to be serious in these 8 citations. The evidence shows that the hazards described were not always present as described in the case of the front-end loader operator, not needing a hard hat or safety shoes until he was in the area of the plant and doing maintenance and clean-up. Also, the continuous ground system was found to be effective and not

a hazard. However, the requirement is that it must be tested and a record kept of this.

On the basis of the foregoing findings and conclusions, I conclude that the following penalties are reasonable and appropriate for the citations which have been affirmed in this case.

Citation No.	Penalty
383422	$ 16.00
383423	18.00
383424	28.00
383425	28.00
383426	32.00
383427	28.00
383428	28.00
383429	24.00
Total	$ 202.00

ORDER

The respondent is ORDERED to pay civil penalties in the amounts shown above, totaling $ 202.00 within forty (40) days of the date of this decision and order, and upon receipt by MSHA, this case is DISMISSED.

Virgil E. Vail
Administrative Law Judge