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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. LAKE 83-82 A.C. No. 33-01869-03504
v.	
GETZ COAL SALES, INC., RESPONDENT	Getz Strip

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards promulgated pursuant to the Act. Respondent filed a timely contest and requested a hearing. A hearing was convened in Youngstown, Ohio, on April 12, 1984. Although the petitioner appeared at the hearing, respondent's counsel did not.

As a result of the failure by respondent's counsel to appear, the hearing proceeded without him, and the respondent was held to be in default. Further, in view of this respondent's past history of failing to appear at scheduled hearings, with absolutely no effort on its part to advise the court of its non-appearance, and in view of this respondent's flagrant disregard and obvious contempt for the Commission and its Administrative Law Judges, the respondent has been certified to the Commission for appropriate disciplinary sanctions pursuant to Commission Rule 80, 29 CFR 2700.80. In addition, in view of counsel's contumacious conduct in failing to appear at the hearing pursuant to notice, he too has been certified to the Commission for appropriate disciplinary action.

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 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.

Discussion

This case concerns four section 104(a) citations issued by MSHA Inspector James A. Boyle, during the course of an inspection of the respondent's mine on May 16, 1983, and the cited conditions and practices follow below.

Citation No. 2067133, cites a violation of mandatory safety standard 30 C.F.R. 77.1710(i), and describes the following condition or practice:

> Seatbelts were not provided for the Caterpillar D9G bulldozer (Serial No. 66A 11107) where there is a danger of overturning and where roll protection (ROPS) is provided. Kenny Doren was operating the bulldozer at the 002-0 pit, stripping overburden under the supervision of Roy Cusick, foreman.

Citation No. 2067134, cites a violation of 30 C.F.R. 77.1606(c), and states the following condition or practice:

> An equipment defect affecting safety was present on the caterpillar D9G bulldozer (serial #66A11107), in that the operator cab doors were not maintained in a working condition. The left cab door was held closed with a tarp strap, the latch was missing. The right cab door was held open with a tarp strap, the inside door handle was missing. Kenny Doren was operating the bulldozer at the 002-0 pit, stripping overburden.

Citation No. 2067135, cites a violation of 30 C.F.R. 77.1710(i), and states the following condition or practice:

> Seatbelts were not provided for the Caterpillar 90G bulldozer (Serial No. 66A10646), where there is a danger of overturning and where roll protection (ROPS) is provided. Dave Henry was operating the bulldozer at the 002-0 pit, stripping overburden, under the supervision of Roy Cusick, foreman.

Citation No. 2067136, cites a violation of 30 C.F.R. 77.1606(c), and states the following condition or practice:

> An equipment defect affecting safety was present on the Caterpillar D9G bulldozer (Serial No. 66A 10646), in that the operator's cab doors were not maintained in a working condition. The left cab door latch was missing and the latch was bad, had to be held shut with a piece of wire. Dave Henry was operating the bulldozer at the 002-0 pit, stripping overburden, under the supervision of Roy Cusick, foreman.

Petitioner's Testimony and Evidence

MSHA Inspector James A. Boyle, testified as to his background and experience as a surface mining inspector, and he confirmed that on May 16, 1983, he inspected the Getz Strip Mine, located in the Lisbon, Ohio, area, and owned and operated by Roland A. Getz (Tr. 20-22). He also confirmed that he inspected two Caterpillar D9G bulldozers and that he issued four citations for certain conditions which he found which were in violation of the cited mandatory safety standards (Exhibits P-3 through P-6; Tr. 46).

Mr. Boyle testified that the bulldozers were operating in the 002 pit area stripping overburden, and he described the terrain and conditions under which they were operating. He confirmed that no seatbelts were provided for the cited bulldozers, and that they were both equipped with ROPS (Tr. 23-27).

Mr. Boyle indicated that the area where the bulldozers were observed stripping was "fairly level." However, he also indicated that the cited bulldozers were continuously required to travel up and down a ramp area in order to dispose of the material which they were mining, and that while the area is sometimes slippery when wet, on the day he cited the violations, it was dry (Tr. 25). He described the ramp as being 150 to 155 feet long, with an open end, and he stated that one side would be against the spoil, and the other side would be "open." He also indicated that the distance from the top of the ramp down into the pit was 50 to 70 feet, but that on the day in question it was probably 50 feet (Tr. 28).

Mr. Boyle conceded that while the bulldozers were operating in the pit there would be no danger of their overturning. However, since they had to travel the ramp area during their normal operation, there would be a danger of overturning on the ramp (Tr. 29). He went on to describe the conditions he cited, and he confirmed that the cited equipment was not equipped with the required seatbelts, and that the door on one of the bulldozers had a missing latch and was secured by a strap, and the doors on the other bulldozers were not maintained in proper working order in that the latch and door handle was missing and had to be held shut with a piece of strap (Tr. 30-32). Although the actual mechanical operation of the dozers was not affected, Mr. Boyle believed that the cited conditions did affect the safety of the operators (Tr. 32-34).

In response to further bench questions, Mr. Boyle stated that the reason he did not fill in the "negligence" and "gravity" blanks on the face of the citations which he issued is that since he found that the violations were not "significant and substantial," his instructions were that he was not to fill out those blanks when he issues "non-S & S" violations (Tr. 36-37)

With regard to the conditions of the door latches which he cited, Inspector Boyle was of the opinion that the operators would have difficulty in getting out of the equipment in the event it overturned, and since the bulldozers have hydraulic

lines which run under the machine in the area where the operators are seated, in the event that the transmission got hot and the lines ruptured, there could be a fire, and the operator wouldn't notice it until it spread to where he was seated (Tr. 32-33).

Findings and Conclusions

In view of the respondent's failure to appear at the hearing pursuant to notice, I have considered this as a waiver of his right to be heard on the record and to defend against the violations, and I held him in default. While Commission Rule 63, 29 C.F.R. 2700.63, requires that a show cause order be issued before a party is held in default for failing to answer an order by the Judge, under the circumstances of this case, respondent is not prejudiced by my not issuing such an order. Rule 2700.63(b) authorizes a judge to enter summary civil penalty dispositions where a respondent is in default, and based on this respondent's long history of ignoring notices, orders, and other Commission findings, any further notices to the respondent would simply be fruitless.

Since the respondent failed to appear at the hearing, I have decided this case on the basis of the evidence and testimony presented by the petitioner in support of the citations. After consideration of the unrebutted testimony of Mr. Boyle, as well as the evidence and arguments made by the petitioner in support of its case, I conclude and find that the petitioner has established the fact that the violations occurred as stated by the inspector in the citations which he issued. Accordingly, the citations are all AFFIRMED.

I take note of the fact that one of the purported reasons for the respondent's counsel failing to appear at the hearing is that since the four citations were "single penalty assessments" totalling $80, counsel apparently believed that it was not "worth the litigation effort." However, it is clear that I am not bound by MSHA's proposed initial "single penalty assessments" of $20 for each of the violations in question. Pursuant to section 110(i) of the Act, penalty assessments imposed by the Commission's judges in a contested case docketed before the Commission, are based on the judge's de novo consideration of all of the facts and circumstances surrounding the cited conditions or practices, as well as the six statutory criteria set forth in the Act.

Even if I were to affirm the inspector's findings that these violations were not "significant and substantial," the fact that MSHA imposed an "automatic" initial penalty assessment in the amount of $20 under its regulatory scheme found in Part 100, Title 30, Code of Federal Regulations, is not binding on me. I may reject or accept such an assessment depending on the facts and circumstances presented in any given case. Further, based on my consideration of the evidence and testimony of record, I may also accept or reject the findings by the inspector that the violations were not "significant and substantial," and may modify the citations to reflect these de novo findings.

When asked to explain why he did not consider the cited conditions or practices to be "significant and substantial," inspector Boyle responded as follows (Tr. 37):

> MR. ZOHN: And I believe, and of course, Mr. Boyle could correct me if I'm wrong, he saw the bulldozers on the floor of the pit, rather than on the ramp. And, that the danger of overturning, in almost all cases, is when they push up onto the open, up onto the ramp and as they're backing down onto the open side, they have a tendency to back down faster, so, that's the greatest danger of overturning, is when they are operating on the ramp, which is a common occurrence, or a frequent occurrence, operating in the pit.
>
> JUDGE KOUTRAS: All right. Now, if that's the case, then, again, why wouldn't these be significant or substantial?
>
> MR. ZOHN: Well, that was one of my questions, following up.
>
> BY MR. ZOHN:
>
> Q. If you had to cite these conditions over again, would you have cited them as non S and S, or would you have given them a higher degree of danger?
>
> A. Well, there again, if those two bulldozers were working where there was a definite time that there would be an overturn, say both of them were coming down the ramp, you could make them S and S, then, yeah.
>
> Q. So, in operating on--

A. See, that was one of the biggest things when we went to this non S and S, is where do you draw the line. We've been criticized because we cited a bulldozer out, doing reclamation, that there was no other equipment or persons around.

JUDGE KOUTRAS: I may have been the Judge that did that to you; but, anyway go ahead.

THE WITNESS: But, anyhow, they say, well, you cited them for say, a backup alarm, and there was no one in the area, there was never a hazard, and you made it S and S. But a lot of inspectors base that, the afternoon shift, he may be working in an area where's six people involved. So we cited him in the spoils for a non S and S citation, and that afternoon, he'd be in an area where there would be other equipment and people involved. So, you have to draw the line, and see where this equipment is working and the potential, that, afternoon you definitely know he'll be in another area. So there's where, I think, this whole thing on this S and S, and non S and S, has really confused a lot of us.

BY MR. ZOHN:

Q. I, another question, in that respect, of the classification of these violations; do you, in fact, now have the opportunity to inspect this mine as frequently as you did, say--

A. No. See, there's another thing that certain type mines are getting in, what we refer to, as a pattern on these two inspections a year now. They'll look at their calendar and say, well, it's April, he's due, and we'll fix things up; where the other five months of the year, he won't. And it's really hurt the safety and health part of it, on these only two inspections.

* * * * * * * * * *

BY MR. ZOHN:

Q. Okay. So were these bulldozers operating on the ramp, during the course of that day? Would they be operating on--

A. Yes. One would. And see when you have--

JUDGE KOUTRAS: Excuse me, you say one would?

THE WITNESS: One was, and then, the other was ripping, and then, when he gets so much ripped, then they'd both be pushing off this.

JUDGE KOUTRAS: Okay.

BY MR. ZOHN:

Q. Did you see them operating up on the incline, at all?

A. Yeah.

Q. All right. Based upon your observations of them operating on the incline, would you have issued them now as S and S citations?

A. I'd have to check the area first, and see how much of a danger there was. Now, these can be, these ramps can be anywhere from forty foot wide to seventy foot wide, and if they're both going up the middle, there is no danger there, but one time or another, the ones on the edge, there is a danger there then.

MR. ZOHN: I don't have any further questions, your Honor.

JUDGE KOUTRAS: Okay. What the, do you recall what the widths of the ramps were, on these days?

THE WITNESS: I think those, the ramps, that day, were in the neighborhood of forty to fifty feet wide.

Significant and Substantial

On the facts of this case, I conclude and find that the violations cited by Inspector Boyle were significant and substantial. His testimony is that the two bulldozers operated on a daily basis in the pits, and while it is true that at the time he observed them they were running on fairly level terrain, he also indicated that they traveled up and down an inclined ramp, and that there was a danger of overturning. Further, in the event of an accident, or overturning, Mr. Boyle further testified that the condition of the cab

doors, the lack of proper latches, and one or more missing handles, would likely trap the operators in the cabs in the event the equipment overturned, and that they would have difficulty in getting out of the equipment. Given these circumstances, I conclude and find that it was reasonably likely that an injury would result from the cited conditions or practices. Accordingly, the violations are modified to reflect that they were significant and substantial, and the inspector's initial findings to the contrary are rejected.

Gravity

I find that all of these citations constitute serious violations. Failure to provide seatbelts and the lack of door handles on the operator's cab, presented a serious hazard to the equipment operator in the event of an accident. If the bulldozers were to overturn, the lack of seatbelts would likely throw the operators out of the cab, and the lack of adequate door handles would prevent their escape from the vehicles in the event of an emergency, particularly if the overturned equipment were to come to rest on the one "good-side" of the cab.

Negligence

Inspector Boyle believed that the respondent's negligence with respect to the condition of the doors on the cited bulldozers was moderate. He stated that with the older bulldozers, while it was difficult to obtain parts such as door handles, he still allowed them to be operated (Tr. 34; 36). Mr. Boyle also confirmed that the foreman was aware that seatbelts were required (Tr. 29). I conclude and find that the violations resulted from ordinary negligence on the part of the respondent.

Good Faith Compliance

Inspector Boyle confirmed that abatement was achieved in a timely manner by the respondent, and the door handles were replaced (Tr. 29; 34-36). He also confirmed that seatbelts were installed. Under the circumstances, I conclude and find that the respondent timely abated the cited conditions and practices, and insofar as the citations are concerned, abated them in good faith.

History of Prior Violations

Exhibits P-1 and P-2, are computer print-outs of the respondent's history of prior violations for the period May 16, 1981 through May 15, 1983, and prior to May 16, 1981. Prior to May 16, 1981, the respondent was assessed for a total of 17 citations, two of which were paid. For the period May 16, 1981, through May 15, 1983, respondent was assessed for two citations, and they remain unpaid.

Based on the respondent's past compliance record, as reflected in the print-outs, I cannot conclude that it is per se a bad record of compliance warranting additional increases in the civil penalties which I have assessed for the four violations which have been affirmed. What I have difficulty comprehending is why this respondent, with an otherwise good compliance record, consistently ignores and flaunts the law after he has abated the conditions, and seeks to be heard through the hearing process.

Size of Business and Effect of Civil Penalties on The Respondent's Ability to Continue in Business

The record reflects that the respondent is a small strip mine operator. Absent any evidence to the contrary, and in view of the respondent's failure to appear and argue otherwise, I cannot conclude that the civil penalties assessed by me for the citations which have been affirmed will adversely affect the respondent's ability to continue in business.

During his closing argument on the record, petitioner's counsel requested a substantial increase in the initial penalty assessments proposed for these violations, and he did so on the basis of the evidence and testimony which indicated that the bulldozers in question were operating in areas where there was a danger of overturning, that no seatbelts at all were provided, and that the lack of adequate door handles and latches would entrap the operators if the vehicles were to overturn. Counsel also agreed that I was not bound by the initial MSHA assessments made for these violations, and he alluded to the fact that the respondent has a history of flaunting the law (Tr. 47-48).

Petitioner's counsel also moved that in view of the failure of the respondent or his counsel to appear in this proceeding, that I refer the matter to the Commission for appropriate disciplinary action pursuant to the Commission's rules. In support of his motion, counsel argued that the respondent has an obvious contempt for these proceedings, that this is not the first time he has failed to appear at a hearing, and that in each instance where other Commission

Judges have ordered payments of civil penalties, or that respondent answer show-cause or other orders, he has flagrantly disregarded them. Counsel also stated that the respondent has made no payments for any civil penalties ordered by the Commission Judges in past proceedings, and that the Department of Labor has sought injunctions against the respondent for non-payment of penalties in the United States District Court (Tr. 12-15; 48-50). Petitioner's counsel also stated that the respondent and his foremen treat MSHA inspectors with general disrespect and that the respondent attempts to avoid the law rather than obey it (Tr. 16).

In support of his assertion that the respondent has flagrantly disregarded the authority and jurisdiction of the Commission, petitioner's counsel alluded to several prior decisions and orders issued by me, by Chief Judge Merlin, and Judges Broderick and Melick, and a discussion of these follow below:

In MSHA v. Getz Coal Sales, Inc., VINC 79-60-P, decided by me on August 7, 1980, 2 FMSHRC 2172, respondent Roland Getz failed to appear at a hearing convened in Warren, Ohio, and he did so without prior notice that he would not appear. He simply ignored the notice, and my personal telephone call to him the morning of the hearing. In that case, he specifically requested a hearing, and did not even give me the courtesy of a telephone call that he would not appear. He was defaulted, and an order was entered that he pay the assessed civil penalty of $75.

In MSHA v. Getz Coal Sales, Inc., LAKE 80-396, Judge Broderick entered a default order on February 9, 1981, requiring the respondent to pay a penalty of $26 for his failure to file an answer or otherwise respond to the Judge's show-cause order. Judge Merlin issued a similar default order on May 13, 1983, in MSHA v. Getz Coal Sales, Inc., LAKE 83-4, and ordered the respondent to make an immediate payment of $46.

In MSHA v. Getz Coal Sales, Inc., LAKE 83-86, Judge Melick approved a settlement motion calling for the respondent to pay a $30 assessment in satisfaction of a citation initially assessed as $42, and in that case, as well as the others noted above, petitioner's counsel states that respondent has made absolutely no payments, and has simply ignored the orders issued by the Judges.

Respondent's Failure to Appear at The Hearing

The record in this case reflects that both the respondent and his counsel received notice of the hearing scheduled in this case, and the postal certified mailing receipts which are part of the record attest to that fact. Respondent received my original hearing notice issued on January 16, 1984, and his counsel received the amended notice issued March 22, 1984, advising him of the specific hearing site. These notices were issued well in advance of the scheduled hearing on April 12, 1984.

In addition to the written notices served on the respondent and his counsel, petitioner's counsel advised me that he personally spoke with respondent's counsel on the day before the hearing and advised him that he should appear. When counsel failed to appear the morning of the hearing, I personally telephoned his office and was advised by his clerical staff that he was away, but that he was aware of the fact that this matter was scheduled for hearing. Given these circumstances, it seems clear to me that respondent and its counsel had ample notice of the hearing, yet they flagrantly ignored the notices and orders.

Although respondent Roland Getz has a history of obvious contempt for these legal proceedings, and apparently derives some vicarious pleasure by thumbing his nose at the Department of Labor, as well as the Commission, I fail to understand and comprehend counsel Neal S. Tostenson's conduct in ignoring the notices served on him in this proceeding. As a member of the Bar, I would think that he would be cognizant of his ethical responsibilities as counsel of record in these proceedings, and act accordingly. If counsel conducted his practice in this manner while before a United States District Court, he would more than likely find himself in contempt of court. Lacking such contempt powers, I do have the discretion to certify the matter to the Commission for possible disciplinary action under its rules, and I may also consider referring the matter to the local bar where counsel is admitted to practice.

After careful consideration of the motion made by petitioner's counsel to certify this matter, IT IS GRANTED, and the matter will be certified to the Commission for consideration of appropriate disciplinary action under 29 C.F.R. 2700.80.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and considering the statutory criteria found in section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate for the violations which have been affirmed.

Citation No.	Date	30 CFR Section	Assessment
2067133	5/16/83	77.1710(i)	$135
2067134	5/16/83	77.1606(c)	175
2067135	5/16/83	77.1710(i)	135
2067136	5/16/83	77.1606(c)	175
			$620

ORDER

Respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date of this decision, and payment is to be made to MSHA.

IT IS FURTHER ORDERED THAT:

> In view of the circumstances surrounding the respondent's apparent flagrant disregard for the authority and jurisdiction of the Commission, and in view of Counsel Neal S. Tostenson's failure to appear at the scheduled hearing pursuant to notice duly served on him, the matter is referred to the Commission pursuant to Rule 80, 29 CFR 2700.80. See: Secretary of Labor ex rel. Roy A. Jones v. James Oliver & Wayne Seal, FMSHRC Docket No. NORT 78-415, March 27, 1979; Canterbury Coal Co., 1 FMSHRC 335 (May 1979); Secretary of Labor v. Co-Op Mining Company, 1 FMSHRC 971 (July 1979) (Disciplinary Proceeding No. D-79-2).

George A. Koutras
Administrative Law Judge