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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

v.

KENNECOTT MINERALS COMPANY,
UTAH COPPER DIVISION,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 83-5-M
A.C. No. 42-01660-05501

Ore Haulage Plant

DECISION

Appearances: James H. Barkley, Esq., Peggy Miller, Esq., Office
of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle &
Latimer, Salt Lake City, Utah,
for Respondent.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the
Act), arose from an inspection of respondent's ore haulage plant.
The Secretary of Labor seeks to impose a civil penalty because
respondent allegedly violated a provision of the Act.

Respondent denies that a violation occurred.

After notice to the parties, a hearing on the merits was
held in Salt Lake City, Utah on September 20, 1983.

The parties waived the right to file post trial briefs.

Issues

The issues are whether respondent violated the Act; if so,
what penalty is appropriate.

Citation 579438

This citation alleges respondent violated Section 109(a) of
the Act. The cited section provides as follows:

Posting of Orders and Decisions

Section 109(a). At each coal or other mine there shall
be maintained an office with a conspicuous sign

designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

Summary of the Evidence

MSHA's evidence: On April 29, 1982, as the result of an accident investigation at the ore haulage plant, MSHA Inspector William W. Wilson issued Citation 579438. The citation, issued at 2 a.m. was given to respondent's representative Frank Klobchar. The citation was not posted while Wilson was on respondent's property (Tr. 14-16, Exhibit P1).

The following morning Fred Peterson, a representative of the miners on the Magna Safety Committee of the United Steel Workers, (Local 392), called Wilson and advised him that the citation could not be located. Thirty minutes later Wilson told Peterson to recheck. On the recheck he was to be accompanied by a witness. Peterson reconfirmed to Wilson that he could not locate the citation (Tr. 16, 17).

Wilson went to the plant, arriving there at 9:30 a.m. on April 30, 1982 (Tr. 17). Wilson looked on the track office bulletin board but he did not find the citation (Tr. 18). The accident for which the citation had been issued involved primarily personnel from the track repair and maintenance crews (Tr. 18). The time cards for these workers are kept at the track yard office (Tr. 18).

Exhibit P2 indicates that respondent's concentrator plant and ore haulage plant are, in their totality, complex areas. The area includes a "time office", a "track yard office", and a small "time clock office" (Tr. 19-20, Exhibit P1, P2).

On April 30th Inspector Wilson checked but could not locate the citation in the yard office or change room for the track yard (Tr. 21).

Assignments are made by supervisors at the yard office. In addition, the supervisors' offices are there. Personnel also

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change clothes there. The area also has a small lunchroom (Tr. 21). At this location the trackmen (the class of workers involved in the accident) usually have lunch, change and receive their instructions (Tr. 22).

In the near vicinity, across a number of railroad tracks, is the building known as the "time clock." This building, which is also for the track people, had not been checked by the inspector (Tr. 22).

In a conversation with the inspector on April 30th between 9:45 a.m. and 10:30 a.m., respondent's safety representatives indicated the citation had not been posted (Tr. 22-23).

Inspector Wilson opted that the citation should have been posted in the "track yard office." But he had checked and it was not at that location (Tr. 24, 25).

Witness Fred Peterson confirmed that he complained to MSHA that the citation had not been posted. After calling the MSHA office Peterson checked for the citation at the "time office", the "yardmaster office", the "trackmen change room", and the "time clock" areas (Tr. 30).

In Peterson's view the normal procedure at the site is to place information on the bulletin board at the yardmaster's office. But the best location to convey the information would be to post it on a small bulletin board inside the trackman's change room (Tr. 32). Trackmen would not look for any information posted at the "time clock" office (Tr. 32). Posting in the time clock building would be contrary to Peterson's experience at the plant (Tr. 32, 33).

Witness Steven Pollock, a trackman in April 1982, was familiar with the "time clock" building. He punches in and out at that location on a daily basis (Tr. 39-40). In April 1982 the "time clock" building did not have a bulletin board (Tr. 40). In Pollack's view the proper places to post notices is on the bulletin board in front of the old change room or on one of the two bulletin boards in the new change room (Tr. 41). Pollack would never go to the "time clock" building for information (Tr. 41). Prior to this litigation Pollard hadn't seen any information posted in the "time clock" building (Tr. 43).

In December 1983 the Union Safety Committee, in a letter to the company, requested that a bulletin board be maintained at the concentrator plant time office for the posting of citations, etc. (Exhibit P3).

Respondent's safety and health engineer Frank Klobchar testified for the respondent.

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After he received the citation Klobchar made copies and went to a staff meeting. He posted the citation between 5:00 to 5:30 p.m. in the ore haulage track time office building used by the track people (Tr. 47-49). Wilson, in a telephone call, told Klobchar that he had not looked for the citation at that particular location (Tr. 49).

Photographs, taken the following week, showed where the citation had been posted by Klobchar (Tr. 50, Exhibit R1).

The practice has been to post citations at the time clocks. Klobchar had never previously posted anything at the location where he posted the April 29 citation (Tr. 53, 54).

Discussion

The facts establish a violation of the Act.

The citation issued on April 29th was not posted "immediately" as the Act requires. Further, it was not, even under respondent's evidence, posted at a location where it would be protected against unauthorized removal.

On the initial issue Inspector Wilson testified that he issued the citation at 2 a.m. on April 29 (Tr. 15-16). However, the citation itself indicates it was issued at 10:20, on a 24 hour time clock. Even if it was issued at the later time, a delay of more than six hours occurred before it was posted. Klobchar testified the citation was not posted until 5:00 to 5:30 p.m.

"Immediately", as defined in Section 109(a) of the Act, means "without interval of time, without delay, straightway, or without any delay and lapse of time", Black's Law Dictionary, 5th Edition, 1979.

Further, respondent's witness Klobchar agrees that at the location where he posted the citation there was nothing that would have prevented its unauthorized removal (Tr. 54). In this respect the location chosen, accordingly, did not comply with Section 109(a) of the Act.

Procedural Issues

At the conclusion of the hearing respondent moved the judge adopt the findings of fact contained in the judge's order of March 2, 1983. The order denied respondent's motion for summary judgment.

The Secretary's objection was sustained on the grounds that such a procedure would effectively deny the Secretary his right of cross-examination. The right of cross-examination is mandated under the Administrative Procedure Act, 5 U.S.C. 556. Further,

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since the function of the judge when resolving a summary judgment motion is to determine if a genuine factual dispute exists, affidavits may not be employed to resolve disputed factual issues. They may be used only to determine whether any issues actually are in dispute. U.S. ex rel Jones v. Rundle, 453 F.2d 147, 150, Third Circuit, (1971); Fed.R.Civ.P., Rule 56.

Accordingly, I reaffirm my original ruling.

CIVIL PENALTY

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. 820(i).

Considering the evidence offered at the hearing on cases heard at the same time as the instant case (WEST 81-242-M; WEST 81-243-M) I find that the operator has a history of 58 prior violations. The minimal penalty will not affect the operator's ability to continue in business and it is appropriate in relation to the large size of the operator. The operator was negligent but a posting violation of this type is of minimal gravity. The file reflects that the operator rapidly abated the violation.

On balance, the proposed penalty of \$20 is appropriate and it should be affirmed.

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

Citation 579438 and the proposed penalty of \$20 are affirmed.

John J. Morris
Administrative Law Judge