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SOL (MSHA) V. VULCAN MATERIALS
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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 85-26-M A.C. No. 47-00220-05503
v.	Oshkosh Mine (Yard 396)
VULCAN MATERIALS COMPANY, RESPONDENT	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on February 11, 1985, a motion for approval of settlement. Under the parties' settlement agreement, respondent would pay a reduced penalty of $750 instead of the penalty of $1,000 proposed by MSHA for the single violation of 30 C.F.R. 56.9-3 alleged in this proceeding.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. The motion for approval of settlement and other pleadings in the official file provide information regarding the six criteria. The proposed assessment sheet indicates that over 27,000 annual hours were worked at respondent's mine involved in this proceeding and that the controlling company worked annual hours of approximately 5,100,000. Those working hours support a finding that respondent operates a large business and that any penalty determined in this proceeding should be in an upper range of magnitude to the extent that it is based on the criterion of the size of respondent's business.

The motion for approval of settlement states that payment of the penalty agreed upon by the parties will not cause respondent to discontinue in business. Therefore, it is not necessary to reduce the penalty by any amount under the criterion that payment of penalties would cause respondent to discontinue in business.

The proposed assessment sheet shows that respondent has been assessed with only one alleged violation during six inspection days for the 24-month period preceding the writing of the order involved in this proceeding. Use of those

statistics to make the calculation described in 30 C.F.R. 100.3(c) of MSHA's assessment formula results in a conclusion that no portion of the penalty should be assessed under the criterion of respondent's history of previous violations.

The penalty of $1,000 proposed by MSHA in this proceeding is based upon a waiver of the use of the routine assessment formula described in section 100.3 and the determination of a penalty pursuant to narrative findings, as described in section 100.5. The narrative findings do not give respondent any reduction in the penalty under the criterion of whether respondent demonstrated a good-faith effort to achieve compliance after the combined order and citation were issued. A subsequent action sheet in the official file, however, indicates that the order was terminated on August 2, 1984, after new brake shoes and other equipment had been installed. The inspector's termination states that the truck "was in good, safe operating condition". Inasmuch as the citation was alleged in an order, the inspector did not specify a time for abatement. MSHA does not provide an operator with the 30-percent reduction for good-faith abatement, pursuant to section 100.3(f), unless a citation containing an inspector's time for abatement is involved. In view of the extensive rebuilding of the truck's brakes in this instance, it would be appropriate to allow for some reduction of the penalty under the criterion of good-faith abatement.

The foregoing conclusion is based in part on the statement in respondent's answer to the proposal for assessment of civil penalty to the effect that the truck being used when the order was issued was a spare truck which was utilized only when two regular trucks normally used were out of service for maintenance or repair. The fact that the brakes on the spare truck were completely overhauled indicates that respondent was concerned about having the spare truck restored to the "good, safe operating condition" referred to by the inspector's termination sheet.

The remaining two criteria of negligence and gravity require a brief discussion of the situation which caused the issuance of the order and citation. An off-road production truck was used to haul limestone from the quarry to the crusher. It traversed some steep inclines in doing so. When the driver of the truck applied the truck's brakes, they were inadequate to stop the truck. The inspector considered respondent to be very negligent for allowing the truck to be operated with defective brakes and he believed that the truck constituted an imminent danger in the circumstances.

It is not possible to determine how much of the proposed $1,000 penalty was specifically allocated by MSHA under the criterion of negligence. The motion for approval of settlement

indicates that the truck's brakes were inspected by a foreman prior to the time that the truck was placed in service and found to be adequate. Respondent's answer to the proposal for assessment of penalty states that it is the company's policy to require the drivers of all mobile equipment to make safety checks of the equipment prior to operating it and to report any defects to the foreman. Respondent states that the driver of the truck in question failed to report any defective brakes to his foreman on the day the order was issued.

Respondent's answer also alleges that the truck driver was displeased by the fact that he was required to operate the spare truck which had a mechanical shift as opposed to the automatic transmission with which the trucks in normal usage are equipped. It is further alleged that the driver of the truck may have deliberately driven through deep water in the quarry to reduce the effectiveness of the truck's brakes before calling them to the attention of the inspector.

It is not possible to determine from the motion for approval of settlement exactly how much weight the parties gave to the above allegations in agreeing to reduce the proposed penalty, but the motion indicates that the Secretary's counsel discussed the allegations with the inspector. Apparently, there was sufficient merit to some of respondent's contentions to cause the Secretary's counsel to conclude that the degree of respondent's negligence was not as great as it was previously considered to be by MSHA when a penalty of $1,000 was proposed.

There is little doubt but that the violation was serious since it appears that the brakes would not bring the truck to a stop at a time when the truck was empty.

The discussion above indicates that the parties agreed to reduce the penalty to $750, primarily under the criterion of negligence. If a hearing had been held, it is likely that a credibility determination would have had to be made as to the degree of the operator's negligence. If it had been proven at the hearing that the driver failed to report the truck's inadequate brakes to the foreman prior to complaining about them to the inspector, there would have been considerable support for a finding that respondent's negligence was not so great as to warrant a penalty of $1,000. In such circumstances, I find that the parties have given a reasonable basis for agreeing to a reduction of the proposed penalty from $1,000 to $750.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the parties' settlement agreement is approved.

(B) Within 30 days from the date of this decision, Vulcan Materials Company shall pay a civil penalty of $750.00 for the violation of section 56.9-3 alleged in Order and Citation No. 2088669 dated July 18, 1984.

Richard C. Steffey
Administrative Law Judge