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SOL (MSHA) v. LATROBE MINING
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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. PENN 85-145 A.C. No. 36-07524-03502
v.	
LATROBE MINING COMPANY, INCORPORATED, RESPONDENT	Lytle Strip Mine

DECISION

Appearances: James E. Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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), seeking a civil penalty assessment of $300 for an alleged violation of 30 C.F.R. 48.28(a), because of the asserted failure by the respondent to give annual refresher training to two of its miners. The two affected miners are Donald Lupyan, the mine operator, and Kevin Fodor, a mine employee. They were the only two full-time mine employees working at the mine, and according to the inspector, an occasional part-time employee was hired by Mr. Lupyan as required.

The respondent contested the violation and requested a hearing. Pursuant to notice, a hearing was convened in Pittsburgh, Pennsylvania on August 29, 1985, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without him. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived his opportunity to be further heard in this matter.

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, 20 C.F.R. 2700.1 et seq.

Issue

The issue presented in this case is whether the petitioner has established a violation of section 30 C.F.R. 48.28(a), and if so, the appropriate civil penalty that should be assessed for the violation.

MSHA's Testimony and Evidence

The following MSHA exhibits were received in evidence in this proceeding:

1. A copy of the section 104(a) Citation No. 2406404, issued by Inspector Wendell E. Hill on October 2, 1984.

2. A copy of a section 104(g)(1) order withdrawing the untrained miners from the mine.

3. A copy of the respondent's legal identity report filed with MSHA's district office.

4. A copy of the respondent's MSHA approved training plan which was in effect at the time the citation was issued by Inspector Hill.

MSHA Inspector Wendell E. Hill testified that he conducted an inspection of the mine on October 2, 1984, because the mine had just changed ownership, and that it is MSHA's policy to conduct an inspection when a new operator begins mining.

Inspector Hill confirmed that he has inspected the mine since 1982 under previous owners. He stated that Mr. Lupyan filed his legal identity report with MSHA in January, 1984 (Exhibit 3), and began mining in October, 1984. Mr. Hill last visited the mine on August 22, 1985, and prior to that had gone there for inspections in May and July. However, since no one was there, Mr. Hill conducted no inspections. Mr. Hill confirmed that during these visits, he observed a

small stockpile of coal, and rusty equipment simply parked by a trailer which serves as the mine office. These observations led him to conclude that active mining was not taking place. Mr. Hill also indicated that the land owner had advised him that someone had visited the site to sow some seed, but that strip mining was not taking place. Mr. Hill confirmed that the respondent has filed no changes to the mine legal identity form, and that as far as MSHA is concerned, Mr. Lupyan is still considered the legal operator of the mine for MSHA's enforcement purposes.

Inspector Hill testified that at the time of his inspection, Mr. Lupyan and Mr. Fodor were constructing a surface silt pond with bulldozers. They were digging a hole approximately 20 feet deep. They were within 50 feet of the highwall, and he believed that prior work that they had performed would necessarily bring them close to the highwall. Since the surface strip mine in question was above an old abandoned underground mine, those miners working on the surface have to be aware of the terrain and possible surface cracks. Without the proper training, they may be unaware of these and possibly other hazards.

Mr. Hill testified that during his inspection he asked Mr. Lupyan and Mr. Fodor if they had completed their annual training, and when they indicated that they had, he asked to see their training certificates. The certificates they produced were dated September 19, 1983, and since they were outdated and Mr. Lupyan and Mr. Fodor could produce no evidence that they had received training during the past year, he issued the citation. He also issued a withdrawal order pursuant to section 104(g)(1) of the Act (Exhibit 2).

Mr. Hill confirmed that he abated the citation the day after it was issued after Mr. Lupyan and Mr. Fodor produced new training certificates indicating that they had received their annual refresher training.

Findings and Conclusions

Respondent's Failure to Appear at the Hearing

The record in this case reflects that the initial Notice of Hearing was mailed to the respondent at his address of record by certified mail on July 10, 1985. The Amended Notice of Hearing advising the respondent of the specific hearing location was similarly mailed on August 13, 1985. However, the postal service registered return receipt cards

were not returned, nor have the notices of hearing been returned as undeliverable.

Petitioner's counsel stated at the hearing that he had attempted to contact Mr. Lupyan on several occasions, both at his residence and at the mine telephone number listed on his records. In each instance, Mr. Lupyan was unavailable and did not return any of counsel's calls or otherwise respond to the messages left for him. Counsel also indicated that he had written to Mr. Lupyan concerning the case but received no response (Tr. 8).

On August 26, 1985, I placed a telephone call to the respondent's mine at the number listed in the file. An answering service (Renee) advised me that Mr. Lupyan was not available. I left a message detailing the date, time, and place of the hearing, and the answering service assured me that the message would be passed on to Mr. Lupyan.

On Thursday morning, August 29, 1985, at approximately 10:00 a.m., and prior to the commencement of the hearing, I placed a telephone call to the respondent's mine and spoke with an individual who identified himself as Mr. Hanley. He advised that he was the caretaker, and informed me that he was not employed by the respondent and had no connection with his mining operation. He also informed me that Mr. Lupyan has not picked up the mail which has been accumulating at the mine, and that the mine is not producing any coal. He explained further that Mr. Lupyan is no longer the president of Latrobe Mining Company, and he identified the new president as a Mr. Paul Shaw. Mr. Hanley also advised me that there was no one at the property that could give me any information and he knew absolutely nothing about the hearing (Tr. 6-7).

In the case of Secretary of Labor v. Little Sandy Coal Sales, Inc., 5 FMSHRC 313, March 28, 1985, the Commission held that a pro se mine operator who fails to appear at a hearing pursuant to notice must be given an opportunity to cross-examine witnesses presented by MSHA even though the presiding judge subsequently accepted his excuse for not appearing but simply gave him an opportunity to present a statement in support of his case. Upon review of that decision, I find that the factual basis for the defaults differ. In Little Sandy, the mine operator attempted to communicate his inability to appear to the judge in advance of the hearing, the case involved a novel question of jurisdiction, and the Commission viewed it as a "test case" concerning the applicability of the Act to the respondent's mining operation.

Given these circumstances, the Commission was of the view that defaulting the operator without giving him an opportunity to fully present his defense by cross-examining MSHA's witnesses was inappropriate. I find no such circumstances presented in the instant case, and I conclude that Little Sandy does not apply.

In the instant case, the respondent contested the proposed assessment, and by letter to the Commission dated April 10, 1985, he requested a hearing. Since that time, he has not been heard from. The respondent has failed to respond to a number of communications made by MSHA's counsel, and he has apparently opted to ignore the notices of hearing served pursuant to the Commission's rules. Under the circumstances, I conclude and find that he has waived his right to be heard further in this matter and that he is in default.

Although Commission Rule 29 C.F.R. 2700.63, calls for the issuance of a show-cause order before a party is defaulted, given the facts of this case where the respondent has completely failed to respond or otherwise communicate with me or trial counsel with respect to my hearing notices, I conclude that the issuance of such an order would be an exercise in futility.

Fact of Violation

I conclude and find that the petitioner has established a violation of 30 C.F.R. 48.28-(a), by a preponderance of the evidence. The testimony of Inspector Hill fully supports the citation which he issued, and IT IS AFFIRMED.

Mr. Hill testified that the two miners in question were observed working near a highwall with a bulldozer, and he was concerned that their lack of training with respect to the recognition of hazards with respect to the old underground mine may have exposed them to surface cracks and other hazards. Given the lack of training, he concluded that it was reasonably likely that the miners would in the course of their work in the construction of the silt pond in question encounter unrecognized hazards, thereby exposing them to possible harm. For these reasons, he concluded that the violation was "significant and substantial." I find the inspector's testimony credible, and I agree with his finding. Accordingly, his "S & S" finding IS AFFIRMED.

Negligence

Inspector Hill stated that the violation resulted from the respondent's moderate negligence. Since the respondent had an approved training plan, it should have been aware of the fact that annual refresher training was required of all employees. The plan covers the types of hazards that one could encounter at a strip mine (Exhibit 4). I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

Inspector Hill testified that both Mr. Lupyan and Mr. Fodor were experienced miners. However, since they were working in an area near the highwall where the rock strata was broken, this could affect the stability of the highwall. Under the circumstances, and since they had not received recent refresher training, they may not have been alerted to these potential hazards. Mr. Hill believed that it was reasonably likely that the lack of training in recognizing such hazards could have resulted in an accident. I find that this violation was serious.

History of Prior Citations

Inspector Hill confirmed that the respondent has no history of prior citations, and I adopt this as my finding on this issue.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

Inspector Hill testified that the respondent's strip mining operation was small and that the mine had only two employees, namely the owner Mr. Lupyan and Mr. Fodor. The mine operated on one shift, 5 to 6 days a week, and produced approximately 30 tons a day.

I conclude and find that the respondent is a small operator. However, since Mr. Lupyan failed to appear at the hearing, I cannot conclude that the penalty assessed will adversely affect his ability to continue in business.

Good Faith Compliance

The record establishes that Inspector Hill fixed the abatement time as October 5, 1984, 3 days after the citation

was issued. He testified that when he returned to the mine the day after he issued the citation, Mr. Lupyan and Mr. Fodor produced new training certificates indicating that they had received the required training. Accordingly, I find that the respondent exercised good faith in rapidly abating the citation.

Civil Penalty Assessment

The violation in this case was "specially assessed" by MSHA's Office of Assessments at $300. Although the respondent had an opportunity to appear at the hearing and present mitigating circumstances on his behalf, he failed to do so. Normally, this would warrant an affirmation of the proposed penalty filed by the petitioner. However, in this case, I have taken into account the fact that the respondent a very small operator (himself and one other full time miner), that he has no prior history of violations, and that he achieved rapid abatement. I have also considered the fact that it would appear from the record here that he is no longer in business, and that when he was, his coal production was limited, and his mining operation was marginal at most. Under the circumstances, I conclude that a civil penalty assessment of $100 is reasonable for the violation in question.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $100, for the violation in question, and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge