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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 84-64
A.C. No. 42-01697-03520

v.

Bear Canyon #1

CO-OP MINING COMPANY,
RESPONDENT

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Carl E. Kingston, Esq., Co-op Mining Company,
Salt Lake City, Utah,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah on November 15, 1984.

The parties waived their right to file post-trial briefs.

Issues

The issues are what penalties are appropriate for the violations.

Stipulation

At the commencement of the hearing the parties stipulated that the company's size was 196,112 production tons and the mine's size was 86,905 production tons. Further, the parties agreed that there was no contest as to the violation. In addition, coverage under the Act was admitted (Tr. 4).

Citation 2336728

This citation alleges respondent violated 30 C.F.R. 75.512 which provides:

75.512 Electric equipment; examination, testing and maintenance.

[Statutory Provision]

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Summary of the Evidence

John R. Turner, a MSHA inspector experienced in mining, initially inspected Bear Creek Canyon on October 5, 1982. On that occasion he issued a citation. He again inspected respondent on November 15, 1983. He then issued Citation 2336728 under Section 104(d) of the Act. The citation was almost identical to the one issued in the previous year (Tr. 18-22).

The instant citation was issued because Kevin Peterson, the section boss, could not produce the book documenting the electrical inspections. Such examinations must be made and recorded weekly but there was no record of such inspections for a period of three months (Tr. 21, 22).

The company had a number of books to log inspections. This was the only book that was missing (Tr. 26, 27).

The inspector did not check any of the electrical equipment itself. In addition, he was not aware of any fatality or injury at respondent's mine (Tr. 28, 29).

The hazard here involves electrical equipment, one of the top three causes of underground fatalities (Tr. 23). The violative condition was abated within 24 hours by an inspection of all of the electrical equipment (Tr. 25, 31-32).

The company manager, Bill Stoddard, testified that Davies Clark inspected the electrical equipment for the company. Clark had custody and control of the inspection book from August to November 1983 (Tr. 48-50). Normally the book would be in a metal desk with all other such books (Tr. 51).

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Davies quit on November 4, 1983, just prior to the instant inspection. After an extensive search the book could not be located (Tr. 51-54).

In January 1984, the book was found under other documents in a filing cabinet (Tr. 56-58). Stoddard testified that Davies had previously bragged he would play "tricks" on the company's management (Tr. 59).

The inspection book itself indicated that no inspections were recorded for 5 of the 14 weeks encompassed by the book (Tr. 62-76; Exhibit R1). Stoddard stated that possibly these entries were not made every week because the State of Utah had closed the mine (Tr. 68).

Discussion

The stipulation of the parties and the facts clearly establish that the respondent violated 75.512. The citation should be affirmed. The facts adduced by respondent address the appropriateness of a civil penalty, discussed infra.

Citation 2337193

This citation alleges respondent violated 30 C.F.R. 40.4, which provides:

40.4 Posting at mine.

A copy of the information provided the operator pursuant to 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

Summary of the Evidence

Robert L. Baker, an MSHA inspector experienced in mining, visited respondent's Bear Canyon No. 1 mine on December 8, 1983 (Tr. 6, 7).

The company was cited for failing to post the names and addresses of the representatives of the miners on the company bulletin board. In the previous week the inspector had discussed this condition with company officials (Tr. 7, 8).

The company manager, Bill Stoddard, had been given until 8 a.m. on the following day to abate this violation. The following day the violation was unabated and the inspector issued Citation 2337193.

Bill Stoddard, respondent's manager, was familiar with this citation (Tr. 41, 42).

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The company had rebuilt its bulletin board and on the day of the inspection it was locked. Stoddard agreed to post the necessary information on the board the following morning but he was called out of town. Hence, he was not present when the inspector issued the Secretary's 104(a) citation (Tr. 42, 47).

The 20 to 30 miners at the mine site are represented by Ron Mattingly who also lives on the mine property. About eighty percent of the miners also live on company property. The workers know Mattingly, where he lives and they also know he has a mine phone in his home (Tr. 45, 46).

Ron Mattingly confirmed Stoddard's testimony (Tr. 80-99). Further, Mattingly felt that the only time any problems might arise when a miner was attempting to contact him was when he would not be available (Tr. 83).

Discussion

The admission of liability and the facts establish that respondent violated 40.4.

The evidence adduced by respondent seeks to mitigate the proposed civil penalties, discussed infra.

Civil Penalties

The Secretary's proposed civil penalties are \$650, (electrical inspection book), and \$180 (failure to post information).

In his proposed special assessment (for the lack of an electrical book) the Secretary believed that no weekly inspections were being performed at the mine. In addition, he considered that the mine's management was negligent since it was their duty to take appropriate action to remedy this violative condition.

The record here does not support the Secretary's conclusion that no electrical inspections were recorded at the mine for a period of three months. To the contrary, inspections were recorded for August 18, August 26, September 1, September 15, September 28, October 6, October 20 and November 4, 1983 (Exhibit R1). While the inspections were not precisely as required by the regulation they were, nevertheless, duly recorded.

In its defense the operator sought to establish that the inspections were not weekly as required by 75.512 because the mine had, from time to time, been closed by the State of Utah. Respondent failed to offer sufficient facts to prove this defense.

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In connection with respondent's failure to post certain information on its bulletin board the Secretary states that his usual penalty would be \$20. But he claims that \$180, as proposed, is minimal particularly since it involved respondent's failure to abate (Tr. 101-103).

The Secretary's proposed penalties are not binding on the Commission. *Sellersburg Stone Company v. FMSHRC*, 736 F.2d 1147. Congress mandated the criteria in 30 U.S.C. 820(i). It provides, in part, as follows:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering the above factors it appears that respondent has a relatively adverse history of 20 violations from December 8, 1981 to December 7, 1983 (Tr. 33, 34; Exhibit P1). The stipulation establishes that respondent is a small operator. Further, assessment of a penalty here should not affect the operator's ability to continue in business. Respondent was negligent in both instances as it should have rectified these violative conditions. Respondent's statutory good faith was established by abating the electrical violation. However, no such good faith should be allowed for the posting violation.

On balance, I deem that penalties of \$300 and \$75 are appropriate for these citations.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. The citations should be affirmed and civil penalties should be assessed for the violation of 30 C.F.R. 75.512 and 30 C.F.R. 40.4.

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ORDER

Based on the foregoing findings of facts and conclusions of law I enter the following order:

1. Citation 2336728 is affirmed and a penalty of \$300 is assessed.

2. Citation 2337193 is affirmed and a penalty of \$75 is assessed.

3. Respondent is ordered to pay the sum of \$375 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge