

CCASE:  
SOL (MSHA) V. CAPITOL AGGREGATES  
DDATE:  
19860325  
TTEXT:

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. CENT 85-138-M  
A.C. No. 41-00010-05502

CAPITOL AGGREGATES, INC.,  
RESPONDENT

Capitol Cement Plant

DECISION

Appearances: James L. Manzanares, Esq., Office of the  
Solicitor, U.S. Department of Labor, Dallas,  
Texas, for Petitioner;  
Richard L. Reed, Esq., Johnston, Ralph, Reed &  
Cone, San Antonio, Texas, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals 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 civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, subpoenas were issued, and pursuant to notice the case was heard in San Antonio, Texas, on February 25, 1986.

Issue

The issue in this case is whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalties which should be assessed for the violations in question. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 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.

Stipulations

The parties agreed that the respondent's Capitol Cement Plant is a "mine" as that term is defined by the Act, and that the respondent and the plant in question are subject to MSHA's enforcement jurisdiction as well as the jurisdiction of the Mine Safety and Health Review commission.

The parties agreed that at all times relevant to this proceeding the respondent's plant worked 277,985 annual man-hours, and that the corporate entity controlling the operation of the plant worked 607,510 annual man-hours.

The parties agreed that the assessment of the proposed civil penalties for the citations in question will not adversely affect the respondent's ability to continue in business.

The parties agreed that the respondent abated the citations in question in good faith.

Exhibit PÄ1 is an MSHA computer print-out reflecting the respondent's prior history of violations. The information provided reflects that for the period February 21, 1983 to February 20, 1985, the respondent had three assessed violations for which it paid civil penalties totaling \$60. For the period prior to February 21, 1983, respondent had seven assessed violations, and paid a civil penalty assessment of \$98 for one of the violations.

Discussion

The alleged violations in this case were all issued after an MSHA fatality investigation at the respondent's plant. The facts show that an intoxicated laboratory technician employed by the respondent intentionally misused and inhaled nitrous oxide gas which resulted in his death. The alleged violations which were issued are as follows:

~432

Section 104(a) "S & S" Citation No. 2231659, February 21, 1985, cites an alleged violation of 30 C.F.R. 56.20Ä1, and the condition or practice is stated as follows:

A fatal accident occurred November 24th, 1984, at about 0200 hours, when an employee was found on the floor, unconscious, in the main room of the laboratory. The employee was pronounced dead at the hospital approximately 1 hour later. The autopsy report showed 0.171 alcohol in the blood and nitrous oxide in the bile due to intentional inhalation by the employee.

Section 104(a) "S & S" Citation No. 2241817, March 13, 1985, cites an alleged violation of 30 C.F.R. 56.18Ä2, and the condition or practice is stated as follows:

A fatal accident was experienced on November 24, 1984. The operator had failed to cause safety and health hazard inspections of all work areas to be conducted each shift. No persons were designated to conduct these inspections and record these findings. Conductance of such inspections would have acted as a deterrent to the apparent abuse of the industrial gas, Nitrous Oxide, and the presence of workers under the influence of alcohol at the mine site.

Section 104(a) "S & S" Citation No. 2241818, March 13, 1985, cites an alleged violation of 30 C.F.R. 56.20Ä11, and the condition or practice is stated as follows:

A fatal accident occurred on November 24, 1984. There had been no signs posted at the exterior laboratory industrial gas supply and service area, or within the laboratory to warn employees of the nature of the hazards involved and the protective action required. Highly combustable, explosive and asphyxiating gases were being routinely used in these areas.

Findings and Conclusions

Citation No. 2231659 - Fact of Violation

30 C.F.R. 56.20Ä1, provides as follows: "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job."

The respondent denied that it permitted any person under the influence of alcohol or narcotics on the job, or that intoxicating beverages and narcotics were permitted by the respondent, or used in or around its mine.

The inspector who issued the citation on February 21, 1985, subsequently modified it on April 23, 1985, and his modification states as follows:

The negligence \* \* \* is reduced from low to none. The company had done all that would be reasonably expected of them to be required and not allow alcohol on the property or drug useage by publishing safety rules which were printed and signed as to being read by the victim.

Petitioner's counsel moved to withdraw Citation No. 2231659, on the ground that the evidence will not support a violation of the cited mandatory safety section 56.20Ä1. Counsel stated that the petitioner cannot establish that the respondent permitted the use of intoxicating beverages or narcotics on the job.

Petitioner's motion to withdraw its proposal for assessment of a civil penalty for Citation No. 2231659, February 21, 1985, 30 C.F.R. 56.20Ä1 IS GRANTED, and the citation IS VACATED.

Citation No. 2241817 - Fact of Violation

30 C.F.R. 56.18Ä2, provides as follows:

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

The parties proposed to settle this violation by the respondent agreeing to pay a civil penalty assessment in the amount of \$168. The initial proposed "special assessment" was in the amount of \$500.

In support of the reduction of the proposed civil penalty assessment, petitioner's counsel took into consideration the fact that the respondent could not have reasonably foreseen that the employee would have intentionally and voluntarily inhaled the nitrous oxide kept in the plant laboratory for the respondent's legitimate business needs. Although counsel believed that he could support a finding of high negligence because a daily examination may have acted as a deterrent, he also believed that the gravity of the violation is less than originally assessed because such an examination would not likely have prevented the employee from intentionally inhaling the nitrous oxide.

Petitioner's counsel confirmed that the intentional act of the employee in question endangered only himself and no other miners, and that the respondent has taken appropriate action to insure or preclude future incidents of this kind.

After careful consideration of the arguments presented in support of the proposed settlement of the violation, I conclude and find that it is reasonable and in the public interest, and IT IS APPROVED. The citation IS AFFIRMED.

The respondent's counsel stated that in agreeing to settle the violations in question and to pay the agreed upon civil penalty assessments the respondent does not agree to liability for the alleged violations, but has taken into consideration the cost of further litigation.

Citation No. 2241818 - Fact of Violation

30 C.F.R. 56.20Ä11, provides as follows: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and protective action required."

~435

The respondent agreed not to contest the citation further, and agreed to make full payment of the proposed civil penalty assessment of \$168. I have considered this proposal as a settlement proposal, and with the agreement of the petitioner, and after consideration of the six statutory criteria found in section 110(i) of the Act, I conclude it is in the public interest, and IT IS APPROVED. The violation IS AFFIRMED.

ORDER

In view of the foregoing, Citation No. 2231659, IS VACATED, and the petitioner's civil penalty proposal IS DISMISSED. The respondent IS ORDERED to pay a civil penalty in the amount of \$168 for Citation No. 2241817, and a civil penalty in the amount of \$168 for Citation No. 2241818. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this case is dismissed.

George A. Koutras  
Administrative Law Judge