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SOL (MSHA) V. JAY TUFT
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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 86-60-M
A.C. No. 42-01804-05506

v.

Lapoint Gravel Pit

JAY TUFT & COMPANY, INC.,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Douglas E. Grant, Esq., Grant & Grant, 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 Section 109(a) of the Federal Mine Safety and Health Act of 1977, 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 August 12, 1986. The parties waived their right to file post-trial briefs.

Issues

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

Citation 2084520

This citation alleges respondent violated section 109(a) of the Act in that it failed to post a previous Citation (No. 2084519). The citation, which had allegedly not been posted dealt with respondent's interference with an MSHA investigation.

Section 109(a) of the Act, now 30 U.S.C. 819(a), provides as follows:

Sec. 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

Benjamin M. Johnson, a special investigator for MSHA, conducted an investigation of respondent at its Midvale office on January 31, 1985 (Tr. 8, 9). The investigation concerned an electrical violation at the Lapoint pit where the citation had been served. The focus of the investigation concentrated on whether the violation was of a knowing and willful nature (Tr. 35).

During the investigation Jay Tuft, respondent's president, objected to the use of a tape recorder. He had been instructed by his attorney not to permit their use (Tr. 20, 21). Later, while inspector Johnson was interviewing the company foreman, Mr. Tuft entered the room and confiscated the cassette tape in the recorder (Tr. 9, 10, 20). As a result Citation 2084519 was issued for interfering with a special investigation (Tr. 10; Ex. P1). At the time it was served the inspector explained to Mr. Tuft that he was responsible to post it on the mine bulletin board (Tr. 11). Tuft asked if he was required to make a special trip to the mine located 145 miles away from the company office (Tr. 11, 12).

Inspector Johnson requested another federal inspector, who was conducting a regular inspection at the mine site, to ascertain if the citation had been posted at the mine (Tr. 12). Field notes generated by MSHA inspector Joslin were received in evidence. They indicated the citation had never been posted although other citations appeared on the bulletin board (Tr. 14).

Subsequently, on March 21, 1985, Citation 2084520 was issued for a failure to post the previous citation (Tr. 14; Ex. P3).

On April 19, 1985 inspector Johnson visited the mine site. The office manager indicated she had never received the citation from Mr. Tuft (Tr. 16, 17). The inspector next issued a section 104(b) non-compliance order for the failure to post the two citations (Tr. 18). The company office manager then talked to

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Mr. Tuft's secretary and was advised that both copies of the citation were in her desk and they had not been mailed to the mine site (Tr. 18). The front-end loader operator also indicated to the inspector that he had never seen the citations posted on the bulletin board (Tr. 19).

Jay Tuft testified that during the course of his two hour interview with Johnson he objected to the use of a tape recorder. When he objected the inspector put it away (Tr. 24, 25).

Later that day Tuft heard men's voices in his wife's office. When he opened the door he found the inspector taping his interview with foreman Richard Logan. Tuft again objected to the use of the recorder. When Johnson failed to stop the recorder Tuft did so and removed the cassette. Johnson left. The following day an MSHA attorney called Tuft from Denver. That afternoon Johnson reappeared with a Midvale policeman and demanded his tape. Tuft contacted his attorney and then surrendered the tape (Tr. 26). Respondent thereafter paid a \$600 penalty for the citation that followed (Tr. 27).

When he received the citation Tuft was told by Johnson to post it. Tuft put it on his bulletin board in his Midvale office (Tr. 27, 29). The large bulletin board contains workman's compensation notices, minority matters, licenses, diesel permits and things of that nature (Tr. 33). All business affairs are conducted out of the Midvale office. At the mine site the trailer office contains a desk, a chair and a small bulletin board (Tr. 33). All of the contact between Tuft and Johnson took place in the company office. None of it took place at the mine site 160 miles away (Tr. 27). The citations were all personally posted by Tuft at the mine site after he received notice of the requirement (Tr. 27, 28).

Tuft indicated that there were two or three copies of the citation at his office. He agreed there could have been a copy in his desk (Tr. 30). Tuft believed Johnson was lying when he related his interview with the company office manager to the effect that the citation had not been received at the mine site by April 19th (Tr. 31, 32). The loader operator would not know if the citation was posted because he cannot read or write (Tr. 32).

Discussion

The statutory requirement mandates that citations are to be posted at the mine site.

In this factual situation a credibility issue arises as to where and if the citation was posted. Inspector Johnson testified it was not posted. His testimony is verified by the field

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notes of inspector Joslin together with the statements of the office manager and the loader operator. I credit MSHA's evidence over Mr. Tuft's bare contrary statement that he posted the citation at the mine site.

However, I credit Mr. Tuft's testimony that he posted the citation at the company office in Midvale. He was in a position to know what occurred. In addition, many items are posted on the company bulletin board at the Midvale office. But such posting at the office and at a place apart from the mine site does not constitute compliance with section 109(a) of the Act. Such evidence, however, relates to respondent's negligence and good faith. These latter elements are factors to be considered in assessing a civil penalty.

For the foregoing reasons, I conclude that Citation 2084520 should be affirmed.

Civil Penalty

The statutory criteria to assess a civil penalty is contained in Section 110(i) of the Act.

In considering the statutory criteria I find that the computer printout received in evidence indicates respondent had eight violations in the two year period ending March 24, 1985 (Ex. P4). In view of these few citations I conclude that respondent's history of previous violations is below average. The penalty appears appropriate in relation to the size of the business. The parties have stipulated that the proposed penalty of \$106 would not impair the ability of the company to continue in business (Tr. 5). The operator's negligence is mitigated somewhat by the fact that the notice was posted at the Midvale office. The gravity of the violation is low since it is a posting requirement. Respondent in fact abated after it was advised of the requirement. On balance, I believe that a civil penalty of \$50 is appropriate.

Conclusions of Law

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

1. The Commission has jurisdiction to decide this case.
2. Respondent violated Section 109(a) of the Act.

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

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ORDER

1. Citation 2084520 is affirmed.
2. A civil penalty of \$50 is assessed.
3. Respondent is ordered to pay the sum of \$50 to the Secretary within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge