CCASE:
SOL (MSHA) V. CONCRETE PRODUCTS
DDATE:
19870220
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. WEST 86-111-M A.C. No. 42-01014-05504
v.	
CONCRETE PRODUCTS COMPANY, RESPONDENT	Walker Sand & Gravel Pit

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Boyd Nielson, Concrete Products Company, Salt Lake City, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under 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 13, 1986.

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

Issue

The issue is what penalty is appropriate for failure to provide a back-up alarm.

Citation 2644078

This citation alleges respondent violated 30 C.F.R. 56.9087 which provides as follows:

> 56.9087 Audible warning devices and back-up alarm. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Summary of the Evidence

William W. Wilson is a person experienced in mining as well as an MSHA safety and health inspector (Tr. 4, 5).

On December 10, 1985 Mr. Wilson inspected respondent, a sand and gravel operation (Tr. 5, 6). There were three or four employees at the pit (Tr. 6). While on the site the inspector observed a 35-ton Caterpillar that did not have a backup alarm (Tr. 7; Ex. P1).

The driver of the vehicle, which was in operation, had restricted vision to the rear. This hazard could reasonably cause a fatality or serious injury (Tr. 8, 11). Inspector Wilson believed the negligence was high because the defect had been reported to the mechanical department over a week before the inspection (Tr. 9). But, there had been no repairs made to the equipment (Tr. 10, 11).

The alarm was either replaced or repaired within the specified time (Tr. 11).

Boyd E. Nielsen, general foreman for respondent, testified the company operates eight sand and gravel pits. They are located in Utah, Nevada and Wyoming (Tr. 17).

The maintenance department was advised of the defect four or five days before the inspection (Tr. 18).

Exhibits were received in evidence showing the normal time required to effect repairs (Tr. 18, 19); Ex. R1, R2).

The company abated the instant violation the same day the citation was issued (Tr. 14, 20).

The company has an outstanding safety record and it makes every effort to comply with MSHA regulations.

The proposed penalty will not effect the company's ability to continue in business (Tr. 21).

Discussion

Respondent in this case admits the violation (Tr. 3, 4). Accordingly, the sole issue focuses on the appropriate penalty.

The statutory criteria to assess civil penalties is contained in section 110(i) of the Act. The provision, now 30 U.S.C. 820(i), provides as follows:

> 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.

The operator had six violations in the two year period ending December 9, 1985. This is a considerable improvement over the 17 violations that occurred before December 10, 1983. The violations involved in the most recent period indicate that the number of respondent's violations are less than average. The respondent must be considered a small operator inasmuch as it has only three or four employees at this pit. It does, however, have additional pits. The operator was negligent in that it failed to remove the equipment from service. Respondent's evidence established there was a time lag between the time of reporting the defect and its repair. I am not persuaded by such evidence particularly when respondent abated the violation the very day the citation was issued. The parties stipulated that the proposed penalty of $400 would not affect the operator's ability to continue in business. The gravity must be considered high since a fatality could occur. The operator's good faith is apparent since it immediately abated the condition.

On balance, I deem that a penalty of $150 is appropriate.

Conclusions of Law

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

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. 56.9087.

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

ORDER

1. Citation 2644078 is affirmed.

2. A civil penalty of $150 is assessed.

3. Respondent is ordered to pay to the Secretary the sum of $150 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge