

CCASE:
SOL (MSHA) V. BRIAN LACKEY
DDATE:
19870512
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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 PROCEEDINGS

Docket No. WEST 85-175-M
A.C. No. 04-04118-05501

v.

Docket No. WEST 86-39-M
A.C. No. 04-04118-05502

BRIAN LACKEY CONCRETE,
RESPONDENT

Lackey Concrete Mine

Appearances: Leroy Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Los Angeles,
California, for Petitioner;
Mr. Brian Lackey, Brian Lackey Concrete, Needles,
California, pro se.

DECISION

Before: Judge Lasher

These proceedings were initiated by the filing of proposals for assessment of civil penalties by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (1977) (herein the "Act"). A hearing on the merits was held in Needles, California, on April 13, 1987.

Respondent concedes that the 17 violations (issued on June 26, 1985, by MSHA Inspector Ronald Barri) charged in the two dockets (16 in Docket 85-175-M and 1 in Docket 86-39-M) occurred. The sole issue was the amount of appropriate penalties. The parties waived filing of post-hearing briefs.

The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a violation, the business size of the operator, and the number and nature of violations previously discovered at the mine involved. Mitigating factors include the operator's good faith in abating violative conditions and the fact that a significantly adverse effect on the operator's ability to continue in business would result by assessment of penalties at a particular monetary level. Factors other than the above-mentioned six criteria which are expressly provided in the Act are not precluded from consideration either to increase or reduce the amount of penalty otherwise warranted.

Based on stipulations reached by the parties at the outset of the hearing, it is found that this is a small mine operator with no history of violations during the 24-month period prior to the issuance of those involved in these two dockets. The Secretary agreed that Respondent proceeded in good faith to promptly abate the 17 violations upon notification thereof. The parties agreed that all violations were committed as a result of but a moderate degree of negligence on Respondent's part. As to the gravity of the violations, three (Citations numbered 2344842, 2344843, and 2344876) were stipulated as being "non-serious" in nature; the remaining 14 violations were agreed to be serious which agreement includes the violation charged in Citation No. 2344874 which is the only citation involved in Docket No. WEST 86-39-M.

With respect to the remaining mandatory penalty assessment criterion provided in the Act, the Respondent established the ultimate economic consideration, that is, Respondent, a sole proprietorship owned and operated by Brian Lackey, showed that he had gone out of business for economic reasons. Mr. Lackey, age 46, had operated this very small (two employees) placer (sand and gravel) mine located near Needles, California, for approximately 20 years. Approximately two months prior to the hearing Mr. Lackey assigned his interest in the business to one Quinto Polidori in payment of his indebtedness (approximately \$28,000.00) for such items as powder and cement. Mr. Lackey also testified that he owns no other businesses and has no other source of income at the present time. Respondent testified under oath that all his remaining assets have a total value of approximately \$5,000.00 while his debts somewhat exceed that sum. In early March 1987, Mr. Lackey underwent surgery for removal of a lung and has been advised not to work for one year for medical reasons. Part of his indebtedness is for medical expenses. Mr. Lackey stated his intention to leave California to return to Illinois to live with family for the immediate future. In view of this information revealed in sworn, un rebutted testimony, it is determined that only very modest penalties (\$5.00 for each violation) are warranted.

ORDER

The 17 citations hereinabove discussed in the above two dockets are affirmed in all respects.

Respondent shall pay the Secretary of Labor within 30 days from the date hereof the 17 penalties hereinabove assessed in the total sum of \$85.00.

Michael A. Lasher, Jr.
Administrative Law Judge