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SOL (MSHA) V. GALLUP SAND & GRAVEL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 89-64-M A.C. No. 29-00917-05504
v.	San Antone Pit
GALLUP SAND & GRAVEL COMPANY, RESPONDENT	

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, For Petitioner;
Frank A. Kozeliski, Materials Engineer, Gallup Sand Sand and Gravel Co., Gallup, New Mexico, For Respondent.

Before: Judge Lasher

This matter was commenced by the filing of a Complaint Proposing Penalty by the Petitioner on April 17, 1989, seeking penalties for 6 violative conditions described in 6 Citations issued on October 19, 1988, by MSHA Inspector William Tanner, Jr.

Respondent concedes the occurrence of the violations (T. 5, 6), but primarily questions the appropriateness of the amount of penalties (totalling $188) sought by Petitioner.

Respondent also pointed out that it had not been previously cited during prior MSHA inspections for the same or similar violations (T. 6, 7; Letter dated May 9, 1989). Taking this question first and viewing the allegations in this connection and the evidence presented most generously in favor of Respondent, a New Mexico corporation which was not represented by legal counsel, the question of the applicability of the doctrine of equitable estoppel will be deemed raised and briefly considered. The Respondent made out no credible case factually that the conditions cited in any of the 6 Citations involved here had been specifically evaluated by the Secretary's representative at any prior time and determined to be within the boundaries of the pertinent regulations. In other words, a factual foundation of the precision which would be required to cause one to conclude that there was a clear-cut or enlightened prior "non-enforcement" by MSHA inspectors previously was not presented. In any event, in Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Commission has generally rejected the doctrine of equitable estoppel.

However, it also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior nonenforcement) as a factor which can be considered in mitigation of penalty, stating:

> "The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.
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> Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty. . . "

Accordingly, the doctrine of equitable estoppel will not be applied to the enforcement actions of the Secretary here. However, the Respondent's evidence in this connection will be considered in determining penalties.

Preliminary Penalty Assessment Factors

The parties stipulated that Respondent, which operates a readi-mix crushed-stone operation (T. 28, 51) in the vicinity of Albuquerque, New Mexico, is a small mine operator (T. 73). It had a history of 2 prior violations prior to the occurrence of the violations in question. Petitioner conceded that Respondent, after notification of the violations, proceeded in good faith to promptly abate the same (T. 17). Respondent made no claim that payment of reasonable penalties or penalties at some given monetary level would jeopardize its ability to continue in business.

Penalty Assessment

Two of the six Citations (Nos. 3274946 and 3274948) involved so-called "significant and substantial" violations. It was the inspector's unrebutted opinion, and the record clearly substantiates such, that both of these violations were the result of a "moderate" degree of negligence on Respondent's part and were serious in nature since it was reasonably likely that the hazards posed by the violations could have occurred and that injuries resulting therefrom could have been permanently disabling, and, in the case of Citation No. 3274946, even fatal. These penalties will not be increased in view of Respondent's apparent belief that it was proceeding in compliance with the regulations involved (T. 6, 42). MSHA's assessment of $54 each for these two violations is found appropriate and here assessed.

The four remaining Citations (Nos. 3274949, 3274950, 3274951 and 3274952) were all considered by MSHA to not be "significant and substantial" and were given routine $20.00 single penalty assessments. The inspector who issued these Citations attributed the violations to have occurred as a result of but "moderate" negligence on the part of Respondent. These are modest penalties and I find no basis to disturb the Secretary's assessments.

ORDER

(1) The six subject Citations are affirmed.

(2) Respondent is ordered to pay the Secretary of Labor within 30 days from the date hereof the total sum of $188 as and for the civil penalties above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge