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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 89-104-M
A.C. No. 14-00483-05505

v.

Vic's Sand Pit

VIC'S SAND & GRAVEL COMPANY,
RESPONDENT

DECISION

Appearances: Oscar L. Hampton, III, Esq., Office of the
Solicitor, U.S. Department of Labor, Kansas City,
Missouri, for the Petitioner;

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding 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). Petitioner seeks a civil penalty assessment in the amount of \$50 for an alleged violation of mandatory injury reporting standard 30 C.F.R. 50.20, as stated in a section 104(a) Citation No. 2651810, served on the respondent by MSHA Inspector James G. Enderby, on January 25, 1989. The condition or practice cited is as follows:

A employee of the company was seriously injured in July 1988 that required medical attention and was lost time away from work. The company did not file a MSHA Form 7000-1 within the required time for reporting. All injuries to anyone that occurs on the mine property are required to be reported to MSHA within 10 days of occurrence.

The respondent contested the citation, and pursuant to notice served on the parties, a hearing was convened in Wichita, Kansas, on April 25, 1990. The petitioner appeared, but the

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respondent did not. The hearing proceeded in the absence of the respondent, and the petitioner presented testimony and evidence in support of the citation.

Issues

The issues presented in this case are (1) whether or not the respondent violated the cited standard, and if so, the appropriate civil penalty that should be imposed for the violation, and (2) whether or not the respondent's failure to appear at the hearing constitutes a waiver of its right to be further heard in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

The Respondent's Failure to Appear at the Hearing

The record clearly establishes that the respondent received notice of the time and place of the hearing by certified mail. When its representative Vic Eisenring failed to appear, I telephoned his office in Wichita and was advised by his secretary that the respondent had mailed a check to MSHA on Friday, April 20, 1990, in payment of the civil penalty assessment and that the respondent did not attend to appear at the hearing. The petitioner's counsel informed me that he was not aware of any payment made by the respondent for the violation in question, and that his attempts to contact the respondent prior to the hearing were fruitless. Under the circumstances, the hearing proceeded in the absence of the respondent, and the petitioner presented its case.

On May 4, 1990, I issued an Order to Show Cause to the respondent (Vic Eisenring) affording him an opportunity to explain why he should not be defaulted and a summary decision entered ordering payment of the civil penalty because of his failure to appear at the hearing or otherwise inform me that he would not appear.

By letter dated May 11, 1990, the respondent filed a reply to my show-cause order. Mr. Eisenring asserted that he has paid the civil penalty assessment. With regard to his failure to appear at the hearing, Mr. Eisenring states that a family emergency prevented his appearances, and that the hearing notices

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contained no instructions that he was to telephone the presiding judge if he could not appear.

The record reflects that Mr. Eisenring's office is in Wichita, and the hearing was held in that same city. When I telephoned Mr. Eisenring's office on the morning of the hearing and spoke to his secretary, she said nothing about any emergency and simply stated that Mr. Eisenring had mailed a check to MSHA in payment of the civil penalty and would not appear at the hearing. Notwithstanding the family emergency, and taking into account the fact that Mr. Eisenring's secretary informed me that he had mailed the check to MSHA on Friday, April 20, 1990, 5-days prior to the scheduled hearing, I believe it is reasonable to conclude that Mr. Eisenring did not intend to appear at the hearing.

With regard to Mr. Eisenring's failure to communicate with me, as previously noted, the hearing was scheduled in the same city where his office is located. The Amended Notice of Hearing which Mr. Eisenring received by certified mail on April 19, 1990, informed him of the location of the hearing in Wichita, and my office telephone number is listed in the notice. Notwithstanding the fact that the hearing notice did not specifically instruct Mr. Eisenring to contact the court if he did not intend to appear at the hearing, since the hearing was convened in Wichita to accommodate Mr. Eisenring, and since the hearing notice included the location of the hearing and my office telephone number, I do not find it unreasonable to expect Mr. Eisenring or his secretary to simply call my office, or the district court in Wichita where the hearing was convened, to inform me that he would not appear.

In view of the foregoing, I conclude and find that pursuant to Commission Rule 63, 29 C.F.R. 2700.63, the respondent is in default, and that his failure to appear constitutes a waiver of his right to be further heard in this matter.

Petitioner's Testimony and Evidence

MSHA Inspector James G. Enderby testified that he conducted an inspection at the respondent's site on December 20 or 21, 1988, and noticed that one of its employees, Hollis Pridgett, was wearing a cast on his foreman. Mr. Pridgett explained that he was injured while repairing a tire in the shop. Mr. Pridgett stated that while filling a tire with air, it did not "bead" properly and it jumped off the tire stand and struck his arm and wrist causing a simple fracture to his forearm and multiple fractures to his wrist. He received medical attention and extensive surgery to his wrist and he missed several work days.

Mr. Enderby stated that Mr. Pridgett informed him that the tire belonged to the respondent and that he was preparing to put

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it on his personal pick-up truck which was used for the benefit of the respondent in picking up equipment.

Mr. Enderby stated that the respondent's owner Vic Eisenring informed him that he had telephoned MSHA's office in Denver and the State workmen's compensation inspector and was told that he was not required to report the injury. Mr. Enderby stated that he reviewed the respondent's telephone records for July and August, 1988, and found no record of any long distance out-of-state calls to Denver. Mr. Eisenring could not recall who he spoke with and indicated that it may have been an "800" number. Mr. Enderby then advised Mr. Eisenring that it was his opinion that the injury had to be reported. He then advised Mr. Eisenring to fill out and file an MSHA Form 7000-1, injury report and to attach a letter to it explaining the circumstances of the injury so that his supervisor could review it and make a determination as to whether a citation should be issued because of the respondent's failure to report the injury within 10 days as required by section 50.20.

Mr. Enderby stated that during a follow-up inspection on January 25, 1989, he issued several citations and asked Mr. Eisenring whether he had mailed in the injury report which they had previously discussed. Mr. Eisenring responded that he mailed it and then left the property. Mr. Enderby then asked Mr. Eisenring's secretary, Cecilia Taylor, whether she had mailed the report and she informed him that she had not mailed the report because "it was tax time." Mr. Enderby then issued the citation. He also telephoned his office and determined that the report which Mr. Eisenring claimed he had mailed had not been received.

Mr. Enderby stated that he subsequently spoke with Mr. Eisenring about the matter and that Mr. Eisenring "used some profanities" and informed him that he "would take him to court" and contest the citation.

Mr. Enderby identified exhibit P-1 as a copy of Form 7000-1, filed by Mrs. Taylor on January 25, 1989, after the citation was issued. The report was submitted to MSHA's Denver, Colorado office, and Mr. Enderby stated that he received a copy of the report in his office on February 17, 1989. He then terminated the citation that same day. The report reflects that Mr. Pridgett was injured on July 15, 1988, while he "was working on his personal tire and was mounting the tire on a rim and the tire exploded." It also reflects that Mr. Pridgett injured his "hand-arm," missed 102 days of work, and that he "still is restricted."

Mr. Enderby stated he made a finding of "high negligence" because MSHA's policy guidelines require such a finding in cases concerning reporting violations pursuant to section 50.20, unless

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there are mitigating circumstances. Mr. Enderby confirmed that there were no such mitigating circumstances in this case.

Mr. Enderby confirmed that he did not consider the violation to be "significant and substantial" because it was not reasonably likely to result in any injury. He did not believe that the respondent exhibited good faith compliance because the injury was not reported until 33 days after he had previously advised Mr. Eisenring to report it and submit an explanatory letter when he discussed the matter with him in December, 1988. In addition, the injury which occurred on July 15, 1988, was not reported until approximately 5 months later.

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory reporting standard 30 C.F.R. 50.20, which requires a mine operator to report an occupational injury within 10 working days after its occurrence. The term "occupational injury" is defined by section 50.2(e) in pertinent part as follows:

Any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in * * * inability to perform all job duties on any day after an injury, * * *.

The evidence in this case clearly establishes that Mr. Pridgett suffered serious injuries to his arm and wrist on July 15, 1988, that he received medical treatment for his injuries, and was incapacitated and missed work for a number of days immediately following his injuries. Contrary to the respondent's assertion that the injury occurred when Mr. Pridgett was performing work on his personal tire for his pick-up, the inspector's credible testimony reflects that the truck was to be used by Mr. Pridgett in performing services for the respondent. Even if I were to accept the respondent's assertions that Mr. Pridgett was working on his own personal vehicle, the applicable definition of "occupational injury" makes no such distinctions. The evidence establishes that the injury occurred at the mine, that medical treatment was administered, and that the injury resulted in Mr. Pridgett's inability to perform his job duties on any day following his injuries. Under the circumstances, all of the criteria for reporting such an injury were met and I conclude and find that the injury was an "occupational injury" which was required to be reported by the respondent within 10 days of its occurrence. The respondent clearly did not do so. Accordingly, I conclude and find that the petitioner has established a violation of section 50.20, by a preponderance of the evidence, and the citation issued by Inspector Enderby IS AFFIRMED.

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Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

Exhibit P-2, a summary of the respondent's mine production, reflects 6,267 manhours worked in Calendar Year 1988. Inspector Enderby testified that the respondent employed four persons "on site," and also used the services of two truck drivers. He considered the respondent to be a small mine operator engaged in the sand and gravel business, and he stated that the principal product is sand which is sold and used in construction, for road materials, and in the production of concrete.

The respondent failed to appear in this case. In the absence of any evidence to the contrary, I cannot conclude that the civil penalty assessed by me for the violation in this case will adversely affect the respondent's ability to continue in business.

I conclude and find that the respondent is a small mine operator, and I have taken this into consideration in assessing a civil penalty for the violation which I have affirmed.

History of Prior Violations

Exhibit P-2, a summary of the respondent's prior history of assessed violations (excluding single penalty assessments timely paid) reflects that the respondent paid civil penalty assessments for one violation in 1986, and one violation in 1987. Inspector Enderby confirmed that the respondent had not previously been charged with any reporting violations pursuant to Part 50, Title 30, Code of Federal Regulations.

I conclude and find that the respondent has a good compliance record and I have taken this into consideration in this case.

Gravity

I conclude and find that the violation was non-serious.

Negligence

Although the record in this case, including the respondent's answer, suggests that the respondent may have been informed that it was not required to report the injury, I find no credible or probative evidence to confirm or corroborate this assertion by the respondent. Further, there is no evidence to establish that the respondent ever filed the required injury report until after the inspector issued the citation on January 25, 1989.

I find the inspector's testimony that he advised Mr. Eisenring on December 20, or 21, 1988, to file the required

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report to be credible. Mr. Eisenring apparently failed to follow the inspector's advice, and I find no evidence to support any conclusion that the report was timely filed. Under all of these circumstances, I agree with the inspector's high negligence finding and it is affirmed.

Good Faith Compliance

I find the inspector's testimony that he advised Mr. Eisenring of his opinion that the injury sustained by Mr. Pridgett on July 15, 1988, was required to be reported to be credible. In my view, the inspector acted reasonably and afforded Mr. Eisenring an opportunity to submit the report with an explanation as to why he had not filed it earlier. Mr. Eisenring failed to do so. Under the circumstances, I agree with the inspector's conclusion that the respondent failed to exercise good faith in timely complying with the requirements of the cited standard.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the proposed civil penalty assessment of \$50, for the violation which has been affirmed is reasonable and appropriate. Accordingly, IT IS AFFIRMED.

ORDER

If it has not already done so, the respondent IS ORDERED to pay a civil penalty assessment in the amount of \$50, to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge