CCASE:
SOL (MSHA) v. EDWIN E. ESPEY, JR.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 90-122-M A.C. No. 41-02319-05511-A
v.	
EDWIN E. ESPEY, JR., EMPLOYED BY ESPEY SILICA SAND COMPANY, RESPONDENT	Espey Pit and Plant

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Petitioner;
Mr. Edwin E. Espey, Jr., San Antonio, Tx, for Respondent.

Before: Judge Fauver

The Secretary seeks a civil penalty under 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

This case was heard in San Antonio, Texas, on May 22, 1991.

Having considered the evidence, oral arguments, and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

FINDINGS OF FACT

1. Espey Silica Sand Company, Inc., a corporation, owns and operates an open pit mine and plant, known as Espey Pit and Plant, in San Antonio, Texas, where it produces silica sand for sales in and affecting interstate commerce.

2. Respondent, Edwin E. Espey, Jr., is vice president and superintendent of the subject mine and plant.

3. The mine and plant, at all times relevant, employed about four employees.

4. On April 26, 1989, Federal Mine Inspector Joseph P. Watson inspected the mine and plant. In the dry screen tower, a four-story building, he found holes and openings in the upper floors that were unguarded and not dangered off. He also found, on the second floor, a wooden purlin (a support beam for a large part of the floor) that was broken and bowed. The floor supported by the purlin was not dangered off. Based on these conditions, the inspector issued a combination imminent danger order and citation, known as Order/Citation No. 3280352, charging a violation of 30 C.F.R. 56.11001, which provides:

> 56.11001 Safe access.
>
> Safe means of access shall be provided and maintained to all working places.

5. The unguarded holes, openings, and broken purlin presented an imminent danger of persons or material falling through a floor and causing permanently disabling or fatal injuries.

6. The conditions observed and cited by the inspector were obvious and evident by the exercise of ordinary attention. The purlin break and bow were obvious. All of the cited conditions were known by the respondent or, by the exercise of reasonable care, should have been known by him, substantially long before the inspection on April 26, 1989.

7. Respondent's father, Edwin E. Espey, who is President and majority stockholder of the corporation, interfered with inspector Watson's performance of his official duties on April 26, 1989, by preventing him from posting a red tag forbidding access to the dry screen tower. As a result of such interference an injunction action was brought in the United States District Court for the Western District of Texas (Secretary of Labor v. Edwin E. Espey, and Edwin E. Espey, Jr., Individually and Espey Silica Sand Co., Inc., a corporation, Civil Action No. SA 89 CA 1416), resulting in a consent decree enjoining defendants from interfering with the Secretary or her agents in carrying out the provisions of the Act.

8. Respondent in this proceeding did not aid his father in interfering with inspector Watson on April 26, 1989, and in general has demonstrated a cooperative attitude toward MSHA inspectors.

DISCUSSION WITH FURTHER FINDINGS

> Section 110(c) of the Act provides that:
> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act

or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The word "knowingly" as used in this section does not have any meaning of bad faith or evil purpose or criminal intent. "It's meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such informations would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." United States v. Sweet Briar, Inc., 92 F. Supp. 777,779 (D.S.C. 1950), quoted approvingly in Secretary v. Kenny Richardson, 3 FMSHRC 8 (1981), affirmed, Richardson v. Secretary of Labor and FMSHRC, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

The facts show that Respondent knew or should have known the existence of the conditions cited by the inspector, and should have corrected them, long before the inspection on April 26, 1989.

In reaching this finding, I have not found it necessary to resolve the conflict in the testimony between Respondent and his nephew, John Espey McDaniel. I find that McDaniel's testimony does not show greater weight than Respondent's testimony and therefore does not preponderate in establishing any fact disputed by Respondent. However, the inspector's testimony and the physical facts observed by him preponderate to show that Respondent knew or should have known the cited conditions before the inspection.

I therefore find that Respondent knowingly permitted the violation as alleged by the Secretary.

Considering the Respondent's overall cooperative attitude toward MSHA inspectors, and the fact that the corporation was assessed a civil penalty of $600 for the same violation as that charged against Respondent, and considering all of the criteria for civil penalties in 110(i) of the Act, I find that a civil penalty of $450 is appropriate for the violation found herein.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent knowingly authorized, ordered or carried out

a violation of 30 C.F.R. 56.11001 as alleged in the Petition for Assessment of Civil Penalty.

ORDER

Respondent shall pay a civil penalty of $450 within 30 days of the date of this decision.

William Fauver
Administrative Law Judge