CCASE:
MSHA V. ANDERSON EQUIPMENT
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-283 A. C. No. 46-01452-03501
v.	:	
	:	Arkwright No. l Mine
ANDERSON EQUIPMENT COMPANY, Respondent	:	

DECISION

Appearances: James V. Blair, Esq., U. S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner;
Hayes C. Stover, Esq., Kirkpatrick & Lockhart, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Anderson Equipment Company (Anderson) with a violation of the mandatory standard found at 30 C.F.R. 48.26(a) and proposing a civil penalty of $60 for that violation. The general issue before me is whether Anderson violated the cited standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Pursuant to notice, a hearing on the merits was held in this matter on August 20, 1991, in Morgantown, West Virginia. Post-hearing briefs were filed by the parties on October 18, 1991. I have considered the entire record of proceedings and the contentions of the parties in making the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

l. Anderson is subject to the provisions of the Act and the undersigned administrative law judge has jurisdiction over these proceedings.

2. Anderson is a small-sized operator under the Act and has committed no violations of the Act or the regulations promulgated thereunder in the 2 years prior to the inspection out of which this case arose.

3. At the time of the October 12, 1989 inspection we are concerned with herein, Mr. Timothy Drake, an Anderson employee, had not been provided with comprehensive training as that term is defined in 30 C.F.R. 48.26, and allegedly in violation of that mandatory standard.

STATEMENT OF THE CASE

Section 104(g)(1) Withdrawal Order No. 3309624 was issued on October 12, 1989, and states as follows:

> Tim W. Drake observed performing mechanic duties on a 530 end loader in the yard at the preparation plant has not received the requisite safety training as stipulated in Section 115 of the Act. Mr. Drake has been determined to be a newly employed experienced miner who has not received the required training under a MSHA approved plan. In the absence of such training Tim Drake, mechanic, is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training. [A] Citation No. 3309625 for violation of 30 C.F.R. 48.26(a) has been issued in conjunction with this Order.

Citation No. 3309625, issued in conjunction with the above order and pursuant to section 104(a) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 48.26(a) and charges as follows:

> Tim W. Drake was observed performing mechanic duties on a 530 end loader in the yard area at the preparation plant. A discussion with Mr. Drake and Edward Wright, safety director for Anderson Equip. Co. revealed that Mr. Drake was not trained under a MSHA approved plan and was not provided with a Form 5000-23 proof of training.
>
> A 104(g)(1) Order No. 3309624 has been issued in conjunction with this citation.

The above-referenced order was not contested by the respondent and is not the subject of the instant civil penalty proceeding. It is mentioned here for the sake of completeness only. The petitioner is seeking a civil penalty assessment for the alleged violation noted in the section 104(a) citation and not the section 104(g)(1) Order.

FINDINGS OF FACT

1. On October 12, 1989, Timothy Drake was employed by the Anderson Equipment Company. That day, he was working on a front-end loader at the Arkwright Tipple of the Consolidation Coal Company, which is located at Granville, West Virginia.

2. MSHA Inspector George H. Phillips also conducted an inspection at the Consolidation Coal Company facility at Granville, West Virginia on October 12, 1989.

3. Inspector Phillips approached Mr. Drake and questioned him concerning his training. Drake informed him that the coal company had provided hazard training and his company (Anderson) had provided him with other safety-related training, but the inspector determined that this "other" training was not comprehensive training pursuant to an MSHA-approved training plan, and he did not have the Form 5000-23 as proof of training.

4. Anderson concedes that Drake had not received comprehensive training under an MSHA-approved plan pursuant to 30 C.F.R. 48.26(a) as of October 12, 1989, nor was he in possession of a Form 5000-23.

5. Government Exhibit No. 1 demonstrates to my satisfaction that Mr. Drake frequently worked at various mine sites, sometimes on an extended basis, including the Consolidation Coal Company facilities at Granville, West Virginia, be it the Arkwright Tipple or the Komfort Tipple. For example, from March 9, 1989 through March 13, 1989, Mr. Drake worked at the Allied Mining facility at Pisgah, West Virginia, for 6 consecutive work days. And from July 27, 1989 through August 3, 1989, he worked at the Consolidation Coal Company facility at Granville, West Virginia, for 6 consecutive work days. During a 14 week period from July 23, 1989 through October 28, 1989, Mr. Drake worked at the Consolidation Coal Company facility at Granville, West Virginia, at least 1 day a week for 12 of those weeks. And in August 1989 alone, he worked at Consol's Granville facility on 12 separate days.

6. Mr. Drake credibly testified that his work place was usually physically located in a segregated repair area, away from the mining operations themselves, but he conceded that was not always possible.

7. I also accept as credible the inspector's opinion based on 19 1/2 years experience as a coal mine safety inspector that Mr. Drake was regularly and frequently exposed to mine hazards generally in the course of his employment as a maintenance worker for Anderson at the various mine sites enumerated in Government Exhibit No. 1.

DISCUSSION WITH FURTHER FINDINGS

Respondent denies that training under 30 C.F.R. 48.26(a) was required in Mr. Drake's case and states that training under 30 C.F.R. 48.31(a) was supplied instead and was the appropriate training in their opinion.

The question is whether Drake is a "miner" as defined in 30 C.F.R. 48.22(a)(1) or (a)(2).

If he is an "(a)(1) miner," he is required to have comprehensive training under section 48.26. If he is an "(a)(2) miner," he is required to have only hazard training under section 48.31, which the Secretary concedes he had received.

Put another way, the question is was Drake a "maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods" (an (a)(1) miner) or was he excluded from (a)(1) coverage because he was "(iii) any person covered under paragraph (a)(2) of this section," i.e., an "occasional short-term maintenance or service worker contracted by the operator."

Program Policy Letter No. P89-III-13 entitled Independent Contractor Training Policy; 30 C.F.R. Part 48 (Respondent's Exhibit No. 3) states that:

> Independent contractors regularly exposed to mine hazards, or who are maintenance or service workers contracted by the operator to work at the mine for frequent or extended periods, must receive comprehensive training. "Regularly exposed" means either frequent exposure, that is exposure to hazards at the mine on a frequent rather than consecutive day basis (a pattern of recurring exposure) or extended exposure of 5 consecutive workdays, or both.

Also, the MSHA Program Policy Manual, Volume III, Part 48 (Respondent's Exhibit No. 2) at page 25 states:

> If the job assignment of a service or maintenance worker exceeds 5 consecutive working days at a particular mine, and they are exposed to mining hazards, comprehensive training must be given . . . .

Page 13-14 of that same manual further recites:

> If the individual . . . is a maintenance or service worker employed or contracted by the operator for frequent periods or on a regular basis and is exposed to mine hazards, the worker must be given

> comprehensive training. Regular exposure is a recognizable pattern of exposure on a recurring basis. Exposure to hazards for more than 5 consecutive days is frequent exposure.

I find and conclude that Mr. Drake was as of the date of the citation at bar, October 12, 1989, a maintenance worker employed by Anderson, and contracted to work at various mine sites on both a frequent and extended basis, where he was regularly exposed to the hazards generally associated with both mining and the repair of heavy equipment. As such, he was required to have comprehensive training, in accordance with 30 C.F.R. 48.26(a). He did not, and therefore, a violation of the cited standard existed at that time, as charged.

The Secretary also urges that I find this violation to be "significant and substantial" (S&S). However, the inspector himself stated that he did not doubt that the man was trained, but it just was not training approved by MSHA or pursuant to an MSHA-approved plan (Tr. 22). Under the circumstances, I find the record to be totally lacking in support for an "S&S" finding. Accordingly, Citation No. 3309625 will be affirmed as a "non-S&S" citation.

Having considered all the criteria for a civil penalty in section 110(i) of the Act, I find that a penalty of $50 is appropriate for the violation found herein.

ORDER

WHEREFORE, IT IS ORDERED that:

1. Citation No. 3309625 is modified to delete the "significant and substantial" finding and as so modified, affirmed.

2. Respondent shall pay the civil penalty of $50 within 30 days of this decision.

Roy J. Maurer
Administrative Law Judge

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