

CCASE:
MSHA V. ROBERT FOSTER
DDATE:
19921021
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-72-M
Petitioner : A.C. No. 41-03504-05520
v. :
: Four Mile Draw
ROBERT FOSTER, Employed by :
SUN PAVING INCORPORATED, :
Respondent :

DECISION

Appearances: J. Phillip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Petitioner;
Robert Foster, Michael F. Harrison, El Paso,
Texas, for Respondent.

Before: Judge Barbour

BACKGROUND

This case concerns proposals for assessment of civil penalties filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA"), Petitioner, against Robert Foster, Respondent, pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c). Petitioner seeks civil penalty assessments for two alleged violations of certain mandatory safety standards for surface metal and non-metal mines found in Part 56, Title 30, Code of Federal Regulations. The Secretary alleges that Respondent, as the agent of corporate mine operator Sun Paving Incorporated, knowingly authorized, ordered or carried out the subject violations. The Respondent filed an answer and the case was docketed for hearing on the merits in El Paso, Texas on September 29, 1992, at 8:30 A.M.

THE PROCEEDINGS

On September 29, 1992, shortly before the start of the hearing, I was advised by Counsel for the Secretary that he had received a telephone call from Respondent on the previous night at counsel's hotel in El Paso and that Respondent had stated he wished to settle the matter by paying in full the proposed civil

penalties for the violations. Counsel further stated that he had advised Respondent that although this would be a satisfactory resolution of the case as far as the Secretary was concerned, any such result would have to be approved by me.

When Respondent, representing himself, arrived at the hearing he and Counsel for the Secretary conferred briefly in private. Following their conference, I convened the hearing and Counsel for the Secretary explained on the record the circumstances of the telephone call and further stated that Respondent admitted liability and wished to pay in full the proposed civil penalties. (Footnote 1) Counsel further stated the Secretary believed the proposed penalties to be appropriate for the violations and that this resolution was acceptable to the Secretary. Tr. 6-7

Respondent then stated on the record that Counsel had described their agreement accurately. When asked by me whether he admitted that the violations had occurred and that he had knowingly authorized them, he stated, "Yes." Tr. 8. He further stated that he is the president and general operating manager of Sun Paving Incorporated, and that although the company had been assessed civil penalties in the past this was the first instance in which he or the company had been involved in the administrative hearing process. Tr. 8-9. Finally, Respondent apologized for his tardiness in contacting Counsel for the Secretary regarding this matter. Tr. 11.

The violations are cited in an order of withdrawal and a citation. The order, citation and proposed civil penalty amounts are as follows:

Order/ Citation No.	Date	30 C.F.R. Section	Assessment
3448601	11/5/90	56.14101	\$700
3448615	11/5/90	56.1400(b)	\$300

Order No. 3448601 states that Respondent knowingly permitted a front end loader to operate without a service brake capable of holding or stopping the loader with its typical load on the maximum grade it traveled. Citation No. 3448615 states that Respondent knowingly permitted the front end loader to operate with a loose steering mechanism.

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I accepted Respondent's apology, but I explained to Respondent that his procrastination had put the government to a great deal of unnecessary expense, and that I expected in the future he would resolve such matters on a timely basis. I emphasized that I was not required to accept the parties' proposal, and I explained that only because this was his first experience with the hearing process would I do so in this instance. Tr. 10-11.

FINDINGS AND CONCLUSIONS

Respondent acknowledged liability and authorizing the violations, and I so find. I further find that the violations were serious in that they could have contributed to a haulage accident. In addition, Respondent abated the violations in a timely fashion. Finally, Respondent is small in size and has a medium applicable history of previous violations.

After review and consideration of the statements in support of the proposed resolution of this matter made by Counsel for the Secretary and the by the Respondent, and keeping in mind Counsel for the Secretary's assurance that the Secretary is fully satisfied that payment in full of the proposed civil penalties is appropriate, I conclude the proposed civil penalties accurately reflect the statutory civil penalty criteria. The parties are put on notice, however, that in the future I will accept such last minute agreements only in the most extraordinary of circumstances.

ORDER

Respondent IS ORDERED to pay in full the proposed civil penalties in the amounts shown above in satisfaction of the violations in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and upon receipt of payment, this proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge
(703) 756-5232

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Distribution:

J. Phillip Smith, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203
(Certified Mail)

Mr. Robert Foster, Mr. Michael F. Harrison, 1840 Lee Trevino,
Suite 110, El Paso, TX 79936 (Certified Mail)

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