

CCASE:

SOL (MSHA) V. DELAWARE VALLEY LANDSCAPE

DDATE:

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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-523-M
Petitioner	:	A.C. No. 36-03161-05507
v.	:	
DELAWARE VALLEY LANDSCAPE	:	Docket No. PENN 92-524-M
INCORPORATED,	:	A.C. No. 36-03161-05506
Respondent	:	Delaware Valley Landscape
	:	Stone Inc.

DECISIONS

Appearances: Maureen A. Russo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Jay H. Harsch, Esq., Eastburn and Gray, Doylestown, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties 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). Both cases concern alleged violations of mandatory safety standard 30 C.F.R. 56.14131(a), which requires seat belts to be provided and worn in haulage trucks. Docket No. PENN 92-524-M, concerns a section 104(d)(1) "S&S" Citation No. 3866333, issued on December 10, 1991, by MSHA Inspector Elwood Frederick for the alleged failure of a haulage truck operator to wear a provided seat belt while hauling material at the respondent's mine site. Docket No. PENN 92-523-M, concerns a section 104(d)(1) "S&S" Order No. 3866334, issued by Inspector Frederick approximately one hour after the issuance of the citation on December 10, 1991. The inspector cited another haulage truck operator for not wearing the seat belt provided in his haulage truck while hauling material at the site.

The respondent filed timely notices of contests and answers denying the alleged violations and challenging the reasonableness of the proposed penalty assessments (\$600 in Docket No. PENN 92-524-M and \$500 in Docket No. PENN 92-523-M). The cases were consolidated for hearing in Allentown, Pennsylvania, on

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March 11, 1993, and the parties appeared and participated fully therein, and they were given an opportunity to file posthearing briefs.

Issues

The issues presented are (1) whether the cited conditions or practices constitute violations of the cited standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violations were the result of the respondent's unwarrantable failure to comply with the cited standards; and (4) the appropriate civil penalties to be assessed for the violations taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq.
2. Sections 104(d)(1) and 110(1) of the Act.
3. 30 C.F.R. 56.14131(a).
4. Commission Rules, 29 C.F.R. 2700.1, et seq.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The respondent is a duly authorized Pennsylvania corporation and it is subject to the jurisdiction of the Act.
2. The presiding Administrative Law Judge has jurisdiction in these proceedings.
3. The subject order and citation were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.
4. The assessment of civil penalties in these proceedings will not affect the respondent's ability to continue in business.
5. The appropriateness of the penalties, if any, to the size of the business should be based on the fact that:

- a. The respondent's company's annual production tonnage is 16,465 (small company);
 - b. The respondent's Delaware Valley Landscape Stone, Inc., Delaware Plant has an annual production of 5,846 tons (small plant).
6. The respondent was assessed a total of eight (8) violations during the 24 months preceding the issuance of the citation and order involved in these proceedings. (Exhibit G-K).
7. The parties stipulate to the authenticity of their exhibits but not to their relevance nor the truth of the matters asserted therein.

Discussion

In support of the alleged violations, the petitioner presented the testimony of Inspector Frederick. In its defense, the respondent presented the testimony of its plant manager and foreman, Clarence Pursell. According to the testimony, Mr. Pursell accompanied the inspector during his inspection on December 10, 1991, and the contested citation and order were served on Mr. Pursell. At the close of all of the testimony, the respondent's counsel presented closing arguments on the record (Tr. 138-142). Petitioner's counsel waived closing argument and opted to file a posthearing brief (Tr. 144). However, prior to the submission of any briefs the petitioner filed a motion pursuant to Commission Rule 30, 29 C.F.R. 2700.30, seeking approval of a proposed settlement agreed to by the parties, the terms of which include an agreement by the respondent to pay civil penalty assessments of \$128, in settlement of each of the violations.

In support of the proposed settlement, the petitioner states that on the basis of the evidence presented during the hearing on March 11, 1993, the parties are in agreement that the respondent's negligence does not rise to the level of aggravated conduct required to support the inspector's unwarrantable failure findings. Under the circumstances, the parties are in agreement that the citation and order should be amended to section 104(a) citations, and that the remaining negligence and gravity findings made by the inspector will remain as issued. In addition, the parties state that the statutory civil penalty criteria found in section 110(i) of the Act have been considered, and they confirm that the violations were timely abated in good faith and that the respondent's history of eight prior citations does not include any seat belt violations.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the proposed settlement of these cases, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.30, the settlements ARE APPROVED.

ORDER

IT IS ORDERED THAT:

1. Docket No. PENN 92-523. The initial Section 104(d)(1) "S&S" Order No. 3866334, December 10, 1991, citing a violation of 30 C.F.R. 56.14131(a), IS MODIFIED to a section 104(a) "S&S" citation, and the violation IS AFFIRMED. The respondent shall pay a civil penalty assessment of \$128, to MSHA within thirty (30) days of the date of this decision and order in satisfaction of the violation, and upon receipt of payment, this matter is dismissed.

2. Docket No. PENN 92-524. The initial Section 104(d)(1) "S&S" Citation No. 3866333, December 10, 1991, citing a violation of 30 C.F.R. 56.14131(a), IS MODIFIED to a section 104(a) "S&S" citation, and the violation IS AFFIRMED. The respondent shall pay a civil penalty assessment of \$128, to MSHA within thirty (30) days of the date of this decision and order in satisfaction of the violation, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Maureen A. Russo, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Jay H. Karsch, Esq., Eastburn and Gray, 60 East Court Street, P.O. Box 1389, Doylestown, PA 18901-1389 (Certified Mail)

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