CCASE:
SOL (MSHA) V. ABYSS SAND & GRAVEL, INC.,
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-493-M
Petitioner	:	A.C. No. 01-02915-05505
v.	:	
	:	Baker Mann Mine
ABYSS SAND & GRAVEL, INC.,	:	
Respondent	:	

DECISION

Appearances: Kathleen G. Henderson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent contested the alleged violations and a hearing was convened in Montgomery, Alabama, pursuant to notice. The petitioner appeared, but the respondent did not, and the hearing proceeded as scheduled. For reasons discussed later in this decision, the respondent is held to be in default, and is deemed to have waived its opportunity 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.

Issues

The issues presented in this case are (1) whether the petitioner has established the violations as cited in the contested citations, and (2) the appropriate civil penalties that should be assessed for the violations.

Discussion

Section 104(a) non-"S&S" Citation No. 3426449, July 21, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.14131(a), and the cited condition or practice states as follows (Exhibit P-4):

> A seat belt was not provided for the Euclid Model R-22 haul truck and was operating in the pit area. However, the ground was level and was not operating on elevated roads.

Section 104(a) "S&S" Citation No. 3426448, July 21, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.14132(a), and the cited condition or practice states a follows (Exhibit P-5):

> The back alarm was not working on the 980 Cat end loader and was operating in the plant and stock pile areas.

The respondent failed to appear at the hearing in this matter. The notices of hearing were mailed to the respondent's business address of record by regular mail and certified mail. The certified mailings were returned from the post office as "undeliverable", "unclaimed", and "no mail receptacle".

The applicable Commission default Rule 66, 29 C.F.R. 2700.66, provides as follows

> (b) Failure to attend hearing. If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.
>
> (c) Penalty Proceedings. When the Judge finds a party in default in a civil penalty proceeding, the Judge shall also enter an order assessing appropriate penalties and directing that such penalties be paid.

William Wilkie, MSHA Inspector and field supervisor, confirmed that he sent an inspector to the respondent's mine site in an attempt to contact the respondent, but found the entrance gate closed, and he could not gain entry. Telephone calls were also placed to the mine phone number listed on MSHA's Legal

Identity form, as well as the respondent's home, but no one answered the phone (Tr. 54). Mr. Wilkie confirmed that MSHA permanently closed the mine on March 29, 1993, and he did not know the whereabouts of the respondent mine operator (Tr. 54).

The Birmingham, Alabama solicitor's office advised me that several prehearing attempts to contact the respondent by telephone at his last known business and residence telephone numbers were to no avail (Tr. 55-56).

In view of the foregoing, the petitioner's counsel moved that a default judgment be entered against the respondent pursuant to Commission Rule 66(b), 29 C.F.R. 2700.66(b), and that both of the citations be affirmed (Tr. 5-6). The motion was granted from the bench (Tr. 6), and my ruling in this regard is herein reaffirmed, and I find the respondent to be in default.

Petitioner's Testimony and Evidence

The evidence presented by the petitioner in the course of the hearing establishes that the respondent is subject to the jurisdiction of the Act, and that the petitioner correctly exercised its enforcement jurisdiction in inspecting the mine and issuing the citations in this case (Tr. 8-12).

MSHA Inspector Jose O. Garcia testified that he inspected the mine in July, 1992, and issued the citations in question. He confirmed that a seat belt was not provided for the cited truck which he observed being operated. He stopped the truck and observed that it did not have a seat belt for the operator to use while driving the truck (Tr. 13-16). He also confirmed that he inspected the cited loader and asked the operator to back it up. When he did, the backup alarm did not work (Tr. 22).

Inspector Garcia testified to the hazards presented in operating the truck without a seat belt, and operating the loader with an inoperative backup alarm (Tr. 16-17; 22-26). He also explained the basis for his "S&S" finding with respect to the backup alarm violation, and he confirmed that he considered the seat belt violation to be non-"S&S" (Tr. 27-29; 41-47).

Mr. Garcia testified that the plant area in question was a rather confined area and that the stockpiles are close to the conveyor belts where the truck drivers come into in the area. He observed people on foot in the area, and he indicated that most loader accidents occur when the loader is backing up in the direction of someone walking nearby. He confirmed that the shift started at 7:00 a.m., and that he observed the loader shortly

after noon and concluded that it had been operating that morning moving materials around the plant area and loading trucks (Tr. 49-52).

Findings and Conclusions

Fact of Violations

As previously noted, the respondent failed to appear at the hearing and it has been defaulted. Based on the evidence and testimony presented by the petitioner, I conclude and find that the violations have been established, and the contested citations ARE AFFIRMED as issued.

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

Inspector Garcia confirmed that the respondent is no longer in business and that the mine has been closed. He characterized the respondent as a small operator employing six or seven people when it was in operation. The mine had an annual production of 1,600 tons or hours worked as a sand and gravel operation (Tr. 32-34).

I conclude and find that the respondent is a small mine operator, and in the absence of any evidence to the contrary, and notwithstanding the fact that the respondent has apparently closed its mining operation, I cannot conclude that payment of the penalty assessments for the violations which have been affirmed will adversely affect the respondent's ability to continue in business.

History of Prior Violations

The inspector confirmed that the respondent has a history of prior violations (Tr. 35). However, the petitioner did not produce a computer print-out detailing any prior violations or assessments, and the inspector had no knowledge of any prior backup alarm or seat belt violations (Tr. 39-40). The pleadings, which include certain information concerning the penalty criteria found in section 110(i) of the Act, reflect 16 prior assessed violations but no further information is provided (Tr. 39).

I take note of the fact that in a prior civil penalty proceeding involving these same parties, Docket No. SE 92-10-M, I issued a settlement decision on June 24, 1992, concerning fourteen (14) prior violations, including a violation of section 56.14131, issued on July 18, 1991, and a violation of section 56.14132(b)(1), issued that same date. The first citation was assessed at $20, and the respondent agreed to settle it by paying the full amount. The second citation was assessed at $68, and it was settled for $30.

Negligence

The inspector testified that the seat belt violation resulted from a moderate degree of negligence on the part of the respondent (Tr. 17-19). He confirmed that he discussed the citations with Mr. Mann, the mine operator, and that he offered no explanations for the violations other than to point out that the truck was an old truck which was not equipped with a seat belt (Tr. 48). The inspector also found a moderate degree of negligence associated with the backup alarm violation. I agree with the inspector's negligence findings and adopt them as my findings and conclusions.

Gravity

I conclude and find that the seat belt violation was nonserious, and that the violation for the inoperative backup was a serious violation.

Good Faith Abatement

The inspector confirmed that the seat belt violation was abated the day after the citation was issued (Tr. 17). He also confirmed that the backup alarm violation was abated and that the respondent acknowledged both of the violative conditions that were cited (Tr. 29). He confirmed that a new switch was installed to repair the backup alarm (Tr. 47-48). I conclude and find that the cited conditions were timely abated by the respondent in good faith.

Civil Penalty Assessments

Although the respondent failed to appear at the hearing and has been defaulted, I nonetheless take note of its answer in this case contesting the amount of the proposed civil penalty assessments. The respondent asserted that its sand and gravel operation has been closed due to the lack of operating funds and its "struggle to pay bills". The respondent characterized the proposed civil penalty assessment of $595 for the "S&S" inoperative backup alarm violation, and $204 for the non-"S&S" seat belt violation as "amazing." The petitioner's oral motion that I affirm the amounts of the proposed penalty assessments was taken under advisement (Tr. 52).

It is well settled that the presiding judge is not bound by the proposed civil penalty assessments and may make his own de novo penalty determinations based on the civil penalty criteria found in section 110(i) of the Act. Further, Commission Rule 66(c) authorizes the judge to enter an order assessing "appropriate penalties" in the case of a defaulting mine operator. Under the circumstances, and based on my consideration

of all of the facts in this case, I conclude and find that the following civil penalty assessments are reasonable and appropriate in this case:

Citation No.	Date	30 C.F.R. Section	Assessment
3426448	7/21/92	56.14132(a)	$125
3426449	7/21/92	56.14131(a)	$75

ORDER

The respondent IS ORDERED to pay the civil penalty assessments made by me for the enumerated violations which have been affirmed by me in this matter. Payment is to be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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