

CCASE:
SOL (MSHA) V. ART BEAVERS CONSTRUCTION
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 12, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 93-171
Petitioner	:	A.C. No. 05-00294-03503ZW5
	:	
v.	:	Somerset
	:	
ART BEAVERS CONSTRUCTION	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
James E. Masson, Esq., Crawford, Colorado,
for Respondent.

Before: Judge Cetti

I

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act". The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the Art Beaver Construction Company (Construction Company) with the violation of 30 C.F.R.

48.28(a). That safety standard provides that each "miner shall receive a minimum of 8 hours annual refresher training.

The mine inspector issued a 104(g) order alleging that four of the Construction Company's employees who had not received 8 hours annual refresher training were "observed performing laborer duties at this mines surface." MSHA made a special assessment and proposed a penalty of \$800.

The operator filed a timely appeal contesting the existence of the alleged violation and the appropriateness of the proposed penalty.

II

ISSUES

At the hearing the issues raised by the Secretary were as follows:

1. Is Art Beavers Construction Company an independent contractor performing services or construction at mines?
2. Is Art Beavers Construction Company an operator performing services or construction at a mine site covered under the Federal Mine Safety and Health Act of 1977?
3. Did Art Beavers Construction Company employ individuals who are considered miners under the Act to perform services or construction at a mine site?
4. Did a violation of 30 C.F.R. 48.28(a) occur as alleged in Order number 4060714?
5. Was such violation of a significant and substantial nature?

Issues raised by the Construction Company were as follows:

1. Whether the employees of Beavers Construction Co. were miners.
2. Whether the employees of Beavers Construction Co. were required to have safety certificates.
3. Whether the employees of Beavers Construction Co. were regularly or frequently exposed to mine hazards.
4. Whether the efficacy of the citation was terminated by the MSHA official on September 15, 1992; thus rendering the penalty assessment illegal or inappropriate.
5. Whether the penalty of excluding the employees from the premises of the mine was sufficient penalty.
6. When did the alleged violations occur. Does the citation adequately advise the Respondent of when the alleged violation occurred.
7. Were the employees of Beavers Construction Co. casual labor on the mine premises; infrequent laborers and thus not required to have safety certificates?

III

STIPULATIONS

At the hearing the following stipulations were read into the record.

1. The Commission has jurisdiction in this matter.
2. The subject order was properly served, by a duly authorized representative of the Secretary, upon an agent of Respondent on the date and place stated therein and may be admitted into evidence for purpose of establishing issuance and not for the truthfulness or relevancy of any statements asserted therein.
3. The exhibits to be offered by the Respondent and the Secretary are stipulated to be authentic, but no stipulation is made to the relevance or truth of the matters asserted therein.
4. The proposed penalty will not affect Respondent's ability to continue in business.
5. The company demonstrated good faith in abating the violations.
6. The certified copy of the MSHA section violation history accurately reflects the history of this company for two years prior to the date of the order.
7. On September 10, 1992, the employees of Art Beavers Construction Company were cited and ordered from the premises of the mine at Somerset, Colorado, and on September 15, 1992, the order was terminated because the employees that had been cited received the annual eight-hour safety refresher course, on September 12, 1992, by Ed Hayduk.
8. The time cards of the Respondent's employees shall be admitted for the truth of the matters asserted therein without the need of the testimony of the company bookkeeper, Patricia Morse.
9. The company is a small company for purposes of size and penalty.

IV

The parties at the hearing presented documentary evidence and points and authorities in support of their contentions as well as written and oral argument. During a recess at the hearing the parties negotiated and reached a settlement of the case. On the record the parties moved for approval of their oral

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settlement. The Solicitor stated that the original proposed penalty resulted from a special assessment and based on her conversations with the MSHA District Office during the recess it was agreed that in view of MSHA's reevaluation of the negligence, the history of no prior violations, the prompt abatement of the violation and the small size of the business, the penalty should be modified to one based on the regular assessment criteria including the S&S designation of the violation. Computation on this basis would result in a penalty of \$195.

V

CONCLUSION

Based upon MSHA's reconsideration of the level of negligence, the timely abatement of the violation, the construction company's lack of penalty history (the company has never been cited before) and the small size of the construction company's business, it appears quite appropriate and reasonable to base the penalty on a "regular" rather than a "special" assessment, keeping intact and affirming the significant and substantial characterization of the violation of 30 C.F.R. 48.28(a). It satisfactorily appears from the record that the citation should be affirmed as written and that the appropriate penalty for the violation in this case is \$195.

ORDER

Accordingly it is ORDERED that Order No. 4060714 including the significant and substantial designation of the violation of 30 C.F.R. 48.28(a) be and is AFFIRMED and that Respondent, Art Beaver Construction Company pay a civil penalty of \$195 to the Secretary of Labor within 30 days of the date of this decision. Upon receipt of payment this proceeding is DISMISSED.

August F. Cetti
Administrative Law Judge

Distribution:

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