

CCASE:  
SOL (MSHA) V. LAUREL SAND AND GRAVE  
DDATE:  
19931118  
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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. YORK 93-81-M  
Petitioner : A. C. No. 18-00410-05522  
v. :  
 : Laurel Operation  
LAUREL SAND AND GRAVEL, INC., :  
Respondent :  
 :

DECISION

Appearances: John M. Strawn, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, PA for the  
Petitioner;  
Terry B. Eichelberger, Director of Safety for  
Laurel Sand & Gravel, Inc., Laurel, Md for the  
Respondent

Before: Judge Weisberger

This case is before me based on a Petition for Assessment of Civil Penalty alleging violations by Laurel Sand and Gravel, Inc. (Laurel) of various mandatory regulatory standards. The case was scheduled to be heard on September 23, 1993. On September 20, 1993, the hearing was canceled at the request of the parties, based on their assertions that a settlement had been reached regarding five of the six citations at issue. The parties also advised that the remaining citation would be submitted for resolution based upon a motion for summary decision. On October 12, 1993, the Secretary filed a motion for summary decision. On the same date, Laurel filed it's response to the motion for summary decision.

1. Citation No. 4082800.

A. Stipulations

The parties stipulated to the following facts:

1. The Laurel operation is owned and operated by Respondent Laurel Sand and Gravel, Inc.
2. The operation is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.
4. The subject Citation was properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time and place stated therein.
5. The assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.
6. The appropriateness of the penalty, if any, to the size of the operator's business should be based on the following facts:
  - a) Respondent company's annual hours for 1991 are 207,878;
  - b) The Laurel operation's annual hours for 1991 are 74,850;
7. Respondent demonstrated ordinary good faith in attaining compliance after the issuance of the Citation.
8. Respondent was assessed a total of 18 Citations based upon 28 inspection days in the 24 months immediately preceding the issuance of the subject Citation. See Joint Exhibit "A", Respondent's history of previous violations.
9. Metal/nonmetal inspector (hereinafter "M/NMI") James E. Goodale is an experienced inspector with seven years as an inspector with MSHA and 16 years in the industry.
10. The Laurel operation is a small sand and gravel processing facility.
11. On December 9-10, 1991, M/NMI Goodale inspected the Laurel operation and issued a number of Citations including the subject Citation No. 4082800. See Joint Exhibit "B".
12. M/NMI Goodale took notes during his inspection corresponding to Citation No. 4082800. See Joint Exhibit "C".

13. M/NMI Goodale was accompanied on his inspection by several of Respondent's employees, Terry B. Eichelberger, Director of Safety and Quality Control, Richard C. Ramsay, Jr., Maintenance Supervisor, and James Roy, Maintenance Technician.
14. On December 10, 1992, M/NMI Goodale and the rest of the party observed approximately six upright unsecured compressed gas cylinders located along one of the exterior walls of the maintenance shop of the Laurel operation.
15. As a result, M/NMI Goodale issued Citation No. 4082800 as a "non-significant and substantial" 104(a) Citation for violation of 30 C.F.R. 56.16005.
16. The regulation requires: "Compressed and liquid gas cylinders shall be secured in a safe manner."
17. M/NMI Goodale indicated that the citation was "non-significant and substantial" based on findings of moderate negligence, of one miner exposed, of unlikely occurrence of injury, and of potential injuries of lost workdays or restricted duties.
18. Respondent's employees, specifically welders and maintenance workers, had access to the area outside of the maintenance shop but were not required to go to that area as a part of their regular duties.
19. The cylinders had open or missing valves and had been left abandoned by the previous owner of the facility.
20. There was no residual pressure in the cylinders.
21. A proposed penalty of \$50.00 was assessed for Citation No. 4082800.

All exhibits are incorporated herein by reference and made a part hereof. (Footnote 1)

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1 Joint Exhibits A, B, and C are admitted, and are considered to be part of the record of this proceeding.

B. Discussion

In essence, the citation at issue alleges that several compressed gas cylinders located at the maintenance shop were not secured in place, in violation of 30 C.F.R. 56.16005 which provides that compressed gas cylinders "... shall be secured in a safe manner." In essence, Respondent does not deny that the cited cylinders were not secured. However, Respondent argues that, in essence, since the cylinders were not under any pressure, no hazard was presented to persons. I find that Laurel's argument is without merit for the reasons that follow.

According to the plain language of 56.16005 supra, a violation is established if compressed cylinders are not secured in a safe manner. Laurel agrees that the cylinders at issue were not secured. In Tide Creek Rock Products, 4 FMSHRC 2241 (December 22, 1982), the operator, who was cited under Section 56.16-5(Footnote 2), contended that the bottles were not empty, and therefore did not present a hazard. Judge Koutras, in affirming the citation found as follows: "The standard cited makes no distinction between full or empty cylinders, and Respondent's defense on this ground is rejected." (Tide Creek Rock Products supra, at 2250. Judge Koutras' reasoning finds support in the clear wording of Section 56.16005 supra, and I follow it herein.

For these reasons, I conclude that it has been established that Laurel violated Section 56.16005 supra, as alleged in Citation No. 4082800. Respondent has not interposed any further defenses. Based upon the criteria set forth in Section 110(i) of the Act as stipulated to by the parties, regarding the size of Laurel's operations, the effect of a penalty upon it's ability to continue in business, it's history of violations, and it's good faith in attaining compliance after the issuance of the citation, I conclude that a penalty of \$50.00 is appropriate for this violation.

II. Citation Nos. 4082793, 4082794, 4082795, 4082796 and 4082799

The Secretary's Motion to Approve Settlement and its Amended Motion regarding Citation Numbers 4082793, 4082794, 4082795, 4082796 and 4082799, alleges that the parties propose to reduce the penalties sought from \$380 to \$200. In addition, the Secretary seeks to vacate Citation No. 4082793. Based on the representations in the Motion, and the documentation in the pleadings, I find that the settlement is appropriate and consistent with the purposes of the Federal Mine Safety and Health Act of 1977. The Motion accordingly is GRANTED.

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2 Presently numbered Section 56.16005, supra.

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ORDER

It is hereby ORDERED that citation No. 4082800 be affirmed, and that Laurel pay a total civil penalty of \$250 within thirty days of this decision.

Avram Weisberger  
Administrative Law Judge

Distribution:

John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, 14480 Gateway Building, Philadelphia, PA 19104 (Certified Mail)

Terry B. Eichelberger, Director of Safety, Laurel Sand & Gravel, Inc., 5601 Van Dusen Road, P.O. Box 719, Laurel, MD 20707 (Certified Mail)

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