

CCASE:
SOL (MSHA) V. NAPOLEON SAND AND GRAVEL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 93-46-M
Petitioner : A. C. No. 32-00185-05509
 :
v. : Docket No. CENT 93-181-M
 : A. C. No. 32-00185-05511
NAPOLEON SAND AND GRAVEL :
 : Docket No. CENT 93-182-M
 : A. C. No. 32-00185-05512
 :
 : Gross Pit

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U. S. Department of Labor, Denver, Colorado for
Petitioner;
Jerold A. Kuhn, Esq. Napoleon, North Dakota, for
the Respondent.

Before: Judge Feldman

The above captioned proceedings are before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et. seq., (the Act). These matters were called for hearing on March 22, 1994, in Bismarck, North Dakota. These cases concern a total of seven 104(a) citations for which the Secretary initially proposed total civil penalties of \$4,038. Three of the seven citations were issued in conjunction with 104(b) orders.(Footnote 1)

At the commencement of the hearing, the parties moved to settle these cases. The settlement terms included the respondent's stipulation to the violations as cited in the subject citations. The agreed upon total civil penalty to be assessed in these cases was \$1,750 which consists of \$250 for each of the seven citations. It was further agreed that payment of the civil penalty would be deferred until on or before September 22, 1994, when the respondent resumes gravel pit operations.

1A 104(b) order is issued pursuant to Section 104(b) of the Act, 30 U.S.C. 814(b), when a violation previously cited is not timely abated.

Section 110(i) of the Act, 30 U.S.C. 820(i), sets forth the statutory criteria for considering the appropriateness of civil penalties. This criteria includes the operator's history of previous violations, the relationship between the amount of the penalty and the size of the operator's business, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after issuance of the citation.

In considering the statutory civil penalty criteria, I note the operator has had only 18 violations during the previous six years of operation, and, that it has not been cited for any violations within the past two years. (Tr. 14). In addition, the respondent is a small business that is operated by Walter Schauer, the sole proprietor. Only Walter Schauer and his son Jerry perform work at the gravel pit site. The gravel pit is only operated sporadically, approximately 400 hours per year, in order to remove approximately 2,000 yards of gravel annually. Although, a small portion of the extracted material is sold to private individuals, the majority of the sand and gravel removed is used for the respondent's ready mix concrete business. (Tr. 11-12). Finally, counsel for the Secretary noted that the respondent has always been courteous to the Mine Safety and Health Administration inspectors and has demonstrated a past willingness to promptly correct violations. (Tr. 14). In this regard, the respondent's culpability for the three 104(b) orders issued in this matter is mitigated by the fact that the gravel pit was not operational during the interim period between the issuance of the initial citations and subsequent 104(b) orders. (Tr. 16-17).

In view of the information presented on the record pertaining to the Section 110(i) penalty criteria, I issued a bench decision approving the settlement agreement proffered by the parties. As noted above, the settlement terms include payment by the respondent of \$1,750 on or before September 22, 1994. If payment is not made on or before September 22, 1994, the total penalty of \$4,038 initially proposed by the Secretary will become due and payable immediately.

ORDER

Accordingly, the parties' motion to approve settlement IS GRANTED. IT IS ORDERED that the respondent pay a total civil penalty of \$1,750 on or before September 22, 1994, in satisfaction of the seven citations in issue. Upon timely payment of this sum, these cases ARE DISMISSED.

Jerold Feldman
Administrative Law Judge

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