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SOL (MSHA) V. EXPLO-TECH
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SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. YORK 93-134-M
Petitioner : A. C. No. 18-00417-05501 W21
:
v. :
: Mechanics Valley Quarry
EXPLO-TECH INCORPORATED, :
Respondent :

DECISION

Appearances: Anthony G. O'Malley, Jr., Esq., Office of
the Solicitor, U. S. Department of Labor,
Philadelphia, Pennsylvania, for the Petitioner;
Frank P. Spada, Jr., Esq., Explo-Tech
Incorporated, Philadelphia, Pennsylvania, for the
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil
penalty filed by the Secretary of Labor against Explo-Tech
Incorporated under section 110 of the Federal Mine Safety and
Health Act of 1977, 30 U.S.C. 820.

Citation No. 4082132 was issued for a violation of 30
C.F.R. 56.15005 and alleges the following condition or
practice:

The contract driller using a Gill (bettle) drill
was observed operating the drill approximately 2 to 3
feet from the bench edge.

The driller was not wearing a safety line and belt
to protect him from a 30 foot fall, if the bench edge
collapsed or he lost his footing.

30 C.F.R. 56.15005 sets forth the following:

Safety belts and lines shall be worn when persons
work where there is danger of falling; a second person
shall tend the lifeline when bins, tanks, or other
dangerous areas are entered.

A hearing was held on March 31, 1994. In an off the record
conference prior to going on the record and in written submis-
sions, the parties agreed to the following stipulations
(Tr. 6-9):

(1) The respondent is an operator and was performing services for Mechanics Valley Quarry, Cecil County, Maryland which services are the subject of this proceeding.

(2) Respondent utilizes tools, equipment, machinery, materials, goods, and supplies in its business activities which have originated in whole or in part from locations outside the Commonwealth of Pennsylvania.

(3) Respondent engages in business which affects commerce.

(4) Operations at the Mechanics Valley Quarry are subject to the Mine Safety Health Act of 1977, as amended.

(5) The Administrative Law Judge has jurisdiction to hear and decide this case pursuant to Section 105 of the Act of 1977.

(6) MSHA Inspector Carl F. Spohn was acting in his official capacity when he issued to Respondent on March 24, 1993, a 104(a) citation for violation of 30 C.F.R. 56.15005 (Citation No. 4082132.)

(7) True copies of the citation referred to in Stipulation No. 6 together with all appropriate modifications and abatements were served on the Respondent or its agents as required by the Act.

(8) The Administrative Law Judge has the authority to assess the appropriate civil penalty under Section 110(i) of the Act if he finds that the citation at issue states a violation of the Act and the regulations.

(9) The parties have agreed that the Respondent's workers were not using safety belts when viewed by the MSHA inspector.

(10) The parties have agreed that the issues are whether the condition noted by the Inspector existed; where the cited miners were standing at the time the MSHA inspector saw them and whether the miners were in danger of falling.

(11) Copies of the subject citation and termination of the violation in issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein.

(12) Payment of any penalty will not affect the operator's ability to continue in business.

(13) The operator demonstrated good faith abatement.

(14) The operator has no history of prior violations.

(15) The operator is small to medium in size.

At the hearing, the Secretary presented testimony from the inspector who issued the citation and from a trainee inspector who was present at the time. The operator presented testimony from its safety and compliance director as well as the miner who was operating the drill when the citation was issued.

After completion of the Secretary's case and during presentation of the operator's testimony, the parties agreed to recommend a settlement of this matter. The parties proposed to delete the significant and substantial designation, leave as unchanged the negligence determination of moderate, and characterize gravity as moderate. The parties also agreed to leave the determination of the appropriate penalty amount to me. In ruling upon the parties' motion, I held as follows (Tr. 155-157):

Under the Mine Safety Act unlike most statutes, the administrative law judge has the affirmative duty to approve a settlement, even if the parties themselves have agreed upon its terms. Under this law the judge does not have to approve a settlement, if he determines it is not in the public's interest. In other words, the judge is here to guarantee the public interest under this mine safety law.

I determine that this proposed settlement is in the public interest. It appears to me to be fully justified by the efforts taken to this point in this matter. I believe that the settlement in addition to being consistent with the public interest, also is to the benefit of both parties.

Therefore, in accordance with the settlement, I order that the finding of a violation in Citation 4082132 date March 24, 1993, be hereby affirmed. I further order that the designation of significant and substantial in said citation be deleted. I further find that the finding of negligence to a moderate degree be affirmed. I further find, as proposed and as indicated by the nature of the testimony here thus far, that the violation was of only moderate gravity.

The parties have left to me the determination of the amount of civil penalty to be assessed. In making this assessment, I particularly note that this small to medium sized operator has no prior history of violations. That to me is a very telling factor. In light of that factor and the other five criteria in section 110(i) of the Act, I assess a penalty of \$50.

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I adhere to the foregoing, findings, conclusions and assessment.

In accordance with the settlement proposal approved on the record as stated above, it is ORDERED that the operator PAY, if it has not already done so, \$50 within 30 days of the date of this decision, and that this case be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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