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SOL (MSHA) V. AMERICAN ASPHALT PAVING  
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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 PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 93-428-M  
Petitioner : A.C. No. 36-00005-05514  
v. :  
: Chase Quarry  
AMERICAN ASPHALT PAVING, :  
Respondent :

DECISION

Appearances: Anthony G. O'Malley, Esq., Office of the  
Solicitor, U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Petitioner;  
Mr. Bernard C. Banks, Jr., Executive Vice  
President, American Asphalt Paving, Shavertown,  
Pennsylvania, for the Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding the Secretary of labor (Secretary), on behalf of his Mining Enforcement and Safety Administration (MSHA), alleges that American Asphalt Paving Company (American Asphalt) in eight instances violated 30 C.F.R. 50.20, a mandatory standard promulgated pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), requiring in pertinent part that "[e]ach operator . . . report each accident . . . at the mine" by mailing to MSHA Form 7000-1 "within ten working days after an accident." The Secretary further alleges that the violations were the result of the company's "high negligence." The Secretary proposes civil penalties of \$300 for each of the alleged violations and petitions for their assessment pursuant to sections 105(d) and 110 of the Act. 30 U.S.C.

815(d), 820. The proposed penalties were derived through t Secretary's special assessment procedures. 30 C.F.R. 100.5.

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American Asphalt responds that it was unaware of MSHA Form 7000-1 and the need to file such in the event of an accident. Further, the company contends it did not exhibit the high negligence attributed to it.

A duly noticed hearing on the merits was held in Wilkes-Barre, Pennsylvania. Anthony G. O'Malley, Jr. acted as counsel for the Secretary. Bernard C. Banks, Jr., an executive vice president of the company, represented American Asphalt. Subsequently, counsel for the Secretary submitted a helpful brief.

#### STIPULATIONS

At the commencement of the hearing counsel stated that the parties agreed as follows:

1. American Asphalt . . . is the owner and operator of the Chase Quarry.

2. [American Asphalt] utilizes tools, equipment, machinery, materials, goods and supplies in its business which have originated in whole or in part . . . outside . . . Pennsylvania.

3. [American Asphalt] engages in business which affect[s] commerce.

4. Operations at the Chase Quarry are subject to the [Mine Act].

5. The Administrative Law Judge has jurisdiction to hear and decide th[e] case pursuant to section 105 of the Act.

6. MSHA Inspector Gerald R. Keith was acting in his official capacity when he issued to [American Asphalt] on April 1, 1993, eight [section] 104(a) [c]itations for violations of . . . [section] 50.20.

7. True copies of the citations . . . were served on [American Asphalt] or its agents as required by the Act.

8. The Administrative Law Judge has the authority to [assess] . . . appropriate civil penalt[ies] . . . if he finds the citations . . . state violations of the Act and the [r]egulations.

9. [T]he violations . . . alleged in each of the eight . . . citations did, in fact, occur in the manner specified by the MSHA inspector.

~1276

10. [T]he only issues . . . are whether the inspector properly noted the degree of negligence . . . and, as a result, whether the proper penalty was assessed.

Tr. 10-13. (nonsubstantive editorial changes made).

In explaining further the company's understanding of stipulations 9 and 10, Banks stated, "[W]e have agreed that the eight violations were cited. [W]e have agreed that the only issue . . . is whether the inspector properly noted the degree of negligence for each of the eight [violations] . . . . [The company] also [is] going to be questioning whether there should be one violation or eight violations." Tr. 19-20. Counsel for the Secretary objected to this interpretation of the stipulations maintaining the stipulations meant American Asphalt agreed that eight violations occurred.

Banks is not an attorney. It was clear to me that if he had believed the wording of the stipulations precluded arguing for a single citation, he would not have agreed to stipulations 9 and 10. In other words, it was clear to me that there was no meeting of the minds on this issue. I therefore overruled the objection and indicated that I would consider the representative's single-citation argument. Tr. 21.

In addition, the parties agreed that American Asphalt's relevant history of previous violations is represented on Gov. Exh. 1, a computed print-out generated by MSHA's assessment office, and that the size of the company is accurately reflected in Gov. Exh. 2, a copy of MSHA's proposed assessment sheet. Tr. 13-14.

#### THE TESTIMONY

#### THE SECRETARY'S WITNESSES

Gerald Keith

Gerald Keith, an MSHA inspector with 17 years experience, works in MSHA's Wyomissing, Pennsylvania field office. Tr. 22-23. Keith is trained in the application and enforcement of the mandatory regulations found in 30 C.F.R. Part 50, regulations that, among other things, pertain to an operator's obligation to report accidents, occupational injuries and occupational illnesses. One of Keith's duties is to monitor compliance with Part 50. This requires him to audit company records for accidents resulting in injuries. Tr. 23-24.

On April 1, 1993, Keith went to American Asphalt's Chase Quarry and Mill to conduct an audit of the company's accident and injury reports. Tr. 25-26. The facility contains both a quarry

~1277

and an asphalt plant. The plant is inspected by the Occupational Safety and Health Administration (OSHA). It was Keith's first visit to the facility and the first time an official from MSHA had audited the company's reports. Tr. 47, 58. Keith stated there are 260 facilities audited by the Wyomissing field office and it "just took this long to get around to [American Asphalt.]" Tr. 62. Keith described the company's attitude during the audit as one of "full cooperation." Tr. 55.

At the company's office Keith asked to see copies of MSHA Form 7000-2, the quarterly mine employment and production report that operators are required to submit. See 30 C.F.R. 50.30. Keith reviewed the copies and noted that the line on which the operator is asked "How many MSHA reportable injuries or illnesses did you have this quarter?" was left blank on all of the copies. Tr. 26-27; 44-45, 49; Gov. Exhs. 11, 12. Keith also reviewed the company's workmen's compensation files and the forms on which the company reported accidents to OSHA. The records indicated to Keith that accidents had occurred at the quarry which should have been reported to MSHA. Keith then checked the company's files for MSHA Forms 7000-1, the form used to report accidents. Tr. 28-32; see Section 50.20. There were no copies in the files.

As a result of the inspection, Keith issued to American Asphalt citations charging that between May 8, 1990 and September 15, 1992, the company failed to report eight lost time accidents and that each failure constituted a separate violation of section 50.20. Tr. 36-37; Gov. Exhs. 3-10. The citations were terminated when Gloria Suda, the company's executive secretary, completed the required Forms 7000-1. Tr. 37.

Keith asked why the accidents had not been reported. He was advised by company officials, including Banks, that American Asphalt believed it had to submit accident report forms to OSHA only, that submission of forms to MSHA was not required. Tr. 41, 45-46, 50.

Keith had inspected many facilities similar to the American Asphalt's in which inspection jurisdiction was divided between MSHA and OSHA. Keith stated that at such facilities, frequently he found MSHA-reportable accidents reported on OSHA forms as well as on MSHA forms. However, that this was the first time he heard an operator maintain it was unaware compliance with MSHA regulations was required or that compliance with OSHA regulations encompassed compliance with MSHA's requirements. Tr. 59-60.

Keith explained to company officials MSHA's regulations regarding reportable accidents and advised the officials that civil penalties assessed for the eight violations would be determined by MSHA special assessment procedures. Tr. 38; see 30 C.F.R. 100.5.

~1278

Keith stated he found the violations to be the result of American Asphalt's high negligence because he followed MSHA policy as set forth in its Program Policy Manual (PPM). The policy requires such a finding absent mitigating circumstances. Tr. 61, 62. (The PPM states, "Failure to report any accident, [or] injury . . . should be considered highly negligent, absent clear, mitigating circumstances. Any violations of Part 50 considered to be the result of a high degree of negligence shall be referred for special assessment." Tr. 46; Gov. Exh. 13.) When asked what "high negligence" meant to him, Keith replied it was when the operator "really didn't know to . . . [report the accidents] and should have done it but didn't." Tr. 61.

In Keith's view, submission of Form 7000-1 is important because MSHA uses it to categorize accident types and to calculate accident and injury statistics. Further, inspectors receive a copy of each report submitted for mines they are assigned to inspect and therefore can better focus their inspection efforts. Tr. 41-42.

Charles McNeal

Charles McNeal supervises those inspectors who conduct inspections at facilities within the jurisdiction of the Wyomissing field office. McNeal also reviews citations issued by the inspectors and he reviewed the citations Keith issued to American Asphalt. Tr. 67-68. As part of the review McNeal discussed with Keith the findings of high negligence. McNeal advised Keith that circumstances mitigating high negligence could be things such as the person responsible for completing the MSHA forms being sick or American Asphalt assigning a new person to complete the forms. Completion of OSHA forms rather than MSHA forms would not be considered a mitigating circumstance because MSHA advises operators about their duty to complete the MSHA forms. Tr. 69-70. According to McNeal, all operators receive the PPM and its periodic updates. McNeal considered this to be notice to operators that MSHA audits operators for compliance with Part 50. Tr. 71. McNeal also stated that MSHA was supposed to provide operators with Part 50 forms. Tr. 88.

McNeal understood that the information on Form 7000-1 was tabulated by the MSHA Analysis Center in Denver which then advised MSHA district offices of problems causing accidents at mines within the district. The information was reviewed by inspectors prior to commencing inspections. In this way inspectors were alerted to areas that required heightened attention at the mines. Tr. 71-72.

McNeal stated that when a reportable accident occurred at a facility inspected by both OSHA and MSHA, the accident was reportable to the agency having jurisdiction over the accident

~1279

site. Tr. 73. OSHA and MSHA do not share the information reported. Id.

McNeal maintained if an inspector issued to an operator a citation for the violation of section 50.30 (failure to submit a quarterly employment and coal production report on MSHA -- Form 7000-2) the inspector invariably told the operator that any accidents during the quarter had to be report on MSHA Form 7000-1. Tr. 78-79. Further, an inspector always issued a citation if a violation of Part 50 occurred because that is what the law requires. An inspector never merely warned an operator to comply in the future. Tr. 84-85.

#### AMERICAN ASPHALT'S WITNESSES

James Koprowski

James Koprowski is the company's personnel insurance manager and safety directory. His duties include conducting safety meetings and walk-around inspections and, in conjunction with the company's insurers, evaluating accidents to determine what remedial action is required. Tr. 93-94.

Koprowski stated that he attended various MSHA authorized safety seminars. He acknowledged his familiarity with the safety and health regulations promulgated by MSHA and published in the Code of Federal Regulations, but he explained that "to go and read through . . . [the CFR] verbatim and know what everything pertains to, I just have too many other job duties to devote that much attention to one particular booklet like that." Tr. 94-95.

Koprowski testified that Keith's inspection was the first time an MSHA inspector had audited the company's records. Tr. 109. Because he was hospitalized, Koprowski was not at the mine office on April 1. Prior to the inspection he never had heard of MSHA Form 7000-1. Tr. 95. Koprowski was unaware of the PPM and did not know whether or not the company had a copy. Tr. 96.

Koprowski believed that American Asphalt had a strong safety program. He identified a copy of a memorandum detailing American Asphalt's plans for safety instruction. These include tool box talks, supervisory safety meetings, safety review visits by Koprowski and a program in which the company cites those of its employees who repeatedly violate company safety rules. Tr. 98; Amer. Asph. Exh. R-1. He also identified a policy statement issued by Banks that emphasizes the company's concern with safety. It states in part, "If you see or observe anything that you believe to be an unsafe condition or act, please report it to your supervisor at once. In our company, there is no such thing as a 'safety nut'." Id. 6. Other company safety documents include lists of management's and employees' responsibilities

~1280

with regard to safety standards for various tasks at the quarry and a memorandum mandating employee attendance at company safety meetings. Id. 7- 24; Tr. 98-100.

Koprowski explained the steps undertaken by the company when reporting an injury. First, the foreman completes the form on which the company reports the accident to the insurance company, and if the accident requires medical attention or time away from work, the foreman reports the injury to OSHA on OSHA Form 200. Next, a more complete report is sent to the company's insurance carrier. Finally, and subsequent to April 1, 1993, MSHA Form 7000-1 is completed and submitted to MSHA.

Koprowski stated that at the time the citations were issued he was unaware of Form 7000-1 or the regulatory requirements pertaining to it. He further stated that if Forms 7000-1 had been sent to the company by MSHA, he would have received them, which he never did. Tr. 107-108.

The company keeps copies of all of its safety records, including those for OSHA and workmen's compensation. The records are kept by incident, there being a single file for each accident. Tr. 110-111.

#### Gloria Suda

Gloria Suda described the process by which the company reports accidents. She stated when she receives a report from the superintendent and foreman that there has been an accident, she completes an OSHA Form 200 followed by an insurance company form. The forms are submitted first to Koprowski for approval, then to the superintendent and foreman for them to initial and then they are filed. After the citations were issued, the company added MSHA Form 7000-1 to the procedure.

On April 1, 1993, when Keith asked to see the accident forms for 1990, 1991 and 1992, Suda showed him the files containing the OSHA forms. When he asked about MSHA Forms 7000-1, Suda told him she was unaware of any. She also stated that she was unaware of MSHA Forms 7000-2. Tr. 116-117. The company made no effort to conceal anything. She stated, "Everything's in the files." Tr. 119.

#### Sharon Jennings

Sharon Jennings, an administrative assistant in the company's materials department, has been employed by American Asphalt for 6 years. One of her jobs is to complete MSHA Forms 7000-2 for the company. The person who filled out the forms for the company previous to Jennings told Jennings to complete them exactly as had been done in the past. Tr. 123, 126-127. Jennings tried her best to follow this instruction, which meant



~1281

she completed only the lines pertaining to the man hours worked, because this was what the person before her had done. She did not include any data on injuries or illnesses because it had not been included previously. Tr. 123-124. Jennings stated that Forms 7000-2 were received quarterly from MSHA. Tr. 125. As far as Jennings knew, the company never received Forms 7000-1 from MSHA. Tr. 125-126.

#### THE VIOLATIONS

American Asphalt does not contest the fact that it violated section 50.20 when it failed to complete and submit to MSHA a Form 7000-1 for each of the eight reportable injuries cited. Rather, and as noted in the above discussion of the parties' stipulations, it argues that it should have been cited once only for failing to report the eight injuries.

This is an argument the Act itself answers. Section 110(a) states: "Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. 820(a) (emphasis added). This language gives discretion to the inspector when confronted with a situation where multiple infractions of the same standard have occurred. Here, where each instance of a reportable violation is separate in time and involves a distinct injury, I find that Keith did not abuse that discretion in issuing separate citations.

The Act requires a civil penalty be assessed for each violation. Having concluded the eight violations existed as charged, the question becomes the proper civil penalty to assess for each violation.

#### CIVIL PENALTY CRITERIA

##### Gravity

The regulatory reporting requirements are more than just clerical hoops through which an operator must jump. As both Keith and McNeal explained, the regulations have a pragmatic impact on effective enforcement of the Act. They are a basis for the compilation and categorization of accident and injury statistics, statistics that alert MSHA to problem areas in mine safety and consequently permit the agency to more effectively focus its industry-wide enforcement and education efforts. Tr. 41-42, 71-72. In addition, the reporting requirements have a mine-specific impact in that copies of the reports are reviewed by inspectors prior to inspections. Id.

Counsel for the Secretary argues -- correctly, I believe -- that compliance with the Part 50 reporting requirements is "extremely important" and he has noted Chief Administrative Law Judge Paul Merlin's observation that Part 50 is a cornerstone of

~1282

enforcement under the Act. Sec. Br. 11. The Chief Judge's comments bear repeating:

Since Part 50 statistics provide the basis for planning, training and inspection activities, accurate reporting is essential. Moreover, failure accurately to report could have extremely dangerous consequences by concealing problem areas of a mine which should be investigated by MSHA inspectors. In short, without proper compliance by the operator under Part 50, the Secretary could not know what is going on in the mines and, deprived of such information, he would be unable to decide how best to meet his enforcement responsibilities.

Consolidation Coal Company, 9 FMSHRC 727, 733-734 (April 1987).

To this I would add only that where, as here, an operator has failed totally to report as required, the harm that is done in general to agency enforcement efforts may well rebound on the particular mine involved because of a consequent failure to alert MSHA authorities to an ongoing safety hazard. For these reasons I conclude the violations were serious.

#### Negligence

Negligence is the failure to meet the standard of care required by the circumstances. Because the reporting requirements are central to effective enforcement of the Act, an operator is under a high standard of care with regard to their observance. This does not mean, however, that each violation of Part 50 is necessarily the product of "high negligence" on the operator's part. Keith found no circumstances in mitigation of American Asphalt's negligence, but after hearing all of the testimony and after considering all of the evidence, I do.

While I fully agree with counsel that a violation may not be excused by an operator's failure to know compliance is required, the concept of strict liability under the Act should not be confused with negligence in failing to conform to its standards. See Sec. Br. 7. In other words, there are instances -- and in my opinion this is one -- where an operator's lack of knowledge regarding compliance may be based on circumstances that mitigate its negligence.

All of the witnesses agreed that MSHA previously had not audited the records at the plant for Part 50 compliance. It is important to remember that MSHA's inspections are not simply vehicles for enforcement, they also serve as teaching tools. (In my opinion the instructional function of inspections has become even more important since MSHA discontinued its compliance assistance visit program.) Here, employees at the facility did

~1283

not have the benefit of a previous inspection by which to learn what the Part 50 regulations required of them.

It is all well and good for counsel to note that Koprowski, who was in overall charge of Part 50 compliance, had the CFR available to him and thus that American Asphalt had information readily available to know what section 50.20 requires. Sec. Br. 7. However, the reality of the situation is that the code is voluminous, and it is understandable that a regulation may be overlooked, especially when its link to miners' safety is derivative rather than immediate.

The company's failure to submit Forms 7000-1 is also understandable in light of Jennings unrefuted testimony that MSHA sent American Asphalt Forms 7000-2 on a quarterly basis but did not send the company Forms 7000-1. Tr. 125. This is not an excuse for failing to submit the forms. It is the operator's duty to obtain the proper forms. However, it is a circumstance that in my opinion helped to lead American Asphalt sincerely to believe it was observing all of MSHA's requirements.

Finally, this is not a situation in which an operator was attempting to avoid compliance or to conceal its actions. I accept as fact that prior to April 1, 1993, American Asphalt's procedures for reporting injuries, involve reports to its insurance company and to OSHA. Had the company been aware of the requirements of section 50.20, I have no doubt it would have submitted Forms 7000-1 as well. Company officials were open and above board with regard to the records. "Everything's in the files" said Suda. Tr. 119. I conclude the fact that "everything" did not include MSHA Forms 7000-1 was not the result of a dereliction from duty so extensive as to be considered "high negligence." Rather, the company's negligence was moderate.

#### History of Previous Violations

In the 24-months prior to April 1, 1993, 14 violations at the Chase Quarry were assessed and paid. Gov. Exh. 1. Of these violations five were assessed using the regular formula and nine were assessed using the single penalty formula. See 30 C.F.R.

100.3, 100.4. (Of course, the company has no prior history violations of the Part 50 regulations there having been no prior audit for Part 50 compliance.) These violations occurred over six inspection days. I do not find this to be a history of previous violations warranting an increase in the penalties otherwise assessed.

### Size of Business

The Secretary's Proposed Assessment indicates the size of the company to be 110,926 production tons or hours worked per year and the size of the Chase Quarry to be 38,722 production tons or hours worked per year. Gov. Exh 2. These figures were not disputed, and I find American Asphalt to be a small to medium size operator. See 30 C.F.R. 100.3(b).

### Ability To Continue In Business

The burden is on the operator to establish that the amount of any penalty assessed will affect its ability to continue in business. American Asphalt offered no proof in this regard, and I find any penalties assessed will not adversely impact the company.

### Good Faith Abatement

The violations were abated prior to the time set by the inspector. The company exhibited good faith in achieving rapid compliance after notification of the violations.

### CIVIL PENALTIES

The Secretary proposes a civil penalty of \$300 for each violation, an amount I find excessive. (The largest amount assessed and paid for a violation in the 24-months prior to April 1, 1993 was \$178. Gov. Exh. 1.) The Secretary argues that "any reduction in the penalties proposed . . . will necessarily send the wrong message." Sec. Br. 13. I do not agree. American Asphalt does not strike me as an operator driven to compliance by the threat of monetary sanctions. All previous assessments have been modest and it has an active and ongoing safety program. I believe, as the company states, that the company recognizes it has "a firm responsibility to prevent injuries to employees," and I was impressed by Koprowski's description of the company's efforts to meet this responsibility. Amer. Asph. Exh. 1 at 6; Tr. 98-99 In my view the assessment of historically high penalties for unintentional violations would be more likely to foster resentment than compliance, especially when it seems clear the company has a commitment to Part 50 compliance now that it understands its responsibilities. For the foregoing reasons I conclude that a civil penalty of \$50 is appropriate for each violation.

In making the assessments I note however that the hearing revealed areas wherein the company needs to improve awareness of its obligations under the Act. Certainly, someone in authority at the Chase Quarry should have a copy of the PPM and a working knowledge of its contents. Further, while one cannot expect Koprowski to know every jot and tittle of the regulations that

~1285

apply to metal and non-metal mines, he, or someone in an equivalent position at the facility, should have a thorough overall familiarity with what the regulations require.

ORDER

The Secretary is ORDERED to modify Citation Nos. 4083556, 4083557, 4083558, 4083559, 4083560, 4084661, 4084662 and 4084663 by deleting the findings of "high negligence" and by including a finding of "moderate negligence". As modified, the citations are AFFIRMED.

American Asphalt is ORDERED to pay to MSHA within 30 days of the date of this decision civil penalties of \$50 each for the violations of section 50.20 set forth in Citation Nos. 4083556, 4083557, 4083558, 4083559, 4083560, 4084661, 4084662 and 4084663 and upon receipt of payment this matter is DISMISSED.

David F. Barbour  
Administrative Law Judge

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