

CCASE:
SOL (MSHA) V. A CONSTRUCTION
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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. VA 94-18-M
Petitioner	:	A.C. No. 44-00040-05501 QHV
v.	:	
	:	Docket No. VA 94-19-M
A & L CONSTRUCTION, INC.,	:	A.C. No. 44-00040-05502 QHV
Respondent	:	
	:	Eastern Ridge Lime Co.

DECISIONS

Appearances: Caryl L. Casden, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Petitioner;
George W. Link, President, A & L Construction,
Inc., Newport, Virginia, pro se, for the
Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for three (3) alleged violations of certain mandatory safety standards found in Part 57, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Roanoke, Virginia. The parties waived the filing of post-hearing briefs (Tr. 195).

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether one of the alleged violations was "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 7-12):

1. The MSHA inspector who issued the violations was acting in his official capacity as an authorized representative of the Secretary of Labor.
2. True copies of each of the contested citations and order were served on the respondent or its authorized agent as required by the Mine Act.
3. Payment of the proposed civil penalty assessments for the violations in issue will not put the respondent out of business.

In a response to the petitioner's interrogatory, the respondent stated that payment of the penalty assessment of \$1,500 in Docket No. VA 94-19-M, will not affect the respondent's ability to continue in business. However, the respondent believed that the proposed penalty is excessive.

The petitioner's counsel submitted a computer print-out concerning the respondent's history of assessed violations, and she confirmed that the respondent has no prior history of paid violations (Exhibit G-9; Tr. 16, 145-148). Counsel further confirmed that the citations issued by the inspector constituted the first time the respondent has been cited, and that the respondent timely abated and corrected the cited conditions in good faith (Tr. 156).

Petitioner's counsel also presented a computer print-out that reflects that the respondent is an independent contractor who worked 342 hours at the Eastern Ridge Lime Company Mine in 1993 (Exhibit G-10; Tr. 146-148). Respondent's owner and president, George Link, characterized his business as a "small grading contractor", and he confirmed that he uses backhoes, endloaders, and dump trucks in his work and that he was working at the mine site in question in 1993, when the citations were issued (Tr. 150, 155-156). He also confirmed that he has 15 to 18 employees (Tr. 160, 163).

Discussion

Docket No. VA 94-18-M

This case concerns two alleged violations with proposed civil penalty assessments of \$50, for each occurrence, and they are as follows.

Section 104(a) non-"S&S" citation No. 4286834, August 5, 1993, cites an alleged violation of mandatory safety standard 30 C.F.R. 57.14132(a), and the condition or practice cited is described as follows:

The reverse-activated, automatic signal alarm was not operating on the Ford 8000 haul truck Co. No. 6. The truck was hauling spoil from the sediment pond to the spoil stockpile. No foot traffic observed in the area.

Mandatory safety standard 30 C.F.R. 57.14132(a), provides as follows:

(a) Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Section 104(a) non-"S&S" citation No. 4286835, August 5, 1993, cites an alleged violation of mandatory safety standard 30 C.F.R. 57.14100(b), and the condition or practice cited is described as follows:

The protective covering on the operator's seat of the white haul truck, S/N BJ0134719218 was missing. The exposed metal springs of the seat showed stress fatigue in the back and side area and could break and puncture the back of the operator. A cushion was observed between the operator's back and the exposed springs.

Mandatory safety standard 30 C.F.R. 57.14100(b), provides as follows:

(b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

Docket No. VA 94-19-M

This case concerns a combined section 107(a)-104(a) "S&S" imminent danger order and citation No. 4286833, issued by Inspector Thomas W. Bonifacio, on August 5, 1993, and subsequently modified on August 18, 1993, to cite an alleged violation of mandatory safety standard 30 C.F.R. 57.14101(a)(3). The

~1828

proposed civil penalty is \$1,500, and the cited condition or practice states as follows:

The brake diaphragm was missing on the back right side and the air supply line plugged behind the drive axel on the white model 43640VC haul truck S/N 8J0134719218, hauling spoil material from the mill sediment pond below the refuse disposal area. The truck traveled an approximate 1,000 foot long, 10% grade access road. Foot and vehicular traffic was observed in the work area. The diaphragm had fallen off the haul truck on 8-4-93. The company mechanic was instructed to plug the air supply line in order to put the unit back into service.

Mandatory safety standard 30 C.F.R. 57.14101(a)(3), provides as follows:

(3) All braking systems installed on the equipment shall be maintained in functional condition.

As correctly stated by the petitioner's counsel, the respondent did not timely contest the imminent danger order within thirty-days of its issuance, and she took the position that the order is not in issue in this proceeding (Tr. 17-18). I agreed with counsel, but ruled that I would consider the inspector's imminent danger finding as part of the gravity associated with the cited conditions (Tr. 19-23).

In support of the violation, the petitioner called Inspector Bonifacio who testified as to his experience, duties, and training, and his reasons for issuing the violation. He also testified as to his reasons for his special "significant and substantial" (S&S) finding, as well as his negligence and other gravity findings (Tr. 24-95). He was also cross-examined by the respondent's president, George W. Link, who appeared pro se in this case (Tr. 95-98).

The petitioner also presented the testimony of Bruce E. Dial, an MSHA instructor at the Department of Labor's National Mine Health and Safety Academy at Beckley, West Virginia. Mr. Dial's experience includes prior service as an MSHA mine inspector, and he has extensive teaching and practical experience in braking systems and the hazards associated with surface coal haulage, including the writing of a training manual used to train inspectors and the publication of several safety bulletin articles (Tr. 98-105).

Mr. Dial confirmed that he was familiar with the violative conditions cited by Inspector Bonifacio, and referring to several hearing exhibits and a demonstration model of a truck braking system, he explained the operation of the braking system with

~1829

respect to the cited truck and the hazards associated with the conditions cited by the inspector (Tr. 105-128). Mr. Dial was cross-examined by Mr. Link (Tr. 130-137; Exhibits G-6, G-7, and G-8).

George W. Link, the owner and president of A & L Construction, Inc., testified in his defense to the contested violation as well as to the scope of the work that he was performing at the mine site in question at the time that his truck was cited by the inspector (Tr. 150-174). The inspector was also called in rebuttal and testified further about his observations in connection with the operation of the haulage trucks on the day the violation was issued (Tr. 174-180).

Mr. Link testified that he did not realize that he was subject to the Mine Act or MSHA's enforcement jurisdiction while performing work on the mine surface areas and he stated that he was never inspected by any state mining inspectors (Tr. 186-187). Petitioner's counsel stated that she had no information that Mr. Link knew he was subject to MSHA's enforcement jurisdiction, and Inspector Bonifacio confirmed that Mr. Link was performing work at the mine site without an MSHA Identification number and that he had not previously known about the respondent and had never previously met Mr. Link until he came to the site after the violations were issued (Tr. 188-191).

With respect to the citation concerning the missing brake diaphragm on the cited haul truck, Mr. Link took the position that there was no dangerous condition presented because the truck driver was a safe and conscientious driver and that the road conditions consisted of soft materials that would allow the truck wheels to sink into the road surface and slow down the vehicle (Tr. 151-154).

Findings and Conclusions

Docket No. VA 94-18-M

Petitioner's counsel informed me at trial that the parties agreed to settle these citations, and that the respondent agreed to pay the full amount of the proposed penalties for each of the violations. Arguments in support of the settlement were heard on the record, and Inspector Bonifacio, who issued the citations, was present in the courtroom. The settlement was approved from the bench (Tr. 11, 13-16). My bench decision is herein affirmed, and the settlement IS APPROVED.

Docket No. VA 94-19-M

In this case, petitioner's counsel informed me after the hearing that the parties agreed to settle the matter. Counsel

~1830

subsequently filed a motion pursuant to Commission Rule 31, 29 C.F.R. 2700.31, seeking approval of the proposed settlement.

In support of the proposed settlement, petitioner's counsel states that upon review of all of the evidence admitted at trial, the parties agree that it does not support a penalty assessment of \$1,500. Counsel believes that the evidence would support a penalty of \$700, and the respondent has agreed to pay this amount. Based on all of the relevant criteria, including the respondent's size, the degree of negligence, the gravity of the violation, the respondent's good faith abatement, and its history of prior violations, the petitioner concludes that the proposed settlement is reasonable and will serve to effect the intent and purposes of the Act.

After careful review of all of the testimony and evidence adduced at the hearing, and the motion filed by the petitioner in support of the proposed settlement, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.31, the motion is GRANTED, and the settlement IS APPROVED.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Docket No. VA 94-18-M. The contested section 104(a) non-"S&S" Citation Nos. 4286834 and 4286835, issued on August 5, 1993, ARE AFFIRMED as issued, and the respondent shall pay civil penalties of \$50 for each of the citations (\$100 total).
2. Docket No. VA 94-19-M. The section 107(a) - 104(a) "S&S" Order/Citation No. 4286833, August 5, 1993, as modified on August 18, 1993, citing a violation of 30 C.F.R. 57.14101(a)(3), IS AFFIRMED as issued, and the respondent shall pay a civil penalty assessment of \$700, for the violation.

IT IS FURTHER ORDERED that the respondent pay the aforementioned civil penalties to MSHA within thirty-days (30) of the date of these decisions and order. Upon receipt of payment, these matters are dismissed. Failure by the respondent to pay the agreed upon penalties may result in an order requiring the respondent to pay the full amount of the original penalty proposed in Docket No. VA 94-19-M.

George A. Koutras
Administrative Law Judge

~1831

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