

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 19, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2013-819-M
Petitioner,	:	A.C. No. 02-00740-321073
	:	
v.	:	
	:	
PAYSON CONCRETE & MATERIALS,	:	
INCORPORATED,	:	
Respondent.	:	Mine: Tonto Pit

DECISION

Appearances: Robert D. Ankeney, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
Tim Hughes, Safety Manager, Payson Concrete & Materials Inc. for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration (“MSHA”) against Payson Concrete & Materials Incorporated at its Tonto Pit location, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket involves fourteen citations with penalties assessed pursuant to section 110(i) of the Mine Act which are in dispute. The parties presented testimony and evidence at a hearing held on January 22, 2014 in Phoenix, AZ.

The parties agree that Payson Concrete & Materials Inc. is an operator as defined by the Act, and is subject to the jurisdiction and provisions of the Mine Safety and Health Act. These citations were issued at the Tonto Pit near Mesa, AZ. Citations 8591193, 8591194, 8591195, 8591196, 8591197, 8591198, 8591199, 8591200, 8598401, 8598402, 8598403, 8598404, 8598405, and 8598406 are at issue. The Secretary contends the Respondent repeatedly violated 30 CFR §50.30(a); where the Respondent failed to correctly report the hours worked by Mr. Randall on the quarterly employment reports. Respondent does not dispute that the regulation was violated, but contends that only one citation that covers all quarters should have been issued. MSHA issued a separate citation for each quarter in which hours were not reported and proposed a penalty of \$100.00 for each. The violations are not S&S and were cited as moderate negligence. After a hearing on the matter, I issued a decision on the record, which follows with a number of corrections to provide easier reading, while leaving the substance of the decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Taken from transcript:

This case involves 14 citations that were issued by Inspector Horning in March of 2013. The Secretary contends that the respondent repeatedly violated 30 CFR 50.30(a) on each of these 14 citations where the respondent failed to correctly report the hours worked by Mr. Randall on the quarterly employment reports, form 7000-2. Respondent does not dispute that the regulation was violated, but contends that only one citation or, fewer than 14 citations should have been issued. The violation is not at issue. The standard requires that Mr. Randall's hours, like all of those working at the mine, be reported, and they were not.

The issue is the number of citations that were written by Horning. The Secretary issued a citation, one for each quarter where the reporting was incorrect. MSHA contends, and the operator agrees, that Mr. Randall, who is one of the owners of the company and does various tasks at the mine, was omitted from the number of hours worked for 14 quarters, beginning with the first quarter of 2009 through the second quarter of 2012. Inspector Horning, from the MSHA field office in Mesa, Arizona, conducted a Part 50 audit of the mine in March of 2013 and found the violations with regard to the 7000-2 forms. He explained the error to Ms. Short, the company bookkeeper and she promptly corrected the error and continues to include Mr. Randall in the form as to this date.

MSHA not only issued a separate citation for each quarter in which Mr. Randall's hours were not reported, they also issued a proposed penalty of \$100.00 for each. The violations are not significant and substantial and originally were marked as a result of moderate negligence. But at hearing prior to the evidence that was submitted by each party, the parties agreed and stipulated that the negligence should be modified from moderate to low. I will modify the negligence in each of the 14 citations from moderate negligence to low negligence. The violation is not really at issue. There is a violation of 30 CFR 50.30 which requires that each -- this is 30 - 50.30(a), each operator of a mine in which an individual worked during any day of a calendar quarter shall complete an MSHA form 7000-2 in accordance with the instruction and criteria in section 50.30-1 and submit the original. And the standard goes on from there. The pertinent part is that all employees, including Mr. Randall, should have been included on the form 7000-2, and he was not. Therefore, I find that there is a violation of 30 CFR 50.30.

The primary issue raised by Respondent is whether or not there should be 14 citations or there should be some fewer number of citations. The second issue is the amount of penalty to be assessed to each of the citations. Mr. Hughes argues on behalf of Payson that the Secretary should have issued fewer than the 14 citations because the mine made a mistake and because the MSHA policy manual, in certain circumstances, directs inspectors to issue only one citation for a series of violations or combine certain kinds of violations into one citation. That's usually when the inspector finds, for example, a number of violations on one piece of equipment, and those violations would be cited under the same standard. They can be placed into one citation instead of issuing a separate citation for each. Respondent makes a good point and it is difficult to understand why -- in some cases, why there have to be 14 citations. However, from a legal standpoint, the standard specifically refers to quarterly reports when it says "each operator during

any day of the calendar quarter” shall report hours worked. I'm not sure MSHA could issue a citation for more than one quarter at a time because of the requirement in the standard itself. The Inspector Citation Writing Manual tells the inspector to issue a citation for each quarter.

Mr. Hughes makes a good point about why it should be different for a paperwork violation than for some safety violations, but that argument goes to the penalty, and that's something that can be dealt with in the penalty portion of this case as opposed to trying to combine more than one quarter into one citation. So I agree with MSHA that the 14 citations were appropriately issued, that one quarter in each citation is the appropriate way to do it.

As the Secretary pointed out, that's consistent with earlier decisions by the Commission ALJs, as well as one of my decisions in the *Eureka Rock*, 34 FMSHRC 476 (July, 2012) (ALJ) where I found that an owner of a mine must be included on the 7000-2 form and that issuing those citations for each quarter was appropriate in that case. I find it was appropriate in this case, as well, that the violation is shown that the 14 citations were appropriate.

PENALTY

What I would like to address is the penalty with regard to each of those 14 citations. The Secretary issued a \$100.00 penalty for each of the 14 violations, which is the minimum penalty under their Part 100 regulations for each of the citations in this case, making a total of \$1,400.00. I am not bound by the Secretary's Part 100 penalty criteria. I am bound by the law and by what the Commission has said and what the statute says about penalties. Section 100(i) of the Mine Act confers upon the Commission, the authority to assess all civil penalties provided under the Act. It further directs that the Commission, in setting penalties, and the Commission judges, shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance with notification. The Commission reiterated that position recently in the case of *Mining & Property Specialists*, 33 FMSHRC 2961, (December 2011). In that case, the ALJ issued a penalty of \$1.00 for some recordkeeping violations. It was a violation where the mine simply did not have the records in the location where they were supposed to as opposed to another location. The judge issued a lower penalty, and the Commission, on appeal, sent the case back to the judge simply to look at the six criteria again. In reviewing the penalty amount, the Commission determined that under the clear statutory language, the Commission alone is responsible for assessing the penalties and neither the ALJ nor the Commission is bound by the Secretary's proposed penalties or by MSHA's Part 100 regulations. However, while there's no presumption of validity given to the Secretary's proposed assessments, the Commission has held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. So while I don't need to make exhaustive findings, I have to provide some adequate explanation as to the basis for the penalty that I assess.

In this case, Payton is a small operator. There was definitely good faith abatement. As soon as Ms. Short learned about the problem, she immediately corrected it, and she continues to correct it to this day. The operator has made no issue of its ability to pay the penalty as assessed.

The history of assessed violations, which is Exhibit 20 in this case, shows that there is no history of violations at this mine. I didn't see any history of violations, and specifically no history of recordkeeping violations. So this would have been the first time that it was brought to the attention of the mine. As to the gravity, again, it's difficult to tell why this should be a serious violation. I think it's certainly not S and S. And leaving Mr. Randall off of the report, I didn't see anything from MSHA that would lead me to believe that would result in some serious safety and health or some serious problem for MSHA. I find the gravity in this case to be negligible. And, finally, the parties agree that the negligence was low, and when the Secretary assessed the \$100.00 penalty, she assessed it for moderate negligence, and it has now been changed to low, and I think rightly so. I think as the mine indicated, Ms. Short made a mistake. She had no idea she was doing it wrong, and until it was brought to her attention, she didn't know that she was doing it wrong and therefore the negligence is low.

Based on the six penalty criteria I've just explained and my reasoning for each of those six penalty criteria, I assess a penalty of \$25.00 for each of these 14 violations, and that means that the total penalty for this docket, then, would be \$350.00. So given my findings in this case, there is a violation. I don't find the violations to be very serious. I find the negligence to be very low. And based upon the six penalty criteria as I described, there's a total penalty of the docket of \$350.00. And I will put that in writing and send it to you, and then Payson will have 30 days from the date of that decision to pay the \$350.00.

(End of Transcript).

8591193, 8591194, 8591195, 8591196, 8591197, 8591198, 8591199, 8591200, 8598401, 8598402, 8598403, 8598404, 8598405, and 8598406 were each originally assessed a proposed penalty of \$100.00 for a total amount of \$1,400.00. As noted above, the negligence is modified in each citation to "low" and the penalty for each violation is modified to \$25.00.

Given my above findings, I assess a total penalty of \$350.00. Payson Concrete & Materials, Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of \$350.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution:

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