

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 24, 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

KANAVAL'S EXCAVATING &
GRAVEL,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. YORK 2013-217-M
A.C. No. 30-03156-329374

Mine: Kanaval's Excavating & Gravel

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor ("Secretary") against Kanaval's Excavating & Gravel ("Kanaval's" or "Respondent") on September 18, 2013, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. Respondent timely filed its Answer contesting the \$100.00 proposed penalty, and Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. YORK 2013-217-M to me on December 2, 2013.

I. STATEMENT OF THE CASE

Citation No. 8713473, the sole violation at issue in this case, charges Respondent with a violation of 30 C.F.R. § 50.30(a) for failing to file a report on the mine's employment activity within the amount of time required by the regulation.¹ On July 30, 2014, I issued an order granting the Secretary's request for a stay of the parties' responses to my Prehearing Order until Friday, August 22, 2014, so the Solicitor of Labor could file a motion for summary decision in the matter. Thereafter, on August 4, 2014, the Secretary filed his Motion for Summary Decision, wherein he requests that I affirm the citation but reduce the negligence finding to "low" and assess the Secretary's proposed penalty.² (Sec'y Mot. at 1-2; Sec'y Mem. at 3.) I subsequently lifted the stay on August 22. Respondent did not file a response to the Secretary's Motion.

¹ Section 50.30(a) provides, in relevant part: "[e]ach operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in §50.30-1 and submit the original to [MSHA] within 15 days after the end of each calendar quarter."

² For the purposes of this decision, references to the Secretary of Labor's Motion for Summary Decision, Memorandum of Law in Support of the Secretary's Motion for Summary

II. ISSUES

The Secretary asserts that Respondent was properly cited for a violation of section 50.30(a) but that the negligence determination should be reduced to “low.” (Sec’y Mot. at 1–2; Sec’y Mem. at 3.) The Secretary further asserts that there are no material facts in dispute. (Sec’y Mot. at 1–2.) Respondent, on the other hand, contends that the citation should be nullified. (Resp’t Answer at 1.)

The issues before me are as follows: (1) whether the Secretary is entitled to summary decision because the record establishes the elements of a violation of 30 C.F.R. § 50.30(a), as well as the Secretary’s allegations regarding the level of gravity and negligence; and, (2) whether the Secretary’s proposed penalty is appropriate. For the reasons that follow, the Secretary’s motion for summary decision is **GRANTED**.

III. FINDINGS OF FACT

Kanaval’s Excavating & Gravel was a surface mine producing sand and gravel in Cohocton, New York. (Sec’y Mem., Ex. 1.) Subsequent to the inspection in this matter, the mine permanently closed in January 2014. *See* Mine Safety & Health Admin., *Mine Data Retrieval System*, <http://www.msha.gov/drs/drshome.htm> (last visited October 23, 2014). Prior to that, the mine operated sporadically for several years, closing for several months at a time. (Sec’y Mem., Ex. 3.) During the fourth quarter of 2012, an average of one person worked a total of seventy-six hours at the mine. (*Id.*) Kanaval’s closed for the winter season on November 4, 2012, opening again only on April 16, 2013. (Resp’t Answer at 1.)

On June 19, 2013, MSHA Inspector Michael Carey conducted an inspection of Kanaval’s mine. (Sec’y Mem., Ex. 2.) During his inspection, Carey reviewed the mine’s MSHA Form 7000-2—Quarterly Employment and Coal Production Reports. (*Id.*) Carey noted that Respondent submitted its Quarterly Employment Report on January 29, 2013. (*Id.*) Carey subsequently issued Citation No. 8713473, alleging a violation of 30 C.F.R. § 50.30(a), which reads as follows:

An MSHA #7000-2 (Quarterly Employment Report) for the 4th Quarter of 2012 (October, November, December) was not completed nor submitted to MSHA’s Health and Safety Analysis Center prior to January 15, 2013. The form was submitted on January 29, 2013.

(Sec’y Mem., Ex. A.) Carey determined that there was no likelihood this paperwork violation would cause injury or illness to any workers. (*Id.*) Carey designated Kanaval’s negligence as moderate because the company had experience filing the quarterly employment reports. (Sec’y Mem., Ex. 2.)

Decision, and the exhibits attached thereto are abbreviated as “Sec’y Mot.,” “Sec’y Mem.,” and “Sec’y Mem., Ex. #,” respectively.

IV. PRINCIPLES OF LAW—ANALYSIS—CONCLUSIONS OF LAW

A. Principles of Law

1. Summary Decision

Commission Rule 67(b) provides that “[a] motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). The Commission has consistently recognized that summary decision is an “extraordinary procedure,” analogizing Commission Rule 67 to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court has determined that summary judgment is appropriate “upon proper showings of the lack of a genuine, triable issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

2. Section 50.30(a)

Section 50.30(a) requires that a mine operator (1) submit a Quarterly Employment Report (2) within fifteen days of the end of a calendar quarter (3) for any quarter in which an individual worked in the mine.

B. Analysis and Conclusions of Law

1. Summary Decision is Appropriate

Here, there is no genuine dispute over the facts of the violation. Respondent, who is *pro se*, declined to respond to the Secretary’s Motion for Summary Decision despite my office’s repeated efforts to elicit a response.³ Nevertheless, Respondent in his Answer does not challenge the Secretary’s assertions that the mine operated during the fourth quarter of 2012 and that Kanaval’s filed its quarterly report two weeks late. Indeed, Respondent admits that the mine operated until November 4, 2012, more than a month into the fourth quarter of the year. (Resp’t Answer at 1.) Therefore, I conclude that summary decision is appropriate in this case.

2. Citation No. 8713473

The facts of this paperwork violation are uncontroverted. During the fourth quarter of 2012, one person worked seventy-two hours at Kanaval’s Excavating & Gravel. The fourth

³ At my request, Law Clerk Carter Tellinghuisen set up a conference call with the parties in this case to hear Respondent’s defense and explain to Mr. Kanaval the court’s procedures for responding to a motion for summary decision. When contacted by telephone, Mr. Kanaval assured Mr. Tellinghuisen he would participate in the August 25 conference call. Nevertheless, Mr. Kanaval failed to join the call. Mr. Tellinghuisen attempted to contact Mr. Kanaval by telephone and email during the week of August 25 to schedule another conference call. Yet Mr. Kanaval failed to respond to any of these repeated attempts to contact him.

quarter ended December 31, 2012. 30 C.F.R. § 50.30–1(b). Respondent therefore was required to file a Quarterly Employment Report by January 15, 2013. Kanaval’s instead filed the report on January 29, 2013, two weeks late, thus fulfilling the elements of a violation of 30 C.F.R. § 50.30(a).⁴ Accordingly, I conclude that Kanaval’s violated section 50.30(a).

Inspector Carey determined in the citation that there was no likelihood that this violation would cause injury or illness. Indeed, there is no suggestion that Kanaval’s tardy filing posed a threat to anyone. I conclude that the Secretary appropriately determined that there was no likelihood that this paperwork violation could cause injury or illness to any miner.

While Inspector Carey decided Kanaval’s tardy filing amounted to moderate negligence, the Secretary argues in the memorandum in support of his motion that Respondent’s negligence would more appropriately be judged as “low.” (Sec’y Mem. at 3.) I agree. Indeed, Kanaval’s mine was closed in January 2013, when the Quarterly Employment Report was due. In addition, Respondent eventually filed the paperwork on his own without being prompted by MSHA. This evidence suggests Kanaval’s negligence was low. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting “low negligence” where the operator “knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.”). In my determination, the fact that this one-person mine was closed during the period when the report was due is a considerable mitigating circumstance, especially when the sole proprietor recognized his oversight and filed the paperwork on his own just two weeks after the deadline.

I therefore conclude that Respondent violated 30 C.F.R. § 50.30(a), that the violation had no likelihood of causing injury or illness to any miners, and that Respondent’s negligence was low. Consequently, I determine that the Secretary is entitled to summary decision as a matter of law.

V. PENALTY

The Secretary proposed a \$100.00 civil penalty for this violation, the minimum penalty under the Secretary’s penalty criteria in his section 100 regulations. 30 C.F.R. § 100.3(g). Commission Administrative Law Judges are not bound by the Secretary’s penalty criteria but by the Mine Act and the Commission’s interpretation of the statute. *See Mining & Property Specialists*, 33 FMSHRC 2961 (Dec. 2011). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator’s business; (3) the operator’s negligence; (4) the penalty’s effect on the operator’s ability to continue in business; (5) the violation’s gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

⁴ Although Respondent does not question the facts in this case, it does challenge the Secretary’s decision to enforce section 50.30(a) on a single-person mine that was closed at the time of the violation. (Resp’t Answer at 1.) Respondent further requests that the Secretary review and rewrite its regulations to be more flexible for such small mines. (*Id.*) Although I am sympathetic to Respondent’s position, this is not the forum to request a new rulemaking. *See* 30 U.S.C. § 811.

Although I have determined that Respondent violated section 50.30(a) by filing MSHA form 7000-2 fourteen days late, the gravity of this violation is negligible. The tardy paperwork in no way placed any miner in danger. As the Secretary himself has argued, Respondent's negligence was low. Indeed, Respondent addressed the oversight before MSHA even noticed the filing error. Moreover, Respondent had no history of violations of this matter in the two years prior to Inspector Carey's visit. (Sec'y Mot. Ex. 4.) Although Kanaval's eventually abandoned its operation of the sand and gravel quarry at the start of 2014, Respondent did not argue and presented no evidence that the Secretary's penalty would affect the company's ability to continue in business. Finally, in considering the appropriateness of the penalty relative to the size of the operator's business, I note this mine is an extremely small, one-man operation where work was performed sporadically throughout the year.

Based on the above, I determine the Secretary's suggested penalty of \$100.00 to be excessive. Upon my consideration of the six penalty criteria, I assess a penalty of \$50.00 as appropriate for this paperwork violation. I further note that, although the Secretary has prosecutorial discretion, the fact that he dedicated the Solicitor's resources toward a case of such insignificance is disappointing. This case is exactly the type of matter that would likely have been resolved quickly through one of MSHA's close-out conferences. We live in a world bound by a scarcity of time and resources. Resources spent pursuing this matter are thus unavailable for the pursuit of serious violations that could have a real impact on miner safety and health.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that the Secretary's Motion for Summary Decision is **GRANTED**, and Citation No. 8713473 is **MODIFIED** by changing the negligence determination from "moderate" to "low."

WHEREFORE, Respondent is **ORDERED** to **PAY** a penalty of \$50.00 within 40 days of this decision.⁵



Alan G. Paez
Administrative Law Judge

Distribution:

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/lct

⁵ Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office,
P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.