

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

February 17, 2016

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

v.

WEST ALABAMA SAND & GRAVEL,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2009-870-M
A.C. No. 01-02738-194100

Mine: West Alabama Sand & Gravel

ORDER

Before: Judge Feldman

The Commission has remanded this matter, directing me to revisit the issue of unwarrantable failure and the appropriate penalty to be assessed. 37 FMSHRC 1884 (Sept. 2015). The single citation at issue is 104(d)(1) Citation No. 6511548, issued to West Alabama Sand & Gravel, Inc., (“West Alabama”), alleging a violation of 30 C.F.R. § 56.15005, which provides that “[s]afety belts and lines shall be worn when persons work where there is danger of falling. . . .” Specifically, Citation No. 6511548 alleges:

A customer truck driver [Johnny Kroger, who was employed by Dunbar Transportation,] was observed climbing on top of the loaded trailer. [Kroger] was not wearing a safety belt and lanyard or any other type of restraining device to prevent a fall to the ground below. [Kroger] was on his knees pulling on tarp within inches of the side of the trailer. [Kroger] was exposed to a fall of ten feet to ground level. Clay Junkin (Vice President) engaged in aggravated conduct constituting more than ordinary negligence by his statement of knowing this was a hazard, and allowing this failure to comply with a mandatory standard.

Citation No. 6511548 was abated after West Alabama posted a sign advising contract haulage drivers to tie down when securing their loads with tarp.

The Secretary filed a motion for summary decision seeking the affirmance of 104(d)(1) Citation No. 6511548, which characterized the cited violation as significant and substantial (S&S) and attributable to an unwarrantable failure, and imposition of the proposed \$15,971.00 civil penalty. West Alabama opposed the Secretary’s motion, not disputing the fact of the violation or the S&S designation, but opposing the imposition of the \$15,971.00 proposed penalty as excessive.

The initial decision granted, in part, the Secretary's motion for summary decision with respect to the fact of the violation and the S&S designation. However, the initial decision modified 104(d)(1) Citation No. 6511548 to a 104(a) citation, thus deleting the unwarrantable failure designation. Consequently, the imposed civil penalty was reduced from \$15,971.00, as initially proposed, to \$760.00. 34 FMSHRC 1651, 1657 (July 2012) (ALJ).

The Commission now has vacated the initial decision in favor of West Alabama on the issue of the unwarrantable failure designation, and directed that I reconsider the issues of negligence and unwarrantable failure consistent with their decision. 37 FMSHRC at 1891.

Following a series of conference calls, on December 15, 2015, West Alabama stipulated that the subject section 56.15005 violation was attributable to an unwarrantable failure. Specifically:

1. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of unwarrantable failure under 30 U.S.C. § 814(d)(1).
2. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of "high" negligence level.

West Alabama's Stipulation of Material Facts, at 1 (Dec. 15, 2015).

Given West Alabama's stipulation to the Secretary's unwarrantable failure designation, the remaining issue is the appropriate penalty to be imposed for Citation No. 6511548. The statutory minimum penalty for citations issued under section 104(d)(1) of the Mine Act is \$2,000.00. 30 U.S.C. § 820(a)(3)(A).

In determining the appropriate civil penalty, the Commission applies the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. § 820(i) provides:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, 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 after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Thus, the issue is whether application of the facts in this case to the statutory penalty criteria in section 110(i) warrants the imposition of a civil penalty in excess of \$2,000.00 minimum for an unwarrantable failure.

ORDER

Consequently, **IT IS ORDERED** that the Secretary address, by applying the statutory civil penalty criteria in section 110(i), whether there are aggravating factors relevant to section 110(i) that warrant a civil penalty higher than the \$2,000.00 statutory minimum.

With respect to the degree of negligence, the Secretary should address:

- Whether West Alabama was on notice that greater efforts for compliance were necessary based on West Alabama's history of previous relevant violations. If so, the Secretary should specify the violations relied upon;
- Whether West Alabama was ever required as a consequence of past MSHA inspections to post a warning sign with respect to the necessity for contract drivers to tie down. If so, the Secretary should provide the relevant details;
- Whether the fact that the violation was committed by a contract employee that was not under the direction and control of West Alabama is a mitigating circumstance;
- What actions Clay Junkin took to justify the assertion made by the issuing inspector that Mr. Junkin "allowed," through his interaction with contractor employee Johnny Kroger, this violation to occur. On this point, the issuing inspector noted in Citation No. 6511548 that:

Clay Junkin (Vice President) engaged in aggravated conduct constituting more than ordinary negligence by his statement of knowing this was a hazard, and allowing this failure to comply with a mandatory standard.

- Whether MSHA has exercised its discretion to cite contractor Dunbar Transportation, in addition to Alabama Sand, for driver Johnny Kroger's failure to tie down, which was the basis for Citation No. 6511548, given the fact that Dunbar Transportation was in a better position to supervise, train, and discipline Kroger. If so, the Secretary should provide a copy of the relevant citation.

With respect to the appropriateness of the penalty to the size and nature of the business, the Secretary should address:

- Whether the imposition of a penalty in excess of \$2,000.00, given the record evidence that West Alabama has only approximately eight employees, is appropriate to the size of the business;
- Whether the fact that Clay Junkin, a principle of West Alabama, has unrelated income as a partner in a law firm is a relevant consideration with respect to the statutory penalty criteria.

With respect to abatement, the Secretary should address:

- Whether Alabama Sand abated the cited violation in a timely manner by installing a sign advising contract haulage drivers to tie down when securing a load.

The Secretary should address any other information relevant to justify the imposition of a civil penalty higher than the \$2,000.00 statutory minimum.

IT IS FURTHER ORDERED that the Secretary respond, in writing, to the above **on or before March 11, 2016**. If West Alabama elects to file a written response to the Secretary's submission, such response should be filed by **March 25, 2016**. Alternatively, the parties should advise, **at any time prior to March 25, 2016**, whether they have reached an agreement with respect to the appropriate civil penalty to be imposed in this matter.



Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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