FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 7, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2009-663-M
Petitioner	:	A.C. No. 14-01477-191032
	:	
v.	:	Docket No. CENT 2009-664-M
	:	A.C. No. 14-01635-191033
NELSON QUARRIES INC.,	:	
Respondent	:	
	:	Mine: Plant 1 & 5

DECISION
ORDER TO PAY

This case is before me on two petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Nelson Quarries, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.§ 815 and 820 (the "Mine Act" or "Act"). The two violations were issued by MSHA under section 104(a) of the Mine Act, one at Plant #1, and the second one at Plant #5. The Secretary proposed assessed penalties of $460.00 and $100.00, respectively.

The parties waived their right to 20 days notice in order to be heard on September 16, 2010 in Springfield, Missouri. The parties presented testimony and documentary evidence at the hearing and entered into certain stipulations that were accepted by the Court and entered into evidence as Ct. Ex. A.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Nelson Quarries, Inc. ("Nelson") operates the five limestone quarries known as Plant numbers 1 through 5 in various counties in Kansas. They employ three crews of miners. Nelson blasts, drills, extracts and crushes limestone at each of these sites. They bid on contracts and use whichever quarry is closer to the customer to supply the product. Because there are five plants and three crews, there are at least two plants not in operation at any one time. Nelson operates its plants intermittently and seasonally. The parties stipulate that Nelson is an operator of the two plants in question here and that the mine known as Plant #1 meets the definition of a mine under the Act subject to the

jurisdiction of the Federal Mine Safety and Health Review Commission ("the Commission"). (Ct. Ex. A).

Inspector Bellfi is a journeyman MSHA mine inspector with previous experience as a member of a mine safety committee at two mines subsequent to serving as highway patrolmen for the State of Nevada for 12 years. On May 18, 2009, he conducted inspections of Plant #1 and Plant #5, and as a result issued citations nos. 6447701 and 6447705, respectively.

A. Plant #1

1. Citation No. 6447701

On May 18, 2009, Inspector Bellfi issued citation no. 6447701, Ex. S-1, to Nelson for a violation of section 56.14132(a) of the Secretary's regulations. The citation alleges that:

> The backup alarm for the Ford F350 welding truck, KS plate PJF841, was not maintained in a functional condition in that the backup alarm did not operate when inspected. The vision from the drivers seat is obstructed by the location of the Miller welding unit attached the (sic.) bed of the truck. The welder is usually by himself performing maintenance and there is little foot traffic at the mine. A fatal injury could occur from this type of hazard.

The inspector found that it was unlikely that an injury would occur but if it did, it would affect one person and could reasonably be expected to cause a fatality. The operator's negligence was assessed as moderate. The Secretary has proposed a penalty of $460.00.

2. The Violation:

The standard, 30 U.S.C. § 56.14132, states, in pertinent part:

> Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.
>
> When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have- an automatic reverse-activated signal alarm; a wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement; a discriminating backup alarm that covers the area of obstructed view; or, an observer to signal when it is safe to back up.

The parties stipulated that the alarm did not function when it was inspected and that the rearview mirror and the rear window of the truck were obstructed by a Miller welder mounted behind the cab. (Ct. Ex. A).

Inspector Bellfi testified that he was met by Forman Clift and Mr. Perez of Nelson Quarries when he arrived to conduct his inspection. Mr. Bellfi testified that he observed that Nelson had a welder mounted on an F350 pickup truck directly behind the cab obstructing the rearview mirror. (See photo Ex. S-4). He testified that the driver of the truck would have a blind spot directly behind the truck and would be unable to see a pedestrian in that area even when using the side view mirrors. (Tr. 34-36). Bellfi spoke with the operator of the welding truck and was informed by him that he usually worked alone when operating the welder. Although there were several people on foot in the mine, Bellfi could not place someone working for any period of time directly behind the truck. Based upon this information, Bellfi assessed the number of persons affected by the violation as one and the gravity as unlikely. (Tr. 28-29 and 36-37). The degree of negligence was assessed as moderate because there was no indication on the pre-shift examination that the backup alarm was not functioning and the operator stated that he did not advise management of that fact. Bellfi found these to be mitigating factors justifying a reduction in negligence from high to moderate. (Tr. 38-39).

With the regard to the nature of an ensuing injury, the inspector testified that based upon his 12 years as a highway patrolman and his review of a MSHA fatalgram involving a similar truck lacking a backup alarm, he felt an accident would result in a fatal crush-type injury. (Ex. S-2). He explained how a vehicle of any size traveling at a slow rate of speed would knock a pedestrian down rather than throw him up and over the vehicle; it would then take the pedestrian's feet out from under him and roll over him, causing a fatality. (Tr. 30-34).

Forman Clift testified that he was present when the welding truck was inspected and he had no knowledge that the backup alarm was not functioning. He further testified that the welder worked either by himself or with one helper and the plant is shutdown when he performs his work. (Tr. 94-95). The welder is located across the bed of the truck directly behind the cab. Mr. Clift acknowledged that despite the truck being equipped with side view mirrors, there is still a blind spot behind the truck. Although, he felt the truck had a "pretty good panoramic view." (Tr. 97). He pointed out that the typical mining truck is significantly larger than a Ford pickup truck and would have a larger blind spot. (Tr. 97-99).

Jason Schmidt, Nelson's mechanic, testified that he was contacted by Clift on the day of the inspection and asked to investigate the cause of the alarm failure. The wires for the alarm system are located in the back of the truck bed. When Schmidt touched them together they worked intermittently but the connector had corroded. He stated that corrosion causing loose wires is an "everyday common problem" and can be caused by hitting a bump in the road, wind, weather and the like. (Tr. 119-120). However, inspections for corrosion of wires were conducted only when the vehicle needed an oil change every six to seven thousand miles. (Tr. 120-121). The operator told Schmidt that the alarm had worked earlier that morning. He made the necessary repairs in a timely manner. (Tr. 114-117). Mr. Schmidt estimated the weight of the truck at 7,000 pounds and the weight of the welder at 2,000 pounds. (Tr. 122).

Nelson argues that the negligence should be assessed as low and the resulting injury as less than fatal, the rationale being that a Ford F350 pickup truck is substantially smaller than the usual mine vehicle and that Nelson was not aware of the malfunctioning alarm prior to the inspection.

I find neither of these arguments persuasive. The standard requires that the alarm shall be maintained in a functional condition. Although the backup alarm may have worked when the pre-shift examination was performed, (although the examination report was not submitted into evidence), knowing that corrosion of wires is an everyday common occurrence causing the alarm to work intermittently at best, I find moderate negligence on Nelson's part in its failure to inspect the wiring more frequently than every six or seven thousand miles. The argument that the severity of an injury should be assessed at something less than fatal because a truck/welder combo weighing just barely less than two tons is lighter than the usual mining vehicle is beyond absurd. I find the testimony of Inspector Bellfi, as a MSHA investigator and 12 year veteran of the highway patrol, credible and controlling on this issue. Although, common sense alone would lead to the conclusion that the human body could not survive being rolled over by a vehicle of 9,000 pounds.

B. Plant #5

1. Citation No. 6447705

Nelson Quarries, as stated above, operates five plants on an intermittent basis depending upon the location of their customer and the season. On January 25, 2009, Nelson filled out a Notification of Commencement of Operations, Closing or Moving form indicating that they were closing Plant #5 at Cherryvale from February 2, 2009 until February 28, 2009. (Ex. S- 9, at 5). Inspector Bellfi traveled to the plant on May 18, 2009, and found what he believed to be a closed mine and issued the citation, (Ex. S-5), which states:

> The operator failed to notify the nearest MSHA office of the correct start date of mining operations. A notification form was filed at the Topeka field office indicating that the mine would commence mining operations on 2/28/2009. The crushing plant was moved to the location but not constructed. The mine was not operating as of the attempted inspection date 5/18/2009. No notification was given to MSHA to indicate mining would not commence by the original date submitted.

The inspector believed that the property at the time of the inspection was under the jurisdiction of the Occupational Safety and Health Administration ("OSHA") because it was temporarily closed, and issued the citation based upon his lost time and effort traveling to the property for an inspection. Because the mine was not operating, the violation was a paper one. Inspector Bellfi assessed moderate negligence because the

weather had been extremely wet preventing Nelson from bringing the plant on line as anticipated. The Secretary proposes a penalty of $100.00.

2. The Violation

Section 56.1000 of 30 U.S.C. provides:

> The owner, operator, or person in charge on any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health District Office before starting operations, of the approximate or actual date operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether the operations will be continuous or intermittent.
>
> When a mine is closed, the person in charge shall notify the nearest district office as provided above and indicate whether the closure is temporary or permanent.

The parties stipulated that when Inspector Bellfi arrived at Plant #5, the crusher was present but not set up and had not been, between February 28, 2009 and May 18, 2009. It was further agreed that there had been no drilling, blasting or extracting of limestone during this time period and that Nelson was the operator this mine with Mine ID No. 14-01635. (Ct. Ex. A).

Inspector Bellfi testified that the Nelson had operated Plant #5 for some time as a limestone quarry. As stated above, Nelson operates mobile and intermittent plants depending upon the weather and orders placed by customers. Plant #5 was due to be closed for 26 days according to the Mine Notification form submitted by Nelson. (Ex. S-6). Plant #5 is approximately three hours away from the Topeka field office. (Tr. 44). When the inspector arrived on the property on May 18 and found the crusher in pieces and only a loader and stockpile present, he concluded that the mine was closed and that he lacked jurisdiction to conduct an inspection. (Tr. 46-48). At one point, he testified that he saw customers pulling up and loading their trucks with product from the stockpile but later he testified that he did not see any customers purchasing limestone. (Tr. 46 and 85). As support for his belief that OSHA rather than MSHA had jurisdiction over the property, he cited the *Interagency Agreement Between the Mine Safety and Health Administration, U.S. Department of Labor, and the Occupational Safety and Health Administration, U.S. Department of Labor* (the "Agreement").[1] (Ex. S-7). Inspector Bellfi stated that somewhere in the Agreement, it states that a loader and a stockpile do not qualify as a mine and are under OSHA's jurisdiction. (Tr. 48, 52-53). Further, the workers present at that time would not fall under the protection of the Mine Act (Tr. 59). Only when there is mining activity does MSHA have jurisdiction over the facility; a plant

[1] *Interagency Agreement Between the Mine Safety and Health Administration, U.S. Dept. of Labor, and the Occupational Safety and Health Administration, U.S. Department of Labor*, U.S. Dept. of Labor (March 29, 1979), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=222 ("Interagency Agreement").

being setup would be mining activity. (Tr. 78-80). When only a stockpile and loader remain on the property, jurisdiction reverts back to OSHA according to the Agreement. (Tr. 82).

When Inspector Bellfi informed personnel of the citation, the response was that it had been very wet. Forman Clift also testified that it rained continuously that spring delaying the setting up of the crusher. (Tr. 100). He also stated that plants may be inoperable from a few days to as long as six months, but that they have never been asked by MSHA for notification on a weekly basis when a plant is temporarily idle. (Tr. 101-103). Mr. Schmidt testified that during the period of February to May, he was called out to Plant #5 of several occasions to repair different pieces of equipment including water pumps set up to remove the rain water in the quarry. (Tr. 114).

Numerous Mine Notification forms were submitted by the Secretary for Plant #5 and other Nelson mines as evidence of Nelson's being well aware of the requirement to file such notices and amended notices of movements of plants, temporary closures and openings of the quarries, changes of address or other changes in identification or nature of mining. (Ex. S-9). In fact, page 4 of Ex. S-9 is the form filled out on June 25, 2009, following the issuance of this citation which indicates a closing date of February 28, 2009, and an opening date of August 3, 2009. Page 3 of Ex. S-9 is a revised form prepared the same day indicating an unknown opening date and page 2 is the final form dated July 31, 2009, informing MSHA of the opening date of August 10, 2009.

The Agreement between OSHA and MSHA does not delineate jurisdiction between the two agencies by the presence of a loader or stockpile nor does it state that jurisdiction bounces back and forth between the two agencies depending upon whether a mine is temporarily closed for seasonal or other reasons. The Agreement is, in fact, inclusive, rather than exclusive, in defining MSHA's jurisdiction. It states that the general principle is that the Secretary will apply the Mine Act and the standards promulgated there under to protect miners from unsafe or unhealthful conditions. MSHA has jurisdiction over mines and mills except when "the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g. hospitals on mine sites) or where there is statutory coverage under the Mine Act but there exists no MSHA standards applicable to particular working conditions on such cites, **then** the OSHAct will be applied to those working conditions." (Emphasis added) *See* Interagency Agreement, *citing* 30 U.S.C.§ 815. The Agreement cites Mine Act section 3(h) which defines a mine over which MSHA has jurisdiction as "lands, structures, facilities, equipment and other property used in, or to be used in, or resulting from mineral extraction." *Id*. There is also a provision under the Act directing the Secretary of Labor, in determining what constitutes mineral milling, to give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical site. When doubts result as to whether jurisdiction lies with OSHA or MSHA, those doubts will be resolved in favor of the Congressional intent that the facility will be included within the coverage of the Mine Act. OSHA's jurisdiction is

carved out as an exception to MSHA's jurisdiction and applies to brick, clay pipe, refractory plants, ceramic plants, fertilizer product operations, concrete batch, asphalt batch, not mixed plants; smelters and refineries whether or not on mine property and salt, cement and gypsum board plants not on mine property.

The evidence shows that Plant #5 has been in operation under Mine ID No 1401635 since December 2004 as an intermittent/mobile limestone mine. (Ex. S-9). Plant #5 has been under the jurisdiction of the Mine Act and has been subject to regular inspections continually since that time. The property still had a workable quarry on it, the pumps were in operation draining the water in preparation of extracting minerals, there was a loader and cranes, and there was a stockpile resulting from prior mineral extraction present on May 18, 2009. There had not been a reversion of jurisdiction to OSHA at any time. That having been said, the fact that the property was under MSHA's jurisdiction does not address the issue of whether Nelson complied with the standard of notifying MSHA of an accurate expected opening date of its operation. This standard was promulgated to ensure inspections are conducted during times at which it can be verified that the operator is adequately protecting the safety and health of the miners. It also serves to conserve MSHA's expenditure of resources by avoiding travel to mines located far from the field offices when not in operation. *See* MSHA, Comment and Recommendations; Notification of Legal Identity, and Notification of Commencement of Operations and Closing of Mines, 72 Fed. Reg. 35730 (proposed June 29, 2007). The process by which an amended notification could have been provided to MSHA was extremely simple. Nelson could have called or faxed in a revision to the initial notification. The fact that they had done numerous such notifications in the past confirms that they were well aware of the necessity for doing so and the means by which it could have been accomplished.

Nelson argued that the mine was not closed when Inspector Billfi came on May 18, 2009. In support of this position, they offered the self-serving testimony of Mr. Schmidt, the mechanic, to say that he was called to the site multiple times to service equipment located there between February and May. However, Nelson did not produce any work orders, inspection reports indicating equipment needing repair, invoices for parts purchased or any specific dates, times and/or repairs done to lend credence to this very vague testimony. Furthermore, the MSHA notification forms they submitted on June 25, 2009, amending the cited notification, indicate that the mine was closed from February 28, 2009, the originally proposed opening date, until August 10, 2009. (Ex. S-9, at 2-3). Finally, Forman Clift simply stated to the inspector on May 19 that the mine was not yet open because of inclement weather all winter and spring.

From these facts, I conclude Plant #5 was still closed on May 18, 2009, when Inspector Billfi issued the citation. I further find that having given an estimated opening date of February 28, 2009, Nelson violated the standard by not providing a revised notice of opening shortly thereafter with a more accurate estimated opening date.

II. PENALTY

The Mine Act section 110(i) delegates to the Commission and its judges "authority to assess all civil penalties provided in the Act." 30 U.S.C. § 820(1). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 830(a). Therefore, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The administrative law judge then has the authority to assess *de novo* the appropriate penalties taking into consideration the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(1).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co***.,** 5 FMSHRC 287, 292 (Mar. 1983), *affd***,** 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s]... [of] the Act." *Id***.** at 294; *Camera Green***,** 22 FMSHRC 616, 620 (May 2000).

The parties' stipulation provides that the proposed assessment will not affect the operator's ability to continue in business. (Ct. Ex. A.). I accept this stipulation based upon the evidence presented.

I also find that the operator abated the citations in good faith in a timely manner. The history shows a number of citations, none of which have been significant or substantial, and I find that the following penalties are appropriate in the case given the statutory criteria:

Citation No. 6447701: I assess a penalty of $460.00 as proposed by the Secretary based upon the negligence and gravity as discussed above.

Citation No. 6447705: I assess a penalty of $100.00 as proposed by the Secretary based upon the negligence involved as discussed above.

III. ORDER

Based on the criteria in section 110(1) of the Mine Act, 30 U.S.C. § 820(1), I assess a penalty of $560.00 for the two violations in this docket. Nelson Quarries, Inc. is *ORDERED TO PAY* the Secretary of Labor the sum of $560.00 within 30 days of the date of this decision.[2]

Priscilla M. Rae
Administrative Law Judge

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[2] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390