

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

March 9, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2008-71-M
Petitioner	:	A.C. No. 40-03269-127960
v.	:	
	:	
	:	
	:	
CLAYSVILLE QUARRY,	:	Claysville Quarry
Respondent	:	

DECISION ON CIVIL PENALTY
AND
ORDER TO PAY

Before: Judge Feldman

The Claysville Quarry (Claysville) is a dimensional stone quarry, owned and operated by Dennis Roy Hinch. At the facility stone is extracted and stacked on pallets for customer delivery. The blasting is performed by Hinch. Hinch employs four employees who operate the mine equipment used during the extraction process. Francisco Morales Stone Stackers, a contractor, provides the services to load the extracted dimensional stone onto pallets.

I. Background

Section 104(g) of the Mine Safety and Health Act of 1977, as amended, (“the Act”), 30 U.S.C. § 814(g), authorizes an inspector to immediately withdraw individuals working at a mine who have not received the requisite new miner training. On August 21, 2007, Inspector Russell E. Ware issued 104(g)(1) Order No. 6123908, the sole subject of this proceeding, for an alleged violation of the mandatory safety standard in 30 C.F.R. § 46.8(a)(1) that specifies the requirements for new miner training. The 104(g) order was issued after Ware observed nine contract employees stacking stone on pallets. These contract employees had not received new miner training.

Inspector Ware designated the violation as significant and substantial (S&S).

Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The violation was attributable to a high degree of negligence. However, although Hinch was aware of the training requirements for new miners, the 104(g) order does not allege that Hinch knew he was responsible for training contract employees. Moreover, although these laborers are “miners” as defined by section 3(g) of the Act by virtue of their work at a mine, they are not operating mine equipment or otherwise exposed to hazards normally associated with the extraction process. 30 U.S.C, § 803(g). Significantly, the Secretary does not allege that the violation is attributable to a reckless or conscious disregard evidencing an unwarrantable failure. Consequently, the failure to provide new miner training evidences, at most, a moderate degree of negligence. The Secretary proposes a penalty of \$3,224.00 for 104(g)(1) Order No. 6123908.

II. Settlement Conferences

In an attempt to encourage settlement a telephone conference was conducted with the parties on January 20, 2010. During the conference call Hinch stipulated that the necessary training was not provided to the nine contract employees. Hinch also stated that he did not dispute that the violation was significant and substantial. Consequently, with the exception of the appropriate civil penalty to be assessed, there are no remaining unresolved issues of material fact. Given the Commission’s unprecedented caseload, in an effort to encourage settlement, I explained to the Secretary’s counsel that the appropriate civil penalty is a *de novo* determination that is not affected by the Secretary’s civil penalty formula in 30 C.F.R. Part 100. I noted that I failed to see any aggravating circumstances that would warrant the \$3,224.00 proposed civil penalty. On the contrary, I noted that the small size of the operator, the lack of any significant history of previous violations, and Claysville’s rapid compliance with the training requirements after service of the 104(g) order were mitigating factors. In addition, I explained that the failure to provide new miner training to nine contract employees was one oversight that did not justify multiplying the gravity ninefold.

In view of the above, I urged the parties to settle this matter for a reduced civil penalty of \$240.00. During the January 20, 2010, telephone conference, Hinch agreed to pay \$240.00 in settlement of the subject 104(g) order. In a subsequent telephone conference with the parties, on January 27, 2010, the Secretary’s counsel, after conferring with Mine Safety and Health Administration officials, rejected the \$240.00 civil penalty that I had suggested. Consequently, over the objection of the Secretary’s counsel, I advised the parties that I was canceling the previously scheduled hearing as there are no unresolved material facts that warrant litigation.

On January 29, 2010, I issued an Order canceling the hearing and ordering the Secretary to address the statutory penalty criteria to the facts of this case. The Secretary responded on February 19, 2010. The Secretary’s response did not identify any aggravating circumstances, and her response did not refute the above mentioned mitigating circumstances.

III. Statutory and Case Law Framework

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, 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 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" 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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 *citing* 30 U.S.C. § 820(i).

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). 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 for the statutory criteria and the deterrent purposes of the Act. *Id.* At 294, *Canera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

ORDER

As discussed above, there are no remaining unresolved material questions of fact. Applying the section 110(i) statutory criteria, the small size of the operator, rapid efforts at good faith abatement, lack of a significant history of previous violations, a reduction in gravity because the failure to train nine individuals is attributable to one oversight, and a reduction in negligence from high to moderate, warrant a significant reduction in the \$3,224.00 civil penalty proposed by the Secretary. Rather, consistent with the statutory penalty criteria, a civil penalty

of \$240.00 shall be imposed for the subsection 104(g)(1) order. I note, parenthetically, that imposition of a \$240.00 penalty is commensurate with the total \$281.00 civil penalty proposed by the Secretary in a similar case for two separate violations of the new miner and hazard training provisions in Part 46 of the Secretary's regulations also committed by a small mine operator. 30 C.F.R. Part 46. *See SCP Investments, LLC.*, 32 FMSHRC 119, 129 (Jan. 2010) (ALJ).

Accordingly, **IT IS ORDERED** that the Claysville Quarry pay a civil penalty of \$240.00 within 30 days of the date of this order in satisfaction of 104(g)(1) Order No. 6123908. Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. The payment should reference Docket No. SE 2008-71-M and A.C. No. 40-03269-127960. Upon receipt of timely payment, **IT IS ORDERED** that the captioned civil penalty case **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution: (Regular & Certified Mail)

Brian C. Winfrey, Esq., Office of the Solicitor, 618 Church Street, Suite 230,
Nashville, TN 37219

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor,
1100 Wilson Blvd., Room 2220, Arlington, VA 22209

Dennis Roy Hinch, Owner, Claysville Quarry, 3458 Old Highway 70,
Crossville, TN 38572

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