

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 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	:	

ORDER CANCELING HEARING
AND
ORDER REQUESTING PENALTY CRITERIA INFORMATION

Dennis Roy Hinch is the owner/operator of the Claysville Quarry. The facility is a dimensional stone quarry where stone used in the installation of patios and walkways is extracted and stacked on pallets for customer delivery. Hinch performs the blasting. The quarry employs a total of four additional employees who operate mine equipment. Hinch uses the services of Francisco Morales Stone Stackers, a contractor that supplies the laborers that load the dimensional stone onto the pallets. This information was provided by Hinch during conference calls with both parties to this proceeding conducted on January 20 and January 27, 2010.

On August 21, 2007, 104(g)(1) Order No. 6123908 was issued for an alleged violation of the mandatory training standard in section 46.8(a)(1) that requires the training of new miners. The citation was issued because Hinch failed to provide new miner training to nine contract employees who were stacking stone on pallets. The Secretary designated the citations as significant and substantial (S&S) and attributed the violation to a high degree of negligence. The Secretary proposes a civil penalty of \$3,224.00 for this 104(g)(1) order.

During the January 27, 2010, conference call Hinch stipulated to the fact of the violation and its designation as S&S in nature. This matter had been scheduled for hearing on February 9, 2010. However, there are now no unresolved issues of material factual that require a hearing. As discussed below, the only remaining issue is the application of the facts in this matter to the statutory section 110(i) penalty criteria. 30 U.S.C. § 820(i). Consequently, **IT IS ORDERED** that the scheduled hearing **IS CANCELED**.

Commission judges make *de novo* findings with respect to the penalty criteria in section 110(i) of the Mine Act, and they are not bound by the Secretary's proposed civil penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Section 110(i) of the Act sets forth the statutory civil penalty criteria used to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

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.

During the January 27th conference call Hinch stated: that his Claysville Quarry has been previously cited for approximately six citations; that the quarry is a small business with only four employees; that he was unaware of the requirement of training contract employees; that the \$3,224.00 penalty proposed by the Secretary would be a hardship given his small business size; and that he immediately provided the required training after the 104(g) order was issued.

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 1503 (Sept. 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC 616, 625-26 (May 2000).

In view of the above, **IT IS ORDERED** that the Secretary address the application of the penalty criteria in section 110(i) to the facts of this case. Specifically, the Secretary should answer yes or no, with a supporting explanation, if appropriate, to the following questions:

- (1) Is the Claysville Quarry history of violations an aggravating factor in the imposition of the civil penalty the Secretary proposes in this matter?
- (2) Is the Claysville Quarry properly designated as a small operator?
- (3) Is the proposed \$3,224.00 civil penalty disproportionate to the size of the operator's business, particularly in view of the total \$281.00 civil penalty proposed for two training violations in SCP Investments, LLC, Docket Nos. SE 2006-148-M and SE 2006-163-M?

(4) Did the Claysville Quarry demonstrate good faith in attempting to achieve rapid compliance after notification of the violation?

(5) Is there a correlation between the number of persons affected and the degree of negligence attributable to the Claysville Quarry for the subject training violation?

ORDER

IT IS ORDERED that the Secretary shall provide answers to the above questions within 21 days of the date of this Order. The Secretary may provide any additional information and arguments that she deems appropriate to support her assertion that the proposed civil penalty in this matter should not be substantially reduced. Failure to timely respond may result in vacating the subject 104(g)(1) order. **IT IS FURTHER ORDERED** that Claysville Quarry shall file a response to the Secretary's submission within 14 days of the receipt of the Secretary's answers.

Jerold Feldman
Administrative Law Judge

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