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 29, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-880-M
Petitioner	:	A.C. No. 01-03255-193266-01
	:	
v.	:	Docket No. SE 2009-881-M
	:	A.C. No. 01-03255-193266-02
	:	
PICENOS BROTHERS,	:	King Quarry
Respondent	:	

DECISION

Appearances: Sophia Haynes, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Alberto Picenos, *pro se*, Oneonta, Alabama, for the Respondent.

Before: Judge Feldman

These civil penalty proceedings are before me based on three alleged violations of the Secretary's mandatory safety standards in Part 56 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U. S.C. Part 56, governing surface metal and nonmetal mines. These proceedings also concern two alleged violations of the Secretary's new miner and refresher training regulations in Part 46 of the Mine Act. These alleged violations occurred at King Quarry, operated by Picenos Brothers, a sole proprietorship. At King Quarry, Picenos Brothers employs six miners who use a dozer, a bobcat, sledge hammers and picks to extract dimensional stone material. The Secretary proposed a total civil penalty of $23,707.00 for the five alleged violations at issue.

During a May 10, 2010, conference call with the parties, Picenos Brothers stipulated to the fact of the violations, but contested the proposed penalties. I expressed concern that the proposed $23,707.00 civil penalty did not appear to be proportionate to the size of the mine operator as required by the statutory penalty criterion in 30 U.S.C. § 820(i). In response to my concern, the Secretary offered to reduce the total proposed civil penalty to $20,000.00, which did not adequately address the issue of proportionality.

During a May 27, 2010, conference call, Picenos Brothers was asked to provide documentation and information regarding the size of the company and the circumstances behind the cited violations. Shortly thereafter, Picenos Brothers provided documentation and information reflecting that it is a relatively small mine operator.

On November 9, 2010, the Secretary was given the opportunity to provide the testimony of the issuing Mine Safety and Health Administration ("MSHA") inspector to

support the proposed civil penalties. Picenos Brothers waived its right to attend the hearing since it had stipulated to the fact of the violations and only contested the proposed penalty amount. Given the Commission's unprecedented workload, the hearing was held in Washington, D.C. At the hearing, I was particularly concerned about MSHA's enforcement of Part 46 training obligations of a small operator, such as Picenos Brothers.

The issuance of the subject 104(g)(1) withdrawal orders blurs the distinction between the failure to provide training and the failure to certify that such training had been given. On June 30, 2009, the inspector issued 104(g)(1) withdrawal Order Nos. 6511150 and 6511151 citing violations of the refresher training and new miner training provisions in Part 46. (Gov. Exs. 8, 9). The citations were issued after the inspector determined that Picenos Brothers had not completed MSHA certification Form 5000-23 for refresher and new miner training as required by 30 C.F.R. § 46.9. Specifically, Picenos Brothers had not certified that: (1) refresher training had been given to six miners; and, (2) new miner training had been given to one miner.

At the hearing, the issuing inspector conceded that on-the-job training is a significant, if not the most important element, of new miner training. (Tr. 250-51). The Secretary attributed the cited violation to a high degree of negligence and proposed a civil penalty of $7,176.00[1] for 104(g)(1) Order No. 6511151 despite the fact that the new miner had been working at the mine site for several months and apparently had received on-the-job training. The training concerned the new miners' job duties that principally consisted of operation of a bobcat and manually stacking pallets. (Tr. 247-49). Though the inspector observed the new miner operating a bobcat, the inspector did not determine the nature and extent of the bobcat training that had previously been provided.

The 104(g) orders required the immediate withdrawal of miners because, as noted in the orders, the miners were alleged to be a hazard to themselves and others. (Gov. Exs. 8, 9). However, the inspector did not determine what, if any, refresher and new miner training had been given to abate the 104(g) orders and to warrant allowing the subject miners to return to work. The withdrawal orders, and the abatement thereof, were based solely on Picenos Brothers' completion of Form 5000-23 for each of the subject miners. (Tr. 213-14, 254-55).

[1] Order No. 6511151 attributed the cited violation to a high degree of negligence, but it was not designated as unwarrantable because it alleged a violation of the statutory provision in section 104(g) of the Mine Act. 30 U.S.C. § 814(g). Only alleged violations of mandatory safety standards can be attributed to an unwarrantable failure. 30 U.S.C. § 814(d)(1). However, the proposed $7,176.00 civil penalty for Order No. 6511151 was the same as the proposed civil penalty for other alleged violations of mandatory standards in these proceedings that the Secretary alleges are unwarrantable.

Obviously, small operators do not have the formal training staff or facilities available to a large mine operator. Nevertheless, new miner and refresher training constitute a significant means of preventing miners' exposure to hazardous conditions and practices. However, MSHA's enforcement in this matter, requiring refresher and new miner certifications, without determining what, if any, training had been provided, elevates form over substance and trivializes, rather than achieves, the purpose of the training regulations. The failure to ascertain the degree of training provided before and after the issuance of 104(g) orders relegates such orders to certification reporting violations rather than serious training violations. I urge the Secretary to revisit her method of enforcement of the Part 46 training regulations, particularly with respect to their application to very small mine operators.

To determine the appropriateness of the size of her proposed penalty, following the hearing, the Secretary deposed Alberto Picenos to obtain further information about the size and operation of his business. The Secretary now has filed a motion to approve settlement wherein the parties have agreed to a reduction in the civil penalty from $23,707.00 to $11,910.00. The parties' settlement agreement includes an agreed upon payment schedule, beginning within approximately 60 days of this order, to be paid in a total of 31 monthly installments.

I have considered the representations and documentation submitted in these matters and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Picenos Brothers **IS ORDERED** to pay $1,500.00 on or before June 1, 2011, and to pay the remaining balance in 30 monthly installments of $347.00 on the first of each month thereafter, in satisfaction of the five citations at issue.[2] In the event that timely payment is not received, the entire balance will become due immediately. Upon receipt of timely payments, the captioned civil penalty matters **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

[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. Please include the Docket Nos. and A.C. Nos. noted in the above caption on the checks.

Distribution: (Certified Mail)

Sophia Haynes, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Alberto Picenos, Owner, Picenos Brothers, 93 Parks Circle, Oneonta, AL 35121

Amy Allman, 5205 County Highway 24, Springville, AL 35146

/jel