

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 17, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 95-112-M
Petitioner : A.C. No. 41-03698-05515-A
v. :
: Tarrant Aggregates Corp.
ROBERT CODNER, Employed by :
TARRANT AGGREGATES :
CORPORATION, :
Respondent :

DECISION

Appearances: Mary K. Schopmeyer, Esq., Office of the
Solicitor, U.S. Department of Labor,
Dallas, Texas, for Petitioner;
Jim Minter, Esq., Fort Worth, Texas,
for Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 820(c), charging the respondent with two alleged "knowing" violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent is charged as an agent of the mine operator while employed as a plant operator. The respondent contested the alleged violations, and a hearing was convened in Fort Worth, Texas.

Issues

The principal issue presented in this case is whether or not the respondent knowingly authorized, ordered, or carried out the alleged violations. If he did, the next question presented is the appropriate civil penalties to be assessed against the respondent taking into account the civil penalty criteria found in Section 110(a) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164.
2. Section 110(c) of the 1977 Act, 30 U.S.C. ' 820(c).
3. Commission Rules, 29 C.F.R. ' 2700.1, et seq.

Discussion

Section 104(d)(1) "S&S" Citation No. 4321326, issued at 9:25 a.m., on January 4, 1994, cites an alleged violation of 30 C.F.R. 14107(a), and the cited condition or practice is described as follows:

The V-belt drive for the horizontal masonry conveyor belt was not provided with a guard. The V-belt drive is located approx. five feet from ground level and there was an employee shoveling in that area at the time of inspection. The plant foreman stated that he knew the guard was off and had records dated on September 25, 1993, that the guard was off.

Section 104(d)(1) "S&S" Order No. 4321327, issued at 10:40 a.m., on January 4, 1994, cites an alleged violation of 30 C.F.R. 56.14107(a), and the cited condition or practice is described as follows:

The guard provided for the tail pulley on the over-size conveyor belt had a hole cut in the east side fourteen inches by 8 inches exposing the self cleaning tail pulley. The tail pulley is located approx. three feet from ground level and employees walk directly beside the pulley two to ten times daily. The plant foreman stated that he knew the hole was in the guard and records

showed the guard had been wrote up on 9-25-93.
This is an unwarrantable failure.

Upon entering their respective appearances in this matter, and in the course of a pre-hearing bench conference prior to the presentation of testimony from witnesses who were present in the courtroom, including one subpoenaed witness, counsel for the parties informed me that they proposed to finalize a settlement in this matter and they filed a joint motion and a settlement agreement for my consideration (Tr. 9-10).

The parties were afforded an opportunity to present arguments in support of the proposed settlement. The parties agreed that the respondent's employer is a small sand and gravel pit operator with a total of 38 employees at two plants. The No. 1 plant where the respondent worked had two employees and the respondent supervised one employee. Respondent's counsel stated that the respondent was an hourly employee earning \$10 an hour, and that he is married with several children and is their sole support. Counsel asserted that the payment of the full amount of the proposed civil penalty assessments will adversely impact financially on the respondent (Tr. 18-28).

With respect to section 104(d)(1) Order No. 4321327, the petitioner's counsel stated that upon further investigation it has been concluded that the evidence does not support a "knowing" violation of the cited mandatory safety standard found at 30 C.F.R. 56.14107(a). Under the circumstances, counsel asserted that the section 110(c) action predicated on that order has been vacated by MSHA.

The petitioner asserted that after further review and consideration of the respondent's financial status and the six statutory civil penalty criteria found in section 110(i) of the Act, it has determined that the initial proposed civil penalty assessment of \$1,200 for section 104(d)(1) Citation No. 4321326

is unduly burdensome to the respondent. Under the circumstances, the petitioner agreed to modify the assessment and reduce the proposed penalty to \$500 for the alleged violation.

MSHA Inspector Ricky J. Horn, who was present in the courtroom, and who issued the citation and order, expressed his approval of the proposed settlement disposition of this matter (Tr. 30).

The respondent has agreed to pay a civil penalty assessment of \$500, in settlement of Citation No. 4321326. He agreed to pay an initial payment of \$100, with four (4) additional monthly installments of \$100, due each 30 days thereafter, until the total amount of \$500 is fully paid (Tr. 37-38).

Conclusion

After careful review and consideration of the pleadings and arguments in support of the proposed settlement disposition of this case, I rendered a bench decision granting the joint motion and approving the settlement (Tr. 37). My decision in this regard is herein re-affirmed. I conclude and find that the settlement disposition is reasonable and in the public interest.

I take note of the fact that the respondent is employed by a small sand and gravel pit operator, is the sole support of his family through hourly wages, timely abated the conditions and presented some mitigating circumstances associated with the cited conditions as part of his answer in this proceeding. Under all of these circumstances, and pursuant to Commission Rule 31, 29 C.F.R. 2700.31, the joint settlement motion **IS GRANTED**, and the settlement **IS APPROVED**.

ORDER

In view of the foregoing, **IT IS ORDERED** as follows:

1. The proposed civil penalty assessment associated with Section 104(d)(1) "S&S" Order No. 4321327, January 4, 1994, 30 C.F.R. 56.14107(a), **IS DENIED** and **IS DISMISSED**.

2. The respondent Robert Codner shall pay a civil penalty assessment in the amount of \$500 in No. 4321326, January 4, 1994, 30 C.F.R. 56.14107(a).
3. The respondent Robert Codner shall make an initial payment of \$100 within thirty (30) days of the date of this decision and order. Payment shall be by check or money order made payable to the Mine Safety and Health Administration.
4. After payment of the first installment, the respondent Robert Codner shall make additional payments to MSHA in four (4) equal installments of \$100, each due within thirty (30) days of the previous payment, until the full amount of \$500 is paid.

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The payments shall include a reference to the date of this decision and order approving settlement and requiring payment, and Docket No. CENT 95-112-M, and A.C. No. 41-03698-05515-A.

This decision will not become final until such time as full payment of the \$500 is made by the respondent to MSHA, and I retain jurisdiction in this case until payment of all installments are remitted and received by MSHA. In the event the respondent fails to comply with the terms of the settlement, the petitioner may file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the case.

George A. Koutras
Administrative Law Judge

Distribution:

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