FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

July 19, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2007-115-M
Petitioner	:	A.C. No. 14-01650-105541
	:	
v.	:	
	:	
HIGGINS STONE, INC.,	:	Higgins Stone, Inc.
Respondent	:	

DECISION

Before: Judge Barbour

This case concerns a proposal for assessment of a civil penalty filed pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §§ 815, 820 (Mine Act or Act). The proposal seeks $1,769.00 for an alleged violation of the mandatory occupational noise exposure standard found at 30 C.F.R. § 62.130(a).[1]

The parties agreed to numerous stipulations, which, *inter alia,* establish the Commission's jurisdiction, the fact of violation and almost all of the statutory civil penalty criteria. *See* Sec's Brief in Support of Motion for Summary Decision (Sec's Br.), Exh. A, Joint Stipulations. In addition, the Secretary moved for summary decision. Sec's Motion for Summary Decision Based on Stipulated Facts and Attached Brief (Sec's Mot.). Under the Commission's rules a summary decision motion may be granted if "there is no genuine issue as to any material fact; and . . . the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §§ 2700.67(b)(1), 2700.67(b)(2).

Before ruling on the motion, it is necessary to set forth fully the parties' stipulations and their factual assertions.

THE JOINT STIPULATIONS

The stipulations are as follows:

[1]The standard requires each operator to assure no miner is exposed during any work shift to noise that exceeds the permissible exposure level (PEL).

1. Higgins Stone, Inc. [Higgins or the company] is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

2. [Higgins] is the operator of the . . . [subject mine].

3. [Higgins] is subject to the jurisdiction of the . . . [Act].

4. The . . . Commission and the assigned Administrative Law Judge . . . have jurisdiction over this matter.

5. MSHA Inspector Chrystal A. Dye conducted a regular inspection of the . . . [mine] on June 28, 2006. She conducted a full-shift noise sample on the hydro splitter operator working in the splitter shed . . . and issued Citation No. 6332898 as a result of . . . the noise sampling.[2] Inspector Dye's dosimeter readings indicated exposure of the [splitter] operator to a[n] . . . exposure level . . . of 326.5%. [T]his was in excess of the . . . (PEL) of 132%.

6. [Higgins] violated [section] 62.130(a) as alleged in Citation No. 6332898. The abatement time was set for July 28, 2006.

7. [The citation] . . . and [the subsequent] continuations [of the citation] were properly served . . . upon an agent of [Higgins] . . . on the date and place stated therein.

8. On August 15, 2006, Inspector Dye went back to [the mine] . . . and re-sampled the splitter operator. Prior to her arrival . . . [Higgins] had run the mufflers of both splitters in the splitter shed through the roof and had built a wooden frame around the motor in order to shield the motor with Plexiglass. On that date, the dosimeter readings came in at 341.50% (again in excess of the PEL set in . . . [section] 62.130(a)[)]. Inspector Dye granted an extension to . . . [Higgins] to try more engineering or administrative controls.

9. On September 20, 2006, . . . Dye went to . . . [the mine] to check on abatement. Dosimeter readings after a full shift sample of the splitter operator showed a PEL of 226.50[%].

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[2]The hydro splitter is a mechanism used to split and shape stone. Sec.'s Mot., Exh. B. at 1, ¶ 2.

Between August 15, 2006, and September 20, 2006 . . . [Higgins] had not tried any additional measures. While Inspector Dye was on the mine site, Scott Wichman, Plant Operator, took the smaller splitter out of operation, covered the motor with blankets, and called the CAT dealer to see about having a sound absorbent compartment built to house the motor. Based on these actions . . . Dye granted a second extension of the abatement date (until October 20, 2006). Dye informed . . . [Higgins] no further extensions would be granted.

10. On November 9, 2006, . . . Dye conducted a full shift noise sample and issued [section] 104(b) Order No. 6332985 when no apparent further efforts had been taken to reduce noise (i.e., the CAT operation had not built the noise absorbing compartment).[3]

11. On November 14, 2006 . . . Dye terminated Order No. 6332985 . . . [Higgins] had built a sound absorbent enclosure around the splitter motor and her dosimeter reading came in at a permissible PEL of 62.150%.

12. The penalty issued for the citation . . . will not affect . . . [the company's] ability to continue in business.

13. The information contained on . . . [MSHA's] . . . [Assessment] Data Sheet accurately reflects the number of violations issued to . . . [Higgins] and the number of inspection days from October 17, 2005 (the date on which . . . [Higgins] began its operations), to December 2006.

14. MSHA Form [No.] 1000-179, which reflects the points that were used to formulate the assessment at issue, accurately

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[3]Section 104(b) provides in part, if an inspector:

> finds (1) that a violation described in a citation . . . (a) has not been totally abated within the time as originally fixed . . . or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he [or she] shall . . . promptly issue a [withdrawal] order.

30 U.S.C. § 814(b).

> depicts points attributable to . . . [the company's] size; the history of previous violations; negligence; and gravity. The total number of points, 9550, was used to compute the penalty of $1,769.00. **[Higgins] does not stipulate to the 10 points added for lack of good faith and does not agree with the failure to allow an allowance of a 30% penalty reduction for good faith abatement** [emphasis in original].

Sec.'s Br., Exh. A.

AFFIDAVIT

An affidavit from Inspector Dye is attached to the Secretary's brief. Sec's Br., Exh. B. In the affidavit, which tracks the stipulations, Dye states, on June 28, 2006, she conducted a full shift-noise sample on the operator of the larger of the two splitters in the splitter shed. Sec's Mot., Exh. B at 1-2, ¶ 3. The smaller splitter was pushed up against the larger splitter, end-to-end. Therefore, the sampled splitter operator was exposed to the noise from both splitters. *Id.* At the time of the sample, the splitter operator was enrolled in a hearing conservation program and was wearing hearing protection. The sample revealed the splitter operator was exposed to a dosimeter reading of 326.5% that equated to 98.5 dBA, which was a violation of section 62.130(a). *Id.* at 2, ¶ 2. Inspector Dye further states, 30 days is the maximum abatement time for health violations, and she allowed Higgins the full 30 days to install all feasible engineering and administrative controls. *Id.* at 2-3, ¶ 4.

Dye maintains she returned to the mine after more than 30 days had run, and although Higgins had redirected the noise from the splitters and built a frame to enclose the motor with plexiglass, a noise sample revealed continued non-compliance. Therefore, she extended the abatement time to September 15, to allow the company "to try some more engineering or administrative controls." Sec's Mot., Exh. B at 3, ¶ 5. When she returned to the mine on September 20, a full shift noise sample on the splitter operator revealed continued non-compliance. She also maintains no work had been done on reducing the noise between August 15 (the date of her prior visit) and September 20. Dye states she warned the plant manager she would issue a closure order for failure to abate, and the manager responded by taking the smaller splitter out of service and by wrapping blankets around the larger splitter's engine. This lowered the dBA, but the noise level was still non-compliant. The manager then arranged for a contractor to build a sound absorbent compartment for the splitter's engine.[4] Dye states she again warned the manager she would not grant a further extension. Sec's Mot., Exh. B at 3, ¶ 6. When Dye returned to the mine on November 9, 2006, the compartment was not built. Dye found out no Higgins employee had spoken to the person responsible for building the compartment in three

[4] I assume the "contractor" is the "CAT dealer" referenced in the stipulations. *See* Sec's Br., Exh. A, ¶ 9.

weeks. She also noted Higgins had not called MSHA to ask for additional time. Moreover, the person responsible for building the compartment was not available to confirm the plant manager's statements about the contractor and the compartment. Accordingly, on November 14, she issued an order to Higgins for failing to comply with the citation. *Id.* at 4, ¶ 7. Finally, Dye states she terminated the order on November 16, when installation of a sound absorbent enclosure around the engine and other ameliorative actions brought the PEL within the requirements of the regulation. *Id.*

THE SECRETARY'S POSITION

The Secretary argues the stipulations establish the appropriateness of MSHA's proposed penalty of $1,769.00. In particular, the record supports finding Higgins failed to take timely action to abate the violation. Sec's Br. 2.

THE COMPANY'S POSITION

Rather than file a brief, the representative of the Respondent indicates the company relies on paragraph 14 of the stipulations, in which the company states in part, "Respondent does not stipulate to the 10 points added for lack of good faith and does not agree with the failure to allow an allowance of a 30% reduction for good faith abatement." (bold type face omitted); *See* e-mail from Sec's counsel to ALJ (June 27, 2007). The company's position is consistent with its answer to the petition, wherein it stated:

> We were aware . . . the noise in the [s]plitter [s]hed would require the employees that operate the equipment to wear hearing protection at all times as well as [to participate] in . . . [a] Hearing Conservation Program [HCP]. Both of these necessities were complied with. However, we were not aware . . . the noise level, even with the hearing protection and HCP in place, was at the level measured by the inspector. We underst[an]d . . . our unawareness [sic] is no excuse, so since the noise level discovery was made, we have made several attempts to buffer the noise and [we have] spent countless dollars and hours to fix the problem. We feel we have done our best to comply with MSHA regulations and we [feel] . . . we should have received more credit towards . . . [the] "Good Faith" [abatement]. . . [penalty criteria].

Letter to Federal Mine Safety and Health Review Commission (April 6, 2007).

RULING

The motion is **GRANTED IN PART**.

The parties agree Higgins violated section 62.130(a) as alleged. Sec's Br., Exh. A, ¶ 6. A violation having been found, a penalty must be assessed. The Commission has made clear the duty of a judge is to assess penalties de novo based on the statutory civil penalty criteria. The judge is not required to give "equal weight . . . to each of the penalty . . . criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (September 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty. *Cantera Green*, 22 FMSHRC 616, 625-626 (May 2000). While I agree with the Secretary with respect to almost all of the penalty criteria, my conclusions concerning the company's attempts at good faith abatement lead me to assess a penalty lower than the one she has proposed.

With regard to the penalty criteria, based on Stipulation 13, I find Higgins has a small history of previous violations. Sec's Pet'n, Exh. A, ¶ 13. There was no stipulation regarding the size of the company, but the Secretary asserts Higgins is small in size, the company does not argue otherwise, and I so find. Sec's Pet'n, Exh. A. The Secretary also asserts the violation was due to moderate neglect on the company's part, Higgins does not disagree, and I so find. Citation No. 6332898. Further, based on stipulation 12, I find any penalty assessed will not affect the company's ability to continue in business. Sec's Br., Exh. A, ¶ 12. While there is no stipulation regarding the gravity of the violation, the Secretary asserts the violation was unlikely to result in a permanently disabling injury to the affected splitter operator, and Higgins does not argue otherwise. Citation No. 6332898. I, therefore, find the violation was not serious.

Finally, I conclude the company is entitled to more credit for its abatement efforts than the Secretary is prepared to give. As the company points out (and as the citation states), the splitter operator was required to wear ear protection and to participate in an HCP program. Letter (April 26, 2007); Citation No. 6332898. I conclude from this the company was mindful of the danger of exposure to excessive noise and was trying to minimize the hazard. I further note, as the inspector's extensions of the citation and her affidavit establish, the company took what appear to have been reasonable steps to come into compliance. It relocated the mufflers of the subject engines (Citation No. 6332898-02; Sec's Br., Exh. B, ¶ 5); it moved the smaller splitter; it muffled the larger splitter's engine; and it arranged for the building of a sound absorbent compartment around the larger splitter (Citation No. 6332898-03; Sec's Br., Exh. B, ¶ 6). The Secretary's determination the company lacked good faith seems have been based on the fact the sound absorbent compartment was not built when the inspector went to the mine on November 9, and on the fact three weeks passed during which the company and the contractor had not been in contact. Inspector Dye also seems to have been frustrated she or a company representative could not reach the contractor "to confirm any information." Sec's Br., Exh. 4.

Good faith is a matter of degree. When abatement requires a series of steps, a determination of the degree to which the operator exhibits good faith in attempting to achieve compliance should be made in the context of all the operator did and is doing. The determination

should not be based solely on the fact abatement has not been accomplished within the time as set or extended. In fact, an operator may fail to comply within the time set by the inspector, be subject to a section 104(b) order, yet the operator may still have exhibited a degree of good faith in trying to comply. In other words, the issuance of a section 104(b) order is not necessarily incompatible with finding a degree of good faith on the operator's part.

Here, Higgins did several things as it tried to bring down the noise level to which the splitter operator was subjected. It was not successful within the time set by the inspector, and Dye issued a "failure to abate order" in the face of the company's unexplained three-week lapse of contact with those trying to help it attain compliance. Yet the company's various efforts, upon which its ultimate compliance was based, warrant full consideration and credit when its good faith is evaluated for penalty purposes. For these reasons, I find Higgins did not totally fail to make a good faith effort to achieve rapid compliance but, rather, it exhibited a moderate degree of good faith toward attaining compliance. In view of this finding and all of the other statutory civil penalty criteria, I conclude a penalty of $1,000.00 is appropriate.

ORDER

Higgins is **ORDERED** to pay a civil penalty of $1,000.00 within 30 days of the date of this decision, and upon payment of the penalty, this matter is **DISMISSED.**

David F. Barbour
Administrative Law Judge
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