

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 6, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-82-M
Petitioner	:	A. C. No. 14-01463-05510
v.	:	
	:	Portable Plant No. 2
MIDWEST MINERALS, INC.,	:	
Respondent	:	

DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Midwest Minerals, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$37,000.00. For the reasons set forth below, I affirm the citations and assess a penalty of \$20,750.00.

Citation No. 7925924 was the subject of a contest proceeding. In a decision following a hearing, the citation was modified from a 104(d)(1) citation, 30 U.S.C. § 814(d)(1), to a 104(a) citation, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designation. *Midwest Minerals, Inc.*, 21 FMSHRC 301 (March 1999). The modified citation was affirmed as being "significant and substantial," but, because it was not necessary to the decision, no determination was made concerning the level of negligence. *Id.* at 306 n.3. The decision was not appealed and has now become final.

The parties have agreed to settle Citation No. 7925923, which alleges that the company violated section 50.10 of the Secretary's regulations, 30 C.F.R. § 50.10, because: "On June 22, 1998, at 1425 hours, a plant superintendent suffered serious multiple injuries which had the potential to cause death. The accident was not reported until June 23, 1998, at 1025 hours. The accident was not immediately reported to MSHA as required. The victim died on 7/20/98 as a result of his injuries." Section 50.10 requires that: "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." The Secretary has agreed to reduce the penalty for this violation from \$2,000.00 to \$750.00 because "[p]reparation for the hearing has revealed that the negligence . . . was less than originally assessed."

With regard to Citation No. 7925924, the parties have entered into stipulations and submitted briefs setting out their positions as to what the penalty should be. The Secretary continues to assert that the proposed penalty of \$35,000.00 is appropriate. The company argues that it should be substantially reduced.

Civil Penalty Assessment

It is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996). Concerning civil penalties, section 110(i) provides that:

In assessing civil monetary penalties, 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 the violation.

The facts, such as they are, are set out in detail in the contest decision. *Midwest Minerals*, 21 FMSHRC at 301-03. Briefly stated, William F. Feathers, the 67 year old superintendent of Midwest's Portable Plant No. 2, suffered injuries that ultimately proved fatal while attempting to start a 1955 Caterpillar D-7 bulldozer. Other than Feathers, there were no witnesses to the accident. The only statement that Feathers made concerning the accident was: "Someone must have put it in reverse." *Id.* at 302.

In connection with the penalty criteria, the parties have stipulated that: (1) the operator demonstrated good faith in abating the violation; (2) Portable Plant No. 2 had 45,479 hours worked, and Midwest Minerals, Inc., had 143,178 hours worked, in 1997; and, (3) Midwest Minerals' ability to continue in business would not be affected if the maximum penalty of \$55,000.00 were to be assessed. From this, I find that Midwest demonstrated good faith in attempting to abate the violation; that while Portable Plant No. 2 is a small operation, Midwest is a medium size operation; and, that Midwest's ability to remain in business will not be affected by any penalty that may be adjudged in this case.

Based on Midwest's violation history, I find that the company has a very low history of prior violations.

Considering the fact that this violation was "significant and substantial" and resulted in a death, I find that its gravity is very serious.

That leaves negligence to be considered. In the contest case, I concluded that the violation “involved negligence of some degree,” but that, because of the lack of evidence, it was not possible to conclude that the negligence rose “to the level of an ‘unwarrantable failure.’” *Id.* at 306. Thus, the negligence is either “low” or “moderate.” From his statement at the time of the accident that someone must have left the bulldozer in reverse, I infer that Feathers did not check to make sure that the bulldozer was not in gear when he started the pony motor. Feathers had been operating the bulldozer for three years, had never started it in gear before, and should have known better. Accordingly, I conclude that he was “moderately” negligent.

Midwest contends that Feathers’ negligence cannot be imputed to it under the so-called *Nacco* defense. The Commission has summarized the imputation of negligence and the *Nacco* defense as follows:

It is well established that the negligent actions of an operator’s foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (August 1982). In *Nacco Mining Co.*, 3 FMSHRC 848 (April 1981), the Commission recognized a narrow and limited exception to this principle. The Commission held that the negligent misconduct of a supervisor will not be imputed to an operator if: (1) the operator has taken reasonable steps to avoid the particular class of accident involved in the violation; and (2) the supervisor’s erring conduct was unforeseeable and exposed only himself to risk. 3 FMSHRC at 850. The Commission emphasized, however, that even a supervisory agent’s unexpected, unpredictable misconduct may result in a negligence finding where his lack of care exposed others to risk or harm or the operator was otherwise blameworthy in hire, training, general safety procedures, or the accident or dangerous condition in question. 3 FMSHRC at 851.

Wilmot Mining Co., 9 FMSRHC 684, 687 (April 1987).

I find that the *Nacco* defense is not applicable in this case. While the evidence at the hearing established that Midwest had taken reasonable steps to avoid the particular class of accident involved in the violation and that Feathers’ conduct was unforeseeable, it did not show that Feathers exposed only himself risk. The out-of-control bulldozer traveled 126 feet in reverse, striking Feathers’ pick-up truck and coming to rest against the plant fence after crossing the main entrance road to the plant. Fortunately, no one was on the road at the time, although the road is used by both customers and employees. In addition, Floyd Ash, who saw the bulldozer when he heard it hit the pick-up, testified that his first intent was to attempt to stop the bulldozer.

Clearly Feathers' lack of care exposed others to the risk or harm of being struck by the bulldozer. *See Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 198 (February 1991). Accordingly, I conclude that Feathers' negligence is imputable to Midwest.

Taking all of the penalty criteria into consideration, I conclude that a penalty of \$20,000.00 is appropriate for Citation No. 7925924 and the agreed on penalty of \$750.00 is appropriate for Citation No. 7925923.

Order

The citations are **AFFIRMED** and Midwest Minerals, Inc., is **ORDERED TO PAY** a civil penalty of **\$20,750.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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