FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 9, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 94-710-M
	:	A.C. No. 45-03085-05512
v.	:	
	:	Wallace Portable Crusher #1
WALLACE BROTHERS, INC., Respondent	:	

DECISION

Appearances: Jay A. Williamson, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
James A. Nelson, Esq., Toledo, Washington, for

Before: Judge Amchan

Factual Background

On May 11, 1994, MSHA representative Rodney Ingram issued two non-significant and substantial citations to Respondent alleging violations of 30 C.F.R. '56.14107(a), which requires the guarding of moving machine parts. Citation No. 4129345 alleged that the standard was violated in that a 5-inch x 8-inch gap existed in the guard of the self-cleaning tail pulley on Respondent's portable crusher (Tr. 15-20). Citation No. 4129346 alleged that the back side of a v-belt drive was unguarded (Tr. 22-28).

Ingram asked Respondent's foreman, Dan Fisher, if two days would be sufficient to abate these violations. Fisher indicated that it would be sufficient. The inspector therefore set May 13,

1994, as the date by which abatement or termination of the violations was required (Tr. 20, 28).

On June 8, 1994, Ingram returned to the Respondent's worksite. Four citations issued the month before had not been timely abated. With regard to two citations, Ingram extended the abatement or termination date. For one, an electrical grounding violation, Ingram accepted Respondent's explanation that it had contacted an electrician, but that the electrician had not been able to come out to the crusher (Tr. 37). Ingram also extended the abatement period for a citation issued for a supervisor's lack of first-aid training. He accepted Fisher's representation that he was having trouble scheduling the class (Tr. 42).

Fisher told Inspector Ingram that he forgot about the guarding citations (Tr. 38-40). Ingram issued Respondent two section 104(b) withdrawal orders (Nos. 4129356 and 4129357) for its failure to timely correct these violations. When Ingram returned to the crusher on June 9, these violations were abated (Tr. 43-47). MSHA subsequently proposed a $1,500 civil penalty for each of the citations/section 104(b) orders[1].

A civil penalty of $1,300 is assessed for each of the citations/section 104(b) orders

Respondent does not contest that the standards were violated on May 11, 1994, nor that these violations were not corrected within the period set forth in the original citations (Tr. 4-5). Rather, it contends that the proposed civil penalties are too high, considering the penalty criteria in the Act and MSHA's regulations regarding penalty calculations at 30 C.F.R. Part 100.

[1]Although the proposed penalty assessment lists only the numbers of the section 104(a) citations, the document and attached narrative clearly indicate that the penalties are for the section 104(b) orders as well. Any confusion in this regard was eliminated by the Secretary's May 5, 1995 prehearing exchange.

Wallace Brothers points to the fact that it purchased the crusher on which the two violations occurred in 1966 (Tr. 84). The crusher had been inspected by MSHA many times prior to May 1994, and none of the inspectors had previously indicated that the inside of the v-belt drive needed to be guarded. Respondent does not know how long the gap in the tail pulley guard existed prior to the citation (Tr. 84-85).

Utilizing MSHA's regulations for proposing civil penalties, Respondent argues that penalties of $210 and $159 should be assessed, rather than those proposed by the Secretary. However, in a contested civil penalty assessment case, the Commission is not bound by MSHA's penalty assessment regulations or practices. The Commission assesses penalties de novo by applying the statutory criteria set forth in section 110(i) of the Act to the evidence of record, Sellersburg Stone Company, 5 FMSHRC 287, 292 (March 1983).

Moreover, an operator's failure to timely correct a citation warrants a substantially greater penalty than the citation itself. This is reflected in section 110(b) of the Act, which authorizes the Secretary to propose and the Commission to assess a penalty of up to $5,000 a day for each day during which each failure to correct a violation continues[2].

The daily penalty for failure to abate orders provides a powerful disincentive for ignoring the abatement requirement of a citation or order. An unabated violation constitutes a potential threat to the health and safety of miners, Legislative History of the Mine Safety and Health Act of 1977, at page 618.

It is one thing to overlook an MSHA violation before a citation or order is issued and another to ignore it after a citation has been issued. Given the number of inspectors, the Act relies, to a great extent, on the mine operator to discover and correct safety and health hazards and to timely correct cited violations. Particularly, in instances in which abatement is not required immediately, it is critical that the operator abate within the reasonable time period set forth in the citation. This is so because the inspector is unlikely to be present on

[2]The maximum daily penalty for a section 104(b) violation was increased from $1,000 to $5,000 by Public Law 101-508, Title III, '3102,(November 1990).

the day on which abatement is required.

Upon discovering a failure to abate, an inspector must apply a rule of reason in determining whether to issue a section 104(b) order or to extend the abatement date, Martinka Coal Co., 15 FMSHRC 2452 (December 1993). In the instant case, Inspector Ingram gave Respondent the benefit of any reasonable doubt by extending the abatement period for two citations. He accepted at face value the excuses of Respondent's foreman. It certainly was reasonable for him not to extend the abatement period for the two citations for which Respondent had no excuse.

To assess a civil penalty of the magnitude suggested by Respondent is to invite dilatory conduct by some operators in timely abating citations and orders. A daily penalty, on the other hand, serves as a warning that such conduct will not be tolerated either by MSHA or the Commission. I therefore assess a $1,300 penalty for each of the guarding citations/section 104(b) orders in this case.

I arrive at this figure by starting with the $50 single-penalty assessment that MSHA would most likely have proposed under section 30 C.F.R. '100.4. I conclude that this is an appropriate penalty for the initial citations in this case considering the criteria in section 110(i) of the Act. However, I multiply this penalty by 26 days to account for Respondent's failure to abate within in the time specified in the citations[3].

[3]I note that 30 C.F.R. '100.3(f) suggests that the only consequence of an operator's timely failure to abate may be the addition of 10 penalty points in computing the proposed civil penalty. This suggestion, in some situations, may lead to a result that is entirely inconsistent with the statutory scheme of the Federal Mine Safety and Health Act. For example, adding 10 points to a 30 point violation under MSHA's penalty conversion table results in a penalty of $270, rather than $135.

This strikes the undersigned as inconsistent with section 110(b), which contemplates penalizing the operator for each day that it fails, without sufficient excuse, to correct a violation after the abatement period has expired.

ORDER

Citation No. 4129345 and section 104(b) Order No. 4129356 are affirmed and a $1,300 civil penalty is assessed.

Citation No. 4129346 and section 104(b) Order No. 4129357 are affirmed and a $1,300 civil penalty is assessed.

The $2,600 in assessed civil penalties shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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