FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 12, 1996

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 ON REMAND

Before: Judge Amchan

Commission Remand

On August 9, 1995, I assessed civil penalties of $1,300 each for Respondent=s failure to timely abate two non-significant and substantial (S&S) violations. One involved the guarding of a self-cleaning tail pulley and the other the guarding of a v-belt drive. I calculated the penalty by multiplying a $50 penalty for the original citations by the 26 days that Respondent failed to abate within the time specified in the citations. I concluded that this was an appropriate penalty considering the criteria set forth in section 110(i) of the Act, 17 FMSHRC 1380, 1383.

On April 2, 1996, the Commission remanded this case to me with instructions to (re)consider the section 110(i) criteria and make findings of fact with respect to each of them.

Findings of Facts

On May 11, 1994, MSHA representative Rodney Ingram issued two non-S&S 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 on the same crusher was unguarded(Tr. 22-28, Exhs. R1-R5).

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 work-site. 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 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 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 other 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 accordance with the following factual findings regarding the section 110(i) criteria:

Operator=s history of previous violations: The record indicates that Respondent had not been cited for any violations within the 24 months prior to the instant citations. It apparently had received MSHA citations prior to this. I conclude that Respondent=s prior history provides no reason to assess a penalty either higher or lower than should otherwise be assessed given the other statutory criteria.

The appropriateness of the penalty to the size of the business of the operator charged: Respondent is a small mine operator, which worked slightly more than 10,000 hours in 1993. This factor leads me to assess a smaller penalty than I would if Respondent was a much larger operator.

The Respondent=s negligence: Inspector Ingram deemed Respondent to be moderately negligent with regard to the original violations. He concluded that they should have been detected by Respondent during Wallace=s daily workplace exam.

I credit the testimony of Respondent=s President that his crusher had been inspected prior to June 1994 and that none of the MSHA inspectors who looked at the crusher before Inspector Ingram had suggested the inside of the v-belt had to be guarded (Tr. 84) The self-cleaning tail pulley had been provided with a guard as the result of an inspection several years prior to June 1994 (Tr. 86). Respondent=s President did not know how long the gap in the guard cited by inspector Ingram had been present (Tr. 85).

I would characterize Respondent=s negligence with regard to the initial citations as low to moderate. Wallace=s negligence with regard to the initial citations would warrant a relatively low civil penalty assuming other penalty criteria would not warrant a higher penalty. On the other hand, Respondent=s negligence with regard to the failure to abate orders is very high and warrants a much higher penalty than the initial citations.

The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

On May 11, 1994 two citations were issued to Respondent with a termination date of May 13, 1994. When inspector Ingram saw the crusher again on June 8, 1994, these violations had not been corrected.

Foreman Dan Fisher=s explanation that he forgot about the violations demonstrates a lack of good faith in attempting to achieve compliance with the Act. Mr. Fisher was a supervisory employee, therefore his acts and omissions are imputable to Respondent for purposes of assessing a civil penalty, Southern Ohio Coal Co., 4 FMSHRC 1459, 1464 (August 1982).

The manner in which Respondent=s lack of good faith in timely abating the original citations should be addressed in assessing penalties is set forth in section 110(b) of the Act. This section provides for a penalty for each day during which a violation continues unabated. Therefore, I multiply the penalty I would have assessed for the original citation by the number of days that Respondent failed to abate.

The effect on the operator=s ability to stay in business. There is no evidence in the record that would indicate that a penalty of $2,600 for the two failure to abate orders would compromise Respondent=s ability to continue in business. Therefore, it is presumed that these penalties would have no such

effect, Sellersburg Stone Co., 5 FMSHRC 287 at 294 (March 1993).

The gravity of the violations. Injury from the gap in the guard on the self-cleaning tail pulley was unlikely because miners would rarely be near it (Tr. 15-18). However, injury was possible and could be very serious, possibly resulting in the loss of a limb (Tr. 18, 72, 82).

Similarly, it was possible but unlikely that a miner would be injured due to the lack of guarding of the inside of the v-belt drive (Tr. 22-27,72, 82). Injuries if they were to occur were likely to be in the nature of broken fingers and cuts (Tr. 24).

The appropriate civil penalty

Based on consideration of the above-mentioned statutory criteria, I find that $50 is an appropriate penalty for each of the original citations in this case. However, taking into account Respondent=s negligence and lack of good faith in rapidly abating these violations, I find that a daily penalty of $50 is appropriate for each day that they remained unabated after the termination date. Thus, I assess a civil penalty of $1,300 for each of the section 104(b) orders.

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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