FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 23, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-184-M
Petitioner	:	A. C. No. 42-01429-05501 A7C
v.	:	
	:	White Mesa Mill
ENERGY TRUCKING, INC.,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Bradley Reber, Vice President, Energy Trucking, Inc., Kanab, Utah, for Respondent.

Before: Judge Fauver

This is a civil penalty action under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below.

FINDINGS OF FACT

1. Respondent, Energy Trucking, Inc., an independent contractor, is regularly engaged in hauling uranium ore for Energy Fuels Nuclear, Inc. The uranium produced from such ore is sold and used in or with a substantial effect upon interstate commerce.

2. At all relevant times, Respondent was performing a contract to haul uranium ore for Energy Fuels Nuclear, Inc. from a stockpile near Kanab, Utah, to Energy Fuels White Mesa Mill processing plant, about 260 miles from Kanab. Respondent hauled uranium ore 24 hours a day, 7 seven days a week and employed about 15 truck drivers to haul uranium ore. In general, the employees provided their own trucks, with a lease charge to the company.

3. On October 10, 1995, about 12:10 a.m., Energy Fuel=s White Mesa Mill notified MSHA of a fatal accident that had occurred about 11:05 p.m., on October 9. A driver, Ivan F. Dial, employed by Respondent, was run over by an unattended tractor that was rolling down a grade.

4. Mr. Dial had 5 years, 7 months experience in mining. All of his mining experience was in the position of a truck driver. He had been employed by Respondent for 1 year, 7 months.

5. Mr. Dial arrived at the White Mesa Mill around 10:50 p.m., with a load of ore from the stockpile near Kanab. He checked in at the scale house and drove a Adumper tractor@ owned by Energy Fuels. A dumper tractor is a tractor that has been modified to dump a semi-trailer.

6. Mr. Dial disconnected his tractor, hooked up the dumper tractor, and drove to the stockpile where he dumped the load of ore.

7. He then drove the dumper tractor with the empty trailer back to his tractor, in order to disconnect the dumper tractor and hook up his tractor to the empty trailer.

8. When Mr. Dial disconnected the dumper tractor from the trailer, the engine was running, the transmission was in neutral, the parking brakes were not engaged, and chocks were not placed under the wheels. Although the area where the trailer was parked was fairly level, dumper tractor was parked just over the crest of a six percent grade. The tractor started to roll down the grade. Mr. Dial apparently ran after it in an attempt to climb into the cab to stop the vehicle. He fell and was run over by the left outrigger wheel. He died about 45 minutes later.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

The Secretary has charged three violations:

Citation No. 4665206 charges that Mr. Dial had not received the mandatory training required for a newly employed experienced miner under 30 C.F.R. ' 48.26.

Citation No. 4665207 charges that the dumper tractor was improperly parked on a grade without setting the parking brakes or chocking the wheels, in violation of 30 C.F.R. ' 56.14207.

Order No. 4665208 charges that six employees (besides Ivan Dial) were not given the safety training required for newly employed experienced miners under 30 C.F.R. ' 48.26.

Although Respondent classified its drivers as Alessor-operators@ rather than employees, its answer to the Secretary=s Petition does not raise a defense that Respondent was not required to comply with the Act and safety and health standards promulgated under the Act with respect to the drivers on the ground that they were not employees. I find that the Secretary proved that they were employed by Respondent as drivers, despite their classification, that Respondent employed

them in work subject to the jurisdiction of the Act, and that Respondent was required by the Act to comply with mandatory safety and health standards with respect to the drivers= performance of such work.

Citation No. 4665206 and Order No. 4665208

The citations and order charge violations for failure to provide training required by 30 C.F.R ' 48.26. Section 48.22 provides that a Aminer@ for the purpose of section 48.26 means Aany person working in a surface mine . . . who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or . . . contracted by the operator to work at the mine for frequent or extended periods.@

Respondent=s drivers made daily trips to Energy Fuels=s White Mesa Mill to transport and unload uranium ore. This work was frequent and regularly exposed them to mine hazards, such as radiation, dust, and vehicle and equipment accidents. They were therefore subject to section 48.26, which provides:

> **Training of newly employed experienced miners; minimum courses of instruction**.
>
> (a) A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties.
>
> (b) The training program for newly employed experienced miners shall include the following:
>
> (1) *Introduction to work environment*. The course shall include a visit and tour of the mine. The methods of mining or operations utilized at the mine shall be observed and explained.
>
> (2) *Mandatory health and safety standards*. The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned.
>
> (3) *Authority and responsibility of supervisors and miners= representatives.* The course shall include a review and description of the line of authority of supervisors and miners= representatives and the responsibilities of such supervisors and miners= representatives; and an introduction to the operator=s rules and the procedures for reporting hazards.

(4) *Transportation controls and communication systems.* The course shall include instruction on the procedures in effect for riding on and in mine conveyances; the controls for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

(5) *Escape and emergency evacuation plans; fire warning and firefighting.* The course shall include a review of the mine escape system; escape and emergency evacuation plans in effect at the mine; and instruction in the fire warning signals and firefighting procedures.

(6) *Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work.* The course shall include, where applicable, an introduction to and instruction on the highwall and ground control plans in effect at the mine; procedures for working safely in areas of highwalls, water hazards, pits, and spoil banks, the illumination of work areas, and safe work procedures for miners during hours of darkness.

(7) *Hazard recognition*. The course shall include the recognition and avoidance of hazards present in the mine, particularly any hazards related to explosives where explosives are used or stored at the mine.

(8) Such other courses as may be required by the District Manager based or circumstances and conditions at the mine.

Violation

Under 48.23, the training required by section 48.26 must be approved by MSHA under a training plan submitted by the mine operator for approval, and must be taught by an instructor who has been approved by MSHA.

Energy Fuels had an approved training plan and instructors who were approved under section 48.26. However, Respondent did not have an approved training plan and its drivers had not been trained under Energy Fuels= plan. Nor were they trained by an instructor approved by MSHA.

The safety training that Respondent=s drivers received did not meet the requirements of section 48.26 and did not approach the scope, detail, and content of the safety standards training required by section 48.26.

The Secretary proved a violation of section 48.26 as alleged in Citation No. 4665206 and Order No. 4665208.

Gravity

The basic purpose of the safety training required by section 48.26 is to ensure that the employees understand the safety standards that apply to their work and have the necessary knowledge and skills to apply them in order to avoid accidents. The failure to provide safety training required by section 28.26 created a reasonable likelihood that the Respondent=s drivers would not have sufficient knowledge of the safety standards and the necessary skills to apply them in order to avoid accidents. It was therefore reasonably likely that Respondent=s violations of section 48.26 would result in an accident with serious injuries. Indeed, the fatality in this case indicates that the driver had not had sufficient training to understand the importance of complying with the Asafety standards pertinent to the tasks assigned,@ which are required training subjects under section 48.26(b)(2). The violations were Asignificant and substantial@ within the meaning of the Act.

Negligence

The violations of section 48.26 could have been prevented by the exercise of reasonable care. Respondent=s drivers had regular and frequent exposure to mine hazards at Energy Fuel=s White Mesa Mill. Their duties plainly brought them within the coverage of section 48.26. I conclude that Respondent=s violations of section 48.26 were due to ordinary negligence.

Citation No. 4665207

This citation charges a violation of section 56.14207, which provides:

> **Parking procedures for unattended equipment**.
>
> Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

When Mr. Dial left the dumper tractor unattended to unhook it from the trailer, the parking brake was not set and the wheels were not chocked or turned into a bank. However, the vehicle was just over the crest of a six percent grade and was therefore Aparked on a grade.@

The Secretary proved a violation of section 56.14207 as alleged in Citation No. 4665207.

The violation could have been prevented by the exercise of reasonable care. I find that it was due to ordinary negligence.

The violation was reasonably likely to result in an accident involving serious injuries. It was therefore a Asignificant and substantial@ violation within the meaning of the Act.

CIVIL PENALTIES

Civil Penalies

Under section 110(i) of the Act, the Commission and its judges assess all civil penalties under the Act. The Commission or judge is not bound by the penalty proposed by the Secretary. Penalties are assessed de novo based upon six criteria provided in section 110(i): (1) the operator=s history of previous violations, (2) the appropriateness of the penalty to the size of the business, (3) the operator=s negligence, (4) the effect on the operator=s ability to continue in business, (5) the gravity of the violation, and (6) the operator=s good faith in abatement of the violation. *Secretary of Labor* v. *Sellersburg Stone Co.*, 5 FMSHRC 287 (1983), aff=d *Sellersburg Stone Co.* v. *FMSHRC*, 736 f.d 1147 (7th Cir. 1984).

In evaluating the fourth factor, Ain the absence of proof that the imposition of authorized penalties would adversely affect [an operator=s ability to continue in business], it is presumed that no such adverse effect would occur.@ *Spurlock Mining Company, Inc.*, 16 FMSHRC 697, 700 (1994), quoting *Sellersburg Stone Co.*, 5 FMSHRC 287. The burden of proof is on the operator. If an adverse effect is demonstrated, a reduction in the penalty may be warranted. However, Athe penalties may not be eliminated . . . , because the Mine Act requires that a penalty be assessed for each violation.@ *Spurlock Mining*, supra, 16 FMSHRC at 699, citing 30 U.S.C. ' 820(a); *Tazco, Inc.*, 3 FMSHRC 1895, 1897, (1981).

Tax returns and financial statements showing a loss or negative net worth are, by themselves, not sufficient to reduce penalties because they are not indicative of the ability to continue in business. *Spurlock Mining, Inc.*, 16 FMSHRC at 700, citing *Peggs Run Coal Co.*, 3 IBMA 404, 413-414 (1974).

The purpose of civil penalties is to deter the operator and others similarly situated from violating the Act and safety and health regulations. To be successful in the objective of inducing effective and meaningful compliance, Aa penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act=s requirements than it is to pay the penalties assessed and continue to operate while not in compliance.@ S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legistative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978).

The ability to continue in business in only one of six criteria. Since the other criteria must also be considered, it would be inappropriate to rule that penalties should be nominal or reduced by a set percentage whenever an operator establishes that the proposed penalties would have an adverse effect on its ability to continue in business. Penalties must still be assessed for each violation, with a deterrent purpose. For example, if an operator is financially unsound and cannot pay its debts and taxes, section 110(i) still does not exempt it from penalties Asufficient to make it more economical . . . to comply with the Act=s requirements than it is to pay the penalties assessed and continue to operate while not in compliance.@ S. Rep. supra.

Respondent=s Size, Financial Condition, and Ability to Continue in Business

At the time the two citations and order were issued, Respondent would be considered a small to medium sized independent contractor. Respondent operated 5 days a week, 11 to 13 hours a day and employed 15 drivers. Over a 52 week period, this would amount to 50,700 hours of work on its contract business.

By the time of the hearing, Respondent had reduced its drivers to three and was working about 10,140 hours per year. This activity would be considered a small sized business.

Around January 1966, Respondent had laid off all of its drivers, because Energy Fuels went into bankruptcy. However, in July 1966, Respondent resumed hauling for Energy Fuels and went from a 15-truck operation to a 3-truck operation. The three trucks are owned by Bradley Reber, Vice President of Respondent, who leases the trucks to Respondent.

Despite the bankruptcy proceedings by Energy Fuels, Respondent received all past amounts due from Energy Fuels, about $200,000.

Respondent=s tax return for 1995 shows gross receipts of $1,342,893 and payments to Alessor-operators@of $1,114,764, i.e., about $74,318 per truck and driver for the 15 trucks operating in 1995. Taxable income was a negative amount, - $2,309. Respondent is essentially a Apass through@ business whereby almost all of its income passes through the company to one or more Alessor-operators.@ Since the hearing, almost all of Respondent=s income has been paid to Vice President Bradley Reber for his lease of three trucks. Mr. Bradley owns 50 percent of the corporation=s stock.

A corporation structured like Respondent=s would effectively have an exemption from civil penalties under the Act if its reported net losses were accepted as proof of an inability to pay substantial penalties and continue in business. However, net operating losses are not proof of an inability to continue in business. Also, corporations are reasonably required to maintain sufficient capital to cover their potential liabilities, including civil penalties, when they work in an industry that is regulated to protect the public interest in health and safety. Respondent has not explained its failure to capitalize.

Respondent is a small sized business. I find that Respondent has failed to meet its burden of proving that the proposed civil penalties of $12,000 would adversely affect Respondent=s ability to continue in business. I also find that the proposed penalties are appropriate to the size of the business.

Negligence and Gravity of the Violations

I have considered and made findings with respect to these factors.

Good Faith Abatement and History of Violations

As to each of the violations, Respondent demonstrated a good faith effort to achieve rapid compliance after notice of the violation. Respondent=s history of prior violations does not indicate a basis for raising or lowering the civil penalties.

Considering the six criteria for civil penalties in section 110(i) of the Act, I find that the proposed civil penalties are reasonable and warranted by the evidence. Accordingly, Respondent is assessed the following civil penalties:

Citation/Order	Civil Penalty
4665207	$ 6,000
4665206	5,000
4665208	1,000

CONCLUSIONS OF LAW

1. Respondent=s business is subject to the Act.

2. The Secretary proved the violations alleged in Citation Nos. 4665206 and 4665207 and Order No. 4665208.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation Nos. 4665206 and 4665207 and Order No. 4665208 are **AFFIRMED**.

2. Respondent shall pay civil penalties of $12,000 in three consecutive monthly installments of $4,000 each, due on the first day of each month, beginning December 1, 1997. Provided: If Respondent fails to pay any installment when due, the total amount remaining shall be due immediately with interest accruing from the default date until the remainder of the penalty is paid. The applicable interest rates will be the rates announced by the Commission=s Executive Director.

Willaim Fauver
Administrative Law Judge

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