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MSHA V. ACME GRAVEL
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SECRETARY OF LABOR,              :  CIVIL PENALTY PROCEEDING
  MINE SAFETY AND HEALTH         :
  ADMINISTRATION (MSHA),         :  Docket No. CENT 92-113-M
               Petitioner        :  A.C. No. 16-01094-05514
          v.                     :
                                 :
ACME GRAVEL COMPANY, INC.,       :  Tynes Island Mine
               Respondent        :
                                 :
SECRETARY OF LABOR,              :  CIVIL PENALTY PROCEEDING
  MINE SAFETY AND HEALTH         :
  ADMINISTRATION (MSHA),         :  Docket No. CENT 92-118-M
               Petitioner        :  A.C. No. 16-01201-05504
          v.                     :
                                 :  Asphalt Plant #5
BARBER BROTHERS CONTRACTING      :    Rock Crusher
  COMPANY,                       :
               Respondent        :
                                 :
                                 :
SECRETARY OF LABOR,              :  CIVIL PENALTY PROCEEDING
  MINE SAFETY AND HEALTH         :
  ADMINISTRATION (MSHA),         :  Docket No. CENT 92-153-M
               Petitioner        :  A.C. No. 16-01217-05507
          v.                     :
                                 :  Kent #2
ACME GRAVEL COMPANY              :
  INCORPORATED,                  :
               Respondent        :
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DECISIONS

Appearances: Ernest Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
John N. Fetzer, III, Esq., Baton Rouge, Louisiana, for the Respondents.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessments of civil penalties filed by the petitioner against the respondents pursuant to section 110(a) of the Federal Mine Safety and Health

Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for three (3) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondents filed timely contests and answers denying the violations, and the cases were heard in Baton Rouge, Louisiana. The parties were afforded an opportunity to file posthearing briefs, but they did not do so.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether two of the alleged violations were "significant and substantial" (S&S) and resulted from an "unwarrantable failure" to comply with the cited standards, and (3) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq.

2. Sections 110(a), 110(i), and 104(d) of the Act.

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 6-11):

1. The respondents and the mines in question are subject to the jurisdiction of the Act.

2. The presiding Judge has jurisdiction to hear and decide these matters.

3. The assessment of civil penalties for the violations in question will not adversely affect the ability of the respondents to continue in business.

4. The respondents exercised good faith in timely abating all of conditions or practices cited as violations.

5. The history of prior violations for the mines in question are reflected in three MSHA computer print-outs identified and received as hearing exhibits P-1 through P-3.

With regard to the settlement disposition of two of the cases, the parties agreed that the following language should be

included as part of the settlement agreements reached by the parties and approved by the presiding Judge (Tr. 24, 40):

> Except for these proceedings and matters arising out of these proceedings, and any other subsequent MSHA proceedings between the parties, none of the foregoing agreements, statements, findings, and actions taken by the respondent shall be deemed an admission by the respondent of the allegations contained within the citations and the petition for assessment of penalty. The agreements, statements, findings, and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably and they shall not be used for any other purpose whatsoever except as herein stated.

Discussion

Docket No. CENT 92-113-M

This case concerns a section 104(d)(1) Citation No. 3896665, issued on September 19, 1991, by MSHA Inspector Stephen C. Montgomery, citing an alleged violation of mandatory safety standard 30 C.F.R.   56.11001. The cited condition or practice is described as follows:

> Safe access to the six (6) inch dredge was not provided. A four (4) feet by eight (8) feet starfoam pontoon was being used by the dredge operator to get to and from the dredge. The dredge was approximately forty (40) feet to fifty (50) feet from the pit bank and the depth of the water was approximately fifteen (15) feet. The dredge operator would "hand-pull" himself to and from the dredge with a rope that was anchored to the ground and tied to the dredge. The flat bottom aluminum boat that had been used for transportation, had been lost several months ago when the river had risen and flooded the property. The dredge operator said he always wore a life jacket when he was on the pontoon. A life jacket was lying on the pontoon when it was observed next to the pit bank.
>
> Mr. Frank Panepinto, Foreman, stated he had "told the dredge operator to stop using the pontoon", for transportation, "sometime ago". Mr. Panepinto stated the "10 inch" dredge operator was supposed to carry the "6 inch" dredge operator back and fourth to the "6 inch" when needed. The "10 inch" dredge operator had a flat bottom aluminum boat to use for transportation on the water. The "10 inch dredge was approximately three hundred (300) to four hundred (400) feet from the "6 inch" dredge.

> This was an unwarrantable failure on the company and Mr. Frank Panepinto for not assuring the pontoon was not still being used for transportation and not providing a boat to be used for transportation for the "6 inch" dredge.

Docket No. CENT 92-153

Section 104(d)(1) "S&S" Citation No. 3896761, issued on December 31, 1991, by MSHA Inspector Benny W. Lara, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.14130(g), and the cited condition or practice is describe as follows:

> The seatbelt was not being worn by the operator of the D6 Cat Dozer, serial No. 3N61185. The operator assumed the buckle was missing. It was discovered wedged behind the seat. The employee stated he had only been working for this company about 6 months and had no training when hiring on. He stated it had a buckle one month ago and during operation one day a rag was tied to the buckle position (no buckle observed). Thought it was gone and used the rag. Frank V. Panepinto stated he has never checked to see if the belts were worn. The only time belts were discussed with the employees was when MSHA held a safety meeting during the last inspection. This is an unwarrantable failure. This machine was being used to push sand which is 12' off the ground or more.

Docket No. CENT 92-118-M

Section 104(a) non-S&S Citation No. 3628839, issued on September 18 1991, by MSHA Inspector Joe C. McGregor, cites an alleged violation of mandatory reporting standard 30 C.F.R. 41.12 and the cited condition or practice is described a follows:

> A change of person in charge of Health and Safety at the mine occurred and notification of change was not sent in to MSHA. MSHA Form 2000-7 is required to be updated when such changes occur. A citation for this violation was issued by another inspector 3/26/91.

Findings and Conclusions

Docket No. CENT 92-113-M

Counsel for the parties informed me that they reached a proposed settlement in this case, and they jointly moved for my approval of the settlement. The initial proposed civil penalty

assessment was $250, and the respondent agreed to pay a civil penalty assessment of $200, with no changes in the citation as it was originally issued (Tr. 11, 23) Inspector Montgomery, who was present in the courtroom, explained the circumstances under which he issued the citation in question (Tr 15-18). The respondent's counsel pointed out that a boat was in fact being used to transport miners to the dredge and that the inspector admitted that he did not actually observe anyone using floatation devices that are normally used to float pipeline as a means of access to the dredge. Counsel further asserted that the respondent does not condone the use of styrofoam pontoons by its employees as a means of access to the dredges, and if an employee engaged in such conduct he did it on his own without any direction or instruction by the respondent. Counsel also indicated that the respondent provided two boats for transportation to the dredges, but that one was lost in a flood, and that a replacement boat has been purchased and two boats are presently available at the site for access to the dredges (Tr. 18-23).

After careful consideration of the information contained in the pleadings, the stipulations with respect to the six statutory civil penalty criteria found in section 110(i) of the Act, the arguments and testimony presented in support of the proposed settlement of this case, and pursuant to Commission Rule 30, 29 C.F.R. 2700.30, the settlement was APPROVED from the bench (Tr. 24, 28). My bench decision in this regard is herein REAFFIRMED.

Docket No. CENT 92-153-M

The parties proposed to settle the seat belt violation which is in issue in this case, and the respondent agreed to pay a civil penalty assessment of $450. The initial proposed penalty was $600. In support of the settlement, the petitioner's counsel stated that the equipment in question was being used on level ground, and although a seat belt was provided, the equipment operator was not using it (Tr. 29-31). The respondent's safety director testified that the employee in question has been discharged for failing to follow company written policy requiring the wearing of a seat belt when the equipment is in operation (Tr. 31).

MSHA Inspector Bennie Lara, the inspector who issued the citation and who was present in the courtroom, confirmed that a seatbelt was present but that the equipment operator was not using it. The inspector stated that the belt was found tucked behind the seat and that the employee was using a rag to tie the belt together, rather than the normal buckle used for that purpose (Tr. 32-37).

After careful consideration of the pleadings and arguments in support of the proposed settlement, including the fact that

the respondent's history of prior violations does not include prior seat belt violations, and pursuant to Commission rule 30, 29 C.F.R. 2700.30, the settlement was APPROVED from the bench (Tr. 38). My bench decision in this regard is herein REAFFIRMED.

Docket No. CENT 92-118-M

Fact of Violation. Citation No. 3628839.

Mandatory reporting standard 30 C.F.R. 41.10, which implements the statutory report filing requirement found in Section 109(d) of the Mine Act, requires a mine operator to submit a properly completed Legal Identity Report Form No. 2000-7, to MSHA. Pursuant to the language found in section 41.10, the submission of this form constitutes adequate notification of legal identity. One of the items required to be included as part of the operator's legal identity notification pursuant to section 41.11, is the name of the person in charge of health and safety at the mine. If any changes are made with respect to the person placed in charge of health and safety, section 41.12, requires the operator to notify MSHA of the change in writing within 30 days after the occurrence of the change. Pursuant to section 41.13, any failure by an operator to notify MSHA in writing of any change is considered a violation of Section 109(d) of the Act and subject to a civil penalty as provided in section 110 of the Act.

The evidence in this case reflects that Inspector McGregor visited the plant site on September 13, 1991, and the plant was not in operation. The inspector requested to speak to Mr. Dave Jones, the individual purportedly in charge of safety and health, and after being informed that Mr. Jones was no longer assigned to the site, the inspector left. He next returned on September 18, 1991, and spoke with foreman Clint Johnson who confirmed that he had replaced Mr. Jones as the responsible health and safety person in charge, and that this had occurred "two or more months" earlier. Based on this information, and without further documentation or verification of the actual date that Mr. Johnson replaced Mr. Jones, the inspector concluded that the change had taken place more than 30 days earlier and had not been reported, and for this reason, he issued the citation (Tr. 46-48, 53). The inspector confirmed that Mr. Johnson called the respondent's risk manager, Mr. Frank Panepinto, and advised him that the citation was issued (Tr. 53).

Inspector McGregor identified a copy of a letter dated September 17, 1991, addressed to MSHA's District Office in Dallas, Texas, with a courtesy copy to the inspector's local MSHA office in Denham Springs, Louisiana, from the respondent's Risk Manager, Frank J. Panepinto, advising MSHA that Mr. Johnson replaced Mr. David Jones as plant foreman on August 19, 1991 (Exhibit P-4). The inspector confirmed that the courtesy copy of

the letter was received in his office, and he identified the envelope the letter came in and confirmed that it is postmarked September 19, 1991 (Exhibit P-5). He also confirmed that he made the notation "Aug. 19 to Sept. 19 is 31 days" which appears on the face of the envelope (Tr. 49-51). The inspector believed that the respondent should have notified MSHA of the change in question by September 18, 1991, which would have been within the 30-day notification requirement found in section 41.12. However, since the envelope containing the notification letter was postmarked September 19, 1991, one day later, the inspector believed that this constituted a violation of section 41.12 (Tr. 49-50).

MSHA's counsel confirmed that the inspector received a fax copy of the Panepinto letter of September 17, 1991, from MSHA's Dallas office after he received the copy addressed to his local field office (Exhibit P-4, Tr. 75). The inspector did not contact the Dallas office to determine when it actually received the letter which Mr. Panepinto mailed to that office. At the conclusion of the hearing, the inspector produced a copy of an updated MSHA Legal Identity Report signed by Mr. Panepinto on September 30, 1991, and the "Effective Date of Changes" shown on the face of the report states "September 17, 1991" (Exhibit ALJ-1). The respondent's counsel stipulated that this form was submitted by Mr. Panepinto after the citation was issued in response to MSHA's request, and that the September 17, 1991, date may have been the date the report was prepared. Counsel stated that MSHA took the position at that time that any changes must be reported by using the MSHA Legal Identity Form and that a letter was insufficient (Tr. 76). A copy of the inspector's "subsequent action" terminating the citation on October 25, 1991, reflects that it was terminated after "a new updated legal identity report has been received in the district manager's office".

At the request of the respondent, the record in this case was left open in order to afford the parties an opportunity to inquire further as to precisely when the MSHA Dallas District Office may have received the Panepinto letter of September 17, 1991 (Tr. 60, 70). On October 7, 1992, I issued an Order affording the parties additional time within which to submit any further information or any posthearing briefs. However, the parties failed to file anything further and my decision in this case is based on the current record.

Mr. Panepinto produced a copy of a company employment and promotion form which reflects that Clint Johnson was promoted to plant foreman on August 19, 1991 (Exhibit R-1). Mr. Panepinto identified a copy of his September 17, 1991, letter which he addressed and mailed to MSHA's Dallas district office that same day, with a copy to Inspector McGregor's local field office in Denham Springs, Louisiana, advising MSHA of the change of the person in charge of health and safety at the plant (foreman

Johnson), and he confirmed that he signed and mailed the letter within 28 or 29 days after the change (Tr. 54-58). Absent any evidence to the contrary, I believe it is reasonable to conclude that Mr. Panepinto mailed the letter after being informed of the inspector's inquiry at the mine site during his inspection and the fact that he issued a citation.

Respondent's counsel argued that although it seems clear from the language found in regulatory section 41.12, that MSHA must be notified of any changes "within thirty days after the occurrence of any change", there is nothing in that regulation that states that the notification must be received by MSHA's District Office within 30-days after the change. Since the unrebutted evidence establishes that the Panepinto letter of September 17, 1991, was written and mailed within the 30-day period, counsel concluded that the respondent has substantially complied with section 41.12 (Tr. 65-67).

MSHA's counsel agreed that the issue in this case is whether or not the filing of the September 17, 1991, letter by Mr. Panepinto advising MSHA that Mr. Johnson replaced Mr. Jones as the responsible health and safety person at the mine was complete upon mailing, or upon receipt of the letter by MSHA Tr. 51). Counsel further agreed that if Mr. Panepinto's letter was received by MSHA'S Dallas office on September 18, 1991, the respondent would be in compliance with the 30-day notification requirement found in section 41.12 (Tr. 64). Counsel suggested that in the event the respondent could establish that the Dallas office timely received the letter by September 18, 1991, he would move to withdraw the civil penalty proposal (Tr. 72).

The contested citation issued by Inspector McGregor cites an alleged violation of section 41.12, and included as part of the description of the violative condition or practice is a statement by the inspector that "MSHA Form 2000-7 is required to be updated when such changes occur". However, the theory of MSHA's case is that the respondent did not comply with section 41.12, because the Panepinto letter of September 17, 1991, was received in the inspector's field office on September 19, 1991, one day after the 30-day notice period for informing MSHA of the change in question expired. Neither the inspector or MSHA's counsel advanced any testimony or arguments that the citation was based on the respondent's failure to timely submit an updated MSHA Form 2000-7, or that a notification by letter, rather than the form, was insufficient or unacceptable. Indeed, when this question was raised by the presiding judge at the conclusion of the hearing after Inspector McGregor volunteered a copy of the updated From 2000-7, which apparently served as the basis for the termination of the citation, MSHA's counsel took the position that notification of any changes transmitted by letter is sufficient to comply with section 41.12, and that the submission of the form is not necessary to achieve compliance (Tr. 78).

I find nothing in section 41.12, that requires the use of an MSHA report form to notify MSHA of any changes in the required legal identity information provided by a mine operator. That section simply requires written notification to MSHA within 30 days after the occurrence of any change. However, I take note of the fact that section 41.20, requires an operator to file "notification of legal identity and every change thereof" with the appropriate MSHA district manager, "by properly completing, mailing, or otherwise delivering Form 2000-7 legal identity report".

The respondent is not charged with a violation of section 41.20, for failing to submit an updated Form 2000-7, reporting a change in the person responsible for health and safety at the mine site in question. As noted earlier, MSHA's case is based on its assertion that the respondent's letter of notification, which MSHA concedes was an acceptable method of notification pursuant to the cited section 41.12, was received one day late. Assuming that section 41.20, can be interpreted to apply to section 41.12, notification could still be accomplished by simply completing and mailing the form to MSHA's district manger.

On the facts of this case, and considering the position taken by MSHA, I conclude and find that the evidence presented establishes that the respondent provided the requisite written notification of the change in question within 30 days after it occurred, and that the preparation and mailing of the notification letter by Mr. Panepinto within this time frame constituted adequate compliance with section 41.12, notwithstanding the fact the the letter was received more than 30 days after the change took place, and that the method of transmitting the information was by letter rather than an MSHA form. Under the circumstances, I further conclude and find that MSHA has failed to establish a violation, and the citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Docket No. CENT 92-113-M. The respondent shall pay a civil penalty assessment of $200, in satisfaction of Section 104(d)(1) Citation No. 3896665, September 19, 1991, 30 C.F.R. 56.11001.

2. Docket No. CENT 92-153. The respondent shall pay a civil penalty assessment of $450, in satisfaction of Section 104(d)(1) Citation No. 3896761, December 31, 1991, 30 C.F.R. 56.14130(g).

3. Docket No. CENT 92-118-M. The contested Section 104(a) Citation No. 3628839, IS VACATED, and the petitioner's proposed civil penalty assessment for this alleged violation IS DENIED AND DISMISSED.

Payment of the aforesaid civil penalty assessments shall be made by the respondent to MSHA within thirty (30) days of the date of these decisions and Order, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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