

CCASE:

ALABAMA BY-PRODUCTS v. SOL (MSHA)

SOL (MSHA) v. ALABAMA BY-PRODUCTS

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ALABAMA BY-PRODUCTS CORP.,
CONTESTANT
v.

CONTEST PROCEEDINGS
Docket No. SE 85-18-R
Citation No. 2480143; 10/16/84

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Docket No. SE 85-19-R
Citation No. 2480144; 10/16/84

Docket No. SE 85-20-R
Order No. 2481839; 10/16/84

Docket No. SE 85-21-R
Citation No. 2481840; 10/16/84

Docket No. SE 85-23-R
Citation No. 2481845; 10/16/84

Docket No. SE 85-24-R
Citation No. 2481846; 10/16/84

Docket No. SE 85-26-R
Order No. 2480147; 10/22/84

Segco No. 1 Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER
v.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 85-82
A.C. No. 01-00347-03604

ALABAMA BY-PRODUCTS CORP.,
RESPONDENT

Docket No. SE 85-89
A.C. No. 01-00347-03606

Segco No. 1 Mine

DECISIONS

Appearances: H. Thomas Wells, Jr., Esq., Maynard, Cooper,
Frierson & Gale, and J. Fred McDuff, Alabama
By-Products Corporation, Birmingham, Alabama,
for the Contestant/Respondent;

George D. Palmer and Cynthia Welch, Esqs.,
Office of the Solicitor, U.S. Department of
Labor, Birmingham, Alabama, for the
Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern the captioned citations and orders issued to the Alabama By-Products Corporation (ABC) by several mine inspectors pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The contests concern ABC's challenge to the legality and propriety of the citations and orders, and the civil penalty proceedings concern MSHA's proposed civil penalty assessments for the alleged violations in question. Hearings were convened on May 14, 1985, in Birmingham, Alabama, and the parties appeared and participated therein.

Issues

The principal issue presented in these proceedings are (1) whether ABC violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed by MSHA, and if so, (2) the appropriate civil penalties that should be assessed ABC for the alleged violations based upon the criteria found in section 110(i) of the Act. Additional issues in connection with the contested citations and orders are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

The citations and orders issued in these proceedings were issued after the completion of a fatal accident investigation conducted by MSHA Inspector William E. Herren on October 15, 1984. The accident occurred when a continuous-mining machine operator was tramming a machine through a crosscut with a remote control unit and suffered fatal injuries when he was pinned between the machine and the rib.

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Although the parties were prepared to go to trial on all of these cases, they advised me at the beginning of the hearings that they had reached a compromise, and proposed to settle all of the cases. Under the circumstances, the parties were afforded an opportunity to present arguments on the record in support of their proposed disposition of the cases (Tr. 5-42). A copy of MSHA's accident report, and photographs of the cited remote control unit were received and made a part of the record (exhibits ALJ-1, R-1 and R-2, and C-8 through C-12).

The circumstances surrounding each of the contested cases are as follows:

Docket No. SE 85-24-R

This proceeding concerns a section 104(a) citation, No. 2481846, with special "S & S" findings, issued by MSHA Inspector William Herren on October 16, 1984. The inspector cited a violation of 30 C.F.R. 75.1719-1(d), when he found that certain working places in the mine where the continuous-mining machine involved in the accident was operated were not illuminated in compliance with the cited standard. The inspector found that four of the illuminated lights installed on the machine were inoperative.

MSHA's counsel asserted that while the inspector made no illumination tests, the citation is supportable, and that if called to testify, Inspector Herren would confirm that the inoperative lights resulted in a lack of adequate illumination. However, given the fact that no tests were made, counsel conceded that the lack of testing presented a disputed and open legal question which would be argued by the parties in support of their respective positions. Given this dispute, the parties proposed to settle this violation by ABC agreeing to pay a civil penalty in the amount of \$300. Upon approval of this proposal, the parties agreed that the citation should be affirmed and the contest dismissed.

In a posthearing letter filed with me on July 22, 1985, MSHA's counsel advised me that at the time of the hearing the parties had anticipated that the proposed civil penalty assessment for the violation would be \$500, and that the proposed settlement was made on that basis. However, counsel has now determined that the proposed penalty assessment was actually \$91, and that ABC paid that assessment on March 20, 1985. Under the circumstances, counsel requested that the citation be affirmed.

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Docket No. SE 85-26-R

This proceeding concerns a section 107(a) imminent danger order, No. 2480147, issued by MSHA Inspector Newell E. Butler on October 22, 1984, and subsequently modified on October 22, 1984. The inspector alleged that the clearance maintained between a continuous-mining machine and the coal rib was inadequate to protect the machine operator, and that this condition resulted from inadequate training by mine management. The order was issued during the course of the fatality investigation.

MSHA's counsel asserted that upon further consideration of this order, including consultation with the inspector, MSHA has concluded that the order should be vacated. Under the circumstances, ABC's counsel requested to withdraw the contest, and agreed that it may be dismissed.

Docket No. SE 85-20-R

This proceeding concerns a section 107(a) imminent danger order, No. 2481839, issued by MSHA Inspector William Herren on October 16, 1984. The order was issued during the course of the fatality investigation, and Mr. Herren alleged that the remote control unit on the continuous-mining machine involved in the accident had been modified in an unauthorized manner, thereby, rendering the machine non-permissible and in violation of mandatory safety standard 30 C.F.R. 75.503. The order was subsequently modified by Mr. Herren on November 6, 1984, to delete his reference to a violation of section 75.503, and it was amended to allege a violation of section 75.1725(a).

Docket Nos. SE 85-21-R and SE 85-82

This proceeding concerns a section 104(a) citation, No. 2481840, with special "S & S" findings, issued by Inspector Herren on October 16, 1984, in conjunction with the issuance of the imminent danger order noted in Docket No. SE 85-20-R. Inspector Herren issued the citation for a violation of section 75.503, but he subsequently modified it on November 6, 1984, by deleting this section and substituting an alleged violation of section 75.1725(a).

The parties proposed to settle the civil penalty case concerning contested Citation No. 2481840, (Docket No. SE 85-82), and ABC agreed to pay a civil penalty in the amount of \$6,100 for the violation (Tr. 6). The parties also agreed that the imminent danger order (Docket No. SE 85-20-R) should be affirmed, and that the contests (Docket No. SE 85-20-R and SE 85-21-R) should be dismissed.

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Docket Nos. SE 85-23-R and SE 85-89

These proceedings concern a section 104(a) citation, No. 2481845, with special "S & S" findings, issued on October 16, 1984. The citation was issued when the inspector found that the remote radio control unit on a continuous-mining machine which had been removed from service had been modified in an unauthorized manner, thereby rendering the machines non-permissible in violation of mandatory safety standard 30 C.F.R. 75.503.

The inspector modified the citation on November 19, 1984, deleting his allegation of a violation of section 75.503, and amending the violation to allege a violation of section 75.1725(a).

The parties agreed to an affirmation of the citation and they proposed to settle the matter by a payment by ABC of a civil penalty assessment in the amount of \$700 (Tr. 6, 7). At the time of the hearing, MSHA's counsel indicated that he expected the violation to be assessed at \$1,000, but that the circumstances presented warranted a reduction in the original penalty assessment.

In his posthearing letter of July 22, 1985, MSHA's counsel advised me that while the parties had expected the violation to be assessed at \$1,000, the proposed assessment is actually \$1,200 (SE 85-89). Counsel also advised that the parties have agreed to amend their proposed settlement as stated during the hearing to reflect an agreement by ABC to pay a civil penalty in the amount of \$900, in full settlement for the citation.

Docket Nos. SE 85-18-R and SE 85-19-R

These proceedings concern two section 104(a) citations, Nos. 2480143 and 2480144, with special "S & S" findings, issued on October 16, 1984, by MSHA Inspectors Newell E. Butler and William Herren. The citations were issued when the inspectors found that the remote radio control units on two continuous-mining machines which had been removed from service by the operator had been modified in an unauthorized manner, thereby rendering the machines non-permissible in violation of mandatory safety standard 30 C.F.R. 75.503.

The inspectors modified the citations on November 19, 1984, deleting their allegations of violations of section

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75.503, and amending the citations to allege violations of section 75.1725(a).

The parties proposed to settle these citations by ABC agreeing to pay civil penalties in the amount of \$700 for each of the citations, or a total of \$1,400 in penalties. Upon approval of their proposal, the parties agreed that the citations should be affirmed and the contests dismissed.

In his posthearing letter of July 22, 1985, MSHA's counsel states that at the time of the hearing the parties had anticipated proposed civil penalties of approximately \$1,000 for each of the citations. However, counsel has now determined that the proposed penalties were actually \$192 for each citation, and that the assessments were paid by ABC on February 20, 1985 (SE 85-18-R), and March 5, 1985 (SE 85-19-R). Under the circumstances, counsel requested that the citations be affirmed.

Size of Business and Effect of Civil Penalties on the Contestant/Respondent's Ability to Continue in Business

The parties agreed that ABC is a large mine operator and that the payment of the agreed-upon civil penalties will not adversely affect its ability to continue in business (Tr. 23-25).

Good Faith Compliance

The record in these proceedings reflects that all of the conditions or practices cited as violations were promptly abated by ABC within the time fixed by the inspectors. MSHA's counsel conceded that this was the case, and he agreed that ABC abated all of the violations in good faith (Tr. 23-25).

Negligence

MSHA's counsel argued that ABC exhibited a high degree of negligence with respect to all of the violations in question in these proceedings. With regard to the continuous-mining machine citations, counsel asserted the negligence was less than gross, and that had these cases proceeded to trial, ABC's counsel would have presented testimony indicating that on prior shifts, the remote controlled mining machine units were operating properly.

MSHA's counsel pointed out that while Inspector Herren found evidence that some of the control units had been

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altered by tape or by "whittling" or shaving some of the control unit levers, these conditions were not readily observable or detectable through visual inspection, and that the inspector agreed that this was the case. Counsel also pointed out that after the accident occurred, the other cited machines were taken out of service by ABC and were not in use at the time they were cited. Counsel agreed that the inspector issued the citations in order to prevent the use of the machines until the defects could be corrected, and that ABC's actions in taking them out of service mitigates the negligence with respect to those violations.

ABC's counsel asserted that given the fact that his investigation reflected that the mining machine involved in the accident was found to be in proper working order on prior shifts, there is a strong presumption that the accident victim may have taped the left control lever, thereby, contributing to the conditions cited by the inspector.

MSHA's counsel consulted with Inspector Ferren, and he reported that Mr. Ferren's investigation did not disclose the identity of any individuals who may have altered the control levers on the cited mining machines. Counsel confirmed that Inspector Ferren had no reason to believe that the required weekly electrical inspections or preshift examinations were not conducted as required.

Gravity

I take note of the fact that the inspectors who issued the citations in these proceedings found a high degree of gravity, and that they made special findings that the cited violations were "significant and substantial" (S & S). In addition, although the parties subsequently agreed to a settlement disposition for all of the violations in question, the inspector's findings that they were "S & S" remains, and they agree that the citations are to be affirmed as issued. Under the circumstances, I conclude and find that all of the violations in issue in these proceedings are serious violations.

With regard to Citation Nos. 2480143, 2480144, and 2481845, I take note of the fact that in the narrative description of the cited conditions on the face of each citation form, the inspectors noted that the citations were a factor which contributed to the issuance of three additional imminent danger orders issued that same day. However, all of these orders were subsequently vacated by MSHA as unsupported, and I dismissed the cases. Under the circumstances,

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MSHA's vacation of the orders mitigates the gravity with respect to these violations.

History of Prior Violations

MSHA's counsel asserted that ABC has an "average" history of prior violations, and that its compliance record is not such as to warrant any additional increases in the civil penalty assessments proposed for the violations in question. Counsel confirmed that ABC's prior history does not include previous citations for defective continuous miner remote control units, or for conditions or practices similar to those cited by the inspectors in these proceedings (Tr. 23-25).

Findings and Conclusions

After careful consideration of the proposed settlement disposition of civil penalty proceedings SE 85-82 and SE 85-89, and taking into account the arguments at the hearing, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest, and pursuant to Commission Rule 30, 29 C.F.R. 2700.30, they are APPROVED.

ORDER

Respondent Alabama By-Products, Inc., IS ORDERED to pay the following civil penalties for the violations which have been settled, and payment is to be made to MSHA within thirty (30) days of the date of these decisions.

Docket No. SE 85-82

Citation No.	Date	30 C.F.R.	
		Section	Assessment
2481840	10/16/84	75.1725(a)	\$6,100

Docket No. SE 85-89

Citation No.	Date	30 C.F.R.	
		Section	Assessment
2481845	10/16/84	75.1725(a)	\$ 900

In view of the settlement approvals, Citation Nos. 2481480 and 2481845, are AFFIRMED, and contest Docket Nos. SE 85-21-R and SE 85-23-R, are DISMISSED.

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In view of the civil penalty assessment dispositions made by and between the parties in connection with contests Docket Nos. SE 85-18-R, SE 85-19-R, and SE 85-24-R the citations in issue in those proceedings (2480143, 2480144, and 2481846) are all AFFIRMED, and the contests are DISMISSED.

By agreement of the parties, the section 107(a) imminent danger order, No. 2481839, issued on October 16, 1984, in Docket No SE 85-20-R, is AFFIRMED as issued, and the contest is DISMISSED.

In view of MSHA's assertion at the hearing that the section 107(a) imminent danger order, No. 2480147, issued on October 22, 1984, in Docket No. SE 85-26-R, cannot be supported, and in light of MSHA counsels' assertion by letter filed with me on July 22, 1985, that the order has been vacated, the contest is DISMISSED.

George A. Koutras
Administrative Law Judge