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SOL (MSHA) V. JEFFERSON COUNTY HWY. DEPT.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. BARB 79-146-PM
A.O. No. 40-00056-05001

v.

County Quarry & Mill

JEFFERSON COUNTY HWY. DEPT.,
RESPONDENT

DECISION

Appearances: Darryl A. Stewart, Attorney, U.S. Department of
Labor, Nashville, Tennessee, for the Petitioner
Telford E. Forgety, Jr., Esquire, Dandridge,
Tennessee, for the Respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition for assessment of civil
penalty filed by the petitioner against the respondent on
December 12, 1978, pursuant to Section 110(a) of the Federal Mine
Safety and Health Act of 1977, charging the respondent with one
alleged violation of the provisions of 30 CFR 56.9-87, as set
forth in Citation No. 108414 issued on May 3, 1978 by MSHA
inspector William R. Tally. The citation reads as follows:

The two EUCLID Pit haul trucks did not have audible
reverse alarm warning devices that were operative.
There was no observer to signal when it was safe to
back up.

Respondent filed an answer to the petition on December 20,
1978, and a hearing was subsequently held in Knoxville, Tennessee
on May 24, 1979, and the parties appeared and were represented by
counsel. By agreement of the parties, I issued a bench decision
in this matter, and pursuant to Commission rule 29 CFR 2700.54
that decision is herein reduced to writing and served on the parties.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) et seq.
2. Section 110(a) of the Act, 30 U.S.C. 820(a).
3. Part 2700, Title 29, Code of Federal Regulations, 43 Fed. Reg. 10320 et seq. (March 10, 1978), the applicable rules and procedures concerning mine health and safety hearings.

Stipulations

The parties stipulated and agreed that the respondent is subject to the jurisdiction of the Act, the Secretary of Labor, and the Commission and its Judges, that the failure of the respondent to provide operative audible back-up alarms on two of its pit haulage trucks constituted a violation of the cited safety standard in issue, that respondent's annual rock crushing quarry operation production is 18,871 tons, that the quarry employs 12 individuals, that the conditions cited were timely abated, that respondent has no prior history of violations, and that a reasonable penalty will not adversely affect the respondent's ability to remain in business (Tr. 4-13).

Testimony and Evidence Adduced by the Parties

Mr. J. C. Thomas, Superintendent of Roads, Jefferson County Highway Department, testified on behalf of the respondent. He explained the scope of the rock crushing quarry operations carried on by the respondent and confirmed the size and scope of that operation as stipulated to by the parties. He confirmed that the citation was issued against the two Euclid pit trucks operated at the quarry but could not recall whether he was present when the inspector cited the violation. He stated that neither he nor the foremen were aware of the inoperative back-up alarms prior to the time of the citation, that breakdowns do occur from time to time and they are repaired immediately. Respondent's policy is to inspect the trucks each morning and the driver is required to conduct the inspection and to report any defects to the pit foreman. The alarms which were installed on the trucks in question were fuse types, and upon the recommendation of the inspector, new devices were ordered and installed to abate the citation. The older alarms would occasionally blow a fuse, but no such problems have been experienced since the new alarms have been installed. Men do not normally work on foot at or near the tipple area where the trucks are loaded and he knew of no one working in the area on the day of the citation, but he conceded he was not there at the time of the inspection. The defective alarms were repaired and when the new ones arrived they were installed (Tr. 14-22).

Mr. Thomas described the crushing and loading operation and the routes that the trucks in question normally take during the day at the quarry. He indicated that the purpose of the alarm is to warn persons in the area that the truck is backing up, but in most cases the alarm is no louder than the vehicle being driven (Tr. 23-33).

MSHA Inspector William R. Talley confirmed that he issued the citation in question, and he indicated that he observed the trucks in operation after he cited them, and that they were operated in reverse and the alarms were inoperative. There was a problem with a relay and the parts were not readily available. He allowed the respondent two days to abate since that amount of time was required to obtain the necessary parts. The conditions were subsequently abated when he returned to the mine site, but did not know whether repairs were effected earlier or later on the day on which is issued the citation. He confirmed that there was a problem with the relays on the back-up alarms and the newer alarms have solved some of the problems which had been encountered within the industry at the time the citation issued (Tr. 33-39).

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Inspector Talley testified that he saw no one around the trucks when they were in operation except for himself and the quarry foreman. However, the trucks were not backing up in their direction and they were out of the way. He described the loading operation and indicated that the trucks do not use the local highways but stay strictly on mine property (Tr. 40).
Arguments Presented by the Parties

At the close of the evidence and testimony, the parties were afforded an opportunity to make oral argument on the record with respect to the statutory criteria concerning civil penalty assessments as set forth in section 110(i) of the Act (Tr. 45-49). Upon consideration of the arguments presented and the evidence and testimony adduced on the record, findings and conclusions were rendered from the bench (Tr. 49-53) and they are as follows:

Fact of Violation

Petitioner has established a violation as cited in Citation No. 108414 and the respondent has so stipulated (Tr. 49).

Prior History of Violations

Respondent has no prior history of violations and that fact is reflected in the civil penalty assessed by me in this matter (Tr. 50).

Size of Business and Effect of Penalty on Respondent's Ability to Remain in Business

Respondent conducts a small quarry operation and the penalty assessed will not adversely affect its ability to remain in business (Tr. 50).

Good Faith Compliance

The conditions cited were timely abated, the defective alarms were repaired prior to the time fixed for abatement, and new alarms were subsequently installed on the trucks in question (Tr. 50).

Negligence

Respondent had a duty to at least insure that the truck drivers or quarry foreman inspect the trucks in question before allowing them to be operated without workable alarms. Such an inspection

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may have detected that they were inoperable. Under the circumstances, I find that respondent failed to exercise reasonable care to prevent the citation and its failure in this regard amounts to ordinary negligence (Tr. 51).

Gravity

The lack of operable back-up alarms would normally be a serious matter. However, on the facts and evidence adduced in this case I cannot conclude that any of the quarry personnel were in fact exposed to any hazard. There is no credible evidence that anyone was on foot in the area where the trucks were operating at the time of the citation, nor was there any evidence that anyone was exposed to a danger of being run over. As a matter of fact, respondent indicated that the noise of the trucks during their normal operation usually precludes the alarms from being heard. In the circumstances here presented I cannot conclude that the citation was serious and my finding is that it was not (Tr. 52).

Order

In view of the foregoing findings and conclusions, respondent is ordered to pay a civil penalty in the amount of \$35.00 for the violation cited in Citation No. 108414, issued on May 3, 1978, within thirty (30) days of the date of this decision.*/

George A. Koutras
Administrative Law Judge

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*/ By letter dated June 15, 1978, a copy of which was filed with me, petitioner's counsel forwarded a check in the amount of \$35.00 to MSHA's Collection Officer which was tendered by the respondent in full satisfaction of the civil penalty assessment made by me in this matter at the close of the hearing as part of my bench decision.