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SOL (MSHA) V. SEQUATCHIE VALLEY COAL CORP.
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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 79-152-P A.C. No. 40-01172-03001
v.	
SEQUATCHIE VALLEY COAL CORP., RESPONDENT	No. 1 Strip Mine

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
William C. Myers, Esq., Stophel, Caldwell & Heggie, Chattanooga, Tennessee, for Respondent

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The Mine Safety and Health Administration (MSHA) filed a petition for the assessment of civil penalties on December 12, 1978, alleging that Respondent committed violations of 30 CFR 77.403(a), 77.1605(a), 77.1109(c)(1), and two separate violations of 77.410. On January 24, 1979, Respondent filed its answer contesting the violations. A hearing was held on June 21, 1979, in Chattanooga, Tennessee, at which both parties were represented by counsel.

Citation No. 7-0002, February 8, 1977

Evidence was first received regarding Citation No. 7-0002 (February 8, 1977), which alleged a violation of 30 CFR 77.403(a). The condition or practice cited by the inspector is as follows: "Roll protection structure was not provided for the Caterpillar 992 endloader, 1971 Model, SN 25K 542, at this mine." The regulation, 77.403(a), provides in pertinent part that: "[a]ll rubbertired or crawler-mounted self-propelled scrapers, front-end loaders, dozers, graders, loaders, and tractors, with or without attachments, that are used in surface coal mines or the surface work areas of underground coal mines shall be provided with rollover protective structures * * * "

On the basis of the evidence presented, and in light of the statutory criteria, a decision was made from the bench finding a violation of the standard and assessing a penalty of $25. This decision from pages 61-64 of the transcript, with some minor corrections, is set forth below:

> In a case like this, I believe that I would be derelict in my duties and obligations if I should find that there was no violation, the principle reason being that the law does place the burden upon the operator to know and comply with the regulations. I believe that this was the intention of Congress; and it would be my obligation to follow that. Of course, my further obligation would be to take into account the circumstances and try to alleviate, if required, any undue hardships that might possibly develop.
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> It is possible, of course, that the inspector had seen this condition before when he had previously inspected this mine. I believe his testimony was to the effect that he didn't remember exactly the times that he had been there before, and it's possible that other inspectors had been there; but I believe the rule would be that the inspector would not be held bound if he should miss a violation on any particular occasion. Also, his explanation that he became aware of this for the first time when he submitted the number of the machine to determine the year seems plausible to me; so I would accept that explanation. Accordingly, I find that the failure as charged to have the roll-over protection did violate 77.403(a).
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> Taking into account, then, the criteria as required by law; and of which there will be at least three that will apply not only to this alleged violation, but to others as well, if they are found to be violations; and the first would be the history of prior violations. My ruling would be that there is not a significant history of past violations.
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> Another applicable item: criteria as to the size of the operator. My belief is that this is a small operator, based on the tonnage mentioned, and I would so find.
>
> And I believe it is also clear not only from the circumstances, but from the testimony, that the size of the penalties here indicated would not affect the operator's ability to continue in business.
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> As to this particular violation, I find that the operator achieved a rapid compliance in good faith in light of the type of violation charged.

So far as gravity is concerned, this can be a serious violation under some circumstances because of the hazard in a machine turning over. However, the inspector did testify here that he saw no imminent danger, and further believed it to be nondisabling due to the location. And, at least, as I understand the testimony, there was not a strong probability at this point of an injury. So, in summary, I would find that it would be a small amount of gravity or seriousness.

Negligence. Certainly, in a technical sense, the operator is held to knowledge of the requirements; and in this case, however, I would take into account the fact that Mr. Studer did testify that he was not aware of these 1974 amendments and I believe, therefore, that this would be a mitigating circumstance.

The assessment of the penalty was $38.00, and the Secretary has indicated that he believes, because of the seriousness, it should be a higher penalty even than that. From my ordinary experiences, this does not seem to be a very high penalty to me; however, I have already indicated that I believe the gravity here is small in this particular circumstance, and I have taken into account that -- the smaller degree of negligence.

Furthermore, in this matter the notice was issued more than two years ago. It's my view that it's not so much the idea of a penalty that's involved there as it is to change the practice which might lead to the hazard; and that was done, and this is all past history. And in these circumstances, I conclude and find that a penalty of $25.00 would be adequate. That would be my assessment for this violation.

The above bench decision and assessment are hereby AFFIRMED.

Citation No. 140056, April 13, 1978

Thereafter, the parties agreed to stipulate as to the fact of the violation set forth in Citation No. 140056 (April 13, 1978), and the correctness of the assessment if a violation should be found. The condition asserted was that "[t]he front windshield was shattered on the Fiat Allis Model 745-4B Company # L2 being used at this mine." The citation alleges a violation of 30 CFR 77.1605(a) which provides that: "[c]ab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

Although stipulating to the fact of the violation, Respondent raised a defense as to the validity of the inspection in which the

citation was issued. This inspection was undertaken by the landing of a helicopter at the mine site and Respondent contended that the place of landing was unsafe because of its proximity to blasting operations. The record is fully developed on the helicopter landing and the activities which were in progress at that time (Tr. 69-116). The evidence showed that blasting was not actually taking place at the moment of landing, so there was not an imminent danger. However, had blasting been taking place, it could have put the helicopter in danger (Tr. 116). Since both Petitioner and Respondent were concerned with the safety aspects of the inspectors' helicopter landings, the parties were directed to try to reach an understanding on such landings for future inspections at this particular mine. Respondent was willing to drop its contention of unsafe inspection practices by MSHA if it would be allowed to designate an area in which helicopter landings could be made safely and unannounced (Tr. 120). The inspector, Jerry McDaniel, testified that in the circumstances such a designation would not affect the element of surprise. The area designated would not change so that inspectors would not have to call in advance to determine its location for landing. Because of the novelty of the proposal, the Solicitor agreed to submit the matter to MSHA for its consideration. Counsel was directed to report to the court within 30 days. On July 2, 1979, Respondent filed a copy of its letter to Petitioner wherein it designated specific areas for helicopter landings. It claimed that "the designated areas will not prejudice the surprise factor in such inspection." Thereafter, on August 2, 1979, Petitioner MSHA advised the court and Respondent that in the future it will land its helicopters within the areas designated by the Respondent. Thus, this particular contention was resolved by mutual agreement. (Footnote 1)

A bench decision was issued at the hearing on the merits of the violation, subject to reconsideration should an agreement not be reached on the landing area. Such reconsideration has been rendered unnecessary in light of the agreement referred to above. The following decision appears on page 124 of the transcript:

> In view of the stipulations, my finding is that there is a violation, and the penalty assessed is that which was assessed by the Office of Assessments, namely, $18.00.

Since the parties have resolved the helicopter landing issue, I hereby AFFIRM the above decision and assessment.

Citation Nos. 140377-140379, April 13, 1978

Following this decision, Petitioner and Respondent introduced evidence on Citation No. 140377 (April 13, 1978), which alleges a

violation of 30 CFR 77.410 stating that: "[t]he automatic reverse alarm installed on the front-end loader SN 25 K 542 was not in operating condition." That regulation requires that: "[m]obile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse." Evidence was also presented on Citation No. 140378 (April 13, 1978), which similarly alleges a violation of 30 CFR 77.410 for failure to have a reverse alarm on a grader. Finally considered was Citation No. 140379 (April 13, 1978), which charges a violation of 30 CFR 77.1109(c)(1) for the same machine, the grader, for failure to provide a fire extinguisher. Section 30 CFR 77.1109(c)(1) provides: "Mobile equipment, incuding trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

On the basis of the evidence presented, and in light of the statutory criteria, a decision on these three remaining citations was issued from the bench. That decision, with some corrections, is as follows:

> In the violation regarding the loader, the charge was that it did not have a backup alarm. The inspector testified that the men were not working at the time, but all the evidence was, in his mind, that it had been working previously and that there was some kind of interruption in the work. From all appearances, that machine was to go back into operation. The miner who operated the machine gave no indication whatsoever that the machine was being taken out of service for repair or was out of service. The indications were that it was to go back into operation.
>
> I realize that Mr. Studer did testify that the machine was out of service -- he understood or thought, at least, for some kind of service repair. But I believe that, as I view the situation, the circumstances suggest that it was there in operation; it was an operational machine.
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> Now, it's true, I think that that alarm possibly could have gone inoperational when it was sitting there, but that seems to me unlikely. The machine operator was not aware of when it was or was not operating or working. It seems likely to me that it was not working previously while that machine was functioning. So accordingly, I would find a violation here of 30 CFR 77.410 on this loader.
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> I do that fully cognizant of the various comments and arguments Respondent made that these [alarms] are somewhat unreliable and that they can go out at any time, and I recognize that in some circumstances this could be a very

harsh rule. I would take into account any indication that it had been recognized that this was out of order and something was being done about it. I don't see that kind of circumstance here in this one instance; so accordingly, I would find a violation and will consider it in the criteria. We have already taken into account certain other criteria previously, and so I have to consider here only the three. The matter was abated in good faith rapidly, so I'll take that into consideration.

Now, as far as the gravity is concerned, there were other men working there. These backup alarms, it seems to me, are extremely important to safety because they are the alarm to anybody in back of the machine, and quite clearly, its failure to operate could result in a serious injury. As far as negligence is concerned, I will take into account the various references to the fact that these alarms are sometimes unreliable. I would take that fully into account. So I find that -- in this particular case, at least, small negligence; although there is some necessarily.

In light of that fact, I would reduce that penalty to $30.00. So accordingly, that would be my finding as to the assessment.

The other two violations as alleged are another 77.410, which involves the lack of a backup alarm, and also a violation of 77.1109(c)(1), which is the alleged lack of a fire extinguisher, also on the same grader. Now, on these two violations, I'm going to bunch them together. I have a difficulty here. It's not that I don't think that the inspector could issue such notices and they should be sustained if there is evidence -- it's not only his belief, of course; but I think that the evidence should sustain his belief that the machine was operational.

Now, this machine, I suppose, in one sense, is operational; but as I understand the testimony, the machine was only used infrequently, perhaps once a month. In light of the fact that it would be normal to inspect the machine used so infrequently for the safety devices, it seems probable to me that before it was put into operation, that any such deficiencies might be corrected. This is not to take away from what the inspector did. I think he probably acted reasonably and he acted on information which, as he understood it, was given to him by Mr. Studer. The only way I can reconcile this is that there was a misunderstanding between the two men as to what was said and as to what Mr. Studer really intended to say. Mr. Studer testified here today that the machine did have a backup alarm; that

> it was not operational; however, that the machine was not in operation at the time and that the policy was that the alarm would be made operational. I don't know that this is quite so clear with the fire extinguisher. [The inspector testified that Mr. Studer, the machine operator, said there was not a fire extinguisher provided on it (Tr. 155.)]
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> I have to agree that the testimony is somewhat in conflict. It depends on precisely what Mr. Studer said there. I would think -- we have no testimony on it; but I would think if the machine had the brackets, it would be clear that when it was put into operation the fire extinguishers would be put on it. But as I indicated, I don't see the testimony being that clear; I just simply can't resolve it that easily.
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> In the circumstances, since this was only an occasionally used machine, I'm just going to give the benefit of the doubt in this instance to the Respondent. As I say, in so ruling, I am not in any way indicating that I believe that the inspector was wrong. He called it as he saw it, and I am simply deciding on the basis of the record, the testimony, and the evidence on both sides as we now have it. And that would be my judgment, then, as to both of those citations, that I would rule that the evidence does not sustain the violations, and that accordingly, they should be dismissed; and I do hereby dismiss them.

The decision above assessing a penalty of $30 in Citation No. 140377 and dismissing the petition as to Citation Nos. 140378 and 140379 is hereby AFFIRMED. Further, Citation Nos. 140378 and 140379 are hereby VACATED.

In summary, a finding of violation has been made regarding Citation No. 7-0002 and a penalty of $25 assessed; violations found in Citation Nos. 140056 and 140377 and penalties assessed of $18 and $30, respectively; and the petitions for Citation Nos. 140378 and 140379 were dismissed and the citations vacated.

ORDER

It is ORDERED that Respondent pay total penalties of $73 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge

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Footnote starts here:-

~Footnote_one

1 I want to take this occasion to commend the parties and their counsel for the amicable resolution of a sticky problem.