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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. DENV 79-189-P
A.O. No. 34-00676-03001

v.

McCurtain No. 2 Mine

GREAT NATIONAL CORPORATION,
RESPONDENT

DECISION

Appearances: David S. Jones, U.S. Department of Labor, Office
of the Solicitor, Dallas, Texas, for Petitioner
Jerry D. Pruitt, Fort Smith, Arkansas, for Respondent.

Before: Judge Stewart

PROCEDURAL BACKGROUND

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. 820(a) (1978). Petitioner filed a petition for assessment of civil penalties for the three violations included under this docket number on January 9, 1979. Respondent answered this petition on February 5, 1979.

The hearing in this matter was held on September 19, 1979, in Fort Smith, Arkansas. Petitioner and Respondent each called a single witness. Petitioner introduced five exhibits. At the conclusion of the hearing the parties waived their right to file proposed findings of fact and conclusions of law.

Findings of Fact and Conclusions of Law

The violations alleged herein were observed by Inspector Farrin E. Walker during the course of inspections of Respondent's McCurtain No. 2 Mine. These inspections were conducted in June of 1978. In each instance, the inspector issued a section 104(a) citation.

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At the hearing, the parties stipulated that Respondent's McCurtain No. 2 Mine was a small mine. Thirty-three employees work at the mine, producing approximately 250 tons of coal per day and 80,000 to 90,000 tons per year.

There is nothing on the record which would indicate that any penalty assessed herein would have an adverse effect on Respondent's ability to remain in business. MSHA's proposed assessment form indicates that Applicant had no relevant history of prior assessed violations.

Citation No. 00391338

The inspector issued Citation No. 00391338 on June 1, 1978, citing a violation of 30 CFR 77.1605(a). He described the relevant condition or practice as follows: "The left cab window in the Trojan Front-end loader, Model 254 (Company No. 22), was broken and shattered. The loader was in operation at the loading tipple." The window was replaced within the time set for abatement by the inspector. The inspector testified that the operator took immediate action, thereby demonstrating good faith.

Section 77.1605(a) requires that cab windows shall be in good condition and shall be kept clean. Both Inspector Walker and Jim Beam, manager of the McCurtain No. 2 Mine, testified that the left cab window of the front-end loader had been broken. The inspector added that dust had gathered on the window. This uncontradicted testimony-- that the windshield was broken and dirty-- established that a violation of section 77.1605(a) existed as alleged.

The operator was negligent in that this condition was readily observable, yet no corrective action was taken prior to the issuance of the citation.

It was improbable that this condition would result either in accident or injury. Although he testified that 90 percent of the windshield had shattered, the inspector admitted that a collision was unlikely. The front-end loader transported waste material between the tipple and a dump, a distance of approximately 100 feet. It operated 5 days per month, making four or five trips per day. It was unlikely that another vehicle would be operating at the same time in this area. The inspector observed coal haulage trucks at the tipple but noted that they did not cross the front-end loader's path. The inspector also admitted that injury would be improbable even if an accident were to occur.

Citation No. 00391340

Inspector Walker issued Citation No. 00391340 on June 13, 1978, again citing a violation of 30 CFR 77.1605(a). He described the

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relevant condition or practice as follows: "The No. 12 service-truck front -cab -window was broken and shattered. The truck is used to service the equipment in the pit areas." The operator abated the condition within the time set by the inspector for abatement, thereby demonstrating a normal degree of good faith.

As noted above, section 77.1605(a) requires that cab windows shall be in good condition. Both Inspector Walker and Mr. Beam testified that the window directly in front of the driver's seat, was broken. This condition was in violation of section 77.1605(a).

The operator was negligent in its violation of the mandatory standard. The condition was readily observable, yet the operator did not take steps to replace the window prior to the issuance of the citation.

It was improbable that the condition would lead to an accident or injury. The cracks in the windshield were on the driver's side of the vehicle. The inspector testified only that the vision of the driver would be obstructed. Mr. Beam testified, on the other hand, that the window had six to eight cracks in it, and that the vision of the driver was unobstructed. It is found that the cracks in the windshield slightly interfered with the driver's vision. Because the vehicle was used primarily between the hours of 4 p.m. and midnight, the likelihood that an accident would occur was further reduced. Other vehicles were not operated on a regular basis when the service truck was in use. The inspector testified that he observed the vehicle in operation between the shop and pit during regular working hours. Mr. Beam testified that it only did so when emergency repairs were necessary. The inspector testified that the vehicle traveled very slowly. Therefore, even if an accident were to occur, the injury expected to result, if any, would be nondisabling.

Citation No. 391341

The inspector issued Citation No. 391341, on June 14, 1978, citing a violation of 30 CFR 77.400(a). He described the relevant condition or practice as follows: "The drag drum mechanism on the 2400 Lima Drag line operating at the Pit No. 002 was not provided with a guard to prevent contact of the exposed moving machine-parts which may cause injury to persons." The condition was corrected within the time set by the inspector for abatement, thereby demonstrating a normal degree of good faith.

Section 77.400(a) requires that moving machine parts which may be contacted by persons and which may cause injury to persons shall be protected. In this instance, the upper half of a drag drum was unprotected. This drum was located within the outer body

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of the dragline. The inspector testified that a person on the walkway inside the body of the dragline would be standing within 4 inches of the drum. This testimony was contradicted by that of Mr. Beam who stated that a person would be approximately 30 inches away from the drum. Despite this inconsistency, the testimony of both witnesses established that a person could make injurious contact with the moving drum. The condition was, therefore, in violation of the mandatory standard.

The operator was negligent in its failure to guard the drum. The condition was readily observable, but steps were not taken to guard the drum until after the issuance of the citation.

It was probable that this condition would lead to an accident. The inspector observed one of Respondent's employees--presumably the oiler--inside the dragline. Mr. Beam testified that the oiler who was normally on duty inside the machine while it was in operation had been instructed to use the outside walkway to get from one part of the machine to the next. It was not established that he complied with these instructions, and there was nothing to prevent him from using the inside walkway for this purpose. It was not established that this oiler did not pass on the walkway, alongside the drum, in the course of his duties. If an accident were to occur, permanently disabling injury would be expected to result.

ASSESSMENTS

In consideration of the findings of fact and conclusions of law in this decision, based on evidence of record, the following assessments are appropriate under the criteria of section 110(i) of the Act:

Citation No.	Penalty
00391338	\$ 50
00391340	50
00391341	150

ORDER

The Respondent is ORDERED to pay the amount of \$250 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge