

CCASE:
SOL (MSHA) V. HOKE COMPANY
DDATE:
19800214
TTEXT:

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. THE HOKE COMPANY, INC.	PETITIONER	Civil Penalty Proceeding Docket No. KENT 79-138 A.O. No. 15-11129-03003 Mine: Land Fill Strip RESPONDENT
---	------------	--

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of civil penalties for six citations issued to Respondent. A hearing was held on January 9, 1980, in Louisville, Kentucky.

The parties stipulated and I find:

1. Respondent, The Hoke Company, Inc., is subject to the Act's jurisdiction, is a small operator, and operates the surface coal mine designated as "Land Fill Strip."
2. On January 16, 1979, Earl T. Leisure, a duly authorized MSHA representative inspected Land Fill Strip and properly issued the citations in question.
3. Exhibit P-1 accurately reflects Respondent's history of previous violations.
4. Any penalty that I assess will not adversely affect Respondent's ability to continue in business.

After submitting evidence, the parties waived filing briefs and proposed findings of fact and conclusions of law and I issued the following decisions from the bench.

Citation No. 399161

The violation, alleged under the Section 110 of the Act, is of 30 CFR 77.410, which reads: "Mobile equipment such as trucks, forklifts, frontend 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."

~452

It is undisputed that Respondent violated that safety provision, and I so find.

There was a high degree of negligence. Knowing that the backup alarm on the vehicle was disabled, Respondent operated the vehicle. This constituted a willful violation of the standard.

The gravity was moderate. No one was in the area, according to Mr. Terry's testimony and the testimony of Mr. Leisure.

As Mr. Leisure testified, it is difficult to see behind this vehicle. The vehicle was in reverse at least 50 percent of the time, and the vehicle is extremely heavy, many tons in weight. Therefore, the risk of death or serious injury as a result of this violation can be quite great. Because of this violation and the negligence involved, sufficient penalty to encourage future voluntary compliance is required. However, taking into consideration the fact that the operator is a small operator and exercised good faith efforts to correct the condition, in this case, I assess a penalty of \$200. But for these factors, I would assess a larger penalty, and I would expect that the next time such a violation occurs, given this type of factual situation by this operator, the penalty would be larger.

Citation No. 399162

This citation involves an alleged violation of 30 CFR 77.404(a), which reads: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Petitioner contends that in operating this truck with its muffler and tailpipe missing, Respondent exposed the occupants of that truck to the danger of being seriously injured by carbon monoxide fumes.

I find that Respondent was in violation of that provision. There was a fair degree of negligence. Respondent knowingly violated that provision.

The gravity was moderate. It was wintertime. There was a danger of the operators of that vehicle keeping the windows closed and of the fumes poisoning the occupants. However, there is no evidence that on this occasion the windows were rolled up.

This is a small operator, and the evidence is that the operator did achieve prompt compliance. Therefore, I find the amount of the penalty warranted for this violation in order to encourage voluntary compliance is \$125.

Citation No. 399163

I find that by not providing this explosive truck with a working horn, Respondent violated several safety standards of this Act.

~453

In my opinion, Respondent violated all three standards that were discussed.

It was a violation of 30 CFR 77.404(a) which reads: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

This was mobile machinery or equipment. A working horn is a requirement of operating a vehicle in a safe operating condition. In not having a working horn, Respondent violated that safety provision.

A similar violation occurred with respect to 30 CFR 77.1302(b), which reads: "Vehicles containing explosives or detonators shall be maintained in good condition and shall be operated at a safe speed and in accordance with all safe operating practices."

In not having a working horn, this vehicle was not maintained in good condition.

Finally, although I agree with Mr. Terry that there is some question as to the applicability of the Section, 30 CFR 77.1605(d). I agree that of the three sections, this may be the least applicable. I find that the language in this section is sufficiently broad to apply.

Therefore, I find a violation. I find moderate gravity. A horn is an important safety device in a vehicle of this kind. There is a question as to the degree of negligence. There is no evidence that the supervisory personnel of Respondent knew of this condition before the inspector discovered it, although there is some hearsay evidence that a driver stated that the condition existed for quite some time.

There was good faith compliance, and this is a small operator. As I have indicated, I consider these standards to be quite important. I assess a penalty of \$65, which I hope would be sufficient enough to encourage voluntary compliance of these standards on the part of the operator in the future.

Citation No. 399164

In view of what I have heard and upon consideration of the six criteria set forth in Section 110(i) of the Act, I will approve the settlement proposed by the parties and I will assess a penalty of \$84 for Citation No. 399164.

Citation No. 399165

After hearing the testimony of the witness and upon consideration of the six criteria set forth in Section 110(a) of the Act, I will approve the proposed settlement and I will approve the assessment. I will assess a penalty of \$106 for the violation in Citation No. 399165.

The citation involves an alleged violation of the mandatory standard at 30 CFR 77.1109(c)(1), which reads: "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

The undisputed testimony of Mr. Leisure is that at the time of his inspection, the Caterpillar D9E tractor did not have a portable fire extinguisher. Therefore, Respondent violated the safety standard.

The operator was negligent in that this condition was readily observable. The extinguisher was reasonably large. It would have been a bright color, and it was the type of item that could have been noted upon an inspection.

The fact that there is no evidence that the officials in charge of the mine knew that the extinguisher was not on the vehicle does not nullify the fact that they should have or could have known upon inspection that the extinguisher was not on the vehicle.

A lack of an extinguisher could have caused serious injury to the driver of the vehicle in the event of a fire.

The gravity of the violation is somewhat mitigated by the fact that, as testified to by Mr. Terry, there were other extinguishers nearby. However, the regulation does require an extinguisher on each vehicle.

There was good faith correction by the operator, and this is a small operator.

I therefore assess a penalty for this violation in an amount of \$65, which I hope would be high enough to deter further violations of this kind and assure voluntary compliance of this Standard by the mine operator.

I affirm these six bench decisions.

Summary

The following table summarizes the citation numbers, the amounts originally proposed by the Assessment Office, and the final assessments to be paid by Respondent:

Citation No.	Proposed Assessment	Final Assessment
399161	\$ 72.00	\$200.00
399162	\$106.00	\$125.00
399163	\$ 48.00	\$ 65.00
399164	\$ 84.00	\$ 84.00
399165	\$106.00	\$106.00
399200	\$ 40.00	\$ 65.00

~455

ORDER

Respondent is ORDERED to pay \$645.00 in penalties within 30 days after its receipt of this Order.

Edwin S. Bernstein
Administrative Law Judge