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

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

Civil Penalty Proceeding

Docket No. SE 79-57-M
Assessment Control
No. 31-00427-05003

v.

GROVE STONE AND SAND COMPANY,
RESPONDENT

Grove Pit and Mill

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner Thomas C. Newman, Corporate Safety Director, Swannanoa, North Carolina, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 27, 1980, a hearing in the above-entitled proceeding was held on April 8, 1980, in Asheville, North Carolina, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

After completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 101-105):

This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. SE 79-57-M on August 27, 1979, by the Mine Safety and Health Administration seeking to have a civil penalty assessed for an alleged violation of 30 CFR 56.9-2 by Grove Stone and Sand Company.

The issue in every civil penalty case is first of all whether a violation occurred and then, of course, if a violation is found to have occurred, a civil penalty has to be assessed under the Act based on the six criteria which are set forth in section 110(i) of the Act.

The first consideration in this case is whether a violation of section 56.9-2 actually occurred. That section provides "[e]quipment defects affecting safety shall be corrected before the equipment is used." Citation No. 108078 dated March 1, 1979, which is Exhibit 1 in this proceeding, states that, "[t]he audible automatic reverse signal alarm was inoperable on the G-258 Caterpillar front end loader used in the stock pile area."

The section of the regulations which is involved does not state specifically that a front-end loader must have an operable back-up alarm. The section that is alleged to have been violated would require that this particular Caterpillar front-end loader have no safety defect in it before the equipment is operated.

In order for the inspector to have been certain that that defect existed before the equipment was ever operated, it would have been necessary for him to have either checked with the equipment operator or with Mr. Green, who was the mechanic, or with someone who knew whether or not the equipment had been inspected and checked before it was put into operation.

The facts are that Mr. Mouser, the inspector, wrote Citation No. 108078 at 8:10 a.m. on March 1, 1979, after the front-end loader had been used to load some mud dredged out of the settling pond. At the time the inspector checked the piece of equipment and had it operated to see if the back-up alarm was working, the front-end loader had been parked and was not being used at that moment.

Everyone agrees, including Mr. Newman, who represents the respondent in this case, that at the moment the equipment was checked the back-up alarm did not work. The back-up alarm is a type which has four steel balls in it and when the equipment is in forward gear the balls stay in their compartments and make no noise, but when the equipment is reversed, the balls fall out of their compartment against a bell and make a clanging alarm sound.

Mr. Green, who is the mechanic for the company respondent, testified that he saw and observed this equipment on March 1, 1979, and that he checked this equipment and other equipment and found no defects in them on that date.

Therefore, his testimony shows that there was no equipment defect on this Caterpillar front-end loader prior to the commencement of the shift. And Mr. Green says that he would have corrected anything that he found wrong with this alarm if he had found anything, because that was his practice.

The inspector seemed to think that the alarm did not work because it was bent, whereas, the mechanic, Mr. Green, states that the only thing that kept the alarm from working was the fact that it had a lot of mud in it as a result of having been used in the area where the settling pond was located.

So, I have before me some evidence which is fairly strong that the back-up alarm was operative before the

shift started and I don't have any testimony from the
inspector or anyone else who really knows that the
equipment was not free

of defects before it was operated. The inspector does not claim to have made a check to make certain that it was defective before it was operated. And, I do have the testimony of Mr. Green that he did check the equipment, and that it had no defects before it was put into operation.

Now, it is true that Mr. Taylor has made some very good arguments about credibility and his primary point is that Mr. Green could not have remembered a check of the equipment which he made on March 1, 1979. But Mr. Newman has countered that argument by pointing out that he did inquire of Mr. Green after the mud was removed from this alarm as to whether the equipment had been checked and as to whether the bent portion of the alarm would have kept it from working. And, it is Mr. Green's position that the bent condition of the alarm did not prevent it from working but that the mud inside the alarm did prevent it from working.

Additionally, Mr. Green based his testimony not entirely on whether he remembered March 1, 1979, but the fact that it is his practice to correct anything wrong with equipment every morning if he finds a defect in it.

So, we do not really have a situation here in which the inspector claims unequivocally that this equipment was defective before it was used, but we have a statement by the inspector that when he checked it, it was defective. And, we have the statement of Mr. Green that it was not defective before it was operated.

So regardless of whether Mr. Green remembers each and every detail about this piece of equipment, I think that the preponderance of the evidence supports a finding that the equipment had been checked and it was not defective before the equipment was used; rather, the alarm became defective from having been splashed by mud in the first hour of the day before it was inspected.

Therefore, I think that the violation was not proved and that the Proposal for Assessment of Civil Penalty should be dismissed.

I should mention that one of the stipulations in evidence in this case is that respondent has agreed that it is subject to the jurisdiction of the Commission, and that I have jurisdiction to decide the case.

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WHEREFORE, it is ordered:

The Proposal for Assessment of Civil Penalty filed in Docket No. SE 79-57-M is dismissed.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)