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SOL (MSHA) V. CONCRETE MATERIALS
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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. YORK 80-36-M A.C. No. 30-00839-05007
v.		Morrisonville Plant
CONCRETE MATERIALS, INC.,	RESPONDENT	

DECISION

Appearances: Deborah B. Fogarty, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner George T. White, Jr., Esq., White, Miller & Wurst, Rochester, New York, for Respondent

Before: Administrative Law Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", in which the Secretary charges Concrete Materials, Inc. (Concrete Materials), with two violations of 30 C.F.R. 56.9-3. The cited standard requires that powered mobile equipment be provided with adequate brakes. In response to a prehearing order, Concrete Materials challenged the validity of the standard alleging that it was "not specific or detailed enough to properly advise operator as to his obligations or failed to provide sufficient guidelines for the operator to comply with the intent of the regulations and in doing so, also failed to establish guidelines for the inspectors, and therefore, leave [sic] too much of a discretionary judgment in the eyes of the inspector, all to the detriment of the operator." Although Concrete Materials cites no legal authority in support of its contention, I interpret it as a challenge to the sufficiency of the standard in light of due process requirements for specificity under the Fifth Amendment to the United States Constitution. The issues before me then are whether the cited standard meets constitutional due process requirements for specificity and if so, whether Concrete Materials has violated the regulatory standard as alleged in the petition for civil penalty filed herein and, if so, the appropriate civil penalty to be assessed for the violation.

I. Constitutional Validity of the Cited Standard

Clearly, the challenged regulation does not involve First Amendment rights or criminal sanctions, and therefore its facial constitutionality is

not at issue. United States v. National Dairy Corp., 372 U.S. 29, 83 S. Ct. 594, 9 L.Ed2d 561 (1963); McLean Trucking Company v. Occupational Safety and Health Review Commission 503 F.2d 8 (4th Cir. 1974). I will therefore consider the challenged vagueness of the standard only in terms of its application to this case. McLean Trucking Company, supra.

The language of the cited standard, i.e., that "powered mobile equipment shall be provided with adequate brakes," indeed does not afford any concrete guidance as to what is to be considered "adequate brakes." A regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an operator unless read to penalize only conduct or conditions unacceptable in light of the common understanding and experience of those working in the industry. Cape and Vineyard Division of the New Bedford Gas and Edison Light Co. v. OSHRC, 512 F.2d 1148 (1st Cir. 1975); National Dairy Corp., supra, United States v. Petrillo, 332 U.S. 1, 67 S. Ct. 1538, 91 L.Ed. 1877 (1947). Unless the operator has actual knowledge that a condition or practice is hazardous the test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard. Cape and Vineyard, supra. The reasonably prudent man has recently been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable." General Dynamics Corporation, Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

The question before me then is whether Concrete Materials knew that the operation of either or both of the cited Euclid haulage trucks with brakes in the condition then existing would be hazardous or whether a conscientious safety expert would have protected against the brake conditions existing here because they presented a reasonably foreseeable hazard.

Citation No. 221884 charges that the brakes on the No. 2 Euclid haulage truck would not stop or hold the empty truck at coast speed on a 5-degree slope. According to MSHA inspector Randall Gadway, the Inspector's Manual recommends testing brakes with the equipment fully loaded on the steepest grade used at that mine. The trucks here were tested unloaded and on a 5-degree grade (although the steepest grade at the mine was 10 degrees) because Gadway thought the brakes would not hold on the steeper grade and that it would therefore be hazardous to perform the tests on that grade. According to Gadway, the driver of the suspect truck was asked to apply his brakes on the 5-degree slope while traveling at a coast speed of 2 or 3 miles an hour. There was "no indication of any brakes" and the truck finally stopped only after moving onto a level area and then dropping into a small recess. The truck continued to roll 60 to 70 feet before stopping. These facts are undisputed. Gadway opined that the truck should have stopped in 3 to 4 feet, and indeed found that it did in fact stop within 3 to 4 feet when tested after the brakes were repaired.

Howard Collins, a qualified mechanic for Concrete Materials

conceded that the Euclid truck had "never been known to have good brakes." He opined that if an empty Euclid truck stopped within 15 to 25 feet after the application of its brakes at coast speed on a 5-degree grade, the brakes were adequate. Collins also testified that after the citation on the No. 2 Euclid was issued, its brake linings and seals were replaced and an air leak was repaired by the removal of some foreign material.

Donald Barry, also qualified as an expert in the mechanics of Euclid trucks, opined on behalf of Concrete Materials that it would take a properly maintained empty Euclid truck moving at coast speed on a 5-degree slope no further than 10 to 12 feet to stop, and, moving from 7 to 8 miles per hour, about 20 to 25 feet to stop.

Within this framework of evidence I find it indeed disingenuous for Concrete Materials to now contend that it did not know what was meant by "adequate brakes" in the context of this violation. By the testimony of one of its own expert witnesses the brakes on the No. 2 Euclid truck would in essence be "adequate" only if they stopped the truck, under the testing conditions here present, within 12 feet. The undisputed evidence is that the truck here continued to roll 60 to 70 feet after the brakes were applied and then only stopped because it dropped into a depression. Under the circumstances, I conclude that Concrete Materials knew that it would be hazardous to operate its No. 2 Euclid haul truck with the brakes in the condition found in this case. Where such actual knowledge exists, the problem of fair notice does not exist. Cape and Vineyard, supra at p. 1152.

Citation No. 221885 also charges a violation of 30 C.F.R. 56.9-3. It alleges that the brakes on the No. 3 Euclid haul truck were not effectively functioning and that the empty truck took approximately 15 to 20 feet to stop at coast speed on a 5-degree slope. Inspector Gadway conceded that the truck had some braking capability and that it indeed did stop within 15 to 20 feet after application of its brakes. As previously noted, there is some conflict in the testimony as to the distance such a truck would require to stop under the testing conditions here utilized. The Government contends that the truck should have stopped in 3 to 4 feet but offered no evidence of industry standards to support this contention or the contention that the brakes on this truck constituted a hazard. The burden of this proof is upon the Government. U.S. v. Petrillo, supra; Cape and Vineyard, supra; Bristol Steel & Iron Works Inc. v. OSHRC, 601 F.2d 717 (4th Cir. 1979).

The operator's experts testified on the other hand that under those testing conditions, a properly maintained truck of this type would take from 10 to 25 feet to stop. Under the circumstances, I cannot conclude that Concrete Materials knew that it would be hazardous to operate its No. 3 Euclid haul truck with its brakes in the condition found in this case. Nor can I conclude, in the absence of any evidence that industry standards are as strict as the Government alleges, that a conscientious safety expert would have found that a hazardous condition existed in operating the No. 3 Euclid truck with its brakes in the cited condition. Accordingly, I find that the standard at bar was improperly applied to the facts of this citation and the citation is therefore vacated.

II. The Violation and Appropriate Penalty - Citation No. 221884

The evidence discussed and the findings made under Part I of

this decision also lead to my conclusion that the violation alleged in Citation No. 221884 is proven as charged. In determining the appropriate penalty to be assessed

against Concrete Materials for this violation, I note that the operator's business utilized 177,654 man-hours in a recent year, and this particular mine utilized 21,120 man-hours in a recent year, thereby placing the mine and the parent company in a small category. According to the evidence submitted, the operator does not have a serious history of violations. There is no evidence that the penalties I am assessing in this case would have any effect on the operator's ability to continue in business. I consider the condition of the brakes on the No. 2 Euclid, to have presented a serious hazard to the driver of the truck and to pedestrian traffic throughout the mine area. Gadway's testimony that he had seen pedestrian traffic on the haul road, in the pit area, and in the stockpile area--areas in which the subject haul truck would be traveling--is undisputed. There was accordingly an imminent danger of death or serious injury presented. I also find the operator to have been negligent in allowing this condition to exist. The credible evidence reveals that the operator did not even test the brake function on this truck before allowing it to operate on that particular shift even though it knew that its Euclid haul trucks had a history of having bad brakes. Under the circumstances, a penalty of $600 is appropriate.

ORDER

Wherefore, Concrete Materials is ORDERED to pay a penalty of $600 within 30 days of this order.

Gary Melick
Administrative Law Judge