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SOL (MSHA) V. TACEY TRANSPORT CORP.
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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 Proceedings Docket No. YORK 80-68-M A.C. No. 27-00233-05001
v.	Docket No. YORK 80-72-M A.C. No. 27-00233-05002
TACEY TRANSPORT CORPORATION, A.K.A. TACEY TRANS. CORP. RESPONDENT	Tacey Pit and Plant

DECISION

Appearances: Frederick E. Dashiell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner Larry Trebino, Billerica, Massachusetts, for Respondent

Before: Judge Melick

These consolidated cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." A hearing on the merits was held in Manchaster, New Hampshire, on September 30, 1980, following which I issued a bench decision. That decision which appears below with only nonsubstantive corrections is affirmed as my final decision at this time.

The general issue in these cases is whether the Tacey Transport Corporation (Tacey) has violated the provisions of the Mine Safety Act and its implementing regulations as charged in the citations before me and, if so, what are the appropriate civil penalties that should be assessed.

In Docket No. YORK 80-72-M, there are two citations both charging violations of the standard at 30 C.F.R. 56.14-1. That particular standard reads as follows:

> Gears; sprockets; chains; drive, head, tail and take-up pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts, which may be contacted by persons and which may cause injury to persons, shall be guarded.

Citation No. 208691 charges that the Caterpillar Model No. 3304 S/N 2B-7016 Diesel Power Plant, V-belt drive pulley and flywheel were not adequately guarded on the work platform side. Citation No. 208692 charges that an adequate guard was not provided forthe flat belt drive flywheel on the Telsmith crusher.

I find that the violations have been proven as charged. The testimony of the inspector in essential respects has not been contradicted and I find it to be credible.

At his inspection on September 20, 1979, MSHA inspector Donald Fowler saw the flat belt drive flywheel operating without protection. The access ladder to the upper part of the plant passed within 1 foot of the flywheel. It was necessary to use this ladder to start and stop the plant. The flywheel itself was 4 feet in diameter and was constructed with spokes. A person slipping on the ladder could receive serious injuries if his leg or arm passed into the flywheel spokes. There was also danger to employees working on the platform within 6 inches of the flywheel. At least half of the diameter of the flywheel was exposed at this point.

The issue of negligence is not at all clear. While the inspector thought that the condition should have been known to the operator because it was in "plain view" the testimony of Mr. Trebino; President of Tacey, indicates that the equipment was already partially guarded. While I do not agree that those guards were sufficient I find that the operator could have reasonably believed that his guarding was in compliance. I also note that this was the first MSHA inspection of this operator. I have been apprised that MSHA will now, under todays practice, provide a one-time first inspection to point out potential hazards and violations to the operator without citing or penalizing those conditions. This operator was not afforded that opportunity and I have therefore considered this in determining the amount of penalty.

With respect to the violation alleged in Citation No. 208691, again, in essential respects the inspector's testimony is uncontradicted. He found that the drive pulley (the multi V-belt pulley from which power is transmitted to the plant) was exposed to people traveling across the work access platform. The drive pulley pinch points were approximately 2 feet away from and 18 inches above the platform. I find that an employee could slip into the pinch points, particularly when stepping over the transmission area to gain access to the transmission lever. At this point the lever is only 14 inches from the pinch point possibly placing the employee only 6 to 8 inches away. The

danger is, of course, that an arm or foot could slip into that pinchpoint thereby causing loss or crushing of a limb. The inspector thought the operator should have seen the hazard. However for the reasons stated with respect to the previous violation, I also find reduced negligence here.

Citation No. 208696 in Docket No. YORK 80-68-M charges that the 966-C Caterpillar S/N 766J4201 front-end loader was operating on ramps and elevated haulage roads without adequate brakes. Inspection revealed that the left rear brake "can" had been removed and the brake lines blocked off with a plug. The machine operator admitted that it had been in this condition for approximately 2 weeks.

The cited standard, 30 C.F.R. 56.9-3, requires that powered mobile equipment be provided with adequate brakes. The violation is indeed conceded by the operator. The cited condition presented essentially three possibilities for serious or even fatal injuries. The front-end loader could lose control and turn over, could run into a truck, or could run into pedestrians walking near the trucks being loaded.

There is no question but that there was a high degree of negligence here. It took an affirmative act on the part of the operator, or someone acting on his behalf, to insert the plug in the brake line. Clearly, also, there was gross negligence on the part of Mr. Vailloncourt, the foreman, who admitted he had the replacement brake "can" in his pick-up truck for some 2 to 3 weeks. He nevertheless did not bother to make the repairs and continued to operate the machine knowing of its serious defect. Vailloncourt's negligent acts as foreman are chargeable to the operator.

It is conceded by the Government that the cited guarding conditions were corrected within the time set for abatement. I therefore consider that the operator demonstrated good faith in those two cases in attempting to achieve rapid compliance after notification of the violation. With respect to the brake condition, a great deal of testimony was produced from the Government regarding an exchange between Trebino and Vailloncourt and between Trebino and the inspector regarding Trebino's ostensible reluctance to have the equipment removed from service. Once the equipment was subject to a withdrawal order and after Inspector Fowler explained the effect of the withdrawal order, however, I believe that Mr. Trebino did in fact exercise appropriate good faith abatement in that the equipment was withdrawn from service and was repaired.

There is no evidence that any penalties I would assess in these cases would affect the operator's ability to continue in business. Although Mr. Trebino claims that

he is essentially

out of this mining business he nevertheless concedes that Tacey is a viable concern and that it has some material in stockpile in the area of the cited plant. He concedes that given the opportunity for a sale it would be removed. He has submitted no evidence of what financial impact any penalties in these cases might have upon the ability of Tacey to continue in business. The size of the business is concededly small and I assume that it has not increased in size since the facts that we have available were obtained. Since this plant had not been inspected before, there is of course no history of violations.

Considering all of these factors, I feel that the following penalties are appropriate. Going first of all to the citations in Docket No. YORK 80-72-M, I feel that a reduction from the penalty as originally assessed in this case would be appropriate in light of the findings that I have made regarding reduced negligence. Therefore, I would assess a penalty of $20 as to Citation No. 208691, and $20 as to Citation No. 208692. In Docket No. YORK 80-68-M I found the one violation cited to be a major hazard and involved gross negligence, I find that a penalty of $200 is appropriate.

ORDER

Wherefore the operator is ORDERED to pay a penalty of $245 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge