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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. LAKE 80-82-M A.O. No. 12-01389-05003
v.	
EVANSVILLE MATERIALS, INC., RESPONDENT	Rockport Plant

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Philip E. Balcomb, for Respondent

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard at Evansville, Indiana. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Evansville Materials, Inc., operated a plant known as the Rockport Plant in Spencer County, Indiana, which produced sand, gravel, and limestone for sales in or substantially affecting interstate commerce.

2. Respondent was engaged in dredging material from the Ohio River and transporting it to its Rockport Plant alongside the river on barges. Conveyor belts carried the material from the shoreline of the river to the plant, where the material was classified, washed, and stockpiled for sales. There were about six belts at the plant, which varied in length from 20 feet to several hundred feet and traveled at a walking pace. The belts were waist-high; however, at the belt direction change points, the belts passed overhead.

3. A belt operator traveled the walkways beside the conveyor belts to check the flow of material. Dust, sand and gravel particles could be blown off the belt by a gust of wind and enter the operator's eyes. However, the material was dredged from the river and was usually wet, so that it was not easily blown off the belts. At times, particles of sand and gravel fell from the belts that passed overhead or around the tail pulley and, if caught by the wind, these could irritate or injure the eyes. Eye injuries were a potential risk, but not actually realized by experience. The preponderance of the evidence established that the employees' hardhats with a brim protected them from falling sand and gravel particles so that the potential risk was wind-blown particles that might enter an employee's eyes. This risk does not appear to have been more severe than the risk of eye injury on an ocean beach that could result from sand being blown into someone's eyes by a sudden gust of wind.

4. In and around the plant, Respondent required its employees to wear hardhats and impact-resistant glasses. As mentioned, the hardhats came with a brim that would protect against injuries to the head, eyes and face from falling objects. The required safety glasses were constructed of impact-resistant lenses to prevent eye injuries from direct impact but they were not equipped with shields to prevent eye injuries from particles entering around the lenses (although some employees wore glasses with side shields).

5. Respondent had difficulty enforcing its safety eyeglass requirement because employees often complained that foreign particles collected on the front of the lenses and became trapped behind the lenses, interfering with vision.

6. On August 7, 1979, federal inspector Jerry Spruell, accompanied by Arnold Mulzer, Jr., one of Respondent's superintendents, inspected the Rockport Plant. The inspector was wearing impact-resistant glasses without peripheral shields. The inspector observed the plant operator, Steve Davis, leaving and entering the control room and traveling underneath belts, on walkways across belts, and past tail pulleys. The belts were transporting sand. The operator was not wearing glasses and Respondent did not have a pair of glasses for him to wear. Other employees were wearing glasses, which Inspector Spruell believed to be impact-resistant glasses, but he was not sure of this. The glasses worn by the inspector and most employees looked very much like ordinary framed eyeglasses, and could not readily be distinguished as having impact-resistant lenses.

7. During the inspection, there was a slight breeze and some loose material was falling or blowing from the belts. On several occasions, the inspector had to wipe sand from his eyes. This caused a slight eye irritation, but not an eye injury.

8. On August 7, 1979, Inspector Spruell issued Citation No. 367445 to Respondent, reading in part: "The plant operator was

observed working around

the tail pulley of the direction switching station without safety glasses. He had to pass under other conveyors during his work shift. Sand being conveyed was noted falling from these areas." The cited condition was deemed to be abated on August 21, 1979, by providing impact-resistant glasses to all employees; the glasses did not have peripheral shields.

9. At the hearing, the inspector testified that there was an additional danger of frayed belt pieces striking the eyes, but such a danger was not proved by a preponderance of the evidence.

The Citation Concerning Brakes

10. Sized stone, sand, and gravel from the stockpiled areas were dumped into customers' trucks with 980-B front-end loaders. The brakes on the loaders consisted of (1) an air-activated service (regular) braking system that operated by depressing either of two brake pedals and (2) a spring-activated emergency braking system that activated automatically when air pressure dropped below 70 p.s.i. or when a dash-mounted emergency parking brake control valve was manually pushed. There were two brake pedals that activated the service brakes. The left brake pedal would also neutralize the transmission.

11. When the engine was running, an air compressor attached to the engine distributed a continuous supply of compressed air to six brake chambers. There were four chambers on the front of the loader and two slightly larger chambers on the rear of the loader. More braking power was required for the front of the loader because it carried more weight when the bucket was loaded.

12. Each brake chamber contained a service brake cylinder and an emergency brake cylinder. The service brake cylinder contained a rod assembly, a diaphragm and a diaphragm return spring. When either brake pedal was depressed, compressed air entered the service brake chamber and forced the diaphragm and rod assembly outward to apply the brakes. About 75 p.s.i. was required to compress the diaphragm return spring. The emergency brake cylinder contained a piston and a spring. When air pressure fell below 70 p.s.i., a buzzer would sound and a light would flash in the operator's compartment and the brakes would automatically lock by the springs releasing to push the pistons against the brakes. When the emergency system was activated, the machine would stop in 2 to 3 seconds.

13. When either the service brakes or the emergency brakes were applied, the push rod in the air chamber extended and forced the slack adjustor to rotate a camshaft, which forced two brake shoes outward against the brake drum.

14. The manufacturer established a safe range of air pressure (the green area on the air pressure gauge) of 77 to 122 p.s.i. and an unsafe range (the red range on the air pressure gauge) of air pressure below 70 p.s.i. When air pressure was in the safe range, the pistons in the brake chambers were

retracted and the emergency springs remained compressed. When air pressure entered the unsafe range or when the parking brake was activated, the springs would force the pistons to activate the emergency brakes.

15. The service and emergency braking systems operated independently so that a problem affecting one of the braking systems would not prevent the other from operating. In normal operation, when the service brakes were released, adequate air pressure was maintained in the emergency braking system so that the springs remained compressed. When the engine was turned on, the air compressor charged the air reservoir and air pressure would gradually build. If either brake pedal was depressed before the parking brakes were released, a double check valve would prevent simultaneous application of both braking systems. Once the emergency brakes were released, compressed air would enter the brake chambers to keep the emergency brakes released and to operate the service brake portion of the system.

16. The air pressure on the diaphragms varied according to how far the brake pedal was pushed down. The farther down the pedal was pushed, the farther the air valve would open and the more pressure would be applied. Normally, the brake pedal was pressed only far enough to activate the brakes.

17. The emergency system could be tested by pressing the brakes repeatedly to bleed the system of air. The pressure gauge would then fall into the red range and the emergency springs would force the brakes to apply, if the emergency system operated properly.

18. On August 7, 1979, at about 3 p.m., Inspector Spruell approached the loader while it was dumping material into a truck. When he was about 20 feet from the loader, the operator applied the brakes and the inspector heard a hissing noise, which he believed to be the sound of escaping air. Normally, when the brakes were applied there would be a rush of air that lasted about 1 second, accompanied by an air pressure loss of between 5 and 10 p.s.i. as air was distributed to the activators. When the service brakes were applied with the engine off, the drop in air pressure would be greater because the air compressor would not be resupplying the air reservoir. The inspector noticed that the sound of escaping air continued as long as the brakes were applied.

19. The inspector climbed on the loader and asked the operator to apply the service brakes again so that he could observe the air pressure gauge. When the operator applied the brakes, the inspector observed a drop in air pressure. The gauge decreased slightly, but it did not enter the unsafe range. The inspector then told the operator to turn off the motor and apply the brakes. When the brakes were applied, the inspector heard the sound of continuously escaping air and the gauge continued to drop without stopping. With the engine turned off, the mechanic, Stanley Dickinson, and the inspector crawled under the loader and the inspector observed loose connections at the hoses leading to

the left rear activator and at the directional valve at the front of the loader, and he observed what he believed to be a leak near the slack adjuster on the left rear brake. He made these observations with the

engine off, by having the operator apply the brakes. The mechanic was able to tighten the loose connections with a wrench; however, the left rear brake cylinder, which the inspector thought to be defective, could not be replaced until the following morning.

20. The loader normally traveled over smooth terrain and a few small inclines. It had a maximum speed of 15 mph; however, it rarely traveled that fast. The surface at the plant site consisted of loose gravel. The inspector did not require the operator to check the capability of the brakes on an incline because he believed that it would be unsafe to do so. Instead, the machine was tested on level ground. The operator traveled 5 to 7 mph, applied the brakes, and the brakes worked. The inspector observed no erratic motion and heard no squeaks; however, he did hear the sound of escaping air.

21. On the morning of August 7, before the loader was placed in operation, the mechanic had told the operator that there was a leak on the loader.

22. On August 7, 1979, Inspector Spruell issued Citation No. 367447 to Respondent, reading in part: "The left rear brake on the Cat. 980 loader had an air leak. The air seemed to be coming past the slack adjuster rod." On August 21, 1979, the cited condition was found to have been abated.

23. The inspector believed that the brakes had an air leak that created a possibility of the machine jerking back and forth and acting erratically if the brakes were applied suddenly. The inspector believed that an accident could occur if the operator had to stop suddenly in an emergency or if the brakes were applied while the loader was on an incline. He also believed that the reliability of the emergency braking system was affected by the air leak.

24. The inspector concluded that Respondent knew or should have known of the leak because the mechanic told the loader operator that morning that there was an air leak and the inspector heard the sound of hissing air.

25. Respondent's employees were provided with a copy of rules for the safe operation of front-end loaders. Safety meetings were also held. The rules required that the machines not be operated unless all safety devices were fully operable and all parts were in safe condition. Before moving a loader at the start of a shift, the operator was supposed to check the air pressure by starting the engine and applying the brakes.

26. Regular inspections of the loaders were conducted before they were placed in operation and extra checks would be made of parts that needed frequent replacement. The loaders were not taken into the shop unless a part needed repair or replacement; parts that required frequent replacement were watched closely. A company safety procedure required that the operator fill out a check-list before the loader was used. The

check-list included starting the engine, testing the brakes, observing the air pressure gauge and listening for air leaks.

27. Diaphragms usually required replacement about once every 9 months. If a diaphragm was damaged, a hissing sound would be noticed and it would gradually grow worse. A small hole in the diaphragm might not be apparent to the operator until it became larger and the hissing noise grew louder. With a substantial leak, the hissing sound could be heard above the noise of the loader when the brakes were applied. Normally, the only way to detect a small air leak was to listen; however, if the leak was large, the air pressure gauge would bleed down. The operating manual required that all leaks, even if small, be sealed immediately.

28. James Rhodes, a superintendent at the Rockport Plant, was not at the plant when the citation was issued on August 7. On his return to the plant the following day, he picked up a new brake chamber to install on the loader. On August 8, 1979, he operated the loader and applied the brakes; however, he did not hear any leaks and the brakes operated satisfactorily. With the help of William Goffinet, a master mechanic, he removed the brake chamber on the left rear wheel, installed the new chamber and disassembled the old chamber at the shop. He tested the old chamber in the shop by applying air; however, he was unable to find a leak in the cylinder. Rhodes then reassembled the cylinder and replaced the new cylinder with the old one and ran the loader again for about 2 hours. He observed no leaks and he experienced no problems with the brakes.

DISCUSSION WITH FURTHER FINDINGS

The Citation Concerning Safety Glasses

Based on the citation issued on August 7, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. 56.15-4, which provides: "All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

The Secretary argues that persons around the belt conveyors were subject to a hazard of eye injury from falling or blowing sand and gravel and from frayed pieces of belt.

The Secretary proposes a penalty of $28.

Respondent's first defense is that the citation issued by Inspector Spruell is defective because it fails to list with particularity all the potential hazards of not wearing protective eye glasses. Respondent contends that the citation refers only to the hazard of falling sand; however, at the hearing, the inspector testified that the plant operator was also in danger of eye injuries from frayed pieces of conveyor belt. Respondent contends that it was prejudiced at the hearing because, had this hazard been alleged in the citation, "respondent would have been prepared to conclusively show by very substantial and provable evidence that there was no potential for any kind of injury from such sources, much less to eyes."

This defense is rejected. The Act requires only that the nature of the violation be described with particularity. Section 104(a) of the Act requires that each citation "shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." The Act does not require that the inspector list every possible hazard that the standard was designed to prevent. I find that the Secretary was not estopped from trying to show at the hearing the hazards and their potential for occurrence, even though they were not included in the citation. Furthermore, Respondent could have found through discovery procedures the hazards that the Secretary was going to try to prove at the hearing.

Respondent next argues that the Secretary failed to prove by a preponderance of the evidence that pieces of torn conveyor belts created a hazard of striking the eyes of employees. Respondent contends that a belt has never torn or snapped as alleged by the Secretary and that no employee has ever been injured by the whipping action of a piece of torn belt. I find that the Secretary failed to prove by a preponderance of the evidence that a hazard of eye injury from a torn belt existed so as to require protective glasses.

Respondent also argues that no hazard relevant to the safety glasses required by the inspector existed at the Rockport Plant. Respondent contends that a preponderance of the evidence established that the purpose of wearing impact-resistant glasses was to prevent injuries from direct or frontal impact and that small particles of sand and gravel blowing or falling from the conveyor belts did not present such a hazard as to require impact-resistant glasses. Respondent argues that its employees were protected from falling objects, including sand, by wearing hardhats with a brim.

A mandatory safety standard must be clearly worded and fairly administered so that a reasonably prudent operator can understand and follow it. The operator should not be subjected to varying and inconsistent interpretations based on the subjective understanding of different inspectors. Clear wording and consistent application of the standard are required to avoid unfairness to the mine operator. The Supreme Court has held that the rule-making procedures in the Administrative Procedure Act were designed to insure fairness and should not be supplanted by ad hoc adjudicatory proceedings. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969).

In Connally v. General Construction Co., 269 U.S. 385, 391 (1925), the Supreme Court said: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." This fundamental principle also applies to industrial and commercial safety standards that can result in the imposition of civil penalties for their violation. See also: Brennan v. OSHRC, 505 F.2d 869, 872 (10th Cir. 1974); Diebold,

Inc. v. Marshall, 585 F.2d 1327, 1335-1336 (6th Cir. 1978); Longview Refining Co. v. Shore, 554 F.2d 1006, 1114 (Temp. Emer. Ct. App. 1977), cert. denied, 434 U.S. 836 (1977). In Diebold, Inc., the court said:

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> Among the myriad applications of the due process clause is the fundamental principle that statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid. In our jurisprudence, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). The principle applies with special force to statutes which regulate in the area of First Amendment rights, but the due process requirement of fundamental fairness is hardly limited to that context. Even a regulation which governs purely economic or commercial activities, if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those whose activities are governed.

585 F.2d at 1335-1336.

In determining whether a safety standard satisfies the principles of due process, the regulation must be examined "in light of the conduct to which it is applied" (Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 732 (6th Cir. 1980); United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963)) and must meet the test of "delineat[ing] its reach in words of common understanding" (Cameron v. Johnson, 390 U.S. 611, 616 (1968)).

The cited standard requires that "safety glasses, goggles or face shields or other suitable devices" be worn by employees in an area of a plant "where a hazard exists which could cause injury to unprotected eyes."

Neither this Commission nor the courts have decided whether this standard meets the notice requirements of due process. (FN.1) However, the courts have

considered several OSHA safety standards that are similar in language, scope, and purpose to the cited standard by requiring the use of personal protective equipment "wherever it is necessary" or "where there is an exposure to hazardous conditions * * *." (FN.2) In considering these general personal protection standards, a majority of the circuit courts have applied an objective "reasonableness" test of whether a reasonably prudent person familiar with the circumstances of the industry would have protected against the hazard. Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); American Airlines, Inc. v. Secretary of Labor, 578 F.2d 38, 41 (2nd Cir. 1978); Voegele Co. v. OSHRC, 625 F.2d 1075, 1079 (3rd Cir. 1980); Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 723 (4th Cir. 1979); Ray Evers Welding Co. v. OSHRC, supra, 625 F.2d at 731-732; Arkansas-Best Freight Systems, Inc. v. OSHRC, 529 F.2d 649, 655 (8th Cir. 1976); Brennan v. Smoke-Craft, Inc., 530 F.2d 843, 845 (9th Cir. 1976). The First Circuit explained that "knowledge of the existence of a hazardous situation must be determined in light of the common experience of an industry, but that the extent of precautions to take against a known hazard is that which a conscientious safety expert would take." General Dynamics v. OSHRC, 599 F.2d 453, 464 (1st Cir. 1979).

The Fifth Circuit, by contrast, has linked the reasonableness standard to the custom and practice of the industry. In Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974), the court said that the general industry safety standard was not unconstitutionally vague as long as it "affords a reasonable warning of the proscribed conduct in light of common understanding and practices." 497 F.2d at 233; United States v. Petrillo, 332 U.S. 1, 4 (1947).

In B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1372 (5th Cir. 1978), which involved a citation for failure of an employee to wear a safety belt, the Fifth Circuit held that a reasonable insulation industry employer would not have required the use of safety belts under the circumstances and that the company did all that was required of it. The court found that only one of 11 witnesses, the OSHA compliance officer, testified that safety belts would have been appropriate under the circumstances and the Secretary of Labor introduced no evidence of industry custom. Ibid. The court said that the Occupational Safety and Health Review Commission's conclusion that industry custom required the use of safety belts under the circumstances was inaccurate because it was based entirely upon the opinion of people employed by the Government without considering the evidence of the people in the industry.

583 F.2d at 1370. See also, Cotter & Company v. OSHRC, 598 F.2d 911 (5th Cir. 1979); Power Plant Division, Brown & Root, Inc. v. OSHRC, 590 F.2d 1363 (5th Cir. 1979).

The other circuits have not followed the Fifth Circuit in limiting the reasonableness standard to the custom and practice of the industry because, as the First Circuit explained, an industry practice standard "would allow an entire industry to avoid liability by maintaining inadequate safety training." General Dynamics, supra, 599 F.2d at 464, accord, Voegele Co., supra, 625 F.2d at 1078. The Sixth Circuit said that industry standards and customs should not be determinative of reasonableness "because there may be instances where a whole industry has been negligent in providing safety equipment for its employees." Ray Evers Welding, supra, 625 F.2d at 732.

In MSHA v. Atlantic Cement Co., YORK 79-10-M, 2 FMSHRC Decs. 2910 (October 10, 1980), Commission Judge Melick considered a vagueness charge in a civil penalty proceeding involving an alleged violation of a mandatory safety standard. He found that the safety standard (30 C.F.R. 56-9.2) was similar to the personal protective equipment standards considered by the Fourth Circuit in McLean Trucking Company v. OSHRC, 503 F.2d 8 (4th Cir. 1974), and the Fifth Circuit in Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974). Judge Melick said:

> The regulatory standard cited herein is similar * * * in that "the regulation appears to have been drafted with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury." Also just as in the case of those standards, inherent in the standard at bar "is an external and objective test, namely, whether or not a reasonable person would recognized [the cited hazard]." McLean, supra at p. 10. The "reasonable person" has recently been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable." General Dynamics v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

I conclude that the wording of the cited standard meets the notice requirements of due process as prescribed in the above cases. However, I conclude that the inspector's application of the standard was arbitrary and unreasonable in this case, and that it would be a denial of due process to hold this operator liable for failing to provide the safety glasses required by the inspector.

Neither the wording of the standard nor the facts of this case would cause a reasonably prudent operator to conclude that the law required unshielded impact-resistant lenses to protect the eyes from falling or wind-blown sand or gravel particles. The glasses worn by the inspector, and accepted by him as compliance with the standard, would not prevent falling and wind-blown sand and gravel from entering the eyes from around the top, bottom, and sides of the glasses. Wrap-around goggles,

safety glasses with

peripheral shields, or face shields would have offered better protection from the dangers of falling and wind-blown sand and gravel particles, but none of these was put in issue either by the inspector's discussion with the operator or by the citation he issued. The inspector believed that wearing safety glasses without peripheral shields would protect a person's eyes from windblown sand and gravel particles. However, even though the inspector was wearing such glasses, he had to wipe particles of sand from his eyes on several occasions.

The evidence shows that the inspector construed "safety glasses" to include the kind he was wearing, i.e., impact-resistant lenses without peripheral shields. However, such glasses have not been shown to be "suitable" to protect against the hazard assumed by the inspector and Respondent is not charged with failing to provide other types of protective devices. The citation alleges a failure to provide "safety glasses" and does not say "goggles, or face shields or other suitable protective devices." Respondent cannot be held liable for failing to provide unsuitable devices even though an inspector may find them to be suitable.

In summary, I conclude that, under the wording of the standard and the facts of this case, it is arbitrary and unreasonable for the Government to charge a safety violation for failing to provide impact-resistant safety glasses such as those worn by the inspector. Whether a different kind of protection, such as safety glasses with peripheral shields, wrap-around goggles, or face shields could and should be required to protect against sand and gravel particles at Respondent's plant has not been put in issue by the Government and is not decided here.

The Citation Concerning Brakes

Based on the citation issued on August 7, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. 56.9-2, which provides: "Equipment defects affecting safety shall be corrected before the equipment is used." The basic issue as to this charge is whether there was a leak in the braking system that affected the safe operation of the front-end loader.

The Secretary argues that a preponderance of the evidence shows there were leaks in the braking system of the front-end loader; that these leaks affected the safe operation of the loader; and that Respondent knew or should have known of the leaks before placing the machine in operation. The inspector testified that he could hear the sound of escaping air, that he observed loose hose fittings on the loader, and that the mechanic had told the operator on the morning of the inspection that there was an air leak. The inspector also observed what he assumed to be a leak near the slack adjuster on the left rear brake.

The Secretary proposes a penalty of $64.

Respondent argues that the Secretary failed to prove, by a

preponderance of the evidence, that there was any air leak that affected the safety of the

loader. Respondent contends that the sound of escaping air heard by Inspector Spruell did not amount to a defect. Respondent argues that the air pressure gauge did not drop into the unsafe range and that the operation of the loader's brakes was not affected by the air leak. Superintendent Rhodes testified that after the citation he tested the brakes and found them to operate satisfactorily. He removed the brake cylinder and examined it at the shop and discovered no holes or other defects. He also testified that the loader was examined by the operator before being placed in operation, as required by the company's rules, and that no brake problems were discovered.

Respondent also contends that the alleged hazards of the loader jerking and swerving were unsupported by the record. The master mechanic, Mr. Goffinet, testified that the level of air pressure was distributed evenly to all six chambers and that, if pressure dropped below 70 p.s.i., the emergency system would activate evenly on all the wheels. He said that the two braking systems operated independently of each other and that a defect in one would not affect the reliability of the other. He said that a hole in one of the brake chambers might slow the operation of the service brakes; however, it would not affect the emergency system and would not cause the machine to jerk or swerve if the brakes were applied suddenly in an emergency.

To prove a violation of the cited standard, the Secretary must show the presence of a defect that affected the safety of the machine. I find that an audible hissing lasting more than one or two seconds when the brakes were applied indicated an abnormal condition in the loader's braking system so as to require further investigation before placing the machine in operation.

The manufacturer's service manual required that all leaks, even small ones, be sealed immediately to avoid rupturing a diaphragm. A damaged diaphragm would produce a hissing noise during operation and, if left unattended, it could gradually grow worse or rupture and cause the emergency braking system to activate. If the emergency braking system activated unexpectedly, its stopping of the vehicle in 2 to 3 seconds could cause the operator to lurch forward and injure himself on the dash or steering wheel, cause a whiplash injury, or distract the operator so as to cause an accident involving another person, vehicle, or object.

On the morning of the inspection, the mechanic warned the operator of a leak in one of the brake cylinders. Inspector Spruell testified that a hissing sound, which he could hear about 20 feet from the loader while it was in operation, caused him to suspect the presence of an air leak in the braking system. He testified that the air pressure gauge dropped slightly when the brakes were applied and that he found two loose hose connections under the loader, which were repaired immediately, and that the audible hissing continued even after the loose fittings were tightened. I credit this testimony as to what he observed and heard.

I conclude that it was a violation to operate the vehicle with the hissing sound found by the inspector, and that under the mandatory safety standard

Respondent had a duty to detect, examine, and correct the source of the hissing sound before allowing the machine to be put in service. However, considering the evidence that the brakes were effectively stopping the vehicle at the time of the inspection and that the emergency braking system provided independent protection, I find that the violation involved a low gravity of risk to the vehicle operator.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceeding.

2. Petitioner did not meet his burden of proving a violation as alleged in Citation No. 367445.

3. Respondent violated 30 C.F.R. 56.9-2 by failing to repair an air leak on the left rear brake of the front-end loader as alleged in Citation No. 367447. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of $64.00 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Evansville Materials, Inc. shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $64.00, within 30 days from the date of this decision.

WILLIAM FAUVER JUDGE

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~FOOTNOTE_ONE

1 The cited standard, which was promulgated by MSHA under its rulemaking authority, can be contrasted with a similar rule, which was promulgated by the Occupational Safety and Health Administration (OSHA) to prevent eye injuries. Section 1910.133(a)(1) of OSHA's regulations, Title 29, Code of Federal Regulations, provides that protective eye and face equipment shall be required "where there is a reasonable probability of injury that can be prevented by such equipment." Section 1910.133(a)(1) specifically requires that eye protection be provided "where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards." Subsection (a)(2) requires that eye protectors provide adequate protection against the particular hazards for which they were designed. Subsection (a)(b) further requires that "design, construction, testing, and use of devices for eye and face protection" meet the standards of the American National Standard for Occupational and Educational Eye and Face Protection, Z87-1 1968 (ANSI).

~FOOTNOTE_TWO

2 Section 1910.132(a) of OSHA's regulations, Title 29, Code of Federal Regulations, is a general industry standard that

requires the use of personal protective equipment "wherever it is necessary by reason of hazards or processes or environment * * * encountered in a manner capable of causing injury * * * through physical contact." Section 1926.28(a) is a general standard that requires "the wearing of appropriate protective equipment in all operations where there is an exposure to hazardous conditions * * *."