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SOL (MSHA) v. JET ASPHALT & ROCK
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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. CENT 79-6-M ASSESSMENT NO. 03-00401-05002
v.	
JET ASPHALT AND ROCK COMPANY, INC., RESPONDENT	DOCKET NO. DENV 79-505-PM ASSESSMENT NO. 03-00401-05001 MINE: Hampton Pit and Plant

DECISION

Appearances: Bobbie J. Gannaway, Esq., Office of the Solicitor United States Department of Labor, Dallas, Texas, for the Petitioner;
Don Dodson, Esq., El Dorado, Arkansas, for the Respondent.

Before: Judge John J. Morris

Pursuant to notice, the above cases were called for a hearing on the merits on January 13, 1981 in Little Rock, Arkansas. After the completion of the evidentiary hearing and after the parties waived closing arguments and the filing of post trial briefs, I rendered a bench decision. After receipt of the transcript an order was entered correcting minor errors in the bench decision. The decision, as amended, is as follows:

JURISDICTION

The parties have stipulated that the Federal Mine Safety and Health Review Commission has jurisdiction to hear and determine this cause.

PRELIMINARY ISSUES

Two preliminary issues are raised by the Respondent, and they are:

1. Lack of a search warrant and

2. Harassment of Respondent by Federal Mine Safety and Health Inspectors.

I rule both of these issues against the Respondent.

Concerning the search warrant, the facts are clear in the case that the inspector did not have a search warrant, and I find that a search warrant is not necessary under existing law. The type of operation as described here by the witnesses is a gravel operation in combination with an asphalt plant. The weight of authority in the United States holds that a warrantless inspection procedure is authorized by 30 U.S.C. 813 and that such a procedure has been upheld in several of the Circuit Court of Appeals.

These cases are Marshall vs. Sink, 614 F. 2d 37 (4th Cir. 1980); Marshall vs. Texoline Co., 612 F. 2d 935 (5th Cir. 1980); Marshall vs.Nolichuckey Sand Company, Inc., 606 F. 2d 693 (6th Cir. 1979), cert. denied, ___U.S. ___, 100 S. Ct. 1835, 64 L. Ed. 2d 261 (1980); Marshall vs. Stoudt's Ferry Preparation Company, 602 F. 2d 589 (3rd Cir. 1979), cert. denied, 444 U.S. 1815, 100 S. Ct. 664, 62 L. Ed. 2d 644 (1980); also, Marshall vs. Cedar Lake Sand and Gravel Company, 480 F. Supp. 171 (E.D. Wis. 1979); Marshall vs. Donofrio, 465 F. Supp 838 (E.D. Pa. 1978), aff'd without opinion, 605 F. 2d 1196 (3rd Cir. 1979), cert. denied, ___U.S. ___, 100 S. Ct. 1067, 62 L. Ed, 2d 787 (1980); cf., Youghiogheny and Ohio Coal Company vs. Morton, 364 F. Supp. 45 (S.D. Ohio 1973). These decisions have generally examined the 1977 Federal Mine Safety and Health Act under the standards established for judging the constitutionality of warrantless administrative inspections which are set forth in the Supreme Court decision of Marshall vs. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978).

A contrary view that would support the Respondent's claim that a warrant is required is set forth in the case of Marshall vs. Wait, 628 F. 2d 1255, which was a case decided by the 9th Circuit Court of Appeals in 1980; in fact, September 29, 1980. I have carefully read the Wait Case and, to me, it holds that an operation involving the husband and wife, or a very small operation, is not within the terms of a pervasively regulated industry and, therefore, a search warrant is required. I distinguish Marshall vs. Wait from this case and, as the parties know, we're not in the 9th Circuit, but we're in the 8th United States Circuit, or the United States Court of Appeals, and to my knowledge they have not ruled on this issue. It may well be that this will be the case that will possibly decide the case for the 8th Circuit if it goes up on appeal. In any event, they have my opinion and the facts before them that the inspector did not have a search warrant and they'll have a full record upon which to decide the issue.

The second preliminary issue raised by the Respondent is that there was an undue harassment, or an illegal harassment of the Respondent by the federal inspectors. I also rule this point against the Respondent. At best, this would be an affirmative defense because it would be particularly within the knowledge of the Respondent because he might well be doing business with different inspectors at different plants. The best that the uncontroverted evidence shows is that inspectors do come to inspect these plants and they contact the superintendent, and

they proceed and inspect the plants and sometimes as much as a full day is involved in these inspections. Each time,

some inspectors do find something different and, naturally, business can be disrupted by these inspections. While I find that this is certainly an inconvenience to a business and to the Respondent particularly, I do not find that this constitutes, under law, an harassment of an operator that is subject to the Act. Further, the evidence fails to establish that the inspections by the Federal Mine Safety and Health Administration have been excessive in view of the fact that they are charged, by the Congress, with making certain annual inspections as the inspector testified to in this case.

For these reasons I rule both of these preliminary issues against the Respondent.

Case No. CENT 79-6-M alleges a violation of several regulations.

ISSUES

The issues are did these violations occur and if they did occur, what penalties, if any, are appropriate.

Citation 162903. This citation alleges a violation of 30 CFR 56.11-1. The initials, the "CFR", of course, stand for the Code of Federal Regulations which is a publication published, in part, on behalf of the United States Government. The citation of 30 CFR 56.11-1 provides as follows:

> Mandatory. Safe means of access shall be provided and maintained to all working places.

I find from the uncontroverted evidence that there existed on this work site a rusted and deteriorated piece of pipe. The pipe was currently one of six braces that holds a crusher and a shaker, or did at one time. Of preliminary importance is the fact that I do not find that this pipe held anything or, by itself, provided any means of access to anything. It was merely on the work site and not in use. The way I read the regulation, anything unsafe must necessarily involve a means of access because this was the very term used in the standard. In view of the fact that there was no means of access involved, I consider that there's no violation of the standard. Accordingly, Citation 162903 should be vacated, together with all proposed civil penalties.

Citation 164032. This citation alleges a violation of 30 CFR 56.14-1 which involves a drive shaft on the pump as described by the witnesses in the evidence. The standard itself provides as follows:

> Mandatory. Gears; sprockets; chains; drive, head, tail, and take-up pulleys; fly wheels; 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.

I find from the facts here that there were in fact unguarded tail pulleys and, as the compliance officer testified, there were workers in the area. Based on this, I find that the government has made a prima facie case, but I'm more persuaded by the Respondent's evidence testified to by its superintendent and foreman with their more detailed explanation of the position of the workers in relation to the exposed equipment; particularly, the workers are some, in one instance, 3 to 3-1/2 feet away from the exposed belt. Also, the witness testified that if a man is working on the equipment itself, the pump is shut down while that work is carried on. In short, I find a lack of employee exposure to the hazard involved here. In a case of this type where the regulation itself provides that equipment must be guarded where it may be contacted by persons or where a person may be injured, the government has an obligation to show a general factual situation which shows that the condition that exists is generally within the regulation itself and must further show that employees, particularly workers of the Respondent, were exposed to a hazard.

Inasmuch as I find no exposure here, I intend to vacate Citation 164032, together with all proposed penalties therefor.

Citation 164033. This citation alleges the violation of 30 CFR 56.9-11. This relates to the cab windows in the equipment. The citation provides as follows:

> Mandatory. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

I find that the facts are essentially uncontroverted in this case. The cab window was, in fact, broken, and the inspector testified that the operator's vision would be impaired from the sun striking the window. He was in the equipment and made this observation. Of course, if the vision of the operator is impaired an injury could result. The Respondent does not deny this condition of the broken window nor the sun possibly impairing the operator's vision, and the standard itself provides that, and it is directed at the windows, that they shall be kept in good condition. I take it that the standard means that the broken window, in combination with the possible distortion of the operator's vision, is sufficient to constitute a violation of the regulation.

Accordingly, based on this conclusion, I intend to affirm Citation 164033 and, in view of the stipulation as to the penalties in the case as set forth at the beginning of the trial, and in view of the statutory criteria for assessing penalties as set forth in 30 U.S. Code 820(i), I deem that the penalty proposed by the Petitioner in the amount of $52.00 is appropriate.

Citation 164034 and 164044. These citations allege separate violations of 30 CFR 56.5-50. The cited regulation provides as follows:

> Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications of type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.
>
> | Duration per day, hours of exposure | Sound leveldBA, slow response |
> |---|---|
> | 8 | 90 |
> | 6 | 92 |
> | 4 | 95 |
> | 3 | 97 |
> | 2 | 100 |
> | 1-1/2 | 102 |
> | 1 | 105 |
> | 1/2 | 110 |
> | 1/4 or less | 115 |
>
> No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

> (b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels of the table

I find here from the facts that an 8-hour dosimeter test was conducted at two different places in this plant. I find that the drag line operator was exposed to an amount of 448 percent in excess of the limits permitted by the regulation, and I further find that the front-end loader operator was exposed to approximately 334 percent in excess of the permissible limits. The government, accordingly, has made a case on these issues.

The defense here, as I see it, centers on the abatement methods used, whether the equipment came properly equipped from the manufacturer, and it also touches somewhat on the use of ear plugs. None of the defenses offered in this case prevail as a legal defense. Whatever abatement methods were undertaken, whether the door reduced the noise level or not, is not relevant. Apparently, -- and I do find from the evidence -- the closure of the door on the equipment did reduce the exposure to the operator within permissible limits. However, abatement is a matter that goes to remedying a violation, and it doesn't go to the violation itself.

There's evidence here that ear plugs were used by the operator. Whether they were or were not used or whether they did or did not reduce the exposure to the operator is not a defense in the case because the way the standard reads, it provides that when there is exposure, then feasible administrative or engineering controls shall be used. Only if such controls are used and fail or if the controls are not feasible does personal protective equipment then come into the picture. That's not saying that personal protective equipment should not be used. What I'm trying to say is that the first thing to be considered is administrative or engineering controls.

In view of the fact that I find a violation of the noise standards, Citations 164034 and 164044 should be affirmed. In view of the statutory penalty provisions which the Congress set forth in 30 U.S. Code 820(i), I consider that the proposed penalty of $60 for each of the citations involving the noise violation should be affirmed.

Citation 164041 and 164042.

These citations involved violations of 30 CFR 56.14-1, which has been cited under Citation 164032.

I find from the facts that the tail pulley on the finish belt, as described by the witnesses, and the cone crusher were in fact unguarded. However, I find from the evidence that the workers have no access to these hazards. To reach the cone crusher, the worker would apparently have to lie on the ground or get on his hands and knees to reach it and, as the witness described, a worker would have to reach over to reach another pinch point. I further find that workers could not reach the pinch point during the time that they were removing any material that might be sloughed off of the tail pulley and if there is no employee exposure, then the citations should be vacated.

As previously indicated, the Petitioner must prove the facts supportive of a violation as well as employee exposure.

I've made several credibility determinations, as are apparent in this case, involving the testimony of the MSHA inspector and the testimony of the company superintendent and foreman particularly as to the unguarded equipment. I have credited the company's representatives with more knowledge of what happens on the work site than I have credited the inspector because the company representatives are there every day and they know the general status of the equipment, but, particularly, they are cognizant of what their employees do in relation to that equipment, and what they don't do. So any credibility determinations on that issue are resolved in favor of the company employees. Not that I have generally discredited the government's representation, but the company employees are there on the job, and I credited them with more knowledge of what the workers do rather than the inspector who made only a short visit to the work site.

Citations 164041 and 164042 and all proposed penalties should be vacated.

Citation 164043.

This citation alleges violation of 30 CFR 56.9-87.

The cited standard provides:

> Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

I find from the facts in this case that the equipment here moves backwards and forwards some 350 to 400 times a day and that there are workers in the

vicinity. The uncontroverted evidence further shows that this equipment had no back-up alarm.

The way I read the standard, the devices must be at least two. The standard itself says, "with audible warning devices," devices being in the plural. Inasmuch as there was no back-up alarm, it's clear, at least to me, that there is a violation of the regulation.

It's my view that Citation 164043 should be affirmed and in reviewing again the statutory criteria regarding assessment of a penalty, I deem that the proposed penalty of $44.00 is appropriate.

The defense raised in this case seems to me to pivot on the issue of whether the driver had an unobstructed view or did not have an unobstructed view to the rear. The standard does not read that way. The first part of the standard reads:

> Heavy duty, mobile equipment shall be provided with audible warning devices.

From there you get into the obstructed view issues and things of that nature.

In short, I rule that the first paragraph requires an absolute duty for equipment to have at least two audible warning devices and inasmuch as there was none, I affirm that citation.

In the case of DENV 79-505-PM.

Citation 164031 alleges a violation of 30 CFR 56.9-22. The citing standard provides as follows:

> Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

I find here that the evidence is uncontroverted. The evidence all indicates that there was a 4-foot-high -- let's call it an elevation for the moment -- some 30 feet long and used by the front-end loader. The defense pivots on certain issues, namely, whether or not this is an elevated roadway. That's one of the defenses. I find that it is since it was in use by the front-end loader.

Further defense is that a 4-foot-high roadway is insufficient to constitute a violation and I disagree. The standard itself says "elevated roadway." A 4-foot-high roadway, if the front-end loader should leave it, would certainly flip it over as well as an 8-foot high. It's just a matter of degree.

The defense is that the proposed method of abatement, namely, the hub-high berm later installed after the citation was issued, was insufficient. Of course, any method of abatement, again, does not relate to whether or not a violation

occurred. If in fact the Respondent believes the 4-foot-high berm is insufficient, then it should be raised. I consider the testimony of the inspector in this regard to again relate to the method of abatement and it would not be relevant as far as whether or not a violation did in fact occur.

In view of this conclusion, I consider the Citation 164031 should be affirmed and, in view of statutory criteria, the proposed penalty of $38.00 should be affirmed.

Based on the foregoing findings of fact, the conclusions of law enter the following:

ORDER

Case No. CENT 79-6-M

1. Citation 162903 and all penalties therefor are vacated.

2. Citation 164032 and all penalties therefor are vacated.

3. Citation 164033 is affirmed and the proposed penalty of $52.00 is affirmed.

4. Citation 164034 is affirmed and the proposed penalty of $60.00 is affirmed.

5. Citation 164041 and Citation 164042 are vacated together with all proposed penalties therefor.

6. Citation 164043 is affirmed and the proposed penalty of $44.00 is assessed.

7. Citation 164044 is affirmed and the proposed penalty of $60.00 is assessed.

Case No. DENV 79-505-PM

1. Citation 164031 is affirmed, together with the proposed civil penalty of $38.00.

(BENCH DECISION CONCLUDED)

ORDER

The foregoing bench decision, as amended, is affirmed.

John J. Morris
Administrative Law Judge