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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

v.

MASSEY SAND AND ROCK COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 80-271-M

A/O No. 04-01854-05004

MINE: Indio Sand & Rock Pit

DECISION

Appearances: Theresa Kalinski, Esq., Office of the Solicitor, United States Department of Labor, 3247 Federal Building, 300 N. Los Angeles Street, Los Angeles, California 90012, For the Petitioner
Mr. Jack Corkill, Compliance Officer, Massey Sand and Rock Company, 43850 Monroe Street, P.O. Box 1767, Indio, California 92201, For the Respondent.

Before: Judge Virgil E. Vail

I. Procedural Background

The above-captioned civil penalty proceeding was brought pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) [hereinafter referred to as "the Act"].

Pursuant to notice, a hearing on the merits was held at Indio, California on January 22, 1981. Cosme Gutierrez, federal mine inspector, appeared on behalf of the petitioner. Respondent offered the testimony of Richard P. Edens, David Holliday and Frank Pease. Neither party elected to file a post-hearing brief.

II. Findings of Fact

CITATION NO. 380866

1. On October 24, 1979, during an inspection, Coseme Gutierrez noticed that the Hough front-end loader was leaking hydraulic fluid. (Tr. 6).

2. While the front end loader was on a 4 to 5% incline, Gutierrez requested that the operator turn off the machine and test the emergency brake. The test was conducted and it was found that the brake would not hold the roll. (Tr. 6-7). Prior to the test the operator of the loader had told the inspector that the brake was not working.

3. The front end loader was approximately 16 to 19 feet high, 22 to 25 feet in length and 10 to 12 feet wide. (Tr. 6).

4. The loader had a ten yard bucket in front and was being used to load materials onto trucks or to stockpile materials. (Tr. 6 and 51).

CITATION NO. 380865

5. The respondent keeps a pile of material that is approximately 60 to 90 feet high. This material is continually being pushed into a hopper by rubber tired bulldozers. (Tr. 20).

6. The operator at the hopper sits on a work platform that is 12 feet high. (Tr. 21). His job is to use the backhoe to keep the large rocks out of the grid and to watch the plant. (Tr. 35-36).

7. Six to eight feet to the right-hand side of the operator's platform there is a control panel. (Tr. 21 and 40). The purpose of the control panel is so the operator can start and stop the conveyor belts and the feeder. (Tr. 38).

8. On October 24, 1979, the control panel had been disconnected because recent heavy rains had caused flooding. Since the control panel was in a low lying area, the wires were under water and the respondent had been forced to deenergize the control panel. (Tr. 23 and 37).

9. Since the control panel had been disconnected, the operation had to be started by another employee at the control shack, which was located approximately 1000 feet from the work platform. (Tr. 23).

10. The operator was unable to see the control shack, nor could the miner at the shack see the work platform where the operator was because there were materials stacked 30 to 50 feet high between the two locations. (Tr. 22 and 36).

11. There was a two-way radio provided so the operator and the miner at the control shack could communicate with one

another. (Tr. 36).

III. Discussion and Conclusions

CITATION NO. 380866

Citation no. 380866(FOOTNOTE.1) alleges a violation of mandatory safety standard 56.9-3 which provides that, "Powered mobile equipment shall be provided with adequate brakes."

It is uncontradicted that the emergency brake was not in good working condition. Frank Pease, the respondent's heavy equipment repair foreman, testified that after the citation was issued he was sent to work on the emergency brake. He found that the lining was off the brake shoes. (Tr. 50).

Respondent offered an operator's manual, pertaining to this piece of machinery, in order to prove that the emergency brake is only to be used to hold the machine in a stationary position after it has come to a stop. (Respondent's Exhibit 2). I do not disagree with respondent's argument, but it is of no value in deciding the issue now before us.

The test was conducted while the machine was stopped and in a stationary position. The fact is that the emergency brake was defective in that it would not stop the machine from rolling when it was in a stationary position.

Respondent's second argument is that the petitioner never proved that the hydraulic fluid leaking from the machine came from the brakes. The inspector testified that the leakage was the reason he conducted the test on the brakes, however the origin of the fluid is not an essential element in proving a violation.

Finally, respondent contends that standard 56.9-3 does not comport with due process requirements because it does not give fair warning as to what conduct is required or prohibited. Respondent raised this issue in its answer, however neither party chose to address it at the hearing.

This issue has already been addressed in the case of Secretary of Labor v. Concrete Materials, Inc. 2 FMSHRC 3105 (1980). In that case the operator challenged standard 56.9-3 as violating due process requirements because of vagueness. The Administrative Law Judge stated that:

The question in this case is whether the operator knew that the operation of the cited trucks with the then existing brakes would be hazardous or whether a
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scientific safety expert would have protected against the brake conditions because they presented a reasonably foreseeable hazard.

The judge went on to reject the due process argument.

In the present case the government proved that the defective emergency brake presented a safety hazard. Furthermore, a witness for the respondent testified that the brake was defective. Under such circumstances, I find it difficult to believe that respondent felt the loader was equipped with "adequate brakes."

For the reasons stated above, I conclude that the citation should be affirmed.

Penalty Assessment

The respondent has had only a small number of prior violations. Since there is nothing contrary contained in the record, I assume that the imposition of a penalty will not affect respondent's ability to remain in business.

I conclude that the respondent knew or should have known of the violation. It is a relatively easy procedure to test the emergency brake and if this had been done respondent would have discovered the defect.

The defect could have led to a serious injury for either the operator or anyone in the immediate vicinity. Also, the respondent did not abate the citation when he became aware of the defect. An order of withdrawal was issued on October 31, 1979 because the brakes had not yet been fixed. (Order no. 380860). For these reasons, I find that the gravity of the violation was severe and that respondent failed to act in good faith.

Under the circumstances, as they have been described above, I find that a penalty in the amount of \$275.00 is appropriate.

CITATION NO. 380865

Citation no. 380865(FOOTNOTE.2) states that:

The control switches to the feed hopper, primary belt conveyor were inoperable. These switches did not work when belt operator was asked to start and shut off equipment. An employee could easily fall into moving equipment resulting in serious injury and no one in the immediate area would have control of shutting off equipment.

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Respondent did not attempt to refute the allegation that the switches at the control panel were inoperative. Rather, respondent argued that this did not constitute a violation of the Act. Respondent points to 56.9-6 which provides that:

When the entire length of a conveyor is visible from the starting switch, the operator shall visually check to make certain that all persons are in the clear before starting the conveyor. When the entire length of the conveyor is not visible from the starting switch, a positive audible or visual warning system shall be installed and operated to warn persons that the conveyor will be started.

The company had an audible warning system and therefore, the respondent contends it was in compliance.

I disagree. Safety standard 56.9-6 applies only to conveyors. In this case not only are we concerned with the conveyor belt system, but the hopper and the back hoe also. I agree with the inspector that since the operator had no way of stopping the equipment because the switches had been disconnected, this constituted a defect in the equipment.

Secondly, respondent argues that the second set of switches which were provided were sufficient for compliance. There were two switches, one for the feeder and one for the first conveyor. These switches were located 10 to 15 feet from where the operator sat. (Tr. 40).

I conclude that the presence of the second set of switches was insufficient to correct the equipment defect. First of all, in order for the operator to get to the switches he had to climb down a ladder. This would take up valuable time in case of an emergency. Most importantly though is the fact that the on-off switches were unreliable. Richard Edens, the electrician for the plant, testified that the switches were working on the day the citation was issued, but could not remember if they were actually tested to see if they were operable. (Tr. 40 and 44). Furthermore, he stated the presence of iron ore at the site sets up a magnetic field between the wires so that at times the switches will not stop the equipment. (Tr. 44).

There is no other logical conclusion but to find that Citation no. 380865 should be affirmed. Operating equipment of this nature from a point where the person who has control of starting and stopping the equipment cannot even see the operator clearly violates 56.9-3.

Penalty Assessment

The negligence of the respondent was slight since the switches at the control panel had to be disconnected because of the recent flooding and normally they would have been energized. However, the seriousness of this violation is such that I cannot approve a reduction of the proposed penalty assessment. If an

employee were to slip and fall into the machine it would not be known immediately by other employees and when it was discovered it is unlikely that the equipment could be stopped before serious injury resulted. For these reasons, I assess a penalty of \$75.00 for the violation.

ORDER

Respondent is hereby ORDERED to pay the amount of \$350.00 within forty days of this decision.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE

Citation no. 380866 states that: "The emergency brake on the #596 front end loader when set would not hold machine. This machine was also leaking a substantial amount of hydraulic fluid. These condition(s) could cause equipment operator to lose control and injury (sic) people in immediate area or the operator himself."

~FOOTNOTE_TWO

Citation 380865 alleges a violation of mandatory safety standard 56.9-2 which provides that, "Equipment defects affecting safety shall be corrected before the equipment is used."