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SOL (MSHA) V. McDOWELL QUARRY
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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.

MCDOWELL QUARRY COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

DOCKET NO. CENT 80-247-M
A/C No. 23-00759-05002 H

DOCKET NO. CENT 80-248-M
A/C No. 23-00759-05003

MINE: Blinne Quarry

Appearances:

James R. Cato, Esq. Office of Tedrick A. Housh, Jr.,
Regional Solicitor, United States Department of Labor
Kansas City, Missouri,

For the Petitioner

William McDowell, appearing Pro Se,
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, McDowell Quarry Company, with violating two regulations adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held in Rolla, Missouri.

ISSUES

The issues are whether respondent violated the regulations. If any violations occurred, what penalties, if any, are appropriate.

CENT 80-247-M

In this case respondent is charged with violating Title 30, Code of Federal Regulations, Section 56.9-3.(FOOTNOTE 1)

SUMMARY OF THE EVIDENCE

On August 8, 1979, MSHA representative Willard J. Graham inspected a Terex loader at the McDowell Quarry (Tr. 12-13). The loader was being operated out of a pit. He checked the brakes by backing up the equipment on a 10 foot incline. The brakes would not hold the Terex (Tr. 24).

The inspector ordered the loader taken out of service because of the hazards: an uneven roadway combined with a 10 percent grade. These features could cause a situation of imminent danger to the workers at the site (Tr. 23, 24, 26, 31-34).

It was the Terex operator's first day on the job (P2). The MSHA inspector credits the operator with stating that he hadn't "had any" brakes. However, I believe McDowell's contrary version to the effect that the Terex had brakes that morning. Initially, when confronted with the operator's statement, McDowell immediately denied it. Further, I find his direct testimony to be credible. He had run the loader himself that morning and the brakes were adequate at that time (Tr. 29, 56-59).

Petitioner offered a flurry of evidence to the effect that William McDowell, owner of the quarry, should have known the Terex brakes were about to fail. I am not persuaded. MSHA inspector Howard Lucas testified that Terex brakes can give "little warning" of a failure (Tr. 69). This basically supports McDowell's view that brakes of this type can fail, as they did here, without any warning (Tr. 55).

In summary, the evidence supports the conclusion that the Terex mobile equipment did not have adequate brakes as required by 30 C.F.R. 56.9-3. The additional matters relating to William McDowell's personal knowledge of the brakes failing does not avoid the violation but addresses the negligence evaluation in assessing a civil penalty.

CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Petitioner proposes a penalty by way of a special assessment in the amount of \$750. Petitioner's narrative findings rely to a large degree on petitioner's perception of the negligence of management in failing to isolate and correct this violation.

As previously indicated a maintenance and inspection program would not have helped the quarry in learning of the defective brakes. I further

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conclude the negligence of the quarry was not severe since the quarry owner had operated the loader and found that the brakes were satisfactory on the morning of the inspection.

Considering the statutory criteria, I deem that a civil penalty of \$75 is appropriate for this violation.

CENT 80-248-M

In this case respondent is charged with violating Title 30, Code of Federal Regulations, Section 56.5-50B2

1 The cited regulation provides as follows:

56.9-3 Mandatory. Powered mobile equipment shall be provided with adequate brakes.

2 The cited regulation, including the permissible noise exposure in 56.5-50(a), provides, in part, as follows:

56.5-50 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 for 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 a 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.

PERMISSIBLE NOISE EXPOSURES

Duration per day hours of exposure	Sound level dBA, 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 to within the levels of the table.