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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.

SAN JUAN COUNTY HIGHWAY DEPARTMENT,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-290-M

MSHA CASE NO. 42-01482-05001

MINE: Lems Draw S & G Pit

Appearances:

Katherine Vigil, Esq., Office of Henry C. Mahlman, Associate
Regional Solicitor, United States Department of Labor, Denver,
Colorado

for the Petitioner

Bruce K. Halliday, Esq., San Juan County Attorney, Monticello, Utah
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, charges respondent, San Juan County Highway Department, with violating Title 30, Code of Federal Regulations, Section 56.9-2 (FOOTNOTE 1), a safety regulation 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 Monticello, Utah on August 20, 1981.

ISSUES

The issues are whether respondent is subject to the Act; whether it violated the regulation, and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

The 10 acre Lems Draw sand and gravel pit is owned by the United States Government and leased to San Juan County, a political subdivision of the State of Utah. The lease is managed by the Bureau of Land Management (Tr 6, 13, 21-22, 28).

On the date of the inspection MSHA representative Kenneth Joslin was told by respondent's truck driver that its Ford diesel truck #32 would jump out of low gear. This would allow the truck to runaway on a down grade (Tr. 13).

On the same occasion a woman truck driver trainee told the inspector that the brakes on her truck were inadequate (Tr. 12). This portion of the citation was later withdrawn as a supervisor and the MSHA inspector road tested the truck. They concluded that the trainee excessively pumped the brakes causing the air to bleed off. The brakes were adequate (Tr. 16).

The inside door latch on the driver's door of the truck was broken (Tr. 15, 17).

DISCUSSION

The uncontroverted evidence shows the truck gear was defective and the door latch was broken.

Respondent contends that it is not subject to the Act, that it is not a mine operator, and the proposed penalty is excessive.

Respondent's contentions concerning liability under the Act have all been ruled contrary to respondent's views in Island County Highway Department, 2 FMSHRC 3227 (November, 1980). Respondent has cited Island County in its brief but has failed to demonstrate why the decision is not applicable in the factual settings presented here. The citation should be affirmed.

CIVIL PENALTY

Respondent further contends that the proposed civil penalty is excessive.

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.

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In reviewing the facts I note that respondent abated the defective conditions and there is no prior adverse history. In addition, the record does not reflect whether the proposed penalty of \$66 considered the later withdrawal of that portion of the citation relating to defective brakes. In view of the low gravity of the violations and in considering the statutory criteria, I conclude that a penalty of \$40 is appropriate.

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

ORDER

1. Citation 335924 is affirmed.
2. A penalty of \$40 is assessed.

John J. Morris
Administrative Law Judge

~FOOTNOTE ONE

1 The cited regulation provides as follows:
56.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.