

CCASE:

SOL (MSHA) V. TURNER BROTHERS

DDATE:

19840604

TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

v.

TURNER BROTHERS, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 84-8  
A.C. No. 34-01358-03506

Checotah No. 1 Mine

Docket No. CENT 84-9  
A.C. No. 34-01317-03508

Heavener No. 1 Mine

DECISION

Appearances: Richard L. Collier, Esq., Office of the  
Solicitor, U.S. Department of Labor, Dallas,  
Texas, for Petitioner;  
Robert J. Petrick, Esq., Turner Brothers,  
Inc., Muskogee, Oklahoma, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for alleged violations of regulatory standards. The general issues before me are whether Turner Brothers, Inc., has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed for those violations. In addition, where the Secretary has alleged that the violation is "significant and substantial" a determination in that regard must also be made. A violation is "significant and substantial" if: (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard i.e. a measure of danger to safety contributed to by the violation, (3) there is a reasonable likelihood that the hazard contributed to will result in an injury, and (4) there is a reasonable likelihood that the injury in question will be of a reasonable serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

Citation No. 2007410 alleges a violation of the regulatory standard at 30 C.F.R. 71.400 and charges that the mine operator had not provided bathing facilities, clothing change rooms and sanitary flush toilet facilities for the use of the miner's employed at the mine. According to Inspector Boatwright of the Federal Mine Safety and Health Administration (MSHA), the mine operator had previously obtained a waiver of these requirements in accordance with 30 C.F.R. 71.403, however, that waiver had expired the month before. The operator abated the violation by obtaining a new waiver. Under the circumstances, the proposal for settlement of this citation in the amount of \$20 is approved.

Citation No. 2077215 alleges a significant and substantial violation of the standard at 30 C.F.R. 77.1605(b) and reads as follows:

The 980C Caterpillar front-end loader Company No. 495 being operated in the 002-0 pit cleaning coal was not equipped with adequate brakes in that when the brakes were tested on a small incline, they would not stop or hold the loader. Four rock trucks, two front-end loaders and one water truck was being operated in this area.

The cited standard requires that mobile equipment be equipped with adequate brakes. The testimony of Inspector Boatwright is undisputed. He testified that the cited front-end loader had absolutely no brakes at all, and observed that in addition to the rock trucks and front-end loaders operating in the vicinity of the cited front-end loader, one person was walking about in the vicinity of that loader. In addition, the evidence shows that the cited loader had no front horn and at the beginning of the shift and following the lunch break the cited loader would be driven down an incline into the pit area, thus increasing the hazard. While the inspector acknowledged that there might not have been a serious hazard to the machine operator's so long as they remained in their cabs, there clearly was a grave danger of serious bodily injury or death to any pedestrian walking in the vicinity of the cited loader. Under the circumstances, I find that the violation was "significant and substantial" and a serious hazard.

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I further find that the operator was negligent in failing to have the cited equipment removed from service. It is apparent from the uncontested evidence that the brake deficiency had existed for some time and should therefore have been discovered during preshift examinations. The condition was abated immediately by the addition of brake fluid. There was no apparent leak in the system from which brake fluid would have rapidly discharged.

Citation No. 2077216 alleges a significant and substantial violation of the standard at 30 C.F.R. 77.1605(d) and charges that the front-end loader previously cited also had an inoperable front horn. The cited standard requires that mobile equipment be provided with audible warning devices.

According to the undisputed testimony of Inspector Boatwright, the hazard associated with this violation was significantly increased by the failure of this front-end loader to have brakes. Accordingly, should the equipment lose control because of the absence of brakes, no warning could be given to persons in its path. As previously indicated, there was one pedestrian walking about in the vicinity of this front-end loader. Within this framework, I find that the violation was indeed significant and substantial and a serious hazard.

It is apparent that the operator was negligent in failing to check its equipment since three or four other pieces of equipment at the mine were also without operative horns that morning. The deficiency should have been observed on preshift examination and corrected before the equipment was put into service. The condition was abated by reconnecting a loose wire.

Citation No. 2077219 alleges a violation of the standard at 30 C.F.R. 77.1110 and charges that the 777 Caterpillar rock truck being operated in the 002-0 pit hauling rock to the spoil area was not provided with a fire extinguisher maintained in an operative condition. The gauge on the fire extinguisher showed the extinguisher to have been discharged. The cited standard requires that fire fighting equipment be continuously maintained in a useable and operative condition.

The undisputed testimony of Inspector Boatwright was that the gauge showed the extinguisher to have been "discharged" and that should have been detected during the preshift examination. Boatwright conceded, however, that the

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extinguisher could have discharged between the time of the preshift examination and the time he cited the violation. Under the circumstances, the proof does not support a finding of high negligence. Boatwright also felt that the hazard was minimal in light of the fact that all of the other equipment operating in the pit area had operative fire extinguishers and that little distance would separate these vehicles.

Citation No. 2077220 alleges another significant and substantial violation of the standard at 30 C.F.R. 77.1605(d) and charges that the 992C Caterpillar front-end loader, Company No. 876, being operated in the 002-0 pit was not provided with an operating front horn. According to Inspector Boatwright, there should not ordinarily be pedestrians in the pit area where the front-end loader was operating, but nevertheless there was nothing to have prevented pedestrian traffic in that area. Moreover, the vehicles are driven in and out of the pit for shift changes, service and refueling so that there is an increased area of exposure to pedestrians. It is reasonably likely that the inability to provide a warning with a front horn could lead to serious injuries and death. The violation is accordingly significant and substantial and serious. It is apparent that the operator was not making thorough preshift checks in his equipment because there were so many defects with horns and back-up alarms on equipment that morning. The operator was accordingly negligent.

Citation No. 2077301 also alleges a violation of the standard at 30 C.F.R. 77.1605(d) and charges that the other 992C Caterpillar front-end loader was also without a front horn. Since this vehicle was operated in the same manner as the subject of the previous citation, I find that this violation too is significant and substantial and a serious hazard. For the reasons noted above, I also find that the operator was negligent.

Citation No. 2077302 also charges a violation of the standard at 30 C.F.R. 77.1605(d). The same 992C Caterpillar front-end loader cited for failing to have a front horn in the previous citation also had no backup alarm. Boatwright observed that this equipment is operated in reverse about 50 percent of the time and presented a serious hazard to pedestrians in the pit area or in the fueling area. Under the circumstances, I find that the violation was significant and substantial and serious. Inasmuch as there were indeed so many defective warning devices found during this inspection, I find it unlikely that a proper preshift

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examination was done on the equipment and that the operator was accordingly negligent.

Citation No. 2077303 and Citation No. 2077304 charge significant and substantial violations on the same rock truck for having no operative backup alarm and front horn respectively. As previously noted, the rock trucks were used to haul rock out of the pit area to the spoil area and were taken outside the pit to a fueling area during lunch and at the end of the shift. I find it reasonably likely that pedestrians would be placed in danger of serious bodily harm and death from the failure of this rock truck to have the required alarm equipment. The violation is significant and substantial and serious. For the reasons previously noted, I also find that the operator was negligent in failing to have detected and corrected these violations.

Citation No. 2077305 charges a violation of the standard at 30 C.F.R. 77.410 charging that the International coal truck, Company No. 126 which was hauling coal from the pit to the coal stock pile area had not been provided with an automatic audible reverse warning device. Boatwright's charges are not disputed by the operator. Based on Boatwright's testimony, I find that it was reasonably likely for a pedestrian to have been struck and killed by this vehicle for failing to have the required warning device. I find the violation to be significant and substantial and serious. I also find the operator to have been negligent. The truck had been on the premises for some period of time and it is not disputed that the operator was aware of the requirement for a backup alarm on this truck.

Citation No. 2077306 charges a violation of the standard at 30 C.F.R. 77.1109(c)(1) and alleges that no portable fire extinguisher was provided for the coal truck previously cited. Inspector Boatwright found only a minimal hazard in that nearby equipment did have operative fire extinguishers. The operator's explanation is not disputed that it had provided an extinguisher on the equipment, but one of the employees had temporarily removed it without the permission or knowledge of management.

Citation No. 2077307 alleges a violation of the standard at 30 C.F.R. 77.1707 and charges that the operator did not have a full complement of first-aid equipment available. According to Inspector Boatwright, the operator had at one time the full complement of equipment, but the first-aid kit had been pilfered and that a fully equipped first-aid kit was available within a quarter of a mile.

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There is no requirement for the first-aid kit to be examined during preshift examinations. The operator promptly abated all violations. Within this framework, I accept the proffered settlement of \$20 for this violation.

DOCKET NO. CENT 84-9

At hearing, the parties proposed a settlement of the one citation at issue, Citation No. 2007409, for \$20. The evidence shows that the mine operator had not indeed provided bathing facilities, clothing change rooms and sanitary flush toilet facilities for the use of the miners employed at the mine, however, the operator had previously obtained a waiver of those requirements and had merely failed to apply for a new waiver. The condition was abated upon the operator's obtaining of a new waiver of the requirements. Under the circumstances, I find that the proffered settlement is appropriate.

In determining the amount of penalties in this case, I am also considering that the operator is of medium size and abated all of the cited violations promptly and in good faith. The Secretary has failed to present any evidence of the operator's prior violations, and, therefore, I am not considering that factor in determining the amount of penalties herein.

ORDER

Turner Brothers, Inc. is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

DOCKET NO. CENT 84-8

Citation No. 2007410	\$	20
Citation No. 2077215		200
Citation No. 2077216		125
Citation No. 2077219		30
Citation No. 2077220		100
Citation No. 2077301		100
Citation No. 2077302		75
Citation No. 2077303		75
Citation No. 2077304		100
Citation No. 2077305		150
Citation No. 2077306		30
Citation No. 2077307		20

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DOCKET NO. CENT 84-9

Citation No. 2007409

20

Total Penalties

\$1,045

Gary Melick  
Assistant Chief Administrative Law Judge