

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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JUL 28 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 86-63  
Petitioner : A. C. No. 36-01423-03503  
: :  
v. : Carlson No. 1 Strip  
: :  
CARLSON MINING COMPANY, :  
Respondent :

DECISION

Appearances: Susan M. Jordan, Esq.; Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, Penn-  
sylvania, for Petitioner;  
Mr. Alan Carlson, New Castle, Pennsylvania, for  
Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act," in which the Secretary charges the Carlson Mining Company with a violation of the mandatory safety standard at 30 C.F.R. § 77.409(a). The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation.

The hearing was held as scheduled on May 22, 1986, at New Castle, Pennsylvania. Documentary evidence, including the deposition of Inspector Klingensmith was received into evidence and oral testimony was received from both parties.

The Mandatory Standard

Section 77.409(a) of the mandatory standards, 30 C.F.R. § 77.409(a) provides as follows:

§77.409 Shovels, draglines, and tractors.

(a) Shovels, draglines, and tractors shall not be operated in the presence of any person exposed to a hazard from its operation and all such equipment shall be provided with an adequate

warning device which shall be sounded by the operator prior to starting operation.

The Cited Condition or Practice

Citation No. 2402051 cites a violation of 30 C.F.R. § 77.409(a) for the following conditions:

The warning device, which shall be sounded by the operator prior to starting operations, for the Fiat Allis FD 50 bulldozer serial no. 42504006 operating at pit 004-0 was not operative.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 7-9):

1. No. 1 **Carlson** Strip Mine is owned and operated by the respondent, **Carlson** Mining Company.
2. **Carlson** No. 1 Strip is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The presiding Administrative Law Judge has jurisdiction over the proceedings.
4. Citation No. 2402051, and its termination, were properly served by an authorized representative of the Secretary upon an agent of the respondent at the date, time, and place stated on the citation, and may be admitted into evidence for the purpose of establishing its issuance.
5. The parties stipulate to the authenticity of their exhibits, but not to the relevancy or truth of the matters asserted therein.
6. The alleged violations were abated in a timely fashion.
7. The total annual production of **Carlson** No. 1 Strip is, approximately, eighty thousand tons of coal per year.
8. The computer printout reflecting the operator's history of violations is an authentic copy, and may be admitted as a business record of the Mine Safety and Health Administration.

9. The imposition of the proposed civil penalty will have no effect on the respondent's ability to remain in business.

#### Discussion and Analysis

The inspector who issued the instant citation testified by deposition that he visited the **Carlson** Strip Mine on October 30, 1985. While there he observed the cited bulldozer operating on the bench area from a distance of approximately a thousand feet away. When he got up to the equipment, about ten (10) minutes after first observing it, the operator had just pulled it over to the side of the bench and was getting off of it. He inspected it there and talked to the equipment operator at that time about the condition of the safety equipment. He states that the bulldozer operator made no mention of the dozer being out for repairs. Thereafter, he issued the subject citation for the inoperative start-up warning device.

The start-up alarm's purpose is to give a warning to people before the equipment is moved forward.

He also marked the significant and substantial box on the citation because this piece of equipment operates in an area where there are people and other equipment also operating. The particular hazard he identified was the danger to a person or persons who might be afoot in the area when this equipment was working without the start-up warning device operating and thereby exposing them to a possibly serious injury.

The respondent does not dispute the fact that the start-up warning device was inoperative but rather the respondent's defense is that the bulldozer was not operating on the day in question. Respondent sponsored the testimony of Mr. Gerald McCurdy, who testified to the effect that although he had started the bulldozer that morning to see if he could find a reported leak, he had not moved the machine prior to the arrival of the inspector.

Therefore, on the ultimate issue of whether or **not** the bulldozer in question was operating that morning, I must **make a** credibility finding between the inspector's testimony and that of Mr. McCurdy. The record demonstrates that the inspector's notes and the citation itself, written at or near the time of the violation, agree with his later testimony by deposition on all pertinent points. Further, the respondent was unable to shake his testimony by **cross-examination** concerning possible misidentification of the bulldozer. Mr. **McCurdy**, on the other hand, while steadfastly maintaining that he had not operated the dozer that

morning, was unable to satisfactorily account for his time between 7 and **8:30** a.m., the hour and a half just prior to the issuance of the citation. I therefore make the necessary credibility finding in favor of the Secretary's witness.

In accordance with the testimony recited herein of Inspector Klingensmith which I find to be credible, I conclude that the cited violation did occur and that it was "significant and substantial" as that term is defined by National Gypsum Co., 3 FMSHRC 822 (1981) and Mathies Coal Co., 6 FMSHRC 1 (1984).

Considering the criteria in section **110(i)** of the Act, I conclude that the civil penalty proposed in this case, i.e., \$58, is appropriate under all the circumstances.

ORDER

Citation No. 2402051 is AFFIRMED. **Carlson** Mining Company is ORDERED to pay a civil penalty of \$58 within 30 days of the date of this decision.



Roy J. Maurer  
Administrative Law Judge

Distribution:

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