CCASE:
SOL (MSHA) V. NELSON TRUCKING
DDATE:
19860911
TTEXT:

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-102-M A.C. No. 47-02575-05501
v.	Pit No. 6 Mine
NELSON TRUCKING, RESPONDENT	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Mr. Kenneth M. Nelson, Nelson Trucking Company, Green Bay, Wisconsin, pro se.

Before: Judge Lasher

A hearing on the merits was held in Green Bay, Wisconsin, on August 13, 1986. After consideration of the evidence submitted and both parties agreeing, a decision on the record was entered at the conclusion of the hearing. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This matter arose upon the filing of a petition for assessment of penalty by a document entitled, "Proposal for a Penalty" by the Secretary of Labor (herein Secretary) on October 21, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (herein the Act). The Secretary charges the Respondent with violating 30 C.F.R. 56.9087 which provides: "Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up."

For purposes of this proceeding, I accept the definition of "audible" contained in the Random House College Dictionary (1980 Revised Edition) as being both a reasonable, common sense, and commonly accepted indication of meaning: "actually heard or capable of being heard; loud enough to be heard." The concept of this definition will be incorporated into the regulation cited by the Secretary herein.

The Citation (Number 2374053) issued by MSHA Inspector Arnie Mattson on July 10, 1985, at Respondent's mine (Pit Number 6) charges that Respondent infracted the above-quoted regulation by engaging in the following condition or practice: "The 120 Hough International front-end loader has a back-up alarm, but it can't be heard above the surrounding noise. The loader was observed loading a truck with no foot traffic."

The matter, after being duly noticed, came on for hearing in Green Bay, Wisconsin, on August 13, 1986. The Secretary was represented by counsel, and the Respondent was represented by Mr. R.J. Bruno, a consultant who is not a lawyer. The Secretary presented Inspector Arnie Mattson as its only witness, and Respondent called two witnesses, Charlie Stauber, a crusher operator who was present on the mine premises at the time and place the alleged infraction occurred, and Perry Pautz, the owner of the pit.

Although not specifically raised by Respondent at the hearing, a preliminary matter should be dealt with which was raised by the Respondent in a letter dated February 21, 1986, which was signed by Kenneth M. Nelson. This letter indicates that:

> "Previous to the start of operation last spring, we asked for and were given a complimentary inspection. At that time we were told everything was in order. Your inspector later penalized us for a back-up alarm that he claimed was not loud enough. We have corrected the problem areas and we feel we should have been told if these items and such were a problem at the time of our complimentary inspection. That is why we requested it in the first place."

This letter raises the question which occasionally occurs in mine safety law concerning whether or not the Secretary, or more specifically MSHA, should be estopped from citing a violation for a condition which previously it had not cited during prior inspections. More precisely, does the legal effect of prior non-enforcement equitably estop a government agency from subsequently charging a mine operator with a violation for a condition which it believes contravenes the mandatory health and safety standards. In Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421 (1981), the Commission rejected the doctrine of equitable estoppel in mine safety and health proceedings. It noted therein that the United States Supreme Court has held that equitable estoppel generally does not apply against the federal government. The Commission also noted that one reason for its declining to permit this concept is that it would be inconsistent with the so-called "liability

without fault" structure of the Act. The Commission reached the same result in Secretary v. Burgess Mining and Construction Corporation, 3 FMSHRC 296. Therefore, to the extent that the letter of Respondent in the file raises the question of equitable estoppel on the basis of the Secretary's failure to find and cite violations during the prior courtesy inspection or that the Secretary should be bound since it did not uncover such a situation during the courtesy inspection, such argument is rejected.

Turning now to the issue which is more directly involved in this proceeding, that is whether or not a violation of the subject regulation occurred, determination of this issue rests upon the resolution of a conflict in testimony between the Inspector and Mr. Charlie Stauber, a crusher operator, who testified on behalf of the Respondent.

The Inspector indicated that the back-up alarm, which was automatic and which was triggered when the front-end loader in question was put in reverse gear, could not be heard by a miner or other person who would be behind the loader and who would be exposed to the hazard of being run over by the loader. The Inspector indicated that the loader's operator, who sat in a cab on the loader which had a rear-view window, would have his vision obstructed by the presence of the loader's engine and that the operator's vision would be obstructed for varying distances, depending on the exact direction the operator would be directing his vision toward.

A direct conflict with the Inspector's determination as to the audibility of the automatic back-up alarm was created by Mr. Stauber's testimony to the effect that on July the 10th, 1985, he was operating a crusher in the vicinity of the loader and that he could hear the automatic back-up alarm clearly even while he was wearing ear plugs. Before resolving the conflict in this testimony, I first note that the testimony of Mr. Pautz is not deemed sufficiently specific or otherwise probative to be considered in the credibility resolution which follows.

In concluding that the testimony of Mr. Stauber must prevail over that of the Inspector in this particular instance, it cannot be avoided that in a determination which essence is that of audibility and where it appears that one person's hearing is impaired and the other's is not that a basic overpowering factor enters the equation on the side and in support of the opinion of the person whose hearing has not been shown to be reduced.

The burden in a case such as this is on the Secretary to establish that a violation occurred and to carry such burden by a preponderance of the evidence. In this matter the question comes down to which judgment, that of the Inspector or that of Mr. Stauber should be given the greatest weight. These are subjective judgments. They do involve the loudness of a horn. The Inspector in effect says it is not loud enough to be heard over the surrounding noise. The crusher operator says that he could hear it even with ear plugs on. The Secretary's burden of proof was not aided in this case by instruments or by the testimony of a corroborating witness. In this instance the Secretary is found to have not established that a violation occurred by a preponderance of the evidence.

Accordingly, it is ordered that Citation Number 2374053 is vacated.

Michael A. Lasher, Jr.
Administrative Law Judge