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SOL (MSHA) V. BRUBAKER-MANN
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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

CIVIL PENALTY PROCEEDING

Docket No. WEST 85-177-M
A.C. No. 04-00030-05504

v.

BrubakerÄMann

BRUBAKERÄMANN, INC.,
RESPONDENT

DECISION

Appearances: Rochelle Ramsey, Esq.,, Office of the Solicitor,
U.S. Department of Labor, Los Angeles, California,
for Petitioner;
Steve Pell, Esq., Ventura, California,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 802 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary to respondent's contentions in WEST 84Ä96ÄM.

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2364577

This citation charges respondent with violating 30 C.F.R. 56.9087 which provides as follows:

56.9087 Audible warning devices and back up alarms.

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such

equipment has an

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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.

Summary of the Evidence

MSHA inspector Ronald Ainge issued this citation because a front-end loader, which was operating on the day of the inspection, did not have a functioning reverse alarm signal (Tr. 56, 119). There was a mill operator and a welder in the area but no spotter was available to tell the equipment driver when it was clear to back up (Tr. 56, 57, 120). The inspector was in the area for two days and he observed no person signaling the loader operator (Tr. 120, 121).

Mr. Mann testified that the Caterpillar was equipped with a reverse signal alarm (Tr. 242, 243, 282). However, the alarm was causing the men mental stress so they turned it down so it could not be heard (Tr. 243, 283). Also there is supposed to be a spotter in the area. No accidents have occurred from this condition (Tr. 243, 284). In addition, this equipment operates in a noisy part of the plant (Tr. 283).

Evaluation of the Evidence

The inspector's testimony establishes a violation of the regulation. Mr. Mann's evidence fails to establish a defense. The fact that the workmen turned off the reverse alarm only contributed to the possibility of an accident or fatality.

Citation 2364577 should be affirmed.

Civil Penalty

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified 30 U.S.C. 820(i). Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be the two citations vacated in *Brubaker v. Mann*, 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The parties have stipulated that the operator is a small company. The penalty appears appropriate in relation to a small operator and it should not affect the ability of the company to continue in business. Concerning the negligence of the operator: this citation involved a failure to use a back-up alarm. This condition was obvious and the operator must be considered as negligent. The gravity is high since a fatality could result from this defect. The operator is credited with good faith since the company abated the violative condition.

On balance, I consider that the proposed penalty of \$79 should be reduced to \$59.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Citation 2364577 should be affirmed and a penalty of \$59 should be assessed.

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

ORDER

1. Citation 2364577 is affirmed.
2. A civil penalty of \$59 is assessed.

John J. Morris
Administrative Law Judge