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SOL (MSHA) V. STAKER CONSTRUCTION
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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 86-120-M A.C. No. 42-01452-05513
v.	
STAKER PAVING & CONSTRUCTION COMPANY, INCORPORATED, RESPONDENT	StakerÔBeck Street Mine

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Orval D. Gillen, Staker Paving Construction Company, Inc., Salt Lake City, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah on August 13, 1986.

The parties waived their right to file post-trial briefs.

Issues

The issues are whether an allegation of unwarrantable failure can be contested in a civil penalty proceeding. Further, whether the violation was of a significant and substantial nature. Finally, what penalty is appropriate under the circumstances in this case.

Citation 2644141

This citation alleges respondent violated 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 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.

Admission

At the commencement of the hearing respondent admitted the violation (Tr. 4, 5).

Summary of the Evidence

William W. Wilson, a duly authorized representative of the Secretary and experienced in mining, inspected respondent on December 16, 1985 (Tr. 9, 10).

During the inspection he issued Citation 2644141 when he observed a Michigan 275C front-end loader without an audible alarm (Tr. 11; Ex. P1). McCoy Evans was operating the vehicle. During the course of two days the inspector observed a laborer and a mechanic in the general area of the loader (Tr. 11). The inspector also did not see anyone spotting for the loader when it backed up (Tr. 11). The back-up alarm was not audible (Tr. 12). In the previous week the operator had turned in several daily reports to the pit foreman (Tr. 13).

The inspector evaluated the operator's negligence as moderate when he wrote the citation (Tr. 14). The following day he confirmed that maintenance reports on the defective vehicle had been written on December 9, 10, 11 and 13 (Tr. 15, 16). On the final citation the inspector accordingly marked the negligence as high and further indicated that the circumstances showed a careless disregard by the operator since no repairs had been made (Tr. 16, 17).

The hazard involved here could reasonably kill or maim a miner (Tr. 17, 18). Respondent abated the condition in six days. It was necessary to obtain a part (Tr. 18).

The inspector indicated he has had some problems with respondent's employee Van Dyke concerning compliance with safety regulations (Tr. 19). But there has been a decline in the number of citations issued against respondent. This has been attributed to the company's efforts (Tr. 20). Apparently a communication problem caused the delay in the repair of the alarm (Tr. 21).

Respondent has, on the average, 12 employees (Tr. 24).

Orval D. Gillen, testifying for respondent, indicated he is the company's safety and training engineer (Tr. 28, 29). The witness identified the various employees on the site at the time of the inspection (Tr. 20, 29).

Mr. Gillen believed the equipment operator, as they normally do, should have immediately notified the shop people of the defect (Tr. 30, 31). The notification can be by telephone or radio, located at the crusher (Tr. 31). The instructions to the operators to proceed in this fashion are verbal and were given during training (Tr. 32).

The pit's size is about 100 by 300. When the citation was issued there were six people at the site (Tr. 32, 34).

After this citation the operators involved were again verbally instructed as to the proper procedure (Tr. 33).

The company employs as many as 500 people but most of them are under OSHA's jurisdiction (Tr. 34).

Payment of the proposed penalty would not affect the company's ability to continue in business (Tr. 25, 37).

Discussion

Since the operator admits the violation the citation should be affirmed.

An additional issue concerns respondent's contest of the allegations of unwarrantable failure. The ruling at the hearing is reiterated at this time: unwarrantable failure cannot be litigated in a civil penalty proceedings, Clinchfield Coal Company, 2 FMSHRC 290 (1980).

A further issue concerns whether the violation was of a significant and substantial nature.

A decision as to whether a violation has been properly designated as being significant and substantial must be made in light of the Commission's rulings in that area. The term "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at page 825, where the Commission stated:

> We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

In this case the facts fail to establish that was a reasonable likelihood that an injury of a reasonable serious nature would result from the violative condition. The evidencees

tablishes there were workers in the 100 by 300 pit. But, it is impossible to ascertain if the described measurements are in feet or yards. Further, no evidence indicates any workers were directly in danger due to the defective back-up alarm on the loader.

For the foregoing reasons the S & S allegations should be stricken from the citation.

The final issue concerns the appropriate penalty to be assessed.

The statutory criteria to assess a civil penalty is contained in Section 110(i) of the Act. The provision, now codified as 30 U.S.C.A. | 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.

In relation to the criteria the computer print-out shows that respondent incurred 19 violations for the two year period ending December 15, 1985. This showed an improvement over the 28 violations assessed before December 16, 1983. The penalty hereafter assessed appears appropriate in relation to the size of the business of this small operator. While the operator at times has as many as 500 employees, the majority of them are not under MSHA's jurisdiction. In fact, there were apparently only six employees at this site. The operator was negligent since four maintenance reports had mentioned the defect. The operator has indicated that the imposition of the proposed penalty of $700 would not affect the company's ability to continue in business. The gravity of the violation should be considered as high because a serious injury or a fatality could result. Under the broad umbrella of good faith it is to respondent's credit that it abated the violation. Further, the respondent at this point has demonstrated a certain dedication to the safety of its workers.

On balance, I deem that a civil penalty of $250 is an appropriate penalty.

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. Respondent violated 30 C.F.R. | 56.9087.

3. The allegations that the violation was significant and substantial should be stricken.

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

ORDER

1. The allegations that the violation was significant and substantial are stricken.

2. Citation 2644141, as amended, is affirmed.

3. A civil penalty of $250 is assessed.

4. Respondent is ordered to pay the sum of $250 to the Secretary within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge