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SOL (MSHA) V. TRIPLE B
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FMSHRC-FCV
MAY 13, 1988

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

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 87-40
A.C. No. 15-08382-03502 M75

v.

Docket No. KENT 87-47
A.C. No. 15-08382-03503 M75

TRIPLE B CORPORATION,
Respondent

South Side Surface Mine

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN, for
Petitioner; Gary A. Branham, President, Triple B
Corporation, Prestonburg, KY, for Respondent.

Before: Judge Fauver

These consolidated proceedings were brought by the Secretary of
Labor for civil penalties for alleged violations of safety standards
under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801
et seq.

Having considered the hearing evidence and the record as a whole,
I find that a preponderance of the substantial, reliable, and probative
evidence establishes the following:

FINDINGS OF FACT

Docket KENT 87-40

1. On September 30, 1986, Mine Safety and Health Administration
Inspector Andrew Reed, Jr., conducted an inspection at South Side
Surface Mine No. 1 operated by the Martin County Coal Corporation.
While conducting this inspection, Mr. Reed inspected equipment of the
Respondent, an independent contractor engaged in reclamation work at
the site.

Citation 2776271

2. A Komatsu bulldozer was not equipped with a reverse alarm.

Order 2776272

3. A Mack truck used for rock haulage was not equipped with an adequate braking system.

Order 2776273

4. A Mack truck was not equipped with a reverse alarm.

Order 2776274

5. A Mack truck was not equipped with a fire extinguisher.

Order 2776275

6. The windshield of a Mack truck contained 11 cracks extending from the center divider and the right side portion was badly broken with a 4" x 6" hole near the bottom of the glass.

Order 2776276

7. A Mack truck was not equipped with a fire extinguisher.

Order 2776277

8. Bryan Childers was observed operating a Mack truck and had not received the required miner training prior to being assigned work duties. He had not received any training since being hired (on September 18, 1986) and according to his 5000.2S Form, his last training in the industry was annual refresher training on March 29, 1985.

Order 2776278

9. A Mack truck used for rock haulage was not equipped with an adequate braking system in that both the right front and right rear wheel brakes were inoperative. The truck was being used on a 17% grade.

Order 2776279

10. A Mack truck had an equipment defect in that the driver's side rear view mirror was broken in three places near the bottom of the mirror, causing a distorted side rear view.

Order 2776280

11. A Komatsu loader was not equipped with a reverse alarm.

Order 2784241

12. A Komatsu loader was not equipped with a fire extinguisher.

Docket KENT 87-47

Order 2784242

13. A Komatsu loader, which was equipped with a roll over protection system, was not equipped with seat belts.

DISCUSSION WITH FURTHER FINDINGS

Respondent contends that its reclamation work was not covered by the Act. This same issue was tried between the same parties and decided in Secretary of Labor v. Triple B Corporation, KENT 87-21 and KENT 87-23 (Judge's Decision, March 15, 1988). That decision controls here by res adjudicata. I hold that Respondent's work at issue was covered by the Act.

Citation 2776271 and Order 2776273

Respondent asserts that at the time of the inspection no one was on foot in the area of the vehicle that had no reverse alarm. I find that this fact does not lower the degree of gravity proved by the Secretary.

Order 2776272

Respondent contends that the cited vehicle "had enough brakes to stop" (Tr. 12), but does not deny that both front brakes were inoperative and the brake drums, shoes, chamber and air line were missing from the right front wheel, and does not deny that the air fitting was plugged off on the right and left front wheels and that the left front wheel brakes line was missing. I find that the brakes were defective and unsafe as charged.

Orders 2776274, 2776276, and 2776280

Respondent contends that the purpose of a fire extinguisher on a vehicle is to protect the vehicle and that, since the driver can escape from the vehicle, the gravity of the violation should be lowered to nonserious. I reject this argument. The driver could be trapped or injured, so that his access to a fire extinguisher or the access of a rescuer to a fire extinguisher on the vehicle could save the driver's life or lessen burn injuries in a fire emergency.

In Consolidation Coal Corporation v. FMSHRC, 824 F. 2d 1071, 1085 (D.C. Cir. 1987, the court stated:

The legislative history of the Federal Mine Safety and Health Amendments Act suggests that Congress intended all except "technical violations" of

mandatory standards to be considered significant and substantial. The 1977 amendments redesignated § 104(c) of the Coal Act as § 104(d) of the Mine Act without substantive change.

In *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3 (1984), the Commission stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum [3 FMSHRC 822], the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. As a practical matter, the last two elements will often be combined in a single showing. [Footnote omitted.]

The fire extinguisher violations meet the above test. The MSHA supervisor's modifications of the inspector's orders to change gravity to a nonserious violation is inconsistent with the evidence. I agree with the inspector's testimony and the Secretary's contention that the violations were significant and substantial.

Order 2776278

4. Respondent contends that the braking system on the Mack truck was adequate. However, the right rear wheel brakes were inoperative. The Secretary contends that the MSHA supervisor's modification of the inspector's order to a § 104(a) citation "is inappropriate and should be disregarded" because the supervisor failed to obtain information from the inspector and gave no basis for his decision other than the conclusory statement of the operator's representative, who was not present at the time the order was issued. I agree with the Secretary's argument based upon the facts shown by the inspector's testimony.

Order 2776279

Respondent does not deny that the driver's side view mirror on the Mack truck was broken in three places near the bottom of the mirror. Respondent challenges the gravity finding of the inspector on the grounds that the truck driver did not complain about the mirror and part of the mirror gave an undistorted side view. I agree with the Secretary's position that the distortion of part of the driver's side view, because of breaks in the mirror, constituted a substantial and significant violation. The fact that the driver did not complain about the mirror does not

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alter the gravity of the violation. I agree with the Secretary's position that the modification of the order by MSHA Supervisor Wilder should be disregarded as being contrary to the evidence. I accept the testimony of the inspector that the broken part of the mirror substantially distorted the driver's side rear view and created a substantial and significant violation.

Order 27784242

Respondent contends that seat belts were not needed because the loader was being operated on level ground. The loader is included in a class of vehicles (§ 77.403a) requiring rollover protection because of a general history of such vehicles turning over. I accept the inspector's testimony that there was a danger of overturning and, therefore, that seat belts were required.

Respondent violated the safety standards as charged in the following citation and orders, and the Secretary proved, by a preponderance of the reliable evidence, the allegations of negligence, gravity, and unwarranted violations. Considering all of the criteria of § 110(i) of the Act for assessment of civil penalties, I find that the following penalties are appropriate:

Violation (30 C.F.R.)	Civil Penalty
Citation 2776271 (\$ 77.410)	\$ 68
Order 2776272 (\$ 77.1605(b))	98
Order 2776273 (\$ 77.410)	140
Order 2776274 (\$ 77.1109(c)(1))	66
Order 2776275 (\$ 77.1605(a))	140
Order 2776276 (\$ 77.1109(c)(1))	66
Order 2776277 (\$ 48.26(a))	140
Order 2776278 (\$ 77.160(b))	68
Order 2776279 (\$ 77.1606(c))	114
Order 2776280 (\$ 77.410)	140
Order 2784241 (\$ 77.1109(c)(1))	66
Order 2784242 (\$ 77.1710(i))	140
	1,246

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction in these proceedings.
2. Respondent violated the safety standards as charged in the above citation and orders.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalties of \$1,246 within 30 days of this Decision.

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William Fauver
Administrative Law Judge

Distribution:

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