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SOL (MSHA) V. ARNO SAND  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. SE 88-55-M  
A.C. No. 31-01585-05502

v.

Highsmith Pit

ARNO SAND COMPANY,  
RESPONDENT

DECISION

Appearances: Michael K. Hagan, Esq., Office of the  
Solicitor, Department of Labor, Atlanta,  
Georgia for Petitioner;  
George A. Arno, President, Arno Sand Company,  
Linden, North Carolina, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging the Arno Sand Company (Arno) with two violations of regulatory standards. The general issue before me is whether Arno violated the cited regulatory standards and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial".

Citation No. 2859775 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 56.9003 and charges as follows:

The Clark 75 front-end loader being used to load sand was being operated without brakes. The brake caliper on left front wheel was bursted [sic].

The cited standard requires that "powered mobile equipment be shall provided with adequate brakes."

There is no dispute in this case that the Clark 75 front-end loader was indeed without adequate brakes when

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cited on November 12, 1987. The left front brake caliper was admittedly broken and, upon later examination, the brake pads were found to be worn down almost to the metal. According to Inspector Ron Lilly of the Federal Mine Safety and Health Administration, (MSHA), Jimmy Arno, the front end loader operator, told him at the outset of the inspection that the brakes were in good shape but when asked to perform a test on the brakes, admitted that the brakes would not stop the loader. Arno also admitted to Inspector Lilly that he had loaded a truck with the loader that morning.

By way of defense, George Arno, former owner of the Arno Sand Company stated that there was no evidence in this case to show that the front-end loader was being operated at the time of the citation. In this regard Jimmy Arno testified that he had moved the loader that day only for the purpose of repairing the back-up alarm. Jimmy Arno also testified, that the last time he had used the front-end loader it had had brakes. He also testified however that he did not know when the brakes went out because he did not use the brakes. This testimony is internally inconsistent and conflicts with the earlier admission to Inspector Lilly. I therefore can give this testimony but little weight. Accordingly I do not find the proffered defense to be credible.

In addition at the time of his inspection on November 12, 1987, Inspector Lilly found the cited front-end loader with the motor running. The loader had admittedly not been tagged out to identify it has having been removed from service and Jimmy Arno admitted that he drove the loader that morning for the purpose of obtaining a "piece of wire" from the trailer. It is also apparent that the front-end loader had been used without adequate brakes on prior occasions since the brake pads had admittedly been worn nearly to the metal. Under the circumstances, it is clear that the violation is proven as charged.

Since the loader had not been removed from service by tagging out or other similar procedure the violation was also "significant and substantial". The testimony of Inspector Lilly in this regard is undisputed. Lilly observed that the cited loader weighed 20 tons. He considered it highly likely that other vehicles would be struck by this loader because it had to drive down a grade into the pit where other traffic from other mine operators were operating. See Mathies Coal Co., 6 FMSHRC 1 (1984).

Inspector Lilly found Arno chargeable with "moderate" negligence. It may reasonably be inferred from the evidence

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that Jimmy Arno had been operating the loader at a time when the brakes were clearly deficient. When considering this in conjunction with the related citation for failing to report this brake defect in accordance the regulatory standard at 30 C.F.R. 56.9001 it is apparent that the operator was indeed negligent in failing to establish and maintain appropriate procedures for reporting equipment defects. See Secretary v. Southern Ohio Coal Co., 4 FMSHRC 59 (1982); Secretary v. Old Dominion Power Co., 6 FMSHRC 1886 (1984).

Citation No. 2859825 alleges a violation of the standard at 30 C.F.R. 56.9001 and charges that "the defect on the Clark 75 front-end loader had not been recorded." The cited standard requires in part as follows:

Equipment defects affecting safety shall be reported to, and recorded by, the mine operator. The record shall be maintained at the mine or nearest mine office for at least six months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

It is not disputed in this case that no records had been prepared concerning the cited defective brakes. Jimmy Arno conceded that he had not even orally informed his father about the worn out brake pads and broken brake caliper. Indeed Jimmy Arno admitted that he had never even seen a record concerning machine maintenance at the mine. George Arno also testified that he did not keep any such records except repair orders and bills. Under the circumstances the violation is proven as charged.

George Arno testified that he had no knowledge of MSHA record keeping requirements for equipment defects. Inasmuch as this mine was a very small operation and apparently had not been subject to prior inspections I find it chargeable with moderate negligence in regard to this violation.

Considering the small size of the operator, the absence of any history of violations and the apparent abatement I find that the following civil penalties are appropriate: Citation No. 2859775 \$50, Citation No. 2859825 \$10.

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ORDER

The Arno Sand Company is hereby ordered to pay civil penalties of \$60 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge  
(703) 756-6261