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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. VA 89-13-M A.C. No. 44-02965-05517
v.	Louisa Plant
A. H. SMITH STONE COMPANY, RESPONDENT	

DECISION

Appearances: Jack E. Strausman, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Ms. Lisa Wolff, Director of Safety/Governmental Affairs, A. H. Smith Stone Co., for Respondent.

Before: Judge Fauver

This case was brought by the Secretary of Labor for a civil penalty for an alleged violation of a safety standard, under 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

At the conclusion of the hearing, oral arguments were heard and a bench decision was issued. This decision confirms the bench decision and assesses a civil penalty for the violation found.

A preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion that follows.

FINDINGS OF FACT

1. The parties have stipulated that Respondent's Louisa Plant is subject to the jurisdiction of the Act, and that the judge has jurisdiction over this proceeding.

2. On July 19, 1988, Respondent operated a Terex front-end loader without an operable backup alarm. This equipment is a large, heavy duty vehicle that has an obstructed view to the rear.

3. The vehicle was equipped with a backup alarm which had been defective for about two weeks before July 19, 1988.

4. Federal Mine Inspector Charles E. Rines observed the defective equipment on July 19, 1988, and, at 10:15 a.m., issued a citation charging a violation of 30 C.F.R. 56.9087. The inspector delivered the citation to Respondent's supervisor, Clifford Ketts. The citation gave Respondent until 7:00 a.m. the next day to abate the cited condition.

5. The following morning, after 7:00 a.m., the inspector inspected the loader and found that the backup alarm was not repaired. He waited for Clifford Ketts to arrive, and about 9:00 a.m., he told Mr. Ketts that the backup alarm had not been repaired, and that it must be repaired by 7:00 a.m. the next day. Mr. Ketts said he would take care of it.

6. The next morning, July 21, the inspector observed that the backup alarm had still not been repaired. At 9:30 a.m., he issued a 104(b) order forbidding use of the loader until the violation was abated. The inspector remained at the Louisa Plant the rest of the day.

7. He returned to the plant the next morning, Friday, July 22, 1988, to check on another matter involving a plant-wide withdrawal order that had been issued forbidding all production operations until abatement of other cited conditions. While the inspector was at the plant, Mr. Ketts told him a mechanic was on the way from Richmond, Virginia, to repair the backup alarm. By the time the inspector left the plant, several hours later, the mechanic had still not arrived although the Louisa Plant is only about 50 miles from Richmond.

8. The following Monday, July 25, 1988, the inspector inspected the backup alarm and found that it had been repaired. He therefore issued a termination of the citation and its related order.

DISCUSSION WITH FURTHER FINDINGS

The Terex loader was operated without an operable backup alarm for two weeks before Citation 3045446 was issued. The violation was easy to detect and should have been corrected long before the inspector inspected the equipment on July 19, 1988. I find that the facts support the inspector's finding of high negligence.

The loader was operated at the loading area where customers were on foot. Operating the loader without an operable backup alarm presented a high risk of serious injury, including a fatality. The facts thus support the inspector's finding of a significant and substantial violation.

Respondent did not make a reasonable effort to abate the violation in the time allowed by the citation. The inspector was therefore justified in issuing a 104(b) order.

Government Exhibits 4 and 5 are compliance printouts for two of Respondent's mining operations for 24 months before the citation. These show that, of a total of $3,732 in assessed civil penalties, Respondent is in arrears for $489 for eight penalties(FOOTNOTE 1) that are not in litigation. Failure to pay final assessments (uncontested or no longer in litigation) is part of an operator's compliance history, one of the criteria to be considered is assessing a civil penalty under 110(i) of the Act. Respondent has submitted a letter stating that it is "missing paperwork" regarding these assessments, and has requested duplicate copies from MSHA's Civil Penalty Compliance Office. If further states it will work to close these matters "as soon as possible." I will credit this representation of prompt future disposition of the outstanding assessments.

In addition to the above final civil penalties, the Solicitor's letter of April 26, 1989, states that other civil penalties in the printouts are also final and overdue. These additional penalties are about $435.

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The record thus indicates that, of $3,732 in civil penalties shown on the printouts, penalties of about $925 are overdue and unpaid.

At the hearing Respondent introduced a letter, "To Whom It May Concern," from two partners, stating that A. H. Smith Associates, Louisa, Virginia, has been "in net profit (loss) position" for fiscal years 1987 and 1988 and that payment of a $395 penalty will "adversely affect the company." I find that this statement, without the opportunity for the Secretary to cross examine the authors, and without a fuller showing of Respondent's financial condition, e.g., net worth, unincumbered assets, revenues, equity, and tax returns, fails to establish a financial hardship defense. Section 110(i) is concerned with the impact of a civil penalty "on the operator's ability to continue in business." Respondent's letter is insufficient to address this issue.

Respondent, as a mining enterprise, is a large operator.

Considering all of the criteria for a civil penalty in 110(i) of the Act, I find that a civil penalty of $395 is appropriate for the violation found herein.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated 30 C.F.R. 56.9087 as charged in Citation 3045446.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation 3045446 is AFFIRMED.

2. Order 3045450 is AFFIRMED.

3. Respondent shall pay the above assessed civil penalty of $395 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. The delinquent penalties, identified in the exhibits as "DLTR" (for Demand Letter), are as follows:

Citation	Civil Penalty
2852078	$ 20.00
2852601	50.00
2852602	50.00
2852605	105.00
2852606	105.00

2852607	119.00
2852608	20.00
2852609	20.00
	$489.00