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SOL (MSHA) V. MID-WEST MINERALS
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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. CENT 89-67-M
A.C. No. 23-00199-05503

v.

Jasper #15 Mine

MIDWEST MINERALS, INC.,
RESPONDENT

DECISION

Appearances: Charles W. Mangum, Esq., Office of the
Solicitor, U.S. Department of Labor,
Kansas City, Missouri for Petitioner;
Alan Stotz, Midwest Minerals, Incorporated,
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 Midwest Minerals, Inc. (Midwest) with four violations of the regulatory standard at 30 C.F.R. 56.9002. The general issue before me is whether Midwest violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

The four citations, issued pursuant to Section 104(a) of the Act alleged, as amended, "significant and substantial" violations and charged as follows:

Citation No. 3273075

The R22 Euclid Haul truck company number 854, did not have a [sic] operating grade retarder. The truck is used to stockpile crushed limestone and travels on the level most of the time except when it is on top of a stockpile. At the time the violation became apparent, the truck was parked and in response to questions it was learned that the retarder didn't work.

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Citation No. 3273076

The grade retarder on the R22 Euclid, company number 855, was not working. The truck was not in operation when this information was learned, but came to lite [sic] when company personnel was [sic] questioned about the operation of the truck. The truck is used to stockpile crushed limestone and runs on the level most of the time except when it is on top of the stockpile.

Citation No. 3273077

The grade retarder on the R22 Euclid haul truck, company number 851, was not operating. The truck was not in operation when the violation was learned and came to lite [sic] when company personnel was [sic] questioned about the operation of the truck. The truck is used to stockpile crushed limestone and runs on the level most of the time, except when it is on top of the stockpile.

Citation No. 3273078

The grade retarder on the R22 Euclid (Company No. 859) was unhooked. The truck was parked when this information came to lite [sic] while company personnel were being questioned about the operation of the truck. The truck is used to stockpile crushed limestone and runs on the level most of the time except when it is on the top of a stockpile.

The cited standard, 30 C.F.R. 56.9002, provides that "equipment defects affecting safety shall be corrected before the equipment is used."

The Secretary's evidence is not disputed. Robert Earl, an inspector for the Federal Mine Safety and Health Administration (MSHA) testified that he was familiar with the Midwest Jasper No. 15 Mine since he had formerly worked there and had previously conducted a compliance (courtesy) inspection at the mine. A courtesy inspection is designed to advise the operator of potentially violative conditions at his mine without being penalized or cited. At the courtesy inspeciton Earl provided about a month before the instant citations were issued he advised mine supervisor Crumpecker that non-functioning grade retarders on the Euclid haul trucks would be cited if not repaired. Grade retarders are

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designed for trucks with automatic transmissions to reduce speed to 3 1/2 miles per hour without the use of brakes. The R22 Euclid haul trucks were capable of hauling 20 to 25 tons of rock and had a net weight of about 20 tons.

On August 11, 1988, Inspector Earl returned to the Jasper No. 15 Mine for a routine regular inspection and found that the grade retarders had not been repaired on the cited haul trucks. Earl accordingly issued the citations now at issue.

It is not disputed that the cited trucks were available for service and were used to stockpile crushed limestone. According to the undisputed testimony of Inspector Earl a ramp is built onto the stockpile and over which these trucks operate. Eventually the ramp would be developed with a 15 percent grade and up to 35 feet long. According Earl it is the industry practice for the grade retarders to be used to reduce speed and it was a particularly important safety device on the Euclid trucks which had "notoriously bad brakes". It is not disputed moreover that the trucks here cited were also operating in a congested area. Earl opined that it was therefore likely that the trucks might be involved in an accident implicitly causing serious injuries to one or both drivers.

Within the above framework of evidence it is clear that the violations are proven as charged that the violations were "significant and substantial". Particularly in light of the undisputed evidence that these haul trucks would be operating in a congested area on a 15 degree ramp and had "notoriously bad breaks" it is clear that the violations involved a discreet safety hazard, that there was a reasonable likelihood that the hazard contributed to would result in an injury from a truck accident and there was a reasonable likelihood that the injuries would be of a reasonably serious nature. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984); Secretary v. Consolidation Coal Co., 8 FMSHRC 890 (1986). Under the circumstances I also reject Midwest's proffered defense that grade retarders are not safety devices or subject to the cited regulation. The fact that grade retarders may also be used to reduce brake wear, as Midwest maintains, only serves to underline the fact that grade retarders are indeed safety devices.

I further find that Midwest is chargeable with high negligence. It is undisputed that several weeks before these citations were issued Inspector Earl advised Midwest

~2172

officials at a courtesy inspection that the grade retarders must be functioning or citations would be issued. There is no evidence that Midwest then disputed MSHA's position that grade retarders were "safety devices" subject to the provisions of 30 C.F.R. 56.9002. In any event the failure of Midwest to have repaired the defective grade retarders before the inspection at bar and the continued use of the trucks without grade retarders therefore constitutes high negligence.

It is also undisputed that as of the date of hearing the grade retarders had still not been repaired. Moreover apparently to avoid making the repairs the cited trucks were moved out of the MSHA district in which they had been cited. Indeed the evidence shows that they had been moved to the State of Kansas under the jurisdiction of the MSHA Topeka District office. According to the testimony of Midwest official Alan Stotz those trucks have since been inspected within that MSHA district and have not been cited for failure to have grade retarders. It is not clear however whether that MSHA office had knowledge of the non-functioning grade retarders. In any event the evidence is clear that the cited violations have not been abated and the mine operator is making conscious efforts to avoid abatement. Accordingly I reject the stipulation by the parties (Joint Exhibit No. 1) that "the Respondent demonstrated good faith in abating the alleged violation".

The penalty assessment in this case must appropriately reflect the findings on these important criteria as well as the size and history of violations. Under the circumstances I find that civil penalties of \$300 for each violation are appropriate.

ORDER

Midwest Minerals, Inc., is directed to pay civil penalties of \$1,200 within 30 days of the date of this decision. The Secretary of Labor is directed to report to the undersigned within 30 days of the date of this decision as to whether the violations herein have been abated and, if not, what further action will be taken.

Gary Melick
Administrative Law Judge
(703) 756-6261