

CCASE:  
SOL (MSHA) V. TEXAS INDUSTRIES  
DDATE:  
19900220  
TTEXT:

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 89-119-M  
A.C. No. 41-00071-05516

v.

Midlothian Quarry

TEXAS INDUSTRIES INC.,  
RESPONDENT

DECISION

Appearances: E. Jeffery Story, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Dallas, Texas for Petitioner;  
Bobby M. Williams, Texas Industries, Inc.,  
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 Texas Industries, Inc., (Texas Industries) with two violations of regulatory standards and proposing a civil penalty of \$1,100 for the violations. The general issue before me is whether Texas Industries violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3281061 alleges two separate violations of regulatory standards (30 C.F.R. 56.14101(a) and 56.14100(b)) and charges as follows:

The service brake system on the electrical powered scooter was inoperable. This scooter belonged to the lab department and was traveling through an area where all the over-the-road type equipment entered and left the plant area. There was also foot travel through this area. (56.14100(b)) The fast pedal [sic] speed selector would not return to neutral it had to be pulled up to stop the scooter.

The regulatory standard at 30 C.F.R. 56.14101(a) provides in relevant part as follows:

- (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

The regulatory standard at 30 C.F.R. 56.14100(b) provides that: "[d]efects on any mobile equipment, machinery and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

Respondent Texas Industries admits the violations as charged but denies that the violations were "significant and substantial" and maintains that the proposed penalties are excessive.

Melvin H. Robertson an electrical inspector for the Federal Mine Safety and Health Administration (MSHA) was performing a regular inspection on March 14, 1989, at the Texas Industries Midlothian Plant. According to Robertson the operation includes both a limestone mine and a cement production facility. During the course of his inspection he observed an electric scooter similar to a 3-wheel battery powered golf cart driving at "high speed" estimated to be about 10 to 15 miles an hour.

Robertson waived for the vehicle to stop but the driver waived back and kept on driving. Rudy Hall the Texas Industries Safety Director was also present and yelled for the operator to stop. The vehicle then turned back to where the men were standing. Robertson then asked the vehicle operator if he had any brakes and the operator responded "well they're not too good". Robertson then asked the operator to apply the foot pedal and he observed that it went down to the floor. Robertson again asked the operator whether he had any brakes and the operator responded "no". Robertson also noticed that the driver leaned over inside of the vehicle and asked why he had done so. The driver responded "well, the foot pedal hangs down on it so I had to pull it up by hand". Upon determining that the vehicle had a functioning parking brake Robertson directed the operator to drive the vehicle to the shop and take it out of service.

Robertson further testified that in his opinion it was highly likely for injuries to occur and it was reasonably likely that those injuries would be fatal. He observed that the cited cart was traveling to the shop and warehouse area passing through an area of other vehicular traffic including

~237

"18 wheelers", a street sweeper, and 1 1/2 ton pick-up trucks. Robertson also observed pedestrian traffic in the same area. According to Robertson no tests were performed on the brakes since the operator agreed to remove the vehicle from service for repairs. See 30 C.F.R. 56.14101(b).

Robertson found the operator chargeable with moderate negligence in regard to these violations. In talking to the supervisor of the lab department Robertson learned that the brakes had recently been installed and adjusted on the cited cart. According to Robertson the mine operator was also unaware that it was required to perform preshift inspections on the cart.

Rudy Hall, testifying on behalf of Texas Industries, acknowledged that he was present with Inspector Robertson at the time the cited cart passed by. Hall observed that after shouting at the driver the vehicle came to a full stop before returning. Hall testified that it was he who first observed that the speed selector was depressed down to the floor and initiated the inquiry into its problem when the driver stated that "it sticks sometimes". Hall maintains that it was he who directed the vehicle to the stop.

Hall further testified that the area in which the scooter was operating was not "highly dangerous". He observed that the speed limit in the area was enforced at 15 miles per hour. While there were admittedly other vehicles in the area including "18 wheelers," Hall observed that the vehicles were usually lined up and only "inching" forward.

Hall also testified that after the scooter was repaired he performed a test without using the brakes and found that by using only the speed selector the vehicle came to a stop from maximum speed in 95 feet. Hall also noted that he had run into a wall with a similar scooter and with the spare tire acting as a bumper the vehicle merely bounced off. He also noted that the vehicle even when operating at its maximum speed of 15 miles per hour can be turned 180 to avoid hazards. While conceding that there was a potential for a scooter with defective brakes to run into a moving vehicle Hall nevertheless thought this was unlikely. Hall also conceded that if a pedestrian would be struck by a scooter traveling at 15 miles per hour that person could be killed. He nevertheless thought that the chance of hitting a pedestrian was "unlikely". Hall observed that no additional parts were needed to repair the scooter and that only adjustments were made.

~238

I find in this case that the necessary elements of a "significant and substantial" and serious violation exist based upon the credible testimony of Inspector Robertson alone. See Mathies Coal Co., 6 FMSHRC 1 (1984). In reaching this conclusion I have not disregarded the opinions of Mr. Hall. However on the facts of this case the greater weight is to be given that of the disinterested and expert testimony of the MSHA inspector. In addition while I do not accept Inspector's Robertson rationale, I accept his finding of only moderate negligence. In evaluating all of the criteria under section 110(i) I find that civil penalties of \$200 and \$100 respectively for Citation No. 3281061 Part A and Citation No. 3281061 Part B are appropriate.

ORDER

Texas Industries, Inc., is directed to pay civil penalties of \$300 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge