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SOL (MSHA) v. HERBA SAND & GRAVEL
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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10 Floor
5203 Leesburg pike
Falls Church, Virginia 22041

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

v.

HERBA SAND & GRAVEL,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. YORK 90-9-M
A. C. No. 30-02184-05502

Mayfield Pit & Plant

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor,
U. S. Department of Labor, New York, New York, for
the Secretary; Mr. Ed Herba, Jr., Owner, Herba Sand & Gravel,
Gloversville, New York, for Respondent.

Before: Judge Weisberger

Statement of the Case

In this Civil Penalty Proceeding, the Secretary (Petitioner), seeks the imposition of a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. 56.14101(a)(3). Pursuant to notice, a hearing was held in this matter on January 23, 1991, in Albany, New York. John Montgomery II testified for Petitioner, and Edward F. Herba, Jr. testified for Respondent.

Findings of Fact and Discussion

I.

On October 5, 1989, John Montgomery, an inspector employed by the Mine Safety and Health Administration, while inspecting Respondent's operation, observed a Euclid haul truck while it was backing up to a dump point. Montgomery testified that it appeared that the truck did not have adequate brakes. He said that he spoke to the driver, Art Thompson, who told him that the parking brakes would not hold the truck. Montgomery testified, in essence, that Thompson further told him that the only way he is able to hold the truck on a hill, is to place two feet on the brakes, and keep the truck in gear.

According to Montgomery, he walked alongside the truck while it was going up a grade that he estimated to be between 8 to 10 percent. Montgomery told Thompson to hit the brakes and, because he had Thompson leave the door of the truck open, he observed that Thompson placed both feet on the brakes, but the truck still rolled backwards. Montgomery thereupon issued an imminent danger order as well as a citation alleging a violation of Section 56.14101(a)(3), supra, which provides as follows: "All braking systems installed on the equipment shall be maintained in functional condition."

Respondent did not offer any evidence to contradict the testimony of Montgomery with regard to the functioning of the brakes on October 5. Edward F. Herba, Jr. testified that the following day the back brakes did work, and he made just a little adjustment on them. However, he indicated that the front brakes were not holding and they had to be adjusted. He opined, essentially, that on the day of Montgomery's inspection the brakes were functioning at 80 percent.

Based on Montgomery's testimony that he observed that the Euclid haul truck rolled backwards after the brakes had been applied, and considering Herba's testimony that the front brakes were not holding and had to be adjusted, I conclude that the evidence establishes that Respondent herein did violate Section 56.14101, supra.

II.

According to Montgomery, based upon his observations, experience, and information he obtained from reviewing accident reports, he concluded that, if the brakes in question were not corrected, it was reasonably likely that an operator could lose control and either go over an embankment injuring himself or run over an outside vendor who could have come onto the premises. He thus concluded that the violation was significant and substantial.

The site in question was described by Herba as being hilly and Montgomery testified that at one point the terrain was at a grade of approximately 8 to 10 percent. Given these conditions and the condition of the brakes, certainly an accident could have occurred as a result of the operator of the truck not being able to stop it properly. However, the evidence fails to establish that an injury of a reasonably serious nature was reasonably likely to have occurred. (See, Mathies Coal Co., 6 FMSHRC 1 (January 1984)). Essentially, according to Montgomery, the haul truck operator could have been injured if the truck rolled over as a consequence of going over an embankment by virtue of the brakes not functioning properly. However, no proof was adduced as to the existence of embankments and their specific locations, particularly in reference to the areas where the haul truck

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operated. Also, the evidence is lacking with regard to whether persons other than the operator are frequently present in the area where the truck operates. Although, according to Montgomery outside vendors could enter the premises, the record does not establish how frequently, if at all, vendors enter the area in question. Hence, I conclude that it has not been established that the violation herein is significant and substantial (See, Mathies Coal Co., supra).

III.

I accept Herba's testimony that the back brakes needed only a small adjustment, but that the front brakes needed adjustment. Additionally, taking into account the hilly terrain in question, I conclude that the violation was of a moderately serious level of gravity. Montgomery testified that Thompson had told him that he had reported to Herba the problem concerning the brakes. However, Thompson did not testify. Herba testified that prior to October 5, 1989, Thompson did not tell him that there were any problems with the brakes. I thus conclude that Respondent was negligent to only a low degree. Considering these factors, as well as the size of Respondent's operation, as stipulated to by the Parties at the hearing, and the fact, as stipulated to at the hearing, that no violations were cited by MSHA in the 24-month period prior to the inspection at issue, I conclude that a penalty of \$150 is appropriate for the violation found herein.

ORDER

It is ORDERED that, within 30 days of this Decision, Respondent pay \$150 as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge