CCASE:
SOL (MSHA) v. GIANT CEMENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

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

v.

GIANT CEMENT COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. SE 90-140-M
A.C. No. 38-00007-05560

Giant Mine

DECISION

Appearances: Leslie John Rodriguez, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for the Petitioner;
Burton L. Ardis, Jr., Safety Director, Giant Cement Company, Harleyville, South Carolina, for the 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 Giant Cement Company (Giant) with two violations of mandatory standards and proposing civil penalties of $40 for those violations. The general issue before me is whether Giant 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. 3612429 alleges a violation of the mandatory standard at 30 C.F.R. 56.14100(b) and charges that "[t]he windshield wipers on the 125B Cat. F/E Loader, Company No. Q11 were not in working condition". The cited standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

In its Answer filed in these proceedings Giant does not dispute the existence of the cited defect nor that it affected safety but maintains that such a defect would have ordinarily been discovered during pretest procedures and that a work order would subsequently have been written and the defect corrected before the cited equipment would have been placed in service. The evidence shows in this case that the cited loader was not

operating (though it was capable of being used) and had been parked and not operated for eight days before the citation at bar was issued on June 4, 1990.

The cited manadatory standard requires that safety defects "shall be corrected in a timely manner to prevent the creation of a hazard to persons" (emphasis added). The term "timely" has been defined as "done or occurring at a suitable time". Webster's Third New International Dictionary of the English Language, Unabridged, 1986, Merriam-Webster, Inc. In order to determine whether the operator herein corrected the cited defects in a "timely" manner it should be determined when the defects were discovered or reasonably should have been discovered. On the credible record before me, it may reasonably be concluded that the cited loader was last operated eight days before the citation was issued. There is no evidence that when the loader was last operated the cited defect was observed or even existed. Since the required inspection of the equipment is done before the beginning of the shift the wipers could very well have become defective sometime during that last work shift. Moreover since the next preshift inspection would not be expected to be made until just before the loader would again be operated, it is also unlikely that the defect would have been, or necessarily should have been, discovered before such time.

Considering that corrections only need to be made under the cited standard in a "timely" manner I cannot find that a violation existed herein. Since the preshift examination had not yet been made nor was it required before the cited loader would next be operated it would be premature to find a violation under this standard. Citation No. 3612429 must accordingly be vacated.

In reaching this conclusion I have not disregarded the Secretary's reference to the case of Secretary v. Mountain Parkway Stone, Inc., 12 FMSHRC 960 (1990) involving the interpretation of a different standard, 30 C.F.R. 57.9002 (1988), with language requiring that "[e]quipment defects affecting safety shall be corrected before the equipment is used." It is not disputed in this case that the cited equipment was not tagged out and was capable of being used within the meaning of the Mountain Parkway decision. The result in this case depends however on the unique language of the standard at 30 C.F.R. 56.14100(b).

Citation No. 3612430, as amended, charges a violation of the mandatory standard at 30 C.F.R. 56.14132(a) and charges that "[t]he service horn was not in working condition on the 125B Cat. F/E Loader, Company No. Q11". The cited standard provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

This standard, unlike the standard at 30 C.F.R. 56.14100(b) previously considered, does not require consideration of timeliness. Indeed it is clear from the plain language of this standard that the operator is made a virtual guarantor that "manually operated horns. . . shall be maintained in functional condition". In this case again it is apparent that the operator does not dispute that the cited horn was not functioning on the cited loader as charged but maintains that during its pretest procedures it would have discovered that defect and a work order would have been written and the defect corrected before the equipment would be operated.

The cited loader was admittedly not "tagged out" of service and was therefore clearly available for usage at the mine site. Under the circumstances the violation is proven as charged. It is clearly immaterial in proving a violation of the cited standard that the operator may have in existence a "pre-test" procedure that, if properly followed, might very well lead to discovery of such defects before the equipment is operated. The existence of such a procedure, if proven effective in the past, may very well reduce the negligence and gravity findings relating to a violation charged under the cited standard but it cannot negate a violation of the standard.

The evidence in this case of a significant number of prior equipment safety violations at this mine indeed suggests that the "pre-test" procedures have not been effectively implemented. Accordingly I can give but little weight to the claims that such procedures would likely result in detecting and correcting such a violation as charged herein. More significantly, however, Giant's mobile equipment repair foreman, Danny Westbury, testified that the discovery of a defect such as the inoperable horn cited herein nevertheless would not prevent the usage of the equipment if repair parts were not available and the equipment was needed. For this additional reason then it is clear that the mere existence of the alleged "pre-test" procedures is irrelevant and not a viable defense to the charges herein nor in mitigation of the penalty. Under the circumstances and considering all of the criteria under Section 110(i) of the Act I find that a civil penalty of $100 is appropriate.

ORDER

Citation No. 3612429 is vacated. Citation No. 3612430 is affirmed and the Giant Cement Company is directed to pay a civil penalty of $100 for the violation therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge