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SOL (MSHA) v. YERINGTON CONSTRUCTION
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

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

v.

YERINGTON CONSTRUCTION COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 91-127-M
A.C. No. 20-02849-05501 GUL

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DECISION

Appearances: Lisa R. Williams, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
the Petitioner;
John S. Yerington II, President, Yerington Leasing
Company, on behalf of Respondent, Yerington
Construction Company.

Before: Judge Melick

This case is before me pursuant to section 105(d) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et
seq., the, "Act," to challenge two citations issued by the
Secretary of Labor, for violations of regulatory standards. The
general issue before me is whether Yerington Construction Company
(Yerington) violated the cited regulatory standards as alleged,
and, if so, what is the appropriate civil penalty for such
violations.

Citation No. 3618745 alleges a "significant and substantial"
violation of the regulatory standard at 30 C.F.R. 56.14100(a)
and charges as follows:

The foreman failed to perform a pre-shift examination
of the dozer prior to use on the mine site. The foreman
stated he was the first to use it at this site. It was
discovered that the service brakes of this Case 450
dozer, serial No. 3071733 were not functional. A person
can be seriously injured if unaware of defects to
equipment due to the lack of an

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equipment safety inspection prior to use. The foreman was acting as a contractor to Yerington Leasing Company.

The cited standard provides that "self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

Citation No. 3618746 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 56.14100(c) and charges as follows:

The employee of the Case 450 dozer, serial No. 3071733 did not remove from service the equipment when he knew the service brakes were not functional. The dozer was in use on a stockpile 20 feet above the pit floor. A person can suffer serious injury if involved in a [sic] accident due to a safety defect involving service brakes.

The cited standard, 30 C.F.R. 56.14100(c), provides as follows:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

The Respondent does not dispute the violations as charged nor the special findings associated therewith, but argues that the cited equipment was rented from a company named Maple Rapids Aggregate, and therefore that company was responsible for the violations. Respondent argues alternatively that in any event he, as job manager, never authorized his employees to put themselves in dangerous positions. According to Mr. Yerington, it would follow therefore that the employee alone was responsible for his own actions.

Under section 3(d) of the Act, however, an "operator" of a mine is "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." From the record herein it is clear that Yerington was, at a minimum, supervising operations at the cited mine and was an independent contractor performing services at the mine. Accordingly, Yerington is an "operator" under the Act charged with the responsibility for conforming with the Act and legally promulgated regulations including the inspection and safe

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operation of its equipment whether owned or leased. It is also noted that the violations in this case were personally committed by the operator's foreman and agent.

According to Federal Mine Inspector Gerald Holeman, on the date of the citations, September 10, 1990, Yerington Construction Company had a separate federal identification number based on a legal identity report filed in that name. During his inspection of the portable crushing plant, he observed only two employees at the work site and both were employees of Yerington Construction Company. He saw one employee operating the bulldozer cited in this case who identified himself as Steve Harman, the foreman. Harman reportedly told Inspector Holeman that Yerington Leasing Company owned the equipment and that he was an employee of Yerington Construction Company, hired to operate the equipment. As Inspector Holeman was questioning foreman Harman, another employee, Bernie Knodl, began operating the bulldozer. Later during the course of his inspection, Knodl was asked about the condition of the brakes. Knodl admitted that the brakes on one side did not work at all, and demonstrated this fact to the inspector.

According to Holeman, the hazard of operating the bulldozer on a 20 foot stockpile without functional service brakes on one side was serious. Since the brakes on only one side of the bulldozer operated you could only turn in one direction. Under the circumstances, there would be limited ability to negotiate the terrain, the equipment could therefore strike other employees and equipment and could roll off the stockpile. Inspector Holeman therefore concluded that it was reasonably likely for an accident to occur and that such an accident was reasonably likely to be fatal. Accepting this undisputed evidence, I find the violations to be indeed serious and "significant and substantial" Mathies Coal Company, 6 FMSHRC 1 (1984). Harman also conceded that he had not preshifted the cited equipment, and that he was the first employee to operate it on that shift. The violations were therefore clearly the result of operator negligence.

Considering the absence of any prior history of violations by this mine operator and its small size but also considering the seriousness of the violation and the fact that an agent of the operator, the foreman, was actually committing the violations, it is apparent that the proposed civil penalty of \$68 for each violation is appropriate.

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ORDER

Citation Nos. 3618745 and 3618746 are affirmed. Yerington Construction Company is hereby directed to pay civil penalties of \$136 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge