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SOL (MSHA) V. CONCO-WESTERN STONE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-41-M A. C. No. 11-00040-05507
v.	Aurora Quarry Mine
CONCO-WESTERN STONE COMPANY, RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-52-M A. C. No. 11-00040-05508-A
v.	Aurora Quarry Mine
ROSS CAMPBELL, EMPLOYED BY CONCO-WESTERN STONE COMPANY, RESPONDENT	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Joseph C. Loran, Esq., Murphy, Hupp, Foote, Mielke and Kinnally, Aurora, Illinois, for the Respondents.

Before: Judge Maurer

These consolidated cases are before me upon the petitions for civil penalties filed by the Secretary pursuant to sections 110(a) and 110(c), respectively, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", seeking civil penalty assessments for alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

The issues presented herein are whether the respondents have violated the standards as alleged in the petition for assessment of civil penalties, whether the violations were "significant and substantial," and the appropriate civil penalties that should be assessed based on the civil penalty criteria found in section 110(i) of the Act. An additional issue in the section 110(c) case is whether Ross Campbell, as the agent

of the corporate mine operator, knowingly authorized, ordered or carried out the cited violations of the mandatory safety standards alleged in the petition for civil penalty.

These issues were tried before me on June 28, 1991, in Aurora, Illinois, and all parties have filed posthearing briefs which I have duly considered in making the following decision.

Citation/Order No. 3259899 was issued by MSHA Inspector Arthur J. Toscano on February 6, 1990, and alleges violations of 30 C.F.R. 56.14100(c), 30 C.F.R. 56.14101(a)(1), and 30 C.F.R. 56.14101(a)(2).

From February 5 through February 7, 1990, Inspector Toscano had conducted an inspection of Conco-Western Stone Company's Aurora Quarry. On February 6, he encountered a "beat-up" green Ford pick-up truck parked on a ramp in front of the main garage and repair building at the quarry site. He observed that the parking brake was permanently wired up in the off position, the doors did not close or latch, the seat of the truck was bare coil springs with only a piece of rubber covering over it, and there was a large hole in the floor of the truck where the floor pan area had rusted through. The truck also had no muffler. The exhaust pipe ended at the hole in the floor. The inspector next attempted to conduct a service brake check. When he pushed on the brake pedal, it went right to the floor. When he attempted to pump it up by pushing on the pedal two or three more times, it came up a little bit.

At this time the radiator was also out of the truck. My impression is that this truck was probably taken out of service de facto on an economic basis with or without the inspector's action, but the fact remains that it wasn't tagged out of service or placed in a designated area posted for that purpose prior to the inspection. Furthermore, Foreman Randy Brey, standing in for the Superintendent, Ross Campbell, who was on vacation, told the inspector that when and/or if a replacement radiator was purchased, the truck would be returned to service. Brey further informed him that the truck had been used in the condition the inspector found it in until the radiator was removed. In fact, the truck had been used up until the day before the inspection in all likelihood.

Respondents, however, admit only that the parking brake was inoperative. They contest the existence of the violation with respect to the service brakes and also deny that the truck's "defects" made its continued operation hazardous to persons in the area and further deny the degree of negligence alleged and the inspector's finding of a "significant and substantial" violation. They affirmatively assert that the vehicle had been taken out of service prior to the inspection.

Respondents also argue that the inspector failed to follow his own regulations for testing the service brakes. He declined to do so because he claims it wouldn't have been safe to move the truck, let alone perform a 15-20 m.p.h. brake test on it. I cannot find any fault with the inspector's reasoning here, especially since he could visually observe that the front service brake system was disconnected and totally inoperable. The truck was designed with a four wheel braking system and he determined that it would be hazardous to operate the truck without service brakes on all four wheels. I concur.

Randy Brey also testified. On the day of the inspection, he was "acting like a foreman" because Ross Campbell was on vacation. He states that it was Ross Campbell, the superintendent, who was responsible at the quarry site for the safety and health of the miners.

Brey is very familiar with the truck in question. It has been in service at the quarry for the 17 and 1/2 years that he has worked there. It was used as a maintenance vehicle and carried tools, parts, welding equipment, etc. It was driven for short distances mostly, generally no more than a half-mile at a time and never off the site.

This witness was aware of and corroborated the inspector's testimony concerning the generally poor condition of the truck; i.e., the doors that wouldn't close, the hole in the floorboard, loud engine exhaust into the truck, and "bad" brakes. However, he insisted that he was not aware that it had "no" brakes, he had only heard that it had "bad" brakes. This he learned from the men that drove it every day, since he had not driven it in 6 months or so at the time of the inspection.

Inspector George Lalumondiere testified that after Citation/Order No. 3259899 was written, he was assigned to do a special investigation into a possible "knowing violation" (a section 110(c) investigation). Based on the information he gathered from the quarry employees and from Ross Campbell himself, he felt that although Campbell denied having actual knowledge of it, had he (Campbell) used prudent care, he had every reason to know of the condition of the truck because he was the superintendent and the person responsible for the safety and health of the employees, and he saw the truck daily in operation around the mine site.

A sampling of some of these witness statements taken from miners during the section 110(c) investigation provide a basis for his opinion. John Raue relates that the truck was in terrible shape; no brakes, no windows in the doors or back of the truck, doors that wouldn't stay shut and floorboards that were rusted completely out of the truck (Petitioner's Exhibit No. 2). Mike Mertens related that the truck had no brakes, no

floorboards, doors that wouldn't stay closed, worn out ball joints and tie rod ends and was just in terrible shape. When he complained to Ross Campbell about it, Campbell told him it was better than walking (Petitioner's Exhibit No. 5).

Campbell himself admits that the exhaust system was bad, there was a hole in the floor, the door wouldn't latch, and the parking brake was not working. He also admits that all of these things should have been fixed. He does, however, dispute that he was aware of any problem with the truck's service brakes. As far as he was concerned, they worked.

After the inspection and citation of February 6, 1990, the truck was discarded. It was never repaired or used again after that.

Basically, with the exception of the disagreement over the status of the service brakes, the evidence is unrefuted and really undisputed that the truck had myriad other safety-related discrepancies. It looked like the inspector, Brey and the other miners, including even Superintendent Campbell say it looked. With regard to the service brakes, my impression is that they were probably marginally operative; but only by pumping the brake pedal and then since only the rear set of brakes was even connected, they were most likely not effective in stopping the vehicle once it had any momentum. It is also my impression that but for the radiator being out of the vehicle, they would have been using it in just the condition it was in on the day of the inspection. I therefore find and conclude that the truck had not been taken out of service, except for the absence of the radiator necessarily shutting it down for the time being. The truck was not marked or tagged out for repairs. It was also not in any designated area set aside for equipment that had been taken out of service.

Because of the totality of circumstances involving the truck, I concur with the Secretary that the truck presented asafety hazard to the miners who drove or rode in or on it as well as to the miners who were pedestrians in the quarry site area all in violation of 30 C.F.R. 56.14100(c).

Specifically with regard to the brakes on the vehicle, I conclude and find that the credible testimony of the inspector establishes that the front service brakes were disconnected and therefore inoperable and the parking brake was admittedly inoperable, all in violation of 30 C.F.R. 56.14101(a)(1) and (2). I conclude and find that any reasonable interpretation of the intent of this standard requires that the brakes perform the function for which they are normally designed when they are on the truck. This truck was designed by the Ford Motor Company to operate under normal conditions with wheel brakes on all four wheels and a parking brake. Moreover, the inspector tested the

remaining rear service brakes by pumping the brake pedal and found them to be in his opinion inadequate to stop the vehicle. I therefore find that it was not necessary and would in fact have been imprudent on his part to risk the life and limbs of anyone else conducting a diagnostic braking test with this truck. Respondent's argument that he should have performed the testing described in 30 C.F.R. 56.14101(b) is without merit and is rejected.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

With the exception of the violation of 30 C.F.R. 56.14101(a)(2), the parking brake violation, I find all the remaining violations (the other two) to be of a significant and substantial nature. That finding is deleted from the parking brake violation and the ordered civil penalty will reflect that. The lack of adequate service brakes (by itself a significant and substantial violation) combined with all the other admitted safety-related deficiencies of this vehicle seriously compromised the safety of all those who had to operate the vehicle or be in the vicinity where it was being operated. I conclude and find therefore that its operation on the quarry site presented a reasonable likelihood of an accident which would reasonably and likely be expected to result in at least injuries to the driver as well as any other occupants or pedestrian quarry personnel exposed to the hazard. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

Turning now to the individual respondent, the evidence in this case clearly supports the charges that the respondent, Ross Campbell, was an agent of a corporate mine operator and that he knowingly authorized the violations of the mandatory standards discussed herein. The condition of the truck was so obvious that he should have known of it and I find he did know of it. He observed the truck daily in use and even used it himself on occasion. Miners had complained to him about the truck's condition and in any event it was his own responsibility as superintendent to keep the truck in compliance with the pertinent mandatory standards.

The Commission has defined the term "knowingly," in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

> "Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

The facts of this case clearly meet this definition.

These "S & S" violations were also serious because by allowing this piece of equipment to deteriorate to the extent it had by the time the inspector found it, the miners had been permitted to work in the presence of serious safety and health hazards for quite some time. These conditions could have led to reasonably serious injuries. On the other hand, I consider the violation involving the parking brake to be neither "significant and substantial" nor serious.

I concur in the inspector's original finding of "moderate" negligence.

Considering all the applicable criteria contained in section 110(i) of the Act, I find the following civil penalties to be appropriate:

Docket No. LAKE 91-41-M

STANDARD VIOLATED		PENALTY
30 C.F.R.	56.14100(c)	$500
30 C.F.R.	56.14101(a)(1)	$500
30 C.F.R.	56.14101(a)(2)	$100

Docket No. LAKE 91-52-M

STANDARD VIOLATED		PENALTY
30 C.F.R.	56.14100(c)	$300
30 C.F.R.	56.14101(a)(1)	$300
30 C.F.R.	56.14101(a)(2)	$ 50

ORDER

Conco-Western Stone Company is ORDERED to pay civil penalties of $1100 within 30 days of the date of this decision.

Ross Campbell is ORDERED to pay civil penalties of $650 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge