CCASE:
MSHA V. BROWN BROTHERS SAND
DDATE:
19920123
TTEXT:

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 91-93-M
	:	A.C. No. 09-00265-05511
v.	:	
	:	Docket No. SE 91-663-M
BROWN BROTHERS SAND COMPANY, Respondent	:	A.C. No. 09-00265-05512
	:	
	:	Docket No. SE 91-756-M
	:	A.C. No. 09-00265-05513
	:	
	:	Junction City Mine

DECISIONS

Appearances: Michael K. Hagan, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for the Petitioner;
Carl Brown and Steve Brown, Brown Brothers Sand Company, Howard, Georgia, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for five (5) alleged violations of certain mandatory safety and health standards found in Part 56, Title 30, Code of Federal Regulations. Hearings were held in Macon, Georgia and the parties appeared and participated therein. The parties waived the filing of posthearing briefs but I have considered their oral arguments made in the course of the hearings in my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the cited conditions or practices constituted violations of the cited safety or health standards; (2) whether two of the alleged violations were Significant and Substantial (S&S); and (3) the appropriate civil penalty assessments for the cited violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq.

2. Commission Rules, 29 C.F.R. 2700.1 et seq.

3. Mandatory Safety and Health Standards, Part 56, Title 30, Code of Federal Regulations.

Stipulations

The parties stipulated to the following:

1. The respondent is subject to the Act and to the Commission's jurisdiction.

2. The respondent is a small sand mine operator employing nine to ten persons.

3. The payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.

4. Petitioner's exhibit P-7, a computer print-out reflecting the respondent's history of prior violations, accurately reflects two prior citations during the period March 26, 1989 through March 25, 1991.

5. All of the citations in these proceedings were timely abated by the respondent in good faith.

Procedural Ruling

Although Docket No. SE 91-756-M, dealing with the alleged noise violation (Citation No. 3605258) does not reflect that an answer was filed by the respondent, I take note of the fact that the answer filed by the respondent in Docket No. SE 91-663-M, makes reference to the noise violation. Under the circumstances, I have accepted this as an answer by the respondent in Docket No. SE 91-756-M.

Discussion

The contested violations in these proceedings are as follows:

Docket No. SE 91-93-M

Section 104(a) non-"S&S" Citation No. 3251229, September 24, 1990, cites an alleged violation of 30 C.F.R. 56.14107(a), and

the condition or practice cited is described as follows:

> The V-belt drive for the pump, located near the shaker screen was not guarded to protect persons from contacting the moving belts.

Docket SE 91-663-M

Section 104(a) "S&S" Citation No. 3605255, March 26, 1991, cites an alleged violation of 30 C.F.R. 56.14103(b), and the cited condition states as follows:

> The operator's cab on the John Deere 644CB front end loader has a shattered windshield.

Section 104(a) non-"S&S" Citation No. 3605256, March 26, 1991, cites an alleged violation of 30 C.F.R. 56.14101(a)(2), and the cited condition is described as follows:

> The park brake on the John Deere 644 CB front-end loader will not hold the equipment on the grade it travels.

Section 104(a) non-"S&S" Citation No. 3605257, March 26, 1991, cites an alleged violation of 30 C.F.R 56.14101(a)(2), and the cited condition is described as follows:

> The park brake on the John Deere 444 front end loader will not hold the equipment on the grade it travels.

Docket No. SE 91-756-M

Section 104(a) "S&S" Citation No. 3605258, March 26, 1991, cites an alleged violation of 30 C.F.R. 56.5050, and the cited condition is described as follows:

> On day shift March 26, 1991, the dredge operator was exposed to mixed noise levels of the dredge (barge) and exceeded unity (100%) by 149.71 times, 149.71% as measured with a dosimeter. This is equivalent to an 8-hour exposure to 93 dBA. Personal hearing protection was not being worn. Feasible engineering or administrative controls were not being used to eliminate the need for hearing protection.

Petitioner's Testimony and Evidence

Docket No. SE 91-93-M

MSHA Inspector Kenneth Pruitt testified that he has served as an inspector for 16 years. He confirmed that he issued the citation on September 24, 1990, after finding that a V-belt drive

for a pump motor near the shaker screen was not guarded. He explained that during a previous inspection there was a cover over the pump and some maintenance work had been done. The respondent had cut an old tank in half and installed it over the pump and motor as a guard. However, there were two openings cut into the cover to provide access to this equipment. In the event someone were to go into the tank area, they would be exposed to the unguarded V-belt and pinch points and their hand or clothing could be caught in these pinch points.

Mr. Pruitt stated that he considered it unlikely that an injury would result since the pump was located in an isolated area where no one works on a regular basis. Accordingly, he considered the violation to be non-S&S. However, he believed that if someone contacted these unguarded pinch-point with their finger or hand they would likely sustain permanently disabling injuries.

Mr. Pruitt stated that he based his moderate negligence finding on the fact that the respondent had all of the other pumps at the facility properly guarded. Abatement was achieved by blocking the area going into the tank and pump area so that no one could enter. He confirmed that there was a two to two and one-half feet distance between the tank and the opening and that the exception found in section 56.14107(b) did not apply in this case.

On Cross-examination, Mr. Pruitt confirmed that during a prior inspection visit there was a metal type enclosure or cover placed over the motor and pump in question. Although the cover was over the equipment, the two openings would allow anyone to walk into the area where the pump and motor were located. He also confirmed that someone would have to walk around the motor to reach the unguarded V-belt drive area. He agreed that if there were no openings exposing the belt drive the large tank placed over the equipment would be an adequate guard.

Docket No. SE 91-663-M

MSHA Inspector Darrell Brennan testified that he has been so employed for 13 years. He confirmed that he issued Citation No. 3605255 (Exhibit P-2), on March 26, 1991, after finding that the windshield on the loader was completely shattered and loose at the top of the frame and that the rubber grommet around the windshield frame was the only means of holding it secure. The loader was being used by an employee in the pit and Mr. Brennan confirmed that he climbed on and in the loader in order to inspect the windshield. He believed that the loosely fitted windshield could have fallen out while the machine was being operated, and if it did, the operator could sustain cuts from the jagged glass edges. Although the condition of the windshield obscured the visibility of the operator, the greater hazard was

the fact that the operator could sustain cuts on his hands in the event the windshield broke and fell in on him while operating the machine.

Mr. Brennan stated that he based his significant and substantial finding on his belief that it was reasonably likely that the windshield could fall in on the operator, and if it did, it would result in severe cuts to the operator's hands. He confirmed that abatement was achieved by removing the windshield. He also confirmed that he based his moderate negligence finding on his belief that the equipment operator and the respondent should have observed the condition of the windshield and taken steps to correct the condition.

On cross-examination, Mr. Brennan confirmed that the rubber grommet which is used to hold the windshield secure and in place is normally used for that purpose regardless of the condition of the windshield.

Inspector Brennan stated that he issued Citation No. 3605256, on March 26, 1991, after determining that the parking brake on the same loader with the shattered windshield would not hold the machine (exhibit P-3). The loader was coming out of the pit on a slight incline, and after it was stopped, the operator applied the parking brake and it would not hold or stop the machine. The loader was empty, and the operator initially stopped the machine with the service brakes. He took it out of gear and applied the parking brake and it would not hold the machine.

Mr. Brennan stated that he considered the violation to be non-"S&S" because the service brakes were operational and could stop the machine, and there was no hazard exposure to many people. He based his moderate negligence finding on his belief that the equipment operator and the respondent should have been aware that maintenance was needed and that the brake condition should have been reported. Mr. Brennan confirmed that when he next returned to the mine the condition was abated and he terminated the citation. He believed that the respondent installed a new brake cable and brake shoes.

On cross-examination, Mr. Brennan stated that the service brakes were workable. He confirmed that the loader bucket could be dropped to stop the machine and he recalled that the operator applied the service foot brake and dropped the bucket at the time he stopped the machine so that he could inspect it.

Inspector Brennan stated that he issued Citation No. 3605257 on March 26, 1991, (exhibit P-4) after inspecting another loader and finding that the parking brake would not hold the machine when it was applied by the operator. He confirmed that this loader was also operating in the pit and that the service foot

brakes were operable. He considered the violation to be non-S&S, because an injury was unlikely. However, in the event of injury resulting from the machine running into someone, it would result in "lost workday or restricted duty" type injuries. He believed the violation was the result of moderate negligence because the equipment operator should have been aware of the condition and reported it so that repairs could be made. A new parking brake cable and brake shoes were installed to abate the violation.

On cross-examination, Mr. Brennan stated that he did not further inspect the loader to determine whether it was equipped with a transmission parking device.

Docket No. SE 91-756-M

Inspector Brennan testified that he issued Citation No. 3605258, on March 26, 1991, after determining that the dredge operator on the barge used to suck up sand was exposed to noise levels in excess of the noise limits stated in the cited mandatory standard section 56.5050. Mr. Brennan stated that he conducted a noise survey for the full eight hour work shift from 7:00 a.m. to 3:00 p.m., using a Quest noise dosimeter. The device was clipped to the shirt collar near the ear of the employee operating the dredge. He checked the device readings periodically during the testing period. The results of his test are shown in exhibit P-6.

Mr. Brennan stated that the sound level meter readings varied from 90 to 96 dBA's, but that the average noise exposure during the shift was equivalent to an eight hour exposure of 93 dBA's. This exceeded the required and acceptable level of 90 dBA's pursuant to section 56.5050. He confirmed that the source of the noise was the dredge electric pump motor, and that the operator was not wearing personal hearing protection.

Mr. Brennan stated that the violation was abated after the respondent constructed an insulated plywood barrier and installed it between the electric motor and the dredge operator. The measured noise exposure after this installation was reduced to 86.5 dBA's, and he attributed this to the barrier. He estimated the cost of construction of the barrier at approximately $100,and he did not believe that this expense was out of proportion to the reduced noise exposure which was achieved.

On cross-examination, Mr. Brennan stated that he had no knowledge as to whether any previous noise studies or tests were ever made at the respondent's mining operation. He did not know the cost of the dosimeter which he used at the time of the inspection, and indicated that such a device could be purchased at Radio Shack for approximately $20.

In response to further questions, Mr. Brennan stated that he considered the violation to be significant an substantial because it was reasonably likely and proven that long exposure to excessive noise levels can cause permanent hearing loss. He confirmed that he did not test any other equipment for noise and believed that the plant was down for maintenance at the time of his inspection. He confirmed that the violation was the result of moderate negligence and that the respondent should have been aware of the noise requirements found in section 56.5050. He further stated that the respondent had the option of using administrative controls to limit the noise exposure by rotating different employees to operate the dredge. As far as he knew, the employee who he tested was the only person regularly assigned to the dredge.

Respondent's Testimony and Evidence

Docket No. SE 91-93-M

Carl Brown, the operator, produced three photographs of the cited pump V-belt drive in question (exhibits R-1 through R-3). Mr. Brown stated that the cover which was previously placed over this equipment was placed there to protect it from the sun which at times generated a lot of heat. The tank enclosure was installed to guard the pump and V-belt drive and the doors were cut out and a fan installed to provide cooling. Mr. Brown was of the opinion that the metal enclosure previously placed over this equipment provided adequate guarding. He also pointed out that the area in question is a remote area and that "not even a rabbit" could get caught in the cited V-belt drive.

On cross-examination, Mr. Brown stated that the V-belt drive in question is visible and accessible through the doorway opening shown in photographic exhibit R-3, and that the wire mesh enclosure shown in exhibit R-2 was installed as a guarding device to abate the citation.

Docket No. SE 91-663-M

Carl Brown testified that the cited John Deere 444 loader was purchased approximately 10 years ago as a used machine and that the parking brake was inoperative. He stated that parts were purchased at that time and the parking brake was repaired. He maintained that the loader operator does not use the parking brake and that the loader bucket is routinely dropped when the loader operator parks the machine or stops it. He also indicated that the loader transmission has a park mode which is used to hold the machine.

With respect to the cited 664 CB loader, Mr. Brown stated that the loader is rusty, sandy, and wet and that this affects the parking brake. He produced a photograph of the interior

braking pedals and devices to support his description of the machine (exhibit R-2). He also indicated that the parking brake is not used and that the operator drops the bucket to hold the machine.

With regard to the cited loader windshield condition, Mr. Brown produced three photographs of the loader in question (Exhibit R-1). He took the position that the condition of the windshield did not obstruct the vision of the operator. He disagreed that the windshield was totally shattered, and he described the conditions shown in the photographs as cracks. He also did not believe that the windshield could fall out and shatter and he stated that when it was removed from the machine it came out intact and in one piece, and that it was "safety glass".

Docket No. SE 91-756-M

With regard to the cited noise violation, Mr. Brown suggested that he was not aware of the noise requirements found in the cited regulation and he stated that he did not have a dosimeter to conduct any noise exposure tests. He further stated that MSHA inspectors have not previously tested his equipment for noise and he believed that an inspector should first inform him of what is required for compliance rather than issuing him citations and fines for violations. He also believed that noise from trains which pass by his property are louder than the noise from the cited dredge motor.

Findings and Conclusions

Citation No. 3251229

I conclude and find that the unrebutted and credible evidence presented by the petitioner establishes a violation of mandatory safety standard 30 C.F.R. 56.14107(a). Although the respondent made an initial effort to guard the cited pump V-belt drive, the testimony of the inspector and the photographs presented by the respondent establish that the two openings in the tank enclosing the pump exposed the unguarded pinch points and presented a hazard to anyone who may have inadvertently come in contact with these moving parts. The standard requires that such moving machine parts be guarded to prevent persons from contacting the exposed drive. While it is true that the cited equipment was located in a remote area where employees did not routinely work or travel, and mitigates the gravity, this is no defense to the violation. The citation IS AFFIRMED.

Citation 3605255

In this instance, the respondent is charged with a violation of 30 C.F.R. 56.14103(b), because of the cited condition of the

windshield on the front-end loader. The standard requires the replacement or removal of damaged self-propelled mobile equipment windows which obscure visibility necessary for safe operation, or create a hazard to the equipment operator.

Although the citation written by the inspector states that it was "shattered" and does not reflect whether the condition posed a visibility problem,or created a hazard to the equipment operator, the inspector testified that his principal concern was that the shattered windshield, which he personally inspected and observed and found to be loosely fitted in the frame and held into place by a rubber grommet, could have fallen in on the equipment operator and cut his hands.

The respondent's defense is that the windshield condition did not obscure the operator's visibility. The respondent also maintained that since the damaged windshield was removed in one piece to abate the citation, it was unlikely that it would fall in on the operator and that it did not pose a hazard.

The photographic exhibits submitted by the respondent reflect that the operator has a clear view out of the window from his position in the cab. Accordingly, I conclude and find that the condition of the windshield did not obscure his visibility.

After viewing the photographs, I find that the windshield was shattered at the top and contained several large cracks and "pitted" areas along the entire surface, particularly at the bottom immediately in front of the steering wheel where the operator is seated. In view of these conditions, I conclude and find that they created a hazard to the operator while he was seated behind the windshield while operating the loader in the pit. I further conclude and find that given the condition of the windshield, as shown in the photographs, it was reasonably likely that the loosely fitted, cracked, and shattered windshield could have fallen in on the operator while the loader was operating in the pit, exposing him to a hazard and placing him at risk. Under the circumstances, I conclude and find that a violation has been established and the citation IS AFFIRMED.

Citation Nos. 3605256 and 3605257

The credible testimony and evidence presented by the petitioner establishes that the parking brakes which were installed on the two cited front end loaders would not hold the empty equipment when the brakes were applied by the operator on the sight pit grades. The cited mandatory section 56.14101(a)(2), provides that if self-propelled mobile equipment is equipped with parking brakes, the brakes must be capable of holding the equipment with typical loads on the maximum grade it travels. In these instances, the brakes would not hold the loaders, which were empty, on slight pit grades.

The respondent's defense is that the loader's were subjected to wear and tear and that one or both of them were equipped with transmissions which had a stopping or parking mode, and that the buckets are routinely dropped to prevent the loaders from moving is rejected. The standard does not provide for the use of transmissions or dropped buckets to hold a loader which is equipped with a parking brake. The parking brake must be operable and capable of holding the machine, independent of any other devices. In this case, it is clear that the parking brakes would not hold the loaders, and that they did not function as they were obviously intended to function when they were installed on the equipment. Under the circumstances, I conclude and find that the violations have been established, and the citations ARE AFFIRMED.

Citation No. 3605258

I conclude and find that the credible and unrebutted evidence presented by the petitioner, including the noise survey test results, supports the inspector's finding that the dredge operator was exposed to noise levels in excess of the requirements found in the cited standard section 30 C.F.R. 56.5050. Accordingly, the citation IS AFFIRMED

Significant and Substantial Violations

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).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In United States Steel Mining Company, Inc., 7 FMSHRC 327, (March 1985), the Commission reaffirmed its previous holding in U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, and that a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations, including the question of whether if left uncorrected, the cited condition would reasonably likely result in an accident or injury.

Citation No. 3605255

I conclude and find that the has not rebutted the credible testimony of the inspector in support of his "S&S" finding concerning the windshield condition on the John Deere 644 CB front-end loader. I find that the inspector's testimony supports a reasonable conclusion that in the normal course of operating the loader in the pit area, the loader operator was exposed to a hazard in the likely event that the loosely fitted and broken windshield fell in on him while seated at the operator's control. If this occurred, I find that it was reasonable likely that the loader operator would sustain cuts of a reasonably serious nature. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Citation No. 3605258

I conclude and find that the inspector's credible and unrebutted testimony that long term exposure to excessive noise levels can result in permanent hearing loss support his "S&S" finding. The unrebutted evidence reflects that the dredge operator who was tested was the only person regularly assigned to the dredge, and he was not wearing personal hearing protection, and no administrative controls were being used. Given the fact

that the evidence suggests that the dredge operator had not previously been tested, and that prior noise surveys were not conducted at the mine site, I believe one can reasonably conclude that he was probably exposed to excessive noise levels over a relatively long period of time. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small mine operator and that the payment of the civil penalty assessments proposed in these proceedings will not adversely affect its ability to continued in business. I adopt these stipulations as my findings in these proceedings.

History of Prior Violations

The evidence reflects that the respondent was served with two single penalty citations during the period March 26, 1989, through March 25, 1991, and paid a civil penalty assessment of $20 for one of these violations. The second violation is the contested Citation No. 3251229, which is the subject of Docket No. SE 91-93-M. I conclude and find that for purposes of the instant proceedings, the respondent has a good compliance history and I have taken this into account.

Gravity

Based on the inspector's gravity and non-S&S findings with respect to Citation Nos. 3251229, 3605256, and 3605257, I conclude that these violations were non-serious . With regard to Citation Nos. 3605255 and 3605258, concerning the condition of the loader windshield and the dredge operator's noise exposure, I agree with the inspector's gravity findings and conclude that these were serious violations.

Negligence

I agree with the inspector's moderate negligence findings with respect to all of the contested citations, and I conclude that all of the violations resulted from the respondent's failure to exercise reasonable care.

Good Faith Abatement

The parties stipulated that all of the violations in these proceedings were timely abated by the respondent in good faith. I adopt the stipulations as my findings.

Civil Penalty Assessments

Based on the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found is section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed.

Docket No. SE 91-93-M

Citation No.	Date	30 C.F.R. Section	Assessment
3251229	9/24/90	56.14107(a)	$20

Docket No. SE 91-663-M

Citation No.	Date	30 C.F.R. Section	Assessment
3605255	3/26/91	56.14103(b)	$40
3605256	3/26/91	56.14101(a)	$20
3605257	3/26/91	56.14101(a)(2)	$20

Docket No. SE 91-756-M

Citation No.	Date	30 C.F.R. Section	Assessment
3605258	3/26/91	56.5050	$35

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above for the citations which have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of these decisions, and upon receipt of payment these matters are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Room 339, 1371 Peachtree Street, NE., Atlanta, GA 30367 (Certified Mail)

Mr. Carl Brown, Brown Brothers Sand Company, Box 22, Howard, GA 31039 (Certified Mail)

/ml