

CCASE:
SOL (MSHA) v. FORD CONSTRUCTION
DDATE:
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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 90-346-M
A.C. No. 04-04925-05503 AMH

v.

Royal Mountain King

FORD CONSTRUCTION COMPANY,
RESPONDENT

DECISION

Appearances: Susanne Lewald, Esq., Office of the Solicitor, U.S.
Department of Labor, San Francisco, CA,
for Petitioner;
Robert D. Peterson, Esq., Rocklin, CA,
for Respondent.

Before: Judge Morris

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges that Respondent Ford Construction Company ("FCC") violated safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., ("the Act").

A hearing on the merits was held in Sacramento, California on November 13, 1991.

The parties filed post trial briefs.

Threshold Issue

The threshold issue is whether MSHA has jurisdiction in the State of California or has it been preempted by Cal-OSHA.

FCC raised this issue at the hearing but did not pursue it in its post-trial brief. Inasmuch as FCC filed material in the nature of a post-trial brief at the close of the hearing, the Judge believes the threshold issue should be considered.

FCC relies on Troy Gold Industries, Ltd v. Occupational Safety and Health Appeals Board, Division of Occupational Safety and Health 187 Cal. App. 3d 379, 231 Cal. Rptr 861 (Nov. 1986). A summary of the relevant California statutes filed herein is necessary.

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Section 6703 vests jurisdiction over employment and places of employment in the California Division of Occupational Safety and Health.

Section 6303 defines "Place of Employment" and "Employment."

Section 6303.5 addresses the exercise of jurisdiction by a federal agency. This section provides as follows:

6303.5. Effect of exercise of jurisdiction by federal agency

Nothing in this division shall be construed to limit the jurisdiction of the state over any employment or place of employment by reason of the exercise of occupational safety and health jurisdiction by any federal agency if federal jurisdiction is being exercised under a federal law which expressly authorizes concurrent state jurisdiction over occupational safety or health issues.

Section 6304 defines "employer."

Section 7950 is the statutory citation for the Tom Carroll Memorial Tunnel and Mine Safety Act of 1972. Title 8, Subpart 17, Section 6950, contains various Mine Safety Orders. These orders appear to establish minimum safety standards at mines.

Title 8, Article 16, Section 7005 addresses drilling operations and jumbos.

Discussion

MSHA has a broad grant of authority to conduct inspections of mining facilities. The statute provides at Section 4 of the Act that "each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine, shall be subject to the provisions of this chapter." 30 U.S.C. 803. The Act further provides in Section 506 that the States may have concurrent jurisdiction with the MSHA to inspect and regulate mining facilities, and are preempted by the federal statute to the extent that any "such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard." 30 U.S.C. 955(a).

Section 6307 of the California Labor Code provides that Cal-OSHA has jurisdiction "over every employment and place of employment" in the state. That broad jurisdictional grant has been, however, qualified by Labor Code Section 6303(a) which defines the "place of employment" as "any place, and the premises appurtenant thereto, where employment is carried on, except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division." [Emphasis added.] Thus it would appear from the plain meaning of the statutory language that in places where a federal agency is authorized to conduct inspections, and where that federal agency actually does conduct inspections, Cal-OSHA is precluded from exercising concurrent jurisdiction pursuant to state law.

This is the exact result which the California Court of Appeals arrived at in the Troy Gold case. In that case, citations issued by Cal-OSHA were vacated on the grounds that the gold mine where the citations arose was within MSHA jurisdiction, and where MSHA had been actively involved in exercising that jurisdiction. The court reasoned that:

. . . the intent of the Legislature, which we derive from the unambiguous language of section 6303, is for the Division to have potential plenary jurisdiction over the occupational health and safety of the place of employment except where such jurisdiction would duplicate the efforts of another agency. [Emphasis added.]

Troy Gold Industries, Ltd. v. Occupational Safety and Health Appeals Board, 187 Cal. App.3d 379, at 389.

In an apparent response to the Troy Gold decision which restricted Cal-OSHA jurisdiction in places of employment subject to active federal regulation, Labor Code Section 6303 was expanded in 1988 with the adoption of Labor Code Section 6303.5 which provides that "nothing in this division shall be construed to limit the jurisdiction of the state over any employment or place of employment by reason of the exercise of occupational safety and health jurisdiction by any federal agency if federal jurisdiction is being exercised under a federal law which expressly authorizes concurrent state jurisdiction over occupational safety or health issues."

California Labor Code Section 6303.5 is, on its face, at odds with the plain language of Section 6303(a), particularly as

interpreted in the Troy Gold case. This fact notwithstanding, nothing in Labor Code Section 6303.5 divests MSHA of any part of its jurisdiction to conduct inspections of California mines. Consequently, Section 6303.5's only effect is to re-affirm that the state safety and health division may exercise the concurrent jurisdiction already granted in and recognized by the federal statute. 30 U.S.C. Section 955(a); Secretary of Labor v. Brubaker-Mann Inc., 8 FMSHRC 1487 (1986).

It is clear from the foregoing that as a result of the enactment of California Labor Code, Section 6303.5, Cal-OSHA may exercise concurrent jurisdiction with MSHA. In order to assure that concurrent jurisdiction among state and federal agencies not lead to undue confusion, the federal statute sets forth rules to follow in the event that the standards used to cite employers under such dual regulation should conflict with one another. Section 506(a) of the Act provides that the federal standard shall supersede the state standard when the state standard is in conflict with the federal act. 30 U.S.C. 955(a). That preemptive language is, however, qualified by Section 506(b) which recognizes that there may be situations in which the states have more stringent standards providing a greater degree of worker safety than the federal act. In such circumstances, the statute provides that those provisions of state law which "provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of the Act . . . shall not thereby be construed or held to be in conflict with the Act." 30 U.S.C. 955(b). The same qualification covers the situation where the states have promulgated standards, and the federal act has no equivalent standards at all.

In sum, Cal-OSHA and the MSHA may exercise their jurisdiction over California mines concurrently. That concurrent jurisdiction may be exercised by the state to the extent that state standards are the equivalent of federal standards, are more stringent than federal standards, or cover topics not addressed by federal standards. To the extent that state standards are more lax than federal standards, they will be held to conflict with the federal act, and will be preempted thereby. There is no contrary situation under which the state standards will be held to preempt the federal standards. Thus, although a more stringent federal standard will preempt a less stringent state standard, a more stringent state standard does not preempt the lesser federal standard; it merely co-exists with it. Under this regulatory scheme, the worker is assured the greatest degree of protection which the combination of federal and state regulatory agencies have mandated.

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Thus, the fact that Cal-OSHA has jurisdiction over mines has no bearing on this case, nor does the fact that the state plan has provisions covering tunneling (not at issue in this case), nor would it make any difference if the state had more stringent equipment regulations covering the earthmovers at issue in this case.

There is no legal basis for, or authority in support of, the proposition that the MSHA is precluded from inspecting a construction site at a California mine where an independent contractor was in the process of constructing tailings ponds.

Accordingly, FCC's motion to dismiss is DENIED.

Summary of the Background Evidence

JAIME ALVAREZ, an MSHA mine safety and health inspector, works in the MSHA field office in Vacaville, California.

Mr. Alvarez, experienced in mining, inspected FCC June 13-15, 1990. The main inspection was being conducted at the Meridian Gold Company, a gold mine. (Tr. 9, 11).

FCC, a contractor, was widening a settling pond (Footnote 1) and raising the height of the dam in front of the settling pond area.

FCC's work also included laying a pad of clay to prevent toxic substances from leaching into the soil. (Tr. 13, 35, 44). This operation involved a large amount of heavy mobile equipment.

Mr. Alvarez was accompanied by his supervisor, Mr. Willy Davis, also by Mr. Kim Witt, safety representative of Meridian. In addition, Louie Kemp, the FCC foreman was present. (Tr. 14).

In cross examination, the inspector conceded his field notes do not reflect a conversation with Mr. Witt indicating that the inspected area was part of the mine site. However, the inspector had looked at a mine map. (Tr. 36, 37).

Mr. Witt, at the inspector's request, took him to the site of contractors other than FCC. (Tr. 37). The entire Meridian

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Gold Mine area was fenced. The inspection group had entered through the main gate. (Tr. 38).

On June 13 and 14, Messrs. Witt and Kemp accompanied the inspector. (Tr. 37).

All of the equipment cited by Mr. Alvarez was working in the same general area, about a half mile square. (Tr. 44). Only FCC was working in this particular area. (Tr. 45).

Mr. Witt (Meridian's representative) introduced Mr. Kemp as the FCC foreman. Mr. Kemp also identified himself as the FCC foreman. (Tr. 43).

Citation No. 3458357

This citation was issued when Mr. Alvarez observed the driver of a 630D Moore scraper operating the vehicle without wearing a seat belt. MSHA's regulation, 30 C.F.R. 56.14130, (Footnote 2) addresses roll-over protective structures and seat belts.

The scraper is approximately 49 feet long, 13 feet wide and 14 feet high. The operator was sitting in the front of the unit. There was no door alongside the operator who was 5 1/2 to 6 feet above the ground. The equipment was operating on a steep incline of 40 to 45 degrees. There were numerous pot holes, bumps and loose material on the road. (Tr. 2, 15-17).

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Mr. Kim Witt (Meridian) talked to Mr. Kemp (FCC) and in turn they talked to the equipment operator. The operator immediately put on his seat belt.

The inspector considered the gravity to be such that if the operator was thrown from the driver's seat, he could be run over by the rear tires. (Tr 17, 18).

The inspector considered the negligence to be moderate since Meridian had notified FCC that they were under MSHA's jurisdiction. Further, Meridian's rules require the use of seat belts.

Inspector Alvarez conceded his field notes show Mr. Louie Kemp was present but the notes do not reflect the presence of Mr. Witt. The inspector indicated he was basically interested in the company at the immediate scene. (Tr. 40).

Mr. Kemp was present when this piece of equipment was inspected. He did not deny the operator was an FCC employee. (Tr. 66).

Discussion

FCC correctly argues that seat belts are not required to be installed on scrapers. Section 56.14130 requires that seat belts be installed on

(1) crawler tractors and crawler loaders;

(2) graders;

(3) wheel loaders and wheel tractors;

(4) the tractor portion of semi-mounted scrapers, dumpers, water wagons, bottom dump wagons, rear dump wagons and towed fifth wheel attachments;

(5) skid-steer loaders; and

(6) agricultural tractors.

A dictionary of Mining, Mineral and related terms, U.S. Department of Interior 1968 defines a scraper in part as follows:

b. A steel tractor-driven surface vehicle, 6 to 12 cubic yard capacity, mounted on large rubber-tired wheels. The bottom is fitted

with a cutting blade which, when lowered, is dragged through the soil. When full, the scraper is transported to the dumping point where the material is discharged through the bottom of the vehicle in an even layer; used for stripping and releveling topsoil and soft material at opencast pits. See also scarifier. Nelson. c. A scraper loader of scraper chain conveyor. e. A mechanical contrivance used at collieries to scrape the culm or slack along a trough to the place of deposit. g. An apparatus drawn by horses or oxen for scraping up earth in making roads or canals, and for removing overburden from shallow coalbeds and mineral deposits. Fay. h. An apparatus used to take up coal from the floor of a mine after it has been shot, and deposit it either in cars or in a conveyor. It is pulled back and forth by two ropes attached to separate drums of a hoist; a rubber-tired device used to move earth in surface mining; i. A machine used in mines for loading cars and transporting ore or waste for short distances. There are two basic types of scraper: (1) the hoe or open type, which is particularly suitable for moving coarse, lumpy ore, and (2) the box or closed type, which is particularly suited for handling fine material, especially on a loading slide. j. A blade or blades caused to bear against the moving conveyor belt for the purpose of removing material sticking to the conveyor belt. k. A digging, hauling, and grading machine having a cutting edge, a carrying bowl, a movable front wall (apron), and a dumping or ejecting mechanism. Also called carrying scraper; pan. 1. See machine scraper. D.O.T. l.m. The name applied to a bowl scraper multibucket excavator; also known as scraper excavator.

It may well be that the term "scraper" fits within one of the six paragraphs enumerated in 56.14130(a) but the record is silent on that issue.

This citation should be vacated.

Citation No. 3458423

This citation alleges FCC violated 30 C.F.R. 56.14130. At the commencement of the hearing, Petitioner moved to vacate this citation. (Tr. 5, 6).

For good cause, the citation should be vacated.
Citation No. 3458424

This citation involved a CAT dozer towing a multi-bladed rotary tiller. The equipment was secured with a primary tow bar.

However, the regulation, 30 C.F.R. 56.14209, (Footnote 3) requires a secondary rigging whether it be a safety chain or cable.

The rotary tiller was 10 feet long by 8 feet wide with numerous axle bonnets containing rotary discs used to scrape the ground. A visual check determined there was no secondary rigging in place. (Tr. 18, 19).

The towing was taking place on ground similar to recently plowed farm-land.

This violation was discussed with Messrs. Witt and Kemp. Abatement was satisfactory and accomplished by installing a safety cable. (Tr. 20).

The inspector considered the gravity, on an injury-illness basis, to be unlikely because if the rope broke, the equipment wouldn't roll far.

The towed equipment had neither its own brake system nor any brake lights. (Tr. 47).

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Mr. Kemp was present and talked to the equipment operator. He did not deny that the operator was an FCC employee. (Tr. 67).

Discussion

FCC argues there is no evidence what company owned and operated the equipment. Nor was there any evidence whose employee was operating the dozer.

I am not persuaded by FCC's arguments. This was obviously an inspection of FCC's operations in a half mile square. (Tr. 44). Neither representative denied ownership, possession, control or operator identity. In fact they both produced a safety cable to abate the violation. (Tr. 20).

The uncontroverted evidence establishes the rotary tiller was towed without a safety chain. A violation of C.F.R. 56.14209 was established.

Citation No. 3458424 should be affirmed.

Citation No. 3458425

This citation involved a large Caterpillar dozer, D8H. The operator violated 30 C.F.R. 56.14130(g) (Footnote 4) in not wearing a seat belt. This equipment was traveling in excess of five miles per hour when the inspector observed it.

This citation was discussed with Messrs. Witt and Kemp. After a short conversation, Mr. Kemp talked to his employee who put on his seat belt.

The inspector considered the gravity, based on injury-illness to be unlikely because the dozer was moving slowly on flat ground. (Tr. 23). He considered negligence to be moderate because Meridian had notified FCC of the MSHA rules and regulations. (Tr. 23, 49, 50).

Mr. Alvarez's notes indicate Mr. Edgar Smith, Meridian's foreman and Mr. Louie Kemp were present. (Tr. 48). Kim Witt was also with this inspection group. (Tr. 50).

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Mr. Kemp talked to the operator during this inspection.
Mr. Kemp did not deny the operator was an FCC employee. (Tr. 67).

Discussion

Inspector Alvarez described this dozer as "an earth moving heavy piece of mobile equipment." (Tr. 22).

However, Section 56.14130(a) is equipment specific as to what pieces and types of equipment are subject to the requirements. Dozers are not included in the specific list of types of equipment covered by the seat belt requirements.

Accordingly, MSHA did not carry its burden of proof that the dozer was subject to 56.14130(a). Since no seat belts are required to be installed, there was no violation of for failing to wear a seat belt.

Citation No. 3458425 should be vacated.

Citation No. 3458426

This citation alleges FCC violated 30 C.F.R. 56.14132. (Footnote 5) An Ingersoll Rand, 5D-150B, heavy roller compactor was being operated by FCC without a reverse signal alarm and without spotters. (Tr. 35, 51, 52). The inspector climbed on the equipment and noticed the obstructed view to the rear. The view was obstructed by the length and height of the equipment. (Tr. 23-25). Basically there was a blind spot behind the operator's position. There were one to four employees in the area but the inspector did not learn their identity.

Messrs. Witt and Kemp were notified of the violation and they confirmed there was no backup alarm on the equipment nor were spotters being used. (Tr. 35-54, 61-62).

Meridian had an alarm installed.

In the inspector's opinion, the possibility of a fatal accident was substantial and reasonably likely. (Tr. 26). He further considered negligence to be moderate because Meridian had notified FCC they were working under MSHA regulations. (Tr. 27).

The inspector did not determine the identity of the operator of this equipment. (Tr. 52).

Mr. Kemp was present during this inspection. He did not deny that the equipment operator was an FCC employee. (Tr. 68).

Discussion

FCC cites portions of the transcript in support of its argument. Specifically, FCC relies on the following exchange at the hearing:

- Q. And did you determine who owned this piece of equipment?
- A. No, we just determined who was using it.
- Q. And who was using it?
- A. Ford Construction Company.
- Q. And how did you determine that?
- A. Asked the foreman Louie Kemp, who was in charge of all the equipment. There was some question earlier who owned and operated the equipment, and I believe the conversation led to Meridian Gold stating that Ford Construction was the primary contractor there, and they were in charge of whatever went on at that particular mine site area including the maintenance of the equipment.
- Q. But in fact that was not the case, was it? In fact Meridian Construction's own people came and fixed those alarms, right?

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A. As far as I know they did.

Q. And did you determine the identity of the operator?

A. No.

(Emphasis added).

FCC's arguments are misdirected. Neither ownership of the equipment nor maintenance responsibilities would relieve FCC from the obligation of complying with the regulation since it operated the equipment.

FCC urges an inconsistency exists in connection with this citation.

It is contended that Mr. Alvarez testified that before he climbed up on this piece of equipment he "walked up behind it and noted that it had a lock (sic) to the piece of equipment at a distance of roughly four to five feet. I could no longer see the operator." (Tr. 25 lines 21-24). FCC claims Mr. Alvarez's testimony was contradicted when, in cross examination, he testified he did not believe he walked up to the rear of the equipment. (Tr. 53, lines 22 through 25 and Tr. 54, line 10).

I disagree. No inconsistency exists here. FCC's cross examination completely changes the inquiry when the cross examiner asks ". . . while this equipment was backing you didn't walk up to the rear . . . "

FCC further points to an inconsistency arising from the following testimony by Mr. Alvarez:

Q. You have indicated that Mr. Louis Kemp was a foreman. How did you determine that?

A. I eventually had asked Mr. Kim Witt when he took me out to see where the contractors were and we ran into this Ford Construction Company doing the contract. I advised him that I also wanted to see the foreman or superintendent or whoever was in charge of the operation. He went and got Mr. Kim Witt.

Q. So you tell Mr. Kim Witt the fact that you wanted the guy that is in charge at Ford, he goes and gets Mr. Kim Witt?

A. Yes, sir.

Q. Now, what did you ask Mr. Kim Witt?

A. In regard to what, sir?

Q. In regard to his status with Ford Construction?

A. I basically asked him if he was the man in charge and he said that he was the foreman.

As FCC suggests, Mr. Alvarez may have been confused (Brief page 12 line 26). However, there was an abundance of evidence establishing that Mr. Louie Kemp was the FCC foreman.

FCC's considerable efforts attacking the credibility of Mr. Alvarez are rejected. I found Mr. Alvarez to be quite credible.

Citation No. 3458433

This citation involved a Caterpillar 835 compactor similar to the equipment in the previous citation. The backup alarm on the compactor was not operating on a constant basis, and no spotters were being used. (Tr. 35). At times the alarm worked and at other times it did not. This situation constituted a violation of 30 C.F.R. 56.14132. (Footnote 6)

Mr. Witt and Mr. Kemp were in attendance when the equipment was checked.

There was probably a short in the compactor. It was repaired by a mechanic. (Tr. 27-29).

The inspector considered the gravity to be low because the area was flat and there was no foot traffic. He further considered negligence to be moderate since Meridian advised FCC they were subject to MSHA regulations. (Tr. 29).

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Mr. Alvarez conceded the back-up alarm wasn't operating automatically. (Tr. 54, 55). The inspector did not identify the operator of the equipment. (Tr. 55).

The inspector's field notes indicate Edgar Smith, Mine Superintendent, was present. (Tr. 56).

Mr. Kemp was also present during this inspection and he did not deny that the operator was an FCC employee. (Tr. 68).

Discussion

In this citation, as with the previous citation, the uncontroverted evidence indicates the back-up alarm was not operating on a constant basis.

The backup alarm was therefore, not in a functional condition as required by 30 C.F.R. 56.14132.

FCC states the inspector had "no idea" who owned the piece of equipment or who was operating it, citing the transcript at page 55, lines 6 through 12.

As noted herein ownership is not a critical element in MSHA's proof.

A considerable portion of FCC's arguments in this citation and others deals with the failure of the inspector's notes to always reflect the presence, for example, of FCC's Louis Kemp. FCC urges the Judge to totally reject MSHA's cases as not credible.

FCC's credibility views are rejected. An inspector's testimony is not expected to precisely follow his notes. Also the reverse is true. In addition, as Mr. Alvarez testified, his notes are primarily to refresh his recollection when he writes his citations. Mr. Alvarez specifically testified that Mr. Kemp was present when all of the violative conditions were observed. Finally, neither Mr. Kemp nor anyone on behalf of FCC offered any contrary evidence.

FCC contends Mr. Alvarez's credibility suffered when he stated that Kim Witt and Louie Kemp were present during this portion of the inspection. However, the inspector couldn't remember whether Edgar Smith was present. Specifically FCC cites the transcript at page 55, lines 20 through 25 and page 56, lines 1 through 6. The cited portion reads as follows:

Q. How about Edgar Smith?

A. Probably there.

Q. I beg your pardon?

A. More than likely he was there.

Q. And do your field safety notes show that at least in that paragraph entitled accompanied by, does it show only Edgar Smith?

A. Yes, it has Edgar Smith, mine superintendent.

Q. It says what? I am sorry.

A. Beg your pardon?

Q. What does it say?

A. It notes Edgar Smith, mine superintendent.

The main focus of the evidence was not Edgar Smith but Kim Witt and Louie Kemp. I do not find the cited exchange affects the inspector's credibility.

Citation No. 3458433 should be affirmed.

Citation No. 3458434

This citation was issued for a violation of 30 C.F.R. 56.14132. (Footnote 7) A Caterpillar model number 641 water wagon had an inoperable backup alarm as required when there is an obstructed view to the rear.

A further inspection by Mr. Witt and Mr. Kemp confirmed the defect. Meridian's mechanic repaired the alarm.

The inspector considered the gravity to be low as the area was flat and there was no foot traffic.

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Inasmuch as Meridian had notified FCC of the MSHA regulations, the inspector considered FCC's negligence to be moderate. (Tr. 29-31, 58).

In connection with this citation, Mr. Alvarez's notes indicate the following individuals were present: Edgar Smith (Mine Superintendent); Chris Gagg (Miner's representative); Willy Davis (MSHA) and Kim Witt (Meridian). (Tr. 59). His notes do not reflect that Mr. Louie Kemp was present. (Tr. 60).

Mr. Kemp was present during this inspection and he did not deny that the operator was an FCC employee. (Tr. 69).

Discussion

The uncontroverted facts here establish a violation of the regulation as the water wagon lacked a back-up alarm.

FCC points out that while Mr. Alvarez testified to the presence of both K. Witt and L. Kemp his field notes show E. Smith, Chris Gagg, Willy Davis and K. Witt were present. But Mr. Alvarez concedes that his notes did not show the presence of L. Kemp (Tr. 60, lines 3 through 5).

This issue has been previously considered. FCC offered no contrary evidence and the absence of any contrary witness and Mr. Alvarez's credible testimony causes me to conclude that Mr. Kemp was present.

FCC notes the lack of employee exposure (no foot traffic); however, lack of employee exposure is an issue to be considered in assessing a civil penalty.

Citation No. 3458434 should be affirmed.

Citation No. 3458435

This citation involves two CAT 637B Moore scrapers, one of the scrapers was cited in Citation No. 3458357 (no seat belts).

This equipment, which weighs over 100,000 pounds, was traveling at a high rate of speed to the settling pond construction area. The terrain consisted of loose ground with bumps and pot holes.

Mr. Kemp's vehicle followed one of the trucks and they were clocked in excess of 24 plus miles per hour. (Tr. 31, 32).

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The citation alleges a violation of 30 C.F.R. 56.9100.(Footnote 8)

Messrs. Kemp and Witt discussed the matter and Mr. Witt stated the mine had a posted speed limit of 15 miles per hour. (Tr. 33). Mr. Kemp felt there was a need to have the vehicles moving as fast as they could.

The vehicles were traveling on a roadway where there was constant foot traffic. If an accident occurred, a fatality could result. (Tr. 33).

Messrs. Witt and Kemp agreed that the vehicles should not travel over 15 miles per hour in this area. (Tr. 34).

The inspector considered negligence to be high because FCC had been made aware of the speed limits.

Mr. Alvarez did not determine the ownership of the truck nor did he identify the driver. (Tr. 57).

Mr. Alvarez's field notes reflect that when the vehicle was clocked, the four men previously mentioned in Citation No. 3458435 were present. These were Smith, Gagg, David, Witt as well as Louie Kemp. (Tr. 60).

The inspector did not observe any posted speed limit signs in this particular area but he had seen the posting. In addition, he did not learn who owned either scraper nor did he identify the driver. (Tr. 33, 61).

Field notes are used as a reference when an inspector later writes his citation. (Tr. 70).

Mr. Kemp was not asked the names of the various operators. However, Mr. Kemp was asked to identify their employer. (Tr. 74).

Discussion

The regulation requires that rules governing speed etc. for the operation of vehicles be posted and followed.

Mr. Witt stated there was a posted speed limit of 15 miles per hour so the posting is not an issue in this case.

FCC contends the evidence is fatally defective in several respects:

Initially, it is claimed that a speed of 24 mph is not excessive. I disagree. Operating a 100,000 pound vehicle in a construction area at such a speed is excessive as a matter of law, especially when loose ground, bumps and potholes exist in the travelway. (Tr. 32).

Further, was the speed limit of 15 mph established and agreed upon the day of the inspection. FCC cites the transcript at page 34, lines 4 through 9, in support of its view. It provides:

During the talk Mr. Kim Witt and Mr. Louie Kemp and I, myself had, we finally arrived at that we could not allow these -- due to the conditions involved -- we could not allow these vehicles to travel over 15 miles per hour. And that was settled as the limit in this new work area.

I consider the above evidence to mean that the existing speed limit would be strictly enforced. Mr. Kim Witt, who should be knowledgeable as Meridian's representative told MSHA that the mine had a posted speed limit of 15 miles per hour. (Tr. 32). Mr. Louie Kemp's view did not prevail. He preferred to have the vehicles moving as fast as they could. (Tr. 32, 33). Further, Mr. Alvarez testified that "Meridian Gold Company had 15 miles per hour speed limit posted at various areas throughout the mine." Mr. Alvarez saw the posting himself but not in this area. (Tr. 33). The preponderance of the evidence shows that the site had a posted limit of 15 miles per hour prior to the time when the vehicles were being operated at 24 miles per hour.

Further, was the driver of the speeding truck identified? The uncontroverted evidence shows that Mr. Kemp, the FCC foreman, was present and talked to the driver. He did not deny that the driver was an FCC employee.

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On the uncontroverted evidence, Citation No. 3458435 should be affirmed.

Civil Penalties

Section 110(i) of the Act, 30 U.S.C. 820(i), mandates consideration of six criteria in assessing civil penalties.

There was no direct evidence offered as to the size of the business of FCC.

The effect of the penalties on the ability of the operator to continue in business is a matter to be established by the operator. In the absence of facts to be contrary, I conclude the payment of the proposed penalties will not cause FCC to discontinue in business. Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974).

The operator's history of previous violations was not in evidence.

FCC was negligent as to each citation since each violative condition was open and obvious.

Gravity was moderate as to Citation No. 3458424, the towed rotary tiller. The equipment would not roll too far even if it came loose.

The lack of a reverse back-up alarm in three of the citations involve high gravity; these are situations that can result in a fatality.

The violative conditions here were promptly abated hence the operator is entitled to statutory good faith.

Accordingly, I enter the following:

ORDER

1. Citation No. 3458357 is VACATED.
2. Citation No. 3458423 is VACATED.
3. Citation No. 3458424 is AFFIRMED and a civil penalty of \$25 is ASSESSED.
4. Citation No. 3458425 is VACATED.

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5. Citation No. 3458426 is AFFIRMED and a civil penalty of \$75 is ASSESSED.

6. Citation No. 3458433 is AFFIRMED and a civil penalty of \$25 is ASSESSED.

7. Citation No. 3458434 is AFFIRMED and a civil penalty of \$25 is ASSESSED.

8. Citation No. 3458435 is AFFIRMED and a civil penalty of \$100 is ASSESSED.

John J. Morris
Administrative Law Judge

Footnotes start here:-

1. A settling or tailing pond is a large pond where mine tailings are dumped. The heavier materials settle to the bottom and the water is normally recycled to other uses. (Tr. 12).

2. 56.14130 Roll-over protective structures (ROPS) and seat belts.

(g) Wearing seat belts. Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.

3. 56.14209 Safety procedures for towing.

(b) Unless steering and braking are under the control of the equipment operator on the towed equipment, a safety chain or wire rope capable of withstanding the loads to which it could be subjected shall be used in conjunction with any primary rigging.

4. Cited, supra, fn 2

5. 56.14132 Horns and backup alarms.

(b)(1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have-

(i) An automatic reverse-activated signal alarm;

(ii) A wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement;

(iii) A discriminating backup alarm that covers the area of obstructed view; or

(iv) An observer to signal when it is safe to back up.

6. 56.14132 Horns and backup alarms

(a) Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

7. Cited, supra, fn 6.

8. 56.9100 Traffic control.

To provide for the safe movement of self-propelled mobile equipment-

(a) Rules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine;