

CCASE:
SOL (MSHA) V. ARROW CRUSHED STONE, INC.
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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, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-219-M
Petitioner : A.C. No. 41-03717-05501
v. :
 : Blum Quarry
ARROW CRUSHED STONE, INC., :
Respondent :

DECISION

Appearances: Nancy Carpentier, Esquire, Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for Petitioner;
Suzanne Arnold, President, Arrow Crushed Stone,
Inc. and John Whitehorn, Vice-President, Arrow
Crushed Stone, Inc., for Respondent

Before: Judge Melick

This case is before me upon the petition for assessment
of 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 Arrow
Crushed Stone, Inc. (Arrow) with 15 violations of mandatory
standards and seeking civil penalties of \$1,107 for those
violations.

During hearings Petitioner submitted a motion for
settlement with respect to all citations, except Citation
No. 4108051, seeking a reduction in penalties from \$924 to
\$462 and seeking to remove the "significant and substantial"
classification from Citation Nos. 3609050, 3609051, 360952,
3609056 and 360959. The motion was supplemented posthearing
and was thereafter approved. An order approving the settle-
ment and directing appropriate payment follows at the
conclusion of this decision.

The one citation remaining at issue, Citation No. 4108051,
alleges a "significant and substantial" violation of the
standard at 30 C.F.R. 56.14101(a)(1) and charges as follows:
On inspection the primary brakes on the
Terex 72-51B front-end loader were not capable
of stopping or holding the equipment stationary

on the incline ramp, primary feed hopper. The loader work area and practice typically to feed primary, will operate in the plant area with observed foot traffic.

The cited standard provides, in relevant part, as follows:

Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

Mike A. Davis, an inspector for the Mine Safety and Health Administration (MSHA) testified that during the course of his inspection of the Arrow operation on March 31, 1992, and upon examination of the cited front-end loader, he observed at the right front wheel what he believed to be a brake fluid leak. As a result of this observation Davis performed a "standing brake test" on the loader. The loader was backed up the 100 foot long ramp, graded from zero to 4 feet and Inspector Davis signaled the equipment operator to stop. The loader failed to stop. The test was repeated and again the loader failed to stop. According to Davis, during the tests the bucket was unloaded and held off the ground 1 to 2 feet. The loader operator, Pueblo Villasano, also told Davis that he had applied the brakes during the tests but they would not hold.

Davis concluded on the basis of these tests that the cited standard had been violated. Davis further concluded that the violation constituted a serious hazard. He testified that the primary hopper into which the front end loader unloaded is adjacent to the haul road on which there was pedestrian traffic and light duty vehicles. Indeed, at the time he cited the condition he observed three persons on the ground. The violation was further aggravated by the absence of any berm on the ramp, the fact that the operator did not wear a seat belt and that there was no operable backup alarm nor operable horn on the cited loader. The loader was also large in size and according to Davis could cause serious damage to a light duty vehicle such as a pickup truck. Under the circumstances Davis concluded that it was highly likely for injuries to occur and that those injuries could be fatal.

There is no direct evidence in this case to contradict Inspector Davis' observations. Arrow Vice President John Whitehorn testified that the loader operator subsequently advised him that he had told the inspector that he had in fact inspected the front end loader that morning and that it had been working fine at that time. Whitehorn also testified that typically the loader is used in reverse when backing

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down the ramp to the primary hopper and therefore the test performed by Inspector Davis was not a true indication of how the brakes would perform in reverse.

I have evaluated the testimony of Mr. Whitehorn but do not find that it contradicts the testimony of Inspector Davis in essential respects. I find accordingly that the violation was "significant and substantial." See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). I do however credit the hearsay reports of the loader operator that there were no problems when he inspected the front-end loader earlier that morning and that it had been working fine at that time. This evidence suggests that the brake condition may very well have deteriorated during the course of operations during the morning and had not been noticed by the loader operator until the brake tests. Under the circumstances I find the operator chargeable with little negligence. Considering all the criteria under Section 110(i) of the Act I find that the proposed penalty of \$183 is appropriate.

ORDER

Citation No. 4108051 is AFFIRMED with its "significant and substantial" findings. The "significant and substantial" findings with respect to Citation Nos. 3609050, 360951, 3609052, 3609056 and 3609059 are deleted. Arrow Crushed Stone, Inc., is hereby directed to pay civil penalties of \$645 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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