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SOL (MSHA) V. MATERIALS DELIVERY
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 93-69-M
Petitioner	:	A.C. No. 44-06731-05501
v.	:	
	:	Darden Pit
	:	
MATERIALS DELIVERY,	:	
Respondent	:	

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Petitioner;
V. Cassel Adamson, Jr., Esq., Adamson & Adamson, Richmond, Virginia, for Respondent.

Before: Judge Amchan

This case is before me upon a petition for civil penalties filed by the Secretary of Labor pursuant to 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., for seven alleged violations of mine safety standards. This matter was heard in Emporia, Virginia on October 5, 1993. After considering the record before me, I have assessed civil penalties of $1,044, the same amount proposed by the Secretary.

NOTIFICATION OF COMMENCEMENT OF OPERATIONS

On January 20, 1993, MSHA Inspector Charles E. Rines conducted a workplace inspection of a pit in Southampton County, South of Franklin, Virginia, at which Respondent was extracting sand and gravel for use in its concrete plants (Tr. 18-21). Rines was on his way to a different site when he noticed the activity at Respondent's Darden pit (Tr. 97-98). From conversations with State of Virginia inspectors he was aware that mining activity was about to start at the site but did not know that such activity had commenced until he drove by the site on January 20 (Tr. 19).

Rines determined that Respondent had not notified MSHA as to commencement of their mining operations at the Darden pit (Tr. 23-25). He, therefore, issued to Respondent Citation No. 4083517 alleging a violation of 30 C.F.R. 56.1000 (Tr. 21-25). This regulation requires that:

> The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, mailing address, person in charge, and whether operations will be continuous or intermittent. . .

In writing the citation (Exh. P-2), Rines characterized Respondent's negligence as "high" due to the fact that he had issued a citation for violation of the same requirement to Respondent on June 22, 1992, at a pit in King William County, Virginia (Exh. P-2b, Tr. 29-37). In June 1992, Rines had discussed the notification requirement with Pat Kenny, who was Respondent's foreman at both the King William site and at the Darden pit, his supervisor, Gene Sneed, and company president, Richard Rose (Tr. 31-37).

THE FRONT-END LOADERS

While Rines was at the Darden pit, Respondent was removing material with a dragline and was using two front-end loaders to move the material to an area where it was separated into sand and gravel and loaded onto trucks for delivery to its cement plants (Tr. 20-21). On one of the loaders, serial number 75A2808, neither the horn nor the reverse signal alarm was working (Tr. 39, 79). Rines spoke to operator of the loader, who told him that both had been inoperative for 2 to 3 days (Tr. 42, 80).

The wheels of this loader were approximately 6 feet high and the operator's vision was obstructed for a distance of 17 feet to his rear (Tr. 44-45). Two employees of Respondent and two truck drivers employed by a contractor were walking back and forth from the pit on the same roadway used by the loaders (Tr. 43). Respondent did not use an observer to signal the driver when it was safe to back up.(Footnote 1)

1There is no direct evidence as to whether there was a signalman or not. Nevertheless, I infer from the record that there was no signalman. Mr. Rines' testimony as to the danger of employees being run over when the loaders were operated in reverse would make no sense if Respondent was using such an

Inspector Rines issued Citation No. 4083518 alleging a "significant and substantial" violation of 30 C.F.R. 56.14132(a) for the use of the loader with an inoperativ reverse signal alarm (Tr. 36-39, Exh. P-3). That standard requires that:

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

The inspector opined that an injury or fatality was "reasonably likely" due to the presence of the blind spot to the operator's rear, the presence of employees in the area of the vehicle, and the ambient noise level at the pit, which he believed would make it unlikely that employees would notice the loader backing up (Tr. 48-50). He characterized Respondent's negligence as "high" due to the fact that it had been cited for the identical violation on the same machine during his inspection of Respondent's worksite in King William County in June 1992 (Exh. P-3a, Tr. 50-53).

Respondent also received Citation No. 4033522, alleging another violation of 30 C.F.R. 14132(a) on account of the inoperative horn on the same vehicle, and Citation No. 4033521 because of an inoperative horn on the other front-end loader, serial number 75A2786 (Tr. 68-82). With regard to the latter vehicle, Rines was told that the horn had not been working for approximately 2 weeks (Tr. 70-71).

Rines characterized these violations as "significant and substantial," because he believed that an accident was reasonably likely--given the proximity of employees to the vehicle and the limited visibility of the operator to the front of the vehicle (Tr. 71-72). He characterized Respondent's negligence as "high" given the fact that the horns on both the loaders did not work, and hadn't been working for a while when he arrived on the site (Tr. 76-83). In assessing the degree of negligence, Mr. Rines also considered the fact that Respondent's foreman, Pat Kenny, was also the supervisor on Respondent's worksite that he inspected in June (Tr. 76).

Footnote 1 continued

observer. Moreover, Respondent has not contended that it used an observer and clearly was relying on the reverse signal alarm to warn employees who might venture behind the loader (Respondent's Answers to Interrogatories, Answers 2, 4, and 8).

UNSECURED COMPRESSED GAS CYLINDERS

During his inspection, Mr. Rines observed five compressed gas cylinders lying on the ground (Tr. 55). Three were Oxygen cylinders; two were acetylene cylinders (Tr. 55). A barrel with a fire inside was 5 to 7 feet from two of the cylinders and the others were within 2 feet of a roadway traveled by the front end loaders (Tr. 55). Two of the cylinders were later used to cut metal (Tr. 113).

Four employees were observed in the area where the cylinders were laying and Mr. Rines was concerned that the proximity of the cylinders to the fire could cause an explosion and that they were subject to damage by the front-end loaders and could become projectiles (Tr. 56-59). The inspector issued Respondent Citation No. 4083519, which alleged a "significant and substantial" violation of 30 C.F.R. 56.16005. That regulation requires that, "Compressed and liquid gas cylinders shall be secured in a safe manner." Mr. Rines deemed Respondent's negligence to be "high" as it had been issued a citation for the same hazardous condition in June, 1992 (Exhibit P-4a, Tr. 60-61).

TOILETS

Inspector Rines also determined that no toilet facilities were provided for the four employees at the mine site (Tr. 65). He, therefore, issued Citation No. 4083520, which alleged a violation of 30 C.F.R. 56.20008. That regulation provides that, "Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel." A citation for the same violation was issued to Respondent at the King William County site in June 1992 (Exhibit P-5a , Tr. 65-66).

THE RAISED BUCKET

On January 21, 1993, Inspector Rines observed the operator of one of Respondent's front-end loaders, leave his vehicle with the bucket loaded and in a raised position (Tr. 83-86). The operator walked behind the vehicle, which was on a 6 percent grade, with its front-end higher than its rear, to talk to his foreman, Pat Kenny, and superintendent Gene Sneed (Tr. 83-86, 116).

The inspector was concerned that the stress placed upon the parking brake by the raised and loaded bucket could cause the parking brake to fail, or that it could cause the rupture of hydraulic hoses (Tr. 87-89). Rines issued Respondent Citation No. 4083523 alleging a "significant and substantial" violation of 30 C.F.R. 56.14206(b). That standard requires that:

When mobile equipment is unattended or not in use,

dippers, buckets and scraper blades shall be lowered to the ground. . .

ISSUES

At hearing, Respondent appeared to dispute the proposition that it was engaged in interstate commerce, although it admitted that it was subject to the Act in responding to the Secretary's request for admissions. In any event, it is clear that Respondent's operations "affect commerce" and, thus, it is covered by the Federal Mine Safety and Health Act.

Respondent uses vehicles manufactured in interstate commerce and, therefore, its operations affect commerce on this basis alone (Tr. 141). Island Construction Co., Inc., 11 FMSHRC 2448 (ALJ December 1989). Moreover, Respondent's pit, which is located within 10 miles of the North Carolina/Virginia state line (Tr. 21), does compete with out-of-state sources of sand and gravel, which Respondent might have to use if it did not operate the Darden pit. Its activities at the Darden pit thus "affect commerce" on this basis as well. Marshall v. Bosack, 463 F. Supp. 800 (DC Pa 1978); Godwin v. OSHRC, 540 F.2d 1013 (9th Cir., 1976).

The only witness presented by Respondent was John Boston, its Financial Manager, who was not on the Darden site the day of Mr. Rines' inspection and has no experience in mining other than in its financial aspects (Tr. 131-136). Mr. Boston testified that Respondent was unable to get a copy of Volume 30 of the Code of Federal Regulations (CFR) for 10 months after its June 1992 MSHA inspection (Tr. 132).

I do not consider the unavailability of the CFR to be an ameliorating factor in assessing the penalties in this case. Respondent was cited for four of the seven violations found in this case during the prior inspection in King William County. Respondent, thus, had been specifically told of the requirement for the reverse signal alarm, toilets, notification of MSHA, and the securing of its gas cylinders. Respondent should have been aware of the need to keep the horns on the front-end loaders in operable condition from its conversations with Rines about the back-up alarm in June, 1992. Additionally, it is only a matter of common sense that, if a vehicle has a horn, it compromises safety to some extent if it doesn't work.

As to the raised and loaded bucket, it appears that Rines considered Respondent's previous lack of knowledge of the regulation in rating its negligence as "moderate" as opposed to "high" as he did for the violations for which Respondent had been cited before (Tr. 90-91). Moreover, MSHA's Office of Assessments also treated this violation differently in proposing a lower penalty.

Respondent also suggests that consideration be given to the fact that Pat Kenny, its foreman at the Darden Pit and at the King William county site, was fired subsequent to this inspection (Tr. 134). However, it is unclear what role, if any, the MSHA citations played in Mr. Kenny's discharge and, in any event, his conduct is imputable to Respondent for penalty assessment purposes Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981).

With regard to its front end loader 75A2808, Respondent contends that Citations Nos. 4083518 (inoperative back-up alarm) and 4083522 (inoperable horn) are duplicative (Tr. 135). The standard states that manually-operated horns or other audible warning devices provided as a safety feature shall be maintained in functional condition. Respondent contends that the standard should be read to require only that the horn or the back-up alarm be functional not both. I conclude that the literal meaning of the standard is not necessarily that given to it by Respondent, and I reject such a reading as being completely at odds with the purposes of the Act.

An interpretation of the standard more in keeping with the Act is that horns and/or other audible warning devices that are on the vehicle must be maintained in functional condition. The horn and the back-up alarm are designed to address different hazards. The horn is provided primarily to warn employees who the operator sees in front or to the side of the vehicle, and to warn employees when the operator is going to move. The back-up alarm is designed to account for the operator's restricted vision to the rear, and operates automatically so as to warn employees who the operator may not be able to see. The devices are not duplicative and thus separate civil penalties are appropriately assessed when both devices on one machine are not working.(Footnote 2)

Inspector Rines characterized the inoperable horns, back-up alarm, the unsecured cylinders, and the raised bucket as "significant and substantial" violations. The Commission has held that to establish a "significant and substantial" violation, the Secretary must show: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard 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 Mathies Coal Company, 6 FMSHRC 1 (January 1984). The determination of whether a violation is "S&S" is not limited to conditions at the time the violation is

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2A penalty for an inoperable back-up alarm may be inappropriate in situations in which the employer is providing an observer to signal when it is safe to back up pursuant to 30 C.F.R. 56.14132(b), but that is not the situation presented in the instant case.

observed but includes consideration of continued normal mining operations U. S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 1984).

There is no controversy regarding the first two elements of the "S&S" criteria with regard to any of the five violations at issue. Respondent's witnesses Boston takes issue with Mr. Rines' opinion that it is reasonably likely that one would be killed if struck by a front-end loader operating in soft sand. As Mr. Rines has expertise, by virtue of his experience in mining and the safety field in particular, I credit his opinion over that of Mr. Boston and find that the Secretary has satisfied criteria number 4 of the "S&S" test.

As to criteria number 3, I also credit Mr. Rines and conclude that in the normal course of mining operations, if front-end loaders operate without horns and or/back-up alarms; if gas cylinders are not properly secured; and if operators leave their loaders unattended with the bucket raised, it is reasonably likely that each of these conditions will sooner or later cause injury to a miner. Therefore, I conclude that all five citations were properly cited as "significant and substantial" violations of the Act.

ORDER

Conclusions and Penalty Assessment

Section 110(i) of the Act requires the Commission to consider six factors in assessing civil penalties; the operator's history of previous violations, the appropriateness of such penalty to the size of Respondent's business, the negligence of the mine operator, the effect of the penalties on the operator's ability to remain in business, the gravity of the violations and the good faith of Respondent in attempting to achieve rapid compliance with the Act.

Respondent has admitted that payment of the proposed penalty will not affect its ability to stay in business (Response to Secretary's Request for Admissions # 6). Certainly Respondent qualifies as a small operator, as it extracts material for use primarily in its cement operations. Respondent demonstrated good faith in correcting the violations promptly after the January 20, 1993 inspection.

Nevertheless, the gravity of the violations and the negligence of the Respondent, particularly with regard to those violations for which it had been previously cited, warrants a penalty in the range of that proposed by the Secretary. I, therefore, assess the following penalties:

Citation 4083517 $50

Citation 4083518 $204

Citation 4083519 $204

Citation 4083520 $50

Citation 4083521 $204

Citation 4083522 $204

Citation 4083523 $128

Respondent is hereby directed to pay civil penalties in the amount of $1,044 within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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