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SOL (MSHA) V. MORRIS SAND AND GRAVEL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 93-3-M
	:	A. C. No. 41-03200-05518
v.	:	Docket No. CENT 93-4-M
	:	A. C. No. 41-03476-05522
MORRIS SAND AND GRAVEL, Respondent	:	Docket No. CENT 93-8-M
	:	A. C. No. 41-03476-05521
	:	Docket No. CENT 93-20-M
	:	A. C. No. 41-03200-05519
	:	Docket No. CENT 93-21-M
	:	A. C. No. 41-03476-05523
	:	Docket No. CENT 93-42-M
	:	A. C. No. 41-03476-05524
	:	Docket No. CENT 93-57-M
	:	A. C. No. 41-03476-05525
	:	Docket No. CENT 93-88-M
	:	A. C. No. 41-03200-05520
	:	Docket No. CENT 93-101-M
	:	A. C. No. 41-03200-05521
	:	Docket No. CENT 93-102-M
	:	A. C. No. 41-03476-05526
	:	Docket No. CENT 93-246-M
	:	A. C. No. 41-03476-05527
	:	Plants No. 1 and No. 2

DECISION

Appearances: Olivia Tanyel Harrison, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Petitioner;
Harriett Morris and Thomas Lee Morris, Pro Se, for the Respondent.

Before: Judge Feldman

This consolidated proceeding is before me based upon petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 801 et. seq., charging the respondent with various violations of the Act and mandatory regulatory safety standards. Pertinent jurisdictional stipulations as well as stipulations pertaining to the civil penalty criteria in Section 110(i) of the Act, 30 U.S.C. 820(i), are of record. The parties waived the filing of posthearing briefs.

These matters were heard on February 23, 1994, in Houston, Texas, at which time Mine Safety and Health Administration (MSHA) Inspector Joseph Watson testified on behalf of the Secretary and Thomas and Harriet Morris testified for the respondent company. At the hearing, the parties moved to settle nine of the eleven captioned docket proceedings. The terms of this comprehensive settlement resulted in an agreed upon total assessment of $2,125. At trial I considered the representations and documentation submitted in support of the parties' agreement, and I concluded that the proffered settlement was appropriate under the criteria set forth in Section 110(i) of the Act. (Tr. 8-33, 177-179). An order directing payment of the agreed upon total civil penalty will be incorporated in this decision.

The parties could not reach a consensus on Docket Nos. CENT 93-57-M and CENT 93-102-M. Docket No. CENT 93-57-M concerns combined 104(a) and 107(a) Order No. 3898640 issued on March 18, 1992, by Inspector Joseph Watson at the respondent's No. 2 Plant. This order alleges the service brakes on the respondent's Trojan, Model 2500, front-end loader, which was being used to load trucks, constituted an imminent danger because the brakes could not stop the loader on level ground in violation of section 56.14101(a)(3), 30 C.F.R. 56.14101(a)(3). This mandatory safety standard specifies that all braking systems installed on equipment must be maintained in functional condition. Docket No. CENT 93-102-M involves 107(a) Order No. 3899545 issued by Watson the following day on March 19, 1992, as a result of the respondent's continuing failure to remove the cited Trojan front-end loader from service.

The respondent, Morris Sand & Gravel, is a sole proprietorship owned by Thomas Morris. The company has a history of financial difficulties manifested by a petition for protection under Chapter 11 of the U.S. Bankruptcy Code filed on August 21, 1987, by Thomas L. Morris, d/b/a Morris Sand & Gravel. (Resp.'s ex. 2). Although not a formal partnership, Harriett Morris testified that she considers Morris Sand & Gravel to be jointly owned. (Tr. 9-10).

Morris Sand and Gravel is a small operator that employs a total of six employees. (Joint Stipulations, Government Ex. 9). The company dredges sand and gravel from the San Jacinto River. The material is dredged at the river level and pumped to a wet screen plant where it is processed over a series of screens that separate the various grades of material. The material is ultimately transported by conveyor to the plant where it is loaded onto customers' trucks. (Tr. 50-53).

Inspector Watson arrived at the respondent's No. 2 Plant at approximately 8:00 a.m. on March 18, 1992, for the purpose of performing a routine inspection. Upon arriving at the plant, Watson observed Fidencio Ruiz, the respondent's loader operator, loading trucks with sand and gravel materials with a Trojan front-end loader. As Watson approached the loader, Ruiz advised him that the brakes on the vehicle were not operating. Watson observed the loader in operation and concluded that the service brakes failed to stop the vehicle. (Tr. 57). He tested the vehicle and confirmed that the brakes would not would not hold on level ground.

Watson estimated that the vehicle weighed approximately 30,000 lbs. and held approximately 3 1/2 yards in its scoop. He concluded, given the size and weight of the vehicle, that its inoperable brakes could reasonably have been expected to cause death or serious physical injuries to Ruiz or to operators of the trucks that were being loaded. Specifically, Watson testified that the loader could easily crush the cab of a haulage truck seriously injuring or killing the truck driver. (Tr. 58). Thus, Watson concluded the condition of the loader posed an imminent danger. Consequently, Watson issued combined 104(a) and 107(a) Order No. 3898640 at 1:40 p.m. (Government Ex. 10). The Order required the respondent to immediately remove the loader from service until the service brake system was repaired and reinspected by an authorized MSHA representative. The Order was served by Watson on Ruiz who is not fluent in English.

Watson returned to the respondent's plant the following morning on March 19, 1992. At approximately 10:30 a.m. Watson explained to Thomas Morris that the imminent danger order given to Ruiz the previous day required the front-end loader to be taken out of service and not used until such time as it could be repaired and reinspected.(Footnote 1) Morris became upset and accused Watson of trying to put him out of business by shutting down his loader. Shortly after the conversation with Watson, Morris called Doyle Finke, Watson's supervisor assigned to the

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1 Section 107(a) of the Act requires equipment posing an imminent danger to be immediately withdrawn form service. 30 U.S.C. 817(a).

San Antonio, Texas field office. Morris complained to Finke that Watson had shut down his business operations. Morris told Finke that his other loader was not operational because his mechanic was working on it and that if he could not use the cited loader, he could not load material for customers. Morris asked Finke if he could use the loader if the brakes were repaired. Finke replied that Morris could not legally use the loader until it was reinspected by an MSHA inspector. Morris told Finke that he would use the loader anyway and take full responsibility for its operation. (Tr. 161-162; Gov.Ex. 4).

Approximately four hours after Watson explained the respondent's statutory obligation to remove the loader from service, Watson returned to the plant and found the loader in operation. Consequently, Watson issued 107(a) imminent danger Order No. 3899545 at 3:20 p.m.

The respondent asserts Ruiz crimped the brakeline on the loader sometime after the initial imminent danger order was issued at 1:40 p.m. on March 18, 1992, and before the subsequent imminent danger order was issued on March 19, 1992, at 3:20 p.m. Therefore, the respondent argues the service brake system had improved. However, Watson testified crimping the brakeline increased the danger because it results in uneven braking, sliding, skidding and loss of control. (Tr. 117-118). Therefore, Watson opined that the crimping of the brakeline did not remove the imminent danger. (Tr. 118-119).

In apparent recognition that the front loader was being operated in less than optimum condition, Harriett Morris testified that "...we're doing the best [we] can -- the best we can to stay in business. We were trying to get another loader. If we shut down our loader, we have to shut down our business." (Tr. 156).

Similarly, Thomas Morris testified that:

> Well, we knew that we had another loader about to be repaired and about to be back on stream, and that it was not going to take us very long to have to use this loader. So, we went ahead and used it and I called Mr. Finke and it appears now that they had either changed their mind about agreeing to let me use that loader or I misunderstood or whatever the case is. My understanding was that we could go ahead and use that loader, and we were just responsible for it. ...I [mean] if anyone got hurt or injured on the job, it was not -- we were not going to hold MSHA responsible for anybody getting hurt or any damage that we did to a truck. (Tr. 161-162).

In addressing the question of imminent danger, the Commission has noted that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975). Although an inspector must have a reasonable basis for concluding a condition presents an impending hazard that requires the immediate withdrawal of affected miners, an inspector is "granted wide discretion because he must act quickly" under such circumstances. Island Creek Coal Co., 15 FMSHRC 339 (March 1993).

After considering the testimony in this matter I issued the following bench decision affirming the subject imminent danger orders which is edited with nonsubstantive changes:

> These matters concern Imminent Danger Order No. 3898640 that was issued on March 18, 1992, at 1:40 p.m. and Imminent Danger Order 3899545 that was issued the following afternoon on March 19, 1992, at 3:20 p.m.
>
> These citations deal with the issue of imminent danger. The term "imminent danger" is defined in Section 3(j) of the Mine Act as "the existence of any condition or practice in a coal or other mine which would reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j).
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> Turning to the issue of whether or not there was an imminent danger with respect to Order No. 3898640, Inspector Watson testified that during his inspection Mr. Ruiz, the operator of the cited front-end loader, complained to him about the brakes not operating properly. Watson then checked the brakes and determined they could not hold the loader on level ground. The loader is a large piece of equipment that holds tons of materials and weighs tons in its own right. As this loader with inoperable brakes approached trucks, there was an imminent danger to Ruiz in that he could lose control of the loader which could result in serious or fatal injuries to him or to operators of the trucks he was loading.
>
> I reject Mrs. Morris' assertion that the loader does not approach the cab of the truck. A loader approaches a truck from many different directions and, in its maneuvering, it is frequently directed towards the front driver compartment of a truck.

I am also not persuaded by Mrs. Morris' attempt to find mitigating circumstances by alleging that the loader can be downshifted or that the shovel on the scoop can be lowered to stop the loader in lieu of properly operating brakes. Watson testified that if the scoop on the loader was loaded with material, the operator would be in no position to lower the scoop to stop the loader. It is also not an enviable position for anybody to be in front of a multi-ton loader that must rely on lowering the scoop or downshifting the transmission to stop the vehicle. In fact, lowering the scoop could contribute to a fatality if the scoop is lowered on the cab of the truck.

In any event, it is clear the brakes were not working in the context of the Secretary's burden of proving the fact of the violation and the resultant imminent danger. My conclusion is consistent with Ruiz' complaint. Moreover, the Morrises have presented no evidence that the brakes were, in fact, functional. Therefore, the Secretary has satisfied his burden of establishing the violation of Section 56.14010(a)(3) and that the inoperable brakes constituted an imminent danger.

The next issue is the service of the initial imminent danger order on Ruiz. The Morrises claim they did not receive actual notice of the withdrawal order from Ruiz because Watson was misunderstood by Ruiz who is not fluent in English. Assuming for the sake of argument that the Morrises did not have actual notice, they had constructive notice. Constructive notice is a concept in law where owners of a company are responsible for information provided to their agents. Mr. and Mrs. Morris knew, or should have known, about the imminent danger order. It was their responsibility to find out if there was a problem in communication. Therefore, I conclude that, although there may have been confusion, the Morrises are charged with notice of the imminent danger order issued at 1:40 p.m. on March 18, 1992.

Moreover, even if there were confusion, the confusion was remedied at 10:30 a.m. on March 19, 1992, when Watson, apparently aware of the difficulty in communicating with Ruiz, had a conversation with Mr. Morris informing him that the front-end loader must be taken out of service immediately. Morris apparently disagreed with this requirement and called Mr. Finke, Watson's supervisor, and received essentially the same information, i.e., that the scoop had to be taken out of service.

Therefore, although there may have been confusion before 10:30 a.m. on March 19, 1992, there is no basis for concluding there was any confusion after the 10:30 a.m. meeting between Watson and Morris.

Finally, there has been quite a bit of testimony about why the respondent continued to operate after 10:30 a.m. The testimony concerns pressure from customers who desired their trucks to be loaded. Section 2 of the Mine Act explicitly recognizes the dangers in the mining industry. It imposes an obligation on operators to prevent the existence of dangerous conditions. Prevention must take precedence over concerns about production. Consequently, I do not find the pressures brought to bear by the respondent's customers on the Morrises as a mitigating circumstance.

Nor do I find the Morrises' testimony that Ruiz was satisfied with the operational performance after crimping the brakeline as a mitigating factor. I am certain very few victims of serious injuries or fatalities were aware they were operating equipment that exposed them to an imminent danger at the time of their injury or death. The effective method of eliminating such imminent dangers is to have defective equipment reinspected by authorized inspectors before permitting such equipment to be returned to service.

I also do not find Mr. Morris' willingness to take responsibility for the operation of the loader as particularly relevant or appropriate. The issue is not who is responsible for the occurrence of an injury or death. Rather, the issue is preventing the potential injury or death. Preventative measure must not be sacrificed to the interests of production and continuing operations. Accordingly, the Secretary has also prevailed with respect to Imminent Danger Order No. 3899545 issued on March 19, 1992, at 3:28 p.m.

The March 19, 1992, violation was more serious than the March 18, 1992, violation as production concerns became more urgent than safety concerns. While I am confident this was not a conscious decision by the Morrises, it was, nevertheless, the result. In recognition of the fact that the respondent is a small operator with a history of financial problems, I am assessing an $800.00 civil penalty for Order No. 3898640 issued on March 18, 1992, and a civil penalty of $1,000 for Order No. 3899545 issued as a result of the Morrises continued failure to remove the loader from service.

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As previously noted nine of the captioned docket proceedings were settled at trial. The terms of the settlement agreement with respect to these docket proceedings are as follows:

Docket No.	Citation/Order No.	Settlement Disposition	Assessed Penalty
CENT 93-3-M	104(a)-4107128	S&S deleted	$50.00
CENT 93-4-M	104(d)-4107131	Modified to 104(a); S&S deleted	$50.00
	104(d)-4107133		$200.00
CENT 93-8-M	104(a)-3899547		$100.00
CENT 93-20-M	104(a)-4107125	S&S deleted	$50.00
	104(a)-4107126		$35.00
CENT 93-21-M	104(a)-4107130		$50.00
	104(a)-4107132	S&S deleted	$50.00
CENT 93-42-M	104(d)-4107129		$690.00
CENT 93-88-M	107(a)-4107124		$800.00
CENT 93-101-M	104(a)-4107127	S&S deleted	$50.00
CENT 93-246-M	104(a)-4107663		vacated
		Total Settlement:	$2,125.00

ORDER

Accordingly, IT IS ORDERED that 104(a)-107(a) Order No. 3898640 in Docket No. CENT 93-57-M and 107(a) Order No. 3899545 in Docket No. CENT 93-102-M ARE AFFIRMED. IT IS FURTHER ORDERED that Thomas L. Morris, d/b/a Morris Sand and Gravel, SHALL PAY a total civil penalty of $3925.00 which represents the sum of the agreed settlement of $2125.00 and the $1800.00 civil penalty imposed as a result of the adjudication in this proceeding.

The respondent is currently paying monthly installments of $300.00 through October 1994 in satisfaction of previous assessed

civil penalties. In recognition that the respondent is a small operator, the Secretary has agreed to defer the required payment in this matter and to accept an installment plan whereby the respondent will remit to MSHA payments of $392.50 on the 15th of every other month beginning on November 15, 1994, and ending on May 15, 1996, in satisfaction of the $3925.00 civil penalty. This payment schedule IS HEREBY APPROVED. If Thomas Morris fails to abide by this payment schedule, the remaining balance will become due immediately. Upon receipt of the total $3925.00 civil penalty, these cases ARE DISMISSED.

Jerold Feldman
Administrative Law Judge

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/ll