CCASE:
SOL (MSHA) V. MECHANICSVILLE CONCRETE
SOL (MSHA) V. M.C. T/A MATERIALS DELIVERY
DDATE:
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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 PROCEEDING
	:	Docket No. VA 93-98-M
	:	A.C. No. 44-06701-05503
v.	:	
	:	Docket No. VA 93-155-M
	:	A.C. No. 44-06701-05504
MECHANICSVILLE CONCRETE, Respondent	:	
	:	Docket No. VA 94-14-M
	:	A.C. No. 44-06701-05505
	:	
	:	Pit No. 1
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION Petitioner	:	
	:	Docket No. VA 93-105-M
	:	A. C. No. 44-06591-05503
v.	:	
	:	Docket No. VA 93-145-M
	:	A.C. No. 44-06591-05504
MECHANICSVILLE CONCRETE T/A MATERIALS DELIVERY, Respondent	:	
	:	Docket No. VA 93-153-M
	:	A.C. No. 44-06591-05505
	:	
	:	Docket No. VA 93-168-M
	:	A.C. No. 44-06591-05506
	:	
	:	Branchville Plant

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, Arlington, Virginia, for Petitioner;
Arthur A. Lovisi, Esq., Office of the General Counsel, Mechanicsville Concrete, for Respondent.

Before: Judge Amchan

Overview of the Cases

These seven cases involve 27 citations issued to Respondent (Footnote 1) during the course of six inspections of 2 of its sand and gravel pits in the State of Virginia between January 6, 1993 and September 15, 1993. Respondent's primary business is the manufacture and sale of ready-mix concrete. Up until 1992 it purchased the sand and gravel used in its concrete from other companies. In 1992 it acquired several sand and gravel pits to supply its needs (Footnote 2).

As a result of its entry into the business of extracting sand and gravel, Respondent began to experience inspections by MSHA inspectors. In June 1992, MSHA Inspector Charles Rines visited the company's King William pit northeast of Richmond and issued several citations, including one for the absence of toilet facilities and an inoperable reverse signal alarm on a front end loader, Materials Delivery, 15 FMSHRC 2467, 2469 (ALJ December 1993), appeal docketed sub nom. Mechanicsville Concrete Inc., T/A Materials Delivery v. Secretary of Labor and F.M.S.H.R.C., No. 94-1222 (4th Cir. February 23, 1994).

On January 6, 1993, Inspector Rines visited Respondent's Branchville pit in Southampton County, Virginia, only a few miles north of the Virginia/North Carolina border. He issued one citation giving rise to Docket No. VA-93-105-M. Two weeks later he inspected Respondent's Darden pit, also in Southampton County and issued 7 citations which were affirmed by the undersigned on December 7, 1993, see Materials Delivery, supra.

On March 23, 1993, MSHA Inspector Carl Snead visited the King William site (Docket VA 93-98-M), and returned to perform a follow-up investigation on April 15, 1993 (Docket VA 93-155-M). On May 10, 1993, Inspector Rines returned to the Branchville pit and issued the citations that gave rise to the citations in Dockets VA 93-145-M, 93-153-M, and 93-168-M. A follow-up inspection by Rines on May 24, 1993, resulted in the issuance of 3 orders alleging a failure to timely abate violations cited on May 10 (Docket VA 93-153-M). The last docket in this matter, VA 94-14, arises from citations issued by Inspector Snead at the King William pit on September 15, 1993.

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1 Respondent in all seven dockets herein is the same company (Exh. P-1, P-22). At hearing the caption in Dockets VA 93-105-M, 93-145-M, 93-153-M, and 93-168-M, was amended to list the company as Mechanicsville Concrete, Inc., T/A Materials Delivery, rather than Materials Delivery.

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2 Respondent also sells approximately $30,000 worth of sand annually to homebuilders in southeastern Virginia (Tr. II: 195-196).

Jurisdiction

Respondent's main contention in contesting the civil penalties proposed in these cases is that it is not subject to MSHA jurisdiction because it is not engaged in interstate commerce. As far as the instant record shows, Respondent does not buy sand from outside of Virginia for use in its concrete production business and does not sell sand and gravel to customers outside Virginia (Tr. II: 170-72, 195-96). There is also no indication that any of Respondent's concrete is sold or transported outside of Virginia. The record does establish, however, that the heavy vehicles used by Respondent at its sand and gravel pits, which are in fact involved in many of the citations, were not manufactured in Virginia (Tr. I: 32-38, II: 27-28).

It is black letter law that Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted section 4 of the Mine Act. Jerry Ike Harless Towing, Inc. and Harless Inc., 16 FMSHRC 683 (April 1994); U. S. v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993). Thus, if Respondent's sand and gravel pits fall within the commerce clause of the Constitution, they are subject to MSHA jurisdiction.

Respondent, in 10 pages of its brief, attempts to distinguish many of the cases holding that a variety of economic enterprises fall within the ambit of the commerce clause. What is most significant is that it can cite only one case, Morton v. Blum, 373 F. Supp. 797 (W.D. Pa. 1973), in which a court intimated that a business was outside the commerce clause (although strictly speaking the decision can be read as turning upon a reading of section 4 of the 1969 Coal Act). Furthermore, the Blum case is inconsistent with the overwhelming weight of precedent since 1942 regarding the reach of the commerce clause.

Indeed, applying that precedent, it is hard to conceive of an economic enterprise outside the bounds of the commerce clause. The case law supports the proposition that use of equipment manufactured outside the state in which it is used is sufficient to bring a business within the purview of the commerce clause, United States v. Dye Construction Company, 510 F.2d 78, 83 (10th Cir. 1975). It is hard to imagine a business in this country that does not utilize supplies or services that do not originate in a state other than the one in which it operates.

Further, I am aware of no case in which the Commission or any of its judges has ever held a mine to be outside the commerce clause, See, e.g., F & W Mines, Inc., 12 FMSHRC 885 (ALJ Maurer April 1990); Mellott Trucking and Supply, Company, Inc., 10 FMSHRC 409 (ALJ Melick March 1988). Many of the operations added

to the reach of the Mine Safety and Health Act by the 1977 amendments are very similar in geographical scope to Respondent's sand and gravel pits.

A purely local activity falls within Article I, Section 8, Clause 3, of the Constitution if it affects interstate commerce, See Wickard v. Filburn, 317 U. S. 111 (1942). Indeed, Congress can regulate an individual enterprise solely on the basis that the class of activities in which it engages affects commerce, Perez v. United States, 401 U. S. 146 (1971), U.S. v. Lake, supra.

Mining obviously affects interstate commerce and, therefore, under Perez Respondent's activities are almost irrelevant to the analysis of coverage under the commerce clause. However, if Respondent did not operate the sand and gravel pits at issue in this case, it would have to buy sand and gravel from other businesses. To the extent that Mechanicsville Concrete can mine its own sand and gravel, it competes with other mines, including those beyond the borders of Virginia.

Furthermore, there is an effect on interstate commerce if part of the reason that it is cost-effective for Mechanicsville to mine its own sand is that it saves money by skimping on safety and health expenditures that other potential sources must make to comply with the Act. Hazardous conditions may result in injuries and illness to Respondent's employees, which impose a substantial burden upon interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments, section 2(a) of the Occupational Safety and Health Act, 29 U.S.C. 651(a).

I will resist the temptation to base my decision on the fact that the Branchville pit is located only a few miles from the North Carolina border and the fact that this record establishes that a potential source of sand and gravel for Respondent's concrete business operates just on the other side of the state line (Tr. I: 157, II: 68). I would find Respondent subject to the commerce clause if its only operation was located at the geographical center of Virginia, or any other state. Although the Supreme Court before World War II may have indicated otherwise, there is no substantial support since 1942 for the proposition that Respondent is not subject to the commerce clause(Footnote 3). Therefore, it is also subject to MSHA jurisdiction.

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3 I note, however, that Chief Justice Rehnquist may well agree with Respondent as evidenced by his concurrence in Hodel v. Virginia Surface Mining & Reclamation Association, 452 US 264, 69 L Ed 2d 1, 36-39 (1981). On the other hand, the majority opinion by Justice Marshall in that case provides a sufficient basis to dispose of Respondent's claim that Federal regulation of its sand

The January 6, 1993 Inspection (Docket VA 93-105-M)

On January 6, 1993, Inspector Charles Rines went to the Branchville pit and asked Gene Snead(Footnote 4), Respondent's foreman, for the company's quarterly reports, MSHA form 7000-2 (Tr. I: 40). These reports indicate the number of employees on the site, the number of hours worked, and the number of reportable accidents (Tr. I: 41).

Snead told Inspector Rines that the reports were not at site but were at the company's Franklin, Virginia office (Tr. I: 40). He produced the reports the next day (Tr. I: 43). Rines issued Respondent citation No. 4083504, alleging a violation of 30 C.F.R. 50.40. That regulation provides:

> (b) Each operator of a mine shall maintain a copy of each report submitted under section 50.20 or section 50.30 at the mine office closest to the mine for five years after submission...

The MSHA form 7000-2 is required to be submitted to the MSHA Health and Safety Analysis Center in Denver, Colorado pursuant to section 50.30. Thus, it is a report falling within the requirements of section 50.40. Respondent contends that it complied with the regulation because it had no office at the Branchville pit and that it kept the reports at the mine office closest to Branchville, which was in Franklin. The Secretary contends that a shipping container at the Branchville site was where Respondent in fact kept records and reports, and, therefore, was the closest office within the meaning of the regulation (Tr. I: 52, 73-74).

Mechanicsville notes that the shipping container had no phone connection and no office personnel worked in the container,

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fn 3 cont'd.

and gravel pits violates the Tenth Amendment to the United States Constitution. The court observed,

> The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers.

69 L Ed 2d 1, at 25.

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4 Gene Snead, Respondent's foreman, should not be confused with Carl Snead, the MSHA inspector who conducted three of the inspections at issue in this case.

although it had a table (Tr. I: 61-62, 74). The company further notes that the language of the regulation, "office closest to the mine", suggests that these reports need not be kept at the mine site. Indeed, there is a Commission judge's decision, Sierra Aggregate Company, 9 FMSHRC 426, 430 (ALJ March 1987), which stands for this proposition.

I decline to follow Sierra Aggregate because I agree with the Secretary that section 50.40 must be interpreted in conjunction with section 109(a) of the Act. Section 109(a) requires that an office be maintained at every mine. Thus, I find that the shipping container was an "office" within the meaning of section 50.40 and that the MSHA Form 7000-2 is required to be maintained at each mine site. I, therefore, affirm citation No. 4083505.

MSHA proposed a $100 civil penalty for this violation which I consider much too high given the statutory criteria in section 110(i) of the Act. I assess a $10 penalty. I see no impact on employee safety or health arising from the violation. Even though Mr. Rines had previously informed Foreman Snead that the reports had to be maintained at the mine site, I think a very low penalty should be assessed, given the fact that the company provided reports the next day, and obviously was not trying to conceal any information or impede MSHA in performing its duties by keeping the reports in Franklin.

The May 10, 1993 Inspection

Docket VA 93-145-M

On May 10, 1994, at about 1:50 in the afternoon, Inspector Rines returned to the Branchville pit (Tr. I: 84-88). A dragline was extracting material from the pit and 2 front end loaders were feeding material to the screening and washing plant (Tr. I: 84). When Respondent's employees recognized the inspector, they stopped working (Tr. I: 87-88). One of the employees, Timmie Young, left the site. Another, John Gunnels, told Rines he'd been instructed to shut down his equipment if Rines showed up (Tr. I: 87-88).

Inspector Rines asked the two employees if they would accompany him on his inspection; they told him that they had no authority to do so (Tr. I: 88-89). The pit remained shut down for several hours until Foreman Snead arrived at the site about 4 p.m. (Tr. I: 88-91). As a result of these events, Rines issued Respondent citation No. 4084520, alleging a violation of 30 C.F.R. 56.18009. That regulation provides:

> When persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency.

Rines inferred that, if none of the employees had authority to accompany him on the inspection, then they also had no authority to take charge in an emergency. I draw the same inference and affirm the citation. Considering the statutory criteria in section 110(i), I assess the $50 penalty as proposed by the Secretary.

The Michigan 125 Front End Loader

On May 10, 1994, Inspector Rines found that one of the two front end loaders used at the Branchville pit, a Michigan model 125 had numerous defects. The windshield and right side glass were broken (Tr. I: 92-95). The sole windshield wiper arm and blade that comes with the machine was missing (Tr. I: 104-05). The parking brake was inoperable, the horn was inoperable and the back-up alarm was inoperable (Tr. I: 109-10, 118-19, 132-33).

Rines issued five separate citations for these defects. Citation No. 4085281 was issued, alleging a violation of 30 C.F.R. 56.14103(b) for the broken windshield and side glass. Citation No. 4085282, alleging a violation of section 56.14100(b), was issued for the missing wiper blade and arm. Citation No. 4085283 was issued, alleging a violation of section 56.14101(a)(2) for the parking brake. Citation No. 4085284 was issued alleging a violation of section 56.14132(a) for the horn. Citation No. 4085285 was issued alleging a violation of section 56.14132(a) for the back-up alarm. Each of these citations alleged that the violations were "significant and substantial" except that the wiper blade violation was cited as non "S&S" due to the fact that it was not raining on the day of the inspection (Tr. I: 105-06)(Footnote 5).

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5 The cited standards provide:

56.14103(b)(2): If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed...

56.14100(b): Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

56.14101(a)(2): If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

56.14132(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.

I affirm all five of the cited violations. As to the shattered windshield and broken glass on the right side of the loader, I credit the testimony of Inspector Rines that damaged glass obscured the operator's visibility in a manner that compromised safe operation of the vehicle (Tr. I: 92-101). With regard to citation No. 4085282, I find that absence of the wiper arm and blade affected safety and was not corrected in a timely manner. In so doing, I credit Inspector Rines' testimony that sand and gravel operations do not shut down due to rain (Tr. I: 105) and conclude that a wiper had been missing for 4-5 weeks, as related to Rines by one of Respondent's employees (Tr. I: 106-107).

The parking brake on the Michigan 125 front end loader violated section 56.14101(a)(2) because the pins from the brake mechanism to the handle that is pulled to activate the brake was missing (Tr. I: 110). Although the terrain at the Branchville pit is generally flat, there are some sloping surfaces in the pit area and Mr. Rines observed the loader parked on a grade (Tr I: 110-112). I find that Respondent violated section 56.14132(a) both with regard to the inoperable horn and inoperable back-up alarm on the front-end loader.

Contrary to Respondent's argument at page 7 of its brief, I conclude that the horn is provided at least, in part, as a "safety feature" within the meaning of the standard. I have previously rejected Respondent's contention that the standard requires only that either the horn or back-up alarm be functional, but not both, Material Delivery, supra, 15 FMSHRC 2467 at 2472. I conclude that Respondent was properly cited for both devices.

All five of the violations on the Michigan 125 front end loader are properly characterized as "significant and substantial." To establish an "S&S" violation, the Secretary must show 1) a violation of a mandatory safety standard; 2) a discrete safety hazard; 3) a reasonable likelihood that the hazard contributed to will result in an injury in the course of continued normal mining operations; 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); U. S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 1984).

The standards cited for these alleged violations are mandatory safety standards. The violations pose hazards to employees that are reasonably likely in the course of continued normal mining operations to result in injuries that are reasonably likely to be serious. The hazards are that the front end loader is more likely to run into other equipment or hit pedestrians due to the violations than if the violations did not exist. Truck drivers coming to the plant get out of their vehicles and walk around (Tr. I: 97). Inspector Rines observed

pedestrian traffic in the area in which the front end loader operated (Tr. I: 134). If a person was struck by this vehicle, it is reasonably likely that their injuries would be serious enough to require hospitalization.

Inspector Rines did not characterize the windshield wiper violation as "S&S" because it was not raining the day of the inspection. Since the record establishes that the loader may operate in the rain in continued normal mining operations, I find that this citation is properly characterized as "significant and substantial" as well (Tr. I: 105). As Section 105(d) of the Act gives the Commission the authority to affirm, modify, or vacate a citation after hearing, I conclude that I have the authority to find an "S&S" violation sua sponte when the record, as it does in this case, clearly establishes one.

It is also clear that the Commission assesses civil penalties pursuant to the criteria in section 110(i) of the Act, without being bound by the penalties proposed by the Secretary, U. S. Steel Mining Co., 6 FMSHRC 1148 (May 1984). The Secretary proposed a $147 penalty for each of the "S&S" citations on the loader and a $50 penalty for the windshield wipers. I assess a $200 civil penalty for each of the citations ($1,000 for the five combined).

The gravity of the violations were "high", particularly in view of the fact that so many things were wrong with the vehicle and several of them adversely affected the operator's ability to avoid hitting pedestrians and other equipment. The fact that the there were so many defects and that some of them had existed for as much as several weeks establishes a high degree of negligence as well.

Respondent's previous history of violations also warrants assessment of a significant penalty. In January at its Darden pit, the company had been cited for having an inoperable horn and inoperable back-up alarm, Materials Delivery, supra. This imposed a higher duty on Respondent to maintain its equipment in a safe condition.

The parties have stipulated that the total penalties proposed in this case will not compromise Respondent's ability to stay in business (Tr. I: 15). Respondent abated these violations within the time period set by the Secretary and, even assuming that the company is a small operator, I conclude that a $200 penalty per violation is appropriate within the criteria set forth by section 110(i).

Toilets, Potable Water, and Quarterly Reports

On May 10, 1994, Inspector Rines issued Respondent citation No. 4085286 alleging a violation of section 56.20008(b), because

the portajohns at the site had no chemicals to treat human waste and no toilet paper. The facts of the violation are uncontroverted. The citation is affirmed and the proposed $50 penalty is assessed (Tr. I: 141-45).

The inspector also discovered that Respondent did not provide potable drinking water to its employees, but required them to bring their own drinking water to the site (Tr. I: 149-51). He, therefore, issued citation No. 4085287, alleging a violation of section 56.20002.

While the testimony at hearing focuses on whether there is any danger that an employee may bring impure water from home (Tr. I: 202-203), I conclude that the real hazard, with respect to this violation, is that employees may not bring enough water, or forget to bring water at all, and be subject to the danger of heat stress. Moreover, if one employee forgets to bring water and shares another's employee's thermos, or water bottle, there may be a hazard of transmitting disease. I, therefore, affirm the citation and assess the $50 penalty proposed by the Secretary.

Rines also requested Respondent to provide him the MSHA Form 7000-2 on May 10. While Respondent was able to produce the 1992 reports from the shipping container it had on site, the report for the first quarter of 1993 was at the Franklin office (Tr. I: 260-265). The inspector issued Mechanicsville Concrete citation No. 4085233 (Docket No. VA 93-168-M), alleging a violation of section 50.40. Inspector Rines rated Respondent's negligence as "high" due to the fact that he had cited the company for the same violation in January (citation No. 4083505 herein). MSHA proposed a $200 civil penalty.

I affirm citation No. 4085233 for the same reasons that I affirmed citation No. 4083505. I conclude that the regulation requires that the MSHA Form 7000-2 be maintained at the mine site. However, I assess only a $10 civil penalty for this violation. I conclude that employee safety was not compromised at all and Respondent had complied substantially with its obligations in maintaining the 1992 reports at the worksite. Given the fact that the company apparently willingly produced the missing report in a timely fashion, I believe that application of the criteria in section 110(i) mandates a token penalty.

The Galion Road Grader (Docket VA 93-254-M)

While inspecting the Branchville site on May 10, 1994, Inspector Rines observed a Galion Road Grader that was parked with the wheels blocked (Tr. I: 276-278). The parking brake, the service brakes and the back-up alarm on this vehicle were all inoperable on that date (Tr. I: 232, 245, 255-56). Rines issued Respondent citation No. 4085289, alleging a violation of section

56.14132(a) with respect to the back-up alarm. He issued citation Nos. 4085290 and 4085291 for the parking brake and service brakes. These citations alleged violations of section 56.14101(a)(2) and (a), respectively. All three citations set May 20, 1994, as the date by which the violations had to be corrected.

When Rines returned to the site on May 24, 1994, none of the cited conditions on the road grader had been corrected (Tr. I: 241, 254-56). The vehicle was parked in a somewhat different location than on May 10 (Tr. I: 242). It apparently had been moved, but not used (Tr. I: 242-43, 281). It was not tagged out but Rines did not determine whether the vehicle was capable of being operated (Tr. I: 242, 246)(Footnote 6).

Rines issued Respondent order Nos. 4085293, 4085294, and 4085295, pursuant to section 104(b) of the Act, alleging a failure to abate the citations issued with respect to the road grader on May 10. Respondent has not offered any significant defense to the citations or the failure to abate orders. Foreman Snead told Rines that the company had not decided whether to fix the grader or remove it from the worksite (Tr. I: 242). However, Snead never told the inspector that the vehicle could not be operated (Tr. I: 248).

The record establishes that there was at least a possibility that the road grader might be used in its defective condition. When Inspector Rines arrived at the site on May 10, the roads leading to the plant area were fairly smooth, thus, indicating that the grader had been used recently (Tr. I: 243). When he returned to the site on May 24, the roads were very rough (Tr. I: 243). Although this indicates that the grader had not been used in the interim, it also indicates that there was an increasing need to smooth out the road.

In the absence of any evidence that the grader was not tagged out or otherwise effectively taken out of service, or that it could not have been used, one must conclude that there was a potential that Respondent's employees would use the road grader before the defects cited on May 10 had been repaired, Mountain Parkway Stone, Inc., 12 FMSHRC 960 (May 1960). Given the additional factors that the roads were in need of grading and that the record does not reflect that any other piece of equipment could have been used to perform this task, the inference that the Galion road grader could have been used in its defective condition is even stronger.

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6 Section 56.14100(c) requires such defective equipment either to be tagged out or placed in a designated area which has been posted to indicate that the equipment has been taken out of service.

I, therefore, affirm three citations issued on May 10, and the three 104(b) orders issued on May 24. Inspector Rines characterized the citations as significant and substantial due to the hazards to pedestrians and the danger of collision with other vehicles (Tr. I: 237-238). I affirm that characterization for the same reasons as I determined the front-end loader defects to be "S&S."

As for the penalties, I assess a $500 penalty for the citation and order regarding the service brakes, $400 for the back-up alarm, and $400 for the parking brake. I deem the gravity of the violations to be very high, particularly with regard to the absence of properly functioning service brakes. Respondent's failure to take any steps to either repair the vehicle or assure that it would not be used in a defective condition also warrants a penalty of the magnitude assessed. None of the other section 110(i) criteria warrants a lower civil penalty.

The March 1993 Inspection at the King William Pit (VA 93-98-M)

On March 23, 1993, MSHA Inspector Carl Snead visited Respondent's sand and gravel mine in King William County, Virginia, northeast of Richmond (Tr. II: 24, Exh. P-22). When inspecting the washing and screening plant, he observed an unguarded pinch point on the head pulley of a conveyor that was 4 1/2 feet above and 1/2 feet horizontally from a work platform (Tr. II: 28-37, Exh. P-25). He issued citation No. 4084534 to Respondent, alleging a violation of section 56.14107(a), which requires guards to protect persons from contact which pulleys and other moving parts.

Inspector Snead also issued Respondent citation No. 4084535 due the fact that there was no railing across the end of the work platform (Tr. II: 41-43). Although employees would rarely need to be on the platform, Snead was told that, on occasion, they did use the work platform to inspect the screens while the conveyor was running (Tr. II: 81-82). Thus, employees were potentially exposed to the unguarded pinch point and a 15 foot fall off the unguarded end of the platform (Tr. II: 42-43, 81-82).

Given the fact that employees did not normally go to the end of the platform to inspect the screens (Tr. II: 87-88), and that contacting the unguarded pulley was fairly unlikely, these violations were properly characterized non significant and substantial. Applying the criteria in section 110(i), I assess a $100 civil penalty for each of these violations.

On March 23, Snead also issued citation No. 4084536 because the horn on a Caterpillar Front-End Loader did not work (Tr. II: 44). Given the fact that Respondent had been cited for having an inoperable horn on two front-end loaders on January 20,

1993, at the Darden pit, Materials Delivery, supra, I assess a $400 penalty in accordance with the criteria in section 110(i).

The April 15, 1993 Inspection at King William (VA 93-155-M)

Inspector Snead returned to the King William pit on April 15, 1993 to perform a follow-up inspection. Snead noticed that no toilet facilities were available for employees on the site (Tr. II: 52-54). There had been no such facilities on March 23, but Snead did not issue a citation because foreman Pat Kenney assured him that they were in the process of being moved from another site (Tr II: 52-54). On April 15, Snead issued citation No. 4084546, alleging a violation of section 56.20008.

The Secretary has proposed a $252 civil penalty for this violation. I assess a $500 civil penalty. Respondent was previously cited for failure to provide toilet facilities at this site in June 1992, and at the Darden pit in January 1993, Materials Delivery, supra, 15 FMSHRC at 2470. Given these two prior citations, and the fact that the company had not had toilet facilities at King William for three weeks, even after the inspector had questioned Foreman Kenney about their absence, a significant penalty is warranted. Section 110(i) requires consideration of an operator's history of previous violations in assessing penalties. If this provision means anything, it means that when an operator repeatedly ignores a requirement of the MSHA standards of which it has been made aware, the civil penalty should be significant enough to goad the operator into compliance in the future.

During this follow-up inspection, Snead also observed a fan inside the cab of a front-end loader which was missing a guard for its blades (Tr. II: 56-60). Snead asked the driver to turn on the fan which was located within the operator's arm reach, 6 inches from the rear view mirror (Tr. II: 59, 100). The fan blades rotated (Tr. II: 57).

Respondent's evidence to the contrary provides an excellent example of why I have credited the testimony of the two MSHA inspectors in toto in deciding these cases. The only witness testifying on behalf of the company was John Boston, the Chief Financial Officer of Mechanicsville Concrete (Tr. II: 167). With regard to individual citations, Respondent introduced exhibit R-1, a document whose preparation was supervised by Mr. Boston (Tr. II: 181-187).

In this exhibit Respondent states that the cited fan was inoperable (Exh. R-1, p. 28, paragraph 36). On cross-examination, Mr. Boston, who was not at the King William site on the day of the inspection, and who has no first hand knowledge as

to whether the fan was operable or not, testified that he acquired his knowledge from Hank Neal, a company supervisor (Tr. II: 191, 204).

At the time of the hearing in this matter, Mr. Neal was Respondent's supervisor at the King William pit. However, that was not the case at the time of the inspection. Mr. Neal was not present at the site on April 15, 1993, and has no more first hand knowledge with regard to the violation than Mr. Boston (Tr. II: 204-205). According to Mr. Boston, Neal acquired his information by talking to an employee, whose name Boston does not know (Tr. II: 209). Given the fact that Respondent's evidence with regard to the facts of the individual violations ranges from second hand to fourth hand, I accord it absolutely no weight.

With regard to the civil penalty, I assess a $100 penalty. I deem the gravity of having an unguarded fan to be quite high. The record, however, gives no indication as to whether Respondent's supervisory personnel should have been aware of this violation prior to its detection by Inspector Snead. Therefore, I conclude that the company's negligence warrants no higher penalty.

The September 15, 1993 inspection (VA 94-14-M)

On September 15, 1993, Carl Snead conducted another inspection of the King William pit (Tr. II: 108-09). He saw the same Caterpillar front-end loader that he cited for an inoperable horn in March and found that the back-up alarm didn't work (Tr. II: 113). He, therefore, issued citation No. 4287124, alleging a non-significant and substantial violation of section 56.14132(a).

Given my view that the regulations require self-propelled mobile equipment to have both a functioning horn and back-up alarm, I affirm the citation. Although not cited as "S&S", the record establishes that this violation meets the criteria set forth in aforementioned caselaw. There was foot traffic in the area in which the vehicle operated (Tr. II: 111). Therefore, I conclude that in the normal course of continued mining operations, an accident resulting in serious injury was reasonably likely.

The driver told Inspector Snead that the alarm had worked the day before (Tr. II: 116). Nevertheless, the record indicates that a substantial civil penalty is warranted for this violation. Section 56.14100(a) requires a pre-shift examination of such equipment. Section 14100(c) requires that equipment that continues to pose hazards to employees be taken out of service until defects are corrected.

Nothing in this record indicates that Respondent had any program to assure that safety defects would be detected by its employees. Thus, I consider Respondent's negligence to be fairly high. Also given the significant number of prior violations involving the use of vehicles with safety defects, I find that $400 is an appropriate civil penalty pursuant to section 110(i).

Inspector Snead also observed an unguarded belt drive on the pond pump at the site (Tr. II: 117-18). Employees came within close proximity of the pump (Tr. II: 120-22, 151-53). I, therefore, affirm citation No. 4287125 and assess a $300 civil penalty, giving particular consideration to the gravity of the violation.

Similarly, I affirm citation No. 4287126, which Snead issued for an incompletely guarded head pulley of the main feed conveyor of the wash plant. The circumstances of this violation are essentially the same of those regarding citation No. 4084534, which was issued by Snead on March 23 (Tr. II: 124-29). I, therefore, assess a $100 penalty, as I did for the March violation.

In the cab of the Caterpillar front-end loader Snead found a fire extinguisher whose gauge indicated it had been discharged (Tr. II: 130-32). The inspector issued citation No. 4287127, which requires the replacement or recharging of extinguishers after discharge. Although the company contends through third-hand evidence that it has no record that the extinguisher was discharged (Tr II: 202-203), I infer that it had been discharged in the absence of any evidence that gauge was not functioning properly. I assess a $100 penalty for this violation.

The same vehicle had a build-up of oil and grease on the ladders and platform leading to its cab. This exposed the driver to the danger of slipping and falling 6 to 8 feet (Tr. II: 133-39). Inspector Snead issued citation No. 4287128, alleging a significant and substantial violation of section 56.11001. That regulation requires that a safe means of access be provided to all working areas.

I affirm the citation and conclude that, if the condition continued to exist in the normal course of mining operations, an accident and serious injury was reasonably likely to occur. I assess a civil penalty of $300, taking into account the criteria in section 110(i), particularly what I deem to be high gravity of the violation.

Finally, Inspector Snead issued citation No. 4287129, alleging a violation of section 56.20003(a), which requires workplaces to be clean and orderly. The citation was based on his discovery of a substantial amount of trash and bottles inside the cab of Mack haul truck (Tr. II: 140-42). Respondent's only

defense to the citation is that the violation was the fault of the driver (Exh. R-1, p. 30, paragraph 45). Under the Mine Safety and Health Act, an operator is strictly liable for safety and health violations and cannot avoid responsibility by blaming its employees. I affirm the citation and assess a $25 civil penalty.

ORDER

All citations and orders issued in these matters are affirmed as discussed herein. The following civil penalties are assessed and shall be paid within 30 days of this decision:

Citation/Order	Civil Penalty
Docket VA 93-105-M	
4083504	$ 10
Docket VA 93-145-M	
4084520	$ 50
4085281	$200
4085282	$200
4085283	$200
4085284	$200
4085285	$200
4085286	$ 50
4085287	$ 50
Docket VA 93-153-M	
4085289/4085294	$400
4085290/4085293	$400
4085291/4085295	$500
Docket VA 93-168-M	
4085288	$ 10
Docket VA 93-98-M	
4084534	$100
4084535	$100
4084536	$400
Docket VA 93-155-M	
4084546	$500
4084547	$100

4087124	$400
4087125	$300
4087126	$100
4087127	$100
4087128	$300
4087129	$ 25

Total Penalties: $4,895

Arthur J. Amchan
Administrative Law Judge

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