CCASE:
SOL (MSHA) V. WALKER STONE
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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. CENT 94-54-M
	:	A. C. No. 14-01467-05510
v.	:	
	:	Portable No. 1
WALKER STONE COMPANY, INC., Respondent	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troup, Junction City, Kansas, for Respondent.

Before: Judge Maurer

This proceeding concerns a proposal for assessment of a civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards found in Part 56 of Title 30, Code of Federal Regulations. An evidentiary hearing in these matters was held on June 2, 1994, in Topeka, Kansas. Subsequently, both parties filed proposed findings of fact and conclusions of law which I have considered in making this decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. 4-5):

l. Walker Stone Company, Inc., is engaged in mining and selling of stone in the United States, and its mining operations affect interstate commerce.

2. Walker Stone Company, Inc., is the owner and operator of the Portable No. 1 Mine, MSHA ID No. 14-01467.

3. Walker Stone Company, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977,

30 U.S.C. sections 801 et seq. (the Act).

4. The administrative law judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to the relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. Walker Stone Company, Inc., is a small mine operator with 94,437 hours worked in 1992.

FINDINGS AND CONCLUSIONS

Citation No. 4336867 was issued on June 21, 1993, by MSHA Inspector Dean Williams, pursuant to section 104(a) of the Mine Act and alleges a violation of the mandatory standard at 30 C.F.R. 56.14132(b)(2)(FOOTNOTE 1):

> The homemade wheel mounted device on the Wabco haul truck, Company No. 359 AF, reportedly was utilized as a reverse signal alarm. However, the bell type device worked on both forward and reverse directions. The device was not audible above the surrounding noise level of the plant at the crusher and other areas to attract attention of a person that may be in the area when the truck was moving in a reverse direction. Routine backing is required at the crusher feeder and the pit loading area.

On this occasion, Inspector Williams, accompanied by an inspector trainee, Curtis Dement, observed a Wabco haul truck, which is a self-propelled piece of mobile equipment with an

FOOTNOTE 1
30 C.F.R. 56.14132(b)(2) provides as follows: Alarms shall be audible above the surrounding noise level.

obstructed view to the rear. A backup alarm is required for this vehicle and one was provided by the respondent.

One method of complying with 30 C.F.R. 56.14132(b) is set out in subsection (b)(1)(ii) as follows: "a wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement."

Inspector Williams found such a home-made alarm device mounted on one of the rear wheels of the truck. In fact, a similar device was also on the other rear wheel. It was constructed out of a hollow metal canister sealed on both ends and into which a metal ball had been placed. The sound is created when the metal ball rolls from end to end of the metal canister as the wheel rotates (forwards or backwards).

As a test, the inspector had the driver back the truck up so he could determine if the sound coming from the device could be heard above the surrounding noise level. Inspector Williams was unable to hear anything from the back of the truck. From the side, he could only hear the alarm faintly over the noise of the truck. However, the inspector admits he has some unquantified hearing loss. Inspector Dement, who at the time was a trainee, also testified. He stated that he was present with Williams when the truck was backed up for the test. He further testified that he could hear it, but, in his opinion, it was not loud enough.

Mr. David S. Walker, the owner/operator of the Walker Stone Company, also testified. He produced in court one of the backup alarms that was constructed locally and attached to the rear wheels of the truck as the inspector found it. These alarms were originally installed on the truck in 1979 to abate a previous citation. They have been on the truck since the summer of 1979, and have passed muster with every MSHA inspector including Inspector Williams until the citation at bar was issued in June of 1993. Mr. Walker also testified that he could hear the alarm over the surrounding noise and had done so numerous times over the years while standing in the quarry.

My observation in the courtroom was that the device was of substantial construction and quite loud. But of course I realize the difference between sounding an alarm inside a courtroom versus a noisy outside work environment, and therefore find little relevance in the courtroom demonstration.

The only issue involved in this citation is whether or not the alarm was audible above the surrounding noise level. It is a very subjective standard. No specific "loudness" is required.

Was it audible? Two of the three witnesses say that they could hear it, albeit Mr. Dement opined that it should have been louder. The third, Inspector Williams, although hearing impaired to some extent, could hear it from the side, but not the back. There is no specific standard beyond "audible above the surrounding noise level."

My interpretation is that if the alarm meets that standard, even if only "faintly," it still complies with the mandatory standard and there is no violation. Citation No. 4336867 will therefore be vacated herein.

Citation No. 4336871 was issued on June 21, 1993, by MSHA Inspector Dean Williams, pursuant to section 104(a) of the Mine Act and also alleges a violation of the mandatory standard found at 30 C.F.R. 56.14132(b)(2) and charges as follows:

> The automatic reverse activated signal alarm provided on the Komatsu front-end loader was not audible above the surrounding noise level. The alarm could not be heard over the loader noise during loading operations and would not attract attention to persons that may be in the area when the loader was moving in a reverse direction. The loader had an obstructed view to the rear and routine backing was required while loading trucks at the quarry pit.

Inspector Williams and Dement also observed a Komatsu front-end loader loading dump trucks on this same date. The Komatsu front-end loader is a piece of mobile equipment that is self-propelled and the operator has an obstructed view to the rear. Approaching the vehicle they got to within 30 feet of it before they could hear the sound of the reverse alarm (an electrical type beeper) and then it was very weak. In their opinion, it was not sufficiently audible to be heard over the surrounding noise level by persons working in the area. However, they heard it.

As with the previous citation, there was a working backup alarm that they could hear; it just was not loud enough in the opinion of the inspectors. It is either audible or it is not audible above the surrounding noise level. If it is not, its a violation, if it is, it is not a violation because there is no specific standard on the books beyond that. It is basic hornbook law that the government must notify the operator what is required in order to enforce a regulation against it.

Accordingly, Citation No. 4336871 will be vacated herein.

Citation No. 4336873 was issued on June 22, 1993, by MSHA Inspector Dean Williams, pursuant to section 104(a) of the Mine Act and alleges a violation of the mandatory standard found at 30 C.F.R. 56.14132(a)(FOOTNOTE 2) and charges as follows:

> The service horn on the Wabco end dump truck, Company No. 359 AF was not maintained in functional condition. The horn is a safety feature on mobile equipment to warn persons in the area when the truck starting motion and to attract attention of other equipment operators to help prevent a collision. The truck was observed hauling shotrock from the quarry pit to the primary crusher.

The inspector found the horn inoperable, not functional. Respondent stipulates that the said horn was not functional. The standard states that the horn "shall be maintained in functional condition." This clearly is a violation of the cited standard and it will be affirmed. The proposed penalty of $50 will be assessed.

With regard to its Wabco haul truck, respondent contends that Citation No. 4336873 (service horn) and Citation No. 4336867 (back-up alarm) along with three unspecified others that were issued in June of 1993, were multiplicative in nature. Respondent implies at least that MSHA is simply running up the citation count at his expense, when all that is actually involved is the serviceability of a single vehicle. I note, however, that the service horn and the back-up alarm are on the vehicle to address different hazards. The devices themselves are not duplicative and therefore separate civil penalties are appropriately assessed when both devices on one vehicle are not working. In this particular case, however, this has become somewhat of a moot point since I am going to vacate Citation No. 4336867 in this decision.

Citation No. 4336878 was issued on June 22, 1993, by MSHA Inspector Dean Williams, pursuant to section 104(a) of the Mine

FOOTNOTE 2

30 C.F.R. 56.14132(a) provides as follows: Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Act and alleges a violation of the mandatory standard found at 30 C.F.R. 56.9300(FOOTNOTE 3) and charges as follows:

> The elevated truck weight scales was not equipped with a guard rail along the outer edge on the south side. The travelway across the scales was approximately 3 1/2 feet (1.1 meter) above ground level and 35 feet long by 12 feet wide.

Williams and Dement also inspected the scale house. There they observed the elevated truck weight scales. Trucks would drive up onto the scales to be weighed. They observed that there was no berm or guardrail on the south edge of the elevated scales as depicted in Exhibit No. P-3. The scale was approximately 12 feet wide and 35 feet long. The inspector determined that the types of vehicles that would drive onto the scales would generally range in width from 8 to 9 feet. Along the south edge, a 3.5 foot vertical drop-off existed along the edge of the scale. The inspector determined that the drop-off was of a sufficient depth so that a vehicle would overturn if it went over the south edge. There were concrete blocks bordering the scale, and although the scale might sink a few inches when a truck drove onto it, the distance between the scale and the concrete blocks would not have kept a truck from going over the side. There was also a hazard to a passenger of the truck alighting upon the narrow area of the scale at the side of the truck. The inspector determined that it was unlikely that the hazard would result in an injury. However, he determined that if an injury did result from the hazard, that the injury or illness that could be reasonably expected would be lost workdays or restricted duty.

Accordingly, I find the violation to be proven by a preponderance of the evidence in the record and the instant citation will be affirmed. Upon consideration of the various penalty assessment factors contained in section 110(i) of the Mine Act, I find a penalty of $50 is proper and reasonable and will be assessed herein.

FOOTNOTE 3

30 C.F.R. 56.9300 provides, in pertinent part, as follows: (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

ORDER

l. Citation Nos. 4336867 and 4336871 ARE VACATED.

2. Citation Nos. 4336873 and 4336878 ARE AFFIRMED.

3. Respondent SHALL PAY to the Secretary of Labor within 30 days from the date of issuance hereof the penalties hereinabove assessed in the total sum of $100.

Roy J. Maurer
Administrative Law Judge

Distribution:

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