FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1701
TELEPHONE: (202) 434-9950
FAX: (202) 434-9949

January 13, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2013-259-M
Petitioner	:	A.C. No. 08-01183-312347 Q121
	:	
v.	:	
	:	
MJM ELECTRIC CONSTRUCTION,	:	South Fort Meade Mine
Respondent	:	

DECISION

Appearances: Anthony L. Burke, Conference Litigation Representative, (CLR), Department of Labor, MSHA, Bartow, Florida, for the Secretary.

Mark J. Masur, President, MJM Electric Construction, Tampa, Florida, Pro Se.

Before: Judge Koutras

STATEMENT OF THE CASE

This simplified proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802, et Seq. (2000), hereinafter the "Mine Act" and the Commission's Procedural Rules at 29 C.F.R. 2700.1, et Seq., concerns a Section 104(a) non-S & S citation served on the respondent on November 14, 2012, for an alleged violation of mandatory safety standard 30 C.F.R. 56.14132(b)(2).

After several Email communications and telephone conferences with the parties pursuant to Rule 2700.106 concerning settlement of this matter, the parties were at an impasse and the respondent requested a hearing. Accordingly, a hearing was held in Tampa, Florida, on November 13, 2013, and the parties appeared and participated fully therein.

Stipulations

The parties agreed that the respondent is an independent contractor with an MSHA issued contractor I.D. number and is subject to the Mine Act and MSHA's enforcement jurisdiction (Tr. 8).

The respondent was provided with copies of the Secretary's hearing exhibits P-1 through P-6, and they were admitted for the record without objection (Tr. 8). The parties presented their arguments orally on the record (Tr. 58-58). I have considered their arguments in the course of this decision.

The Alleged Violation

Section 104(a) non – S & S Citation No. 8642576, issued on December 14, 2012, alleges a violation of 30 C.F.R. 56.14132(b)(2), and the cited condition is described as follows:

> The backup alarm on the #8432 F-150 Ford truck could not be heard above the surrounding noise level. The truck was parked at the dragline area.

Leroy Ford, retired MSHA inspector, testified that he retired on August 30, 2013, and previously served as an inspector for sixteen years, including initial training at the Beckley, West Virginia Mine Academy. His prior experience consisted of 26 years with private mines working in various jobs, including a job as a safety director (Tr. 11-13).

The inspector confirmed that he issued the non – S & S citation on November 14, 2012, (Ex. P-4), and identified the notes that he made that day (Ex. P-5). He explained that he issued the citation after inspecting the respondent's truck that was parked at the actively working dragline area of the mine with its foreman John Butts at the wheel (Tr. 16).

The inspector stated that he was standing approximately 12 to 15 feet away from the back of the truck when he asked Mr. Butts to engage the backup alarm as he placed the vehicle in reverse. The inspector stated that although the alarm was "working with a faint beep, it needed to be louder" because he could not hear it over the surrounding noise (Tr. 18).

The inspector confirmed his gravity finding of "unlikely" and "lost workdays" if a person were run over by a vehicle, and his "moderate" negligence finding based on the foreman's belief that the alarm was loud enough. He further stated that one person would be exposed to any injury and he considered the fact that the vehicle had been pre-shifted that same morning (Tr. 16, 19).

The inspector stated that the foreman's records reflected that the truck was pre-shifted the morning of the inspection and that the backup alarm was working. The inspector was of the opinion that from his position behind the truck, when it was put in reverse he could hear it "beeping", but it was not loud enough to be heard above the traffic up and down the area where he was standing (Tr. 19-21). The inspector stated that Mr. Butts stayed in the truck with the window down and the truck in reverse, and stated that "he didn't hear it that loud either" (Tr. 24).

On Cross-Examination, the inspector confirmed that pursuant to MSHA's standards, the cited pickup truck was not required to be equipped with a back-up alarm because the operator can see behind the vehicle with no problem and can see through the mirrors or back window with no problem. Therefore, no alarm is required. However, once a backup alarm is installed on a truck, such as the one in this case, it has to work properly (Tr. 22-23). He confirmed that the cited truck had a clear and unobstructed view of the rear (Tr. 35). The inspector confirmed his belief that the alarm should have been louder. He stated that the cited safety standard does not reflect how far someone has to be in order to be able to hear the alarm (Tr. 23I).

In response to further questions, the inspector confirmed that the violation was abated the next day after a new alarm was purchased and installed (Tr. 25). I accept the respondent's credible and undisputed testimony that the original alarm was not broken or otherwise malfunctioning, other than the inspector's opinion that it was not loud enough, and that in order to remain compliant the new one was louder and equipped with decibel readers (Tr. 26).

The inspector stated that the cited standard provides no regulatory requirement for sound testing such as decibel readings other than "you just have to be able to listen to hear the backup" (Tr. 27). He confirmed that when he inspected the truck it was parked on the side of the road with the engine running, and he described the surrounding noise as the noise from the truck engine itself once it was started and "revved up", and that there was traffic back and forth on the road (Tr. 29).

The inspector stated that his normal practice in testing a backup alarm is to ask the driver to "put the gas on a little bit so we can see if the engine noise itself" is such as to prevent anyone from hearing the alarm. He agreed that although increasing or decreasing the engine speed would increase or decrease the ability of someone to hear the alarm, his practice is to test the vehicle while it is normally put in reverse and that in this case he could only hear "a faint beep" (Tr. 38).

The inspector further explained that assuming Mr. Butts had backed up at a slower pace, with a resulting slight beep, he would still issue a citation because it would still be not loud enough to be heard at other work areas where employees would be exposed to a backup hazard, and he wanted to insure that "nothing would happen anyplace else" (Tr. 39). He confirmed that when he returned to the mine the next day to terminate the citation, the new alarm was sufficient, and stated "I could hear it without even trying to get close or anything" (Tr. 40). He confirmed that he has his hearing tested by MSHA annually (Tr. 41).

The inspector stated that although Section 56.14132(a) does not specifically mention a truck, MSHA's policy explanation with respect to self-propelled mobile equipment reference in this subsection includes any rubber wheeled equipment capable of moving itself, including the cited truck. The policy further provides that subsection (b)(2) is cited if an alarm is operating as designed (functional) but is not audible above the surrounding noise level (Ex. P-6, (Tr. 31-37).

The Secretary's Arguments

The Secretary's arguments in support of the citation are reflected by the inspector's following statement to the respondent's foreman who was in the cited truck (Tr. 47):

> I told him you didn't have to have an alarm on this because you could see, but since you have an alarm on this piece of equipment, it has to work properly, and that's basically what I told Mr. Butts, and I proceeded to write the violation because it wasn't loud enough.

The Secretary asserted that despite the fact that the cited standard does not specifically include a truck, the cited pickup truck with rubberized wheels was a piece of self-propelled mobile equipment requiring the provided back-up alarm to be audible above the surrounding noise level as explained in MSHA's policy guidelines. In this regard, I take note of the fact that the respondent agreed that the cited standard applied to the cited pickup truck in this case (Tr. 51-52).

The Secretary characterized the respondent as a "stellar company" based on the absence of any prior violations or any reportable accidents, and the Secretary commended the respondent's compliance record as a "great feat" (Tr. 54). However, when an operator decides to provide a piece of equipment with an alarm the standard unambiguously requires that it be maintained in an operative working condition in order that it is able to be heard above the surrounding noise environment. In this case, the Secretary argues that the inspector's testimony in this case clearly establishes a violation and that the citation should be affirmed (Tr. 54-55).

The Respondent's Arguments

The respondent called no witnesses to testify in this case, including the foreman who was operating the cited pickup truck. Further, the respondent did not dispute the inspector's qualifications and clearly understood that the inspector did not believe that the truck backup alarm was loud enough (Tr. 22). The thrust of the respondent's defense is that it acted responsibly and proactively, and together with the company safety committee, voluntarily equipped every vehicle in its inventory with backup alarms to insure the safety of anyone who may be exposed to any potential hazard or injury as the result of the operation of any of its vehicles, including vehicles that do not require alarms (Tr. 43-45).

The respondent argued that the cited standard does not provide for testing sound levels by decibel readings, nor does it provide any distance parameters from a vehicle to determine whether or not it is loud enough to be heard (Tr. 44-45). The respondent strongly suggested that it may be forced to remove the alarms from all of its vehicles that do not require them and that any decision in this regard would be a business decision to avoid future citations (Tr. 52).

The respondent further believed that the cited standard is "very ambiguous" and that the "functional condition" requirement infers nothing about the sound level of that device. He cited the inspector's statement that he heard the alarm from a couple of feet behind the truck as an indication that it was functional, but there is "nothing to tell us what the distance is where that has to be audible" (Tr. 57).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of 30 C.F.R. 56.141.32(b)(2) that provides in relevant part as follows:

> Section 56.14132 Horns and Backup Alarms
>
> (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.
>
> (2) Alarms shall be audible above the surrounding noise level.
>
> The evidence establishes that the cited truck was not provided with a backup alarm and none was required. However, pursuant to subsection (a) if an alarm is provided, it must be maintained in a functional condition, and pursuant to subsection (b)(2), it must be audible above the surrounding noise level.

Although there is an inference that an audible alarm that cannot be heard above the surrounding noise is not maintained in a functional condition, and may require repairs, in this case the credible evidence establishes that the cited alarm was replaced by a new one and was not repaired. Further, the inspector agreed that the alarm was working when he inspected the truck and heard a "faint beep" when the truck was backed up in reverse (Tr. 18).

Although the respondent expressed his disagreement with the Secretary's interpretation and application of the standard, as well as his frustration for being cited after equipping all of his company vehicles with alarms even though they were not required, he nonetheless did not disagree with the inspector's decision to issue the violation (Tr. 56), and did not question the inspector's explanation that he did so because he did not believe the backup alarm was loud enough (Tr. 47). Further, the respondent called no witnesses, including the foreman who was in the truck when it was inspected, to rebut the testimony of the inspector who I find was credible. He also agreed that the standard relied on by the inspector applied to the cited truck (Tr. 51-52).

In the course of the hearing, I expressed concern that the absence of any regulatory standard language providing objective procedures for testing alarm noise or surrounding noise levels, may result in differences of opinions inviting litigation (Tr. 27, 31). However, I conclude and find that there is a reasonable expectation that a backup alarm that is provided on a piece of rubbered tired mobile equipment such as the cited truck, be loud enough to be heard by anyone exposed to any hazards presented by the truck operating in reverse. Further, any credibility determinations regarding whether or not the audible alarm is loud enough to be heard above the surrounding noise is best resolved by the Court.

I further find that the Secretary's policy of citing a violation of subsection (b)(2) "if a backup system is provided and is operating as designed (functional) but is not audible above the surrounding noise level" is reasonable and deserving of deference. Further, I find that the function of a backup alarm that is provided and installed on a vehicle as required by the cited standard and policy is to emit and sound an audible warning loud enough to be heard above the vehicle surrounding environment. I conclude and find that the Secretary has established by a preponderance of the credible evidence that the cited alarm that was on the truck in question was not loud enough to be heard over the surrounding noise level of the truck engine as it was placed in reverse.

After careful consideration of the arguments presented by the parties, I conclude and find that the Secretary's position is supportable and correct based on the credible and unrebutted testimony of the inspector in support of his citation and the absence of any credible rebuttable evidence produced by the respondent. Accordingly, the disputed violation IS AFFIRMED.

History of Prior Violations

The respondent's compliance record (Ex. P-1, P-2, P-3) reflects no prior civil penalty assessments or any accidents. Further, The Secretary acknowledged that the respondent has a stellar safety record and commended the respondent (Tr. 53). I agree and find that this is the case. I have also considered the fact that working together with the company Safety Committee, the respondent voluntarily equipped all of its vehicles with alarms in order to insure the safety of miners at the mine sites where work was performed.

Good Faith Compliance

The inspector terminated the citation the next day after it was issued and his notes, as well as the termination notice, reflect that the alarm was repaired (Ex. P-4, P-5). However, I find credible the testimony of the respondent that no repairs were made and that a new alarm with a louder audible sound capability was installed. Accordingly, I find that the cited condition was rapidly abated in good faith out of an abundance of caution to insure safety and to preclude future citations.

Gravity

The inspector based his non – S & S determination on his belief that any injury was unlikely and the fact that the foreman was sitting alone in the truck on the side of the road with nothing around him at that time (Tr. 16-17). Under the circumstances, I conclude and find that the violation was minor.

Negligence

The inspector testified that he based his moderate negligence finding on the statement made by the foreman who was in the truck that he thought the backup alarm was loud enough (Tr. 16). He further confirmed that the pre-shift truck inspection records for that morning

reflected that the backup alarm was working, and that the foreman told him it was working when he checked it (Tr. 19). Under these circumstances, and based on the fact that the truck was parked on the side of the road with no evidence to suggest that the foreman was aware that the alarm was not loud enough, I modify the negligence level from moderate to low.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Remain in Business

In the absence of any evidence to the contrary, I conclude and find that the respondent is a small electrical construction contractor covered by the Mine Act and that the penalty assessed in this case will not adversely affect its ability to remain in business.

ORDER

Based on the foregoing findings and conclusions in this case, and in consideration of the civil penalty criteria set forth in Section 110(I) of the Mine Act, the Court assesses a civil penalty of $75.00 for the Section 104(a) non – S & S Citation No. 8642576, December 13, 2012, citing a violation of 30 C.F.R. 56.14132(b)(2), that has been AFFIRMED. Further, the Court MODIFIES the negligence level from moderate to low.

The respondent is ORDERED to pay a civil penalty assessment of $75.00, satisfaction of the aforesaid violation. Payment shall be made within thirty (30) days of the date of this decision, and remitted by check made payable to U.S. Department of Labor/MSHA, P.O. Box 790390, St. Louis, MO 631790390. Upon receipt of payment, this matter IS DISMISSED.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

Distribution:

Anthony L. Burke, CLR, U.S. Department of Labor, Mine Safety and Health Administration, 1661 Park Avenue, Bartow, FL 33830-5390

Mark J. Massur, President, MJM Electric Construction, 3225 East 4th Avenue, Tampa, FL 33605-0000