

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 24, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-118-M
Petitioner	:	A. C. No. 14-00211-05502
v.	:	
	:	Vondra Clay Pit
ACME BRICK COMPANY,	:	
Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, and Dennis J. Tobin, Conference and Litigation Representative, Mine Safety and Health Administration, Grand Junction, Colorado, for the Secretary;
Steven R. McCown, Esq., Littler, Mendelson, Fastiff, Tichy and Mathiason, Dallas, Texas, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' ' 801 et seq., the "Act," charging the Acme Brick Company with two violations of the regulatory standard found at 30 C.F.R. ' 56.14101(a)(3). The general issues before me are whether the respondent violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Pursuant to notice, the case was heard at Hays, Kansas, on May 31, 1995. At the hearing, Inspector James G. Enderby testified for the Secretary of Labor. Mr. Clinton L. Bunch, plant manager, testified for respondent.

STIPULATIONS

At the hearing the parties entered the following stipulations into the record (Joint Ex. No. 1):

1. Respondent is engaged in mining and selling of clay in the United States, and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of Vondra Clay Pit, MSHA I.D. No. 14-00211.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. " 801 et seq. ("the Act").

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

5. The subject citation and order were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date 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 their relevance or the truth of the matters asserted therein.

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

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

9. Respondent is a medium sized mine operator with 196,073 tons/hours of production in 1992.

DISCUSSION, FINDINGS AND CONCLUSIONS

On October 20, 1993, MSHA Inspector James G. Enderby issued section 104(d)(1) Citation No. 4336451 to the respondent because an International Harvester truck had the brake lines to the front service brakes disconnected, rendering them inoperable. Fifteen minutes later, he issued section 104(d)(1) Order No. 4336452 on a second International Harvester truck for essentially the same reason.

The particular section of the mandatory standards that the inspector cited, 30 C.F.R. ' 56.14101(a)(3), provides that : "All braking systems installed on the equipment shall be maintained in functional condition." (Emphasis added).

The standard requires that all braking systems, including front braking systems, installed on the equipment be maintained in functional condition. The evidence clearly establishes that the front service brakes on the cited equipment were completely disconnected and therefore not functional. That is a violation of the standard. It is as simple as that.

Respondent also believes the citation and order should be vacated because MSHA conducted the inspection outside the geographical confines of its jurisdiction.

The Vondra Clay Pit is a small clay pit that the company mines clay from and then hauls it, using these two trucks, to a production plant 3 miles away to make the finished product, face brick. The clay pit is subject to MSHA jurisdiction, while the production facility is under OSHA jurisdiction.

Inspector Enderby conducted his inspection of the two trucks in question while they were parked at the production plant, OSHA country. However, the inspector had previously observed these trucks being operated at the clay pit earlier that month and both the plant foreman, Mr. Lamia and the maintenance man, Mr. Modrow, informed him that the vehicles had had the front service brakes disconnected ever since they had been delivered to this operation, years ago. The front brakes are purportedly removed

from service as a standard practice because of a folkloric notion popular among truck drivers that you will have better control of

the vehicle in an emergency stop situation without the front service brakes locking up the front wheels.

Although in an ideal world the inspector would have inspected the trucks and cited the trucks while they were operating in an MSHA-regulated environment, I do not find that fatal to the Secretary's case. The inspector testified that earlier that month he had personally observed these trucks operating at the Vondra Clay Pit, and Mr. Bunch also testified to the effect that these trucks were used to haul material from the clay pit to the plant. Mr. Bunch also admitted that the trucks had been operating in the cited condition, vis-a-vis the front service brakes, since their arrival at the pit in 1985 in the one case and 1987 in the other. Accordingly, I find the two violations of the standard proven as charged.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. ' 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

Inspector Enderby opined that if the truck driver had to stop in an emergency, he would not have sufficient braking power to safely stop the vehicle. However, I note that with the exception of the front service brakes all the other braking systems on the trucks were functional. In addition, one of the trucks pulls a trailer which also has an independent braking system. I also note that there is a complete lack of evidence in the record as to any testing or empirical determination of whether these trucks would safely come to a stop in the cited condition. After all, they had been operating in this configuration for 6-8 years before this violation without mishap.

Really, the only evidence the Secretary submitted of any hazard with regard to operation of these trucks in the cited condition was the unsubstantiated conclusion of Inspector Enderby that such a hazard existed. That is not enough to satisfy the Secretary's burden of proof. I therefore find that it has not been established that an injury producing event was reasonably likely to have occurred. Accordingly, it is concluded that the

violations found herein, were not significant and substantial ("S&S").

Inasmuch as Citation No. 4336451 does not recite an "S&S" violation, it must be modified to a citation issued under section 104(a) of the Act. Likewise, since Order No. 4336452 relies on Citation No. 4336451 to start the "d" chain, and since itself does not recite an "S&S" violation, it must also be modified to a section 104(a) citation.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty of \$100 for each of the violations found herein, or \$200 total, is a reasonable and appropriate civil penalty.

ORDER

1. Citation No. 4336451 and Order No. 4336452 **ARE MODIFIED** to delete the "S&S" finding and, as modified to section 104(a) citations, **ARE AFFIRMED**.

2. The Acme Brick Company **IS ORDERED TO PAY** the Secretary of Labor a civil penalty of \$200 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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