FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 14, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-160-M
Petitioner	:	A.C. No. 03-01619-05504 A
v.	:	
	:	Blue Bayou Sand and Gravel Mine
CLOVIS L. JEWELL,	:	
Employed by D. JEWELLCO, INC., d/b/a:		
BLUE BAYOU SAND & GRAVEL, CO.,	:	
Respondent	:	

DECISION

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Mr. Danny Jewell, Owner, Jewellco, Inc., Texarkana, Arkansas for Respondent.

Before: Judge Weisberger

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (Petitioner) pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977 (Athe Act@), alleging that Clovis L. Jewell (Respondent), employed by D. Jewell Co., Inc., d/b/a Blue Bayou Sand & Gravel Co., (ABlue Bayou@) knowingly authorized, ordered, or carried out a violation of 30 C.F.R. ' 56.14101(a)(1).[1]

[1]In a prior proceeding involving the citation at issue in the instant proceeding which had been issued to Blue Bayou Sand and Gravel, Inc., it was found at the ALJ level that Blue Bayou violated 30 C.F.R. ' 56.14101(a)(1), but that the violation was not S&S (16 FMSHRC 1059) (May 1994). The Secretary petitioned the Commission for discretionary review challenging the ALJ=s S&S and imminent danger determinations. The Commission reversed the determination that the violation did not present an imminent danger, and remanded the S&S issue. Blue Bayou appealed to the U.S. Court of Appeals, and the instant proceeding was stayed pending this appeal. Subsequently, Blue Bayou withdrew its appeal.

The Secretary, in the instant proceeding, filed a motion in limine to preclude Jewell from challenging the existence of a significant and substantial violation of Section 56.14101(a)(1), supra, arguing that the Secretary should not be required again to prove that Blue Bayou violated Section 56.14101(a) supra. After entertaining oral argument from representatives of both parties in a telephone conference call, the Secretary=s motion was denied.

Pursuant to notice the case was heard on May 1, 1997, in Shreveport, Louisiana.[2] At the conclusion of the hearing, the parties were requested to file post-hearing briefs, and the filing date was subsequently extended to June 27, 1997. On July 1, 1997, Petitioner filed a Post-Hearing Statement. On July 7, 1997, Respondent filed a Post-Hearing Statement.

I. Findings of Fact and Discussion

A. Introduction

Section 110(c) of the Act provides in essence, that a corporate agent who Aknowingly authorized, ordered, or carried out@ mandatory safety standard shall be subject to a civil penalty. Hence in order for Petitioner to prevail, she must establish a violation of a mandatory standard, and that Respondent either knowingly authorized ordered or carried out such violation.

1. Violation of 30 C.F.R. ' 56.14101(a)

a. Petitioner=s evidence

D. Jewellco Inc., d/b/a Blue Bayou Sand & Gravel, Inc., operates an open-pit sand and gravel mine in Arkansas. On April 28, 1993, Larry Slycord an MSHA inspector, and his supervisor, Billy G. Ritchey inspected the mine. Slycord observed a 22-ton Euclid haul truck after it had been loaded by a truck hoe. Slycord motioned to the driver, William Jewell, to stop, and advised him that he wanted to check the brakes. According to Slycord, William Jewell said that Athe brakes weren=t any good on the truck@ (Tr. 55). Slycord asked William Jewell how he was Aholding@ the truck, and William Jewell told him Athat he was holding the truck with the transmission@ (Tr. 56).

Slycord directed William Jewell to open the door of the truck, and drive forward. Slycord walked alongside the truck, which he estimated was traveling at 3 to 4 miles an hour, and motioned to William Jewell to stop the truck. According to Slycord, as Jewell applied the service brakes, the truck kept rolling for 20 to 25 feet and came to a Aslow rolling stop@ (Tr. 59). The truck was tested again with the same result. Ritchey corroborated Slycord=s testimony, and indicated that when Jewell applied the service brakes the wheels did not hesitate or grab. Accordingly, he concluded that there was no

[2]The Stay Order previously issued in this case on September 14, 1994, and continued in an order issued on July 22, 1996, is hereby lifted nunc pro tunc to April 17, 1997.

indication that braking was taking place.

Slycord issued a withdrawal order, which is not at issue herein, and a citation alleging a violation of 30 C.F.R. ' 56.14101(a)(1) which, as pertinent, provides as follows: A(a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.@

According to Slycord, Paul Jewell examined the brakes after the vehicle was cited, and found a leak in one of the brake pods which he replaced. Slycord opined that with a leak in one pod there would be a loss of air volume and air pressure, resulting in insufficient air to supply to all four brakes and all four brake pods.

b. Respondent=s position

Respondent did not proffer the testimony of any eyewitness to contradict the testimony of Slycord and Ritchey that when the former directed the truck to be stopped it did not stop, but continued to roll forward. Clovis Jewell, testified that William Jewell who had operated the truck in question for three weeks prior to its being cited, had not expressed any problems with the truck. Also Clovis Jewell indicated that he had operated the truck in this time period, and did not have any problems stopping. According to Clovis Jewell he stopped the truck by using a retarder, and the brakes never failed to operate properly. He opined that, applying the retarder when the truck travels at 3 to 4 miles an hour down a 3 percent grade would slow it to a speed of less than that of a person walking. He also opined that the retarder is designed for use in emergencies, and that at a top speed of 10 to 12 miles an hour and carrying a full load the truck would still stop within six seconds. According to Clovis Jewell, revving the truck=s motor would put more air than needed in the braking system.

c. Discussion

Based on the uncontradicted testimony of Slycord and Ritchey that the truck did not stop when the brakes were applied and continued to roll forward, I find that the weight of the evidence establishes a violation of section 56.14101(a) supra.

2. Knowingly authorized ordered or carried out the violation.

The Commission has defined Aknowledge@, under section 110(c) to include both

actual knowledge and having reason to know of a violative condition. The Commission has also held that liability under section 110(c) requires aggravated conduct rather than ordinary negligence (Secretary v. Richardson, 3 FMSHRC 8, 16 (1981), aff=d, 689 F.2d 632 (6th Cir. 1982 accord, Secretary v. Beth Energy Mines, 14 FMSHRC 1232, 1245 (1992). The Commission=s interpretation was held to reasonable and was adopted, in essence, by the D.C. Circuit in Freeman United Coal Co., v. FMSHRC, 108 F.3d 358, (D.C. Cir. 1997)).

Approximately 4 to 5 weeks prior to April 28, 1993, Albert Braneff, was hired to operate the track hoe. He testified that when he started to work, Clovis Jewell told him to put a mound of dirt between the track hoe, and the Euclid truck when it backed up to be loaded by the track hoe, as there were problems stopping it. Braneff indicated that Clovis Jewell told him to watch the brakes on the truck, and to assist in stopping it by using the bucket at the back of the track hoe. He indicated that the driver of the truck told him that the brakes were not holding, and to watch him to make sure the truck would not roll. According to Braneff, all employees knew there were problems with the truck.

J.E. Jewell, testified that he inspected the truck the day after the citation was issued, and the only problem that he found with the brakes was that Athere was an >O= ring out in the air pod@ (Tr. 219, February 9, 1994)[3] He opined that the leak in the air pod was not of sufficient size to affect the ability of the brakes to work properly. He said that the leak would have affected braking ability only if the brakes were applied for about 15 minutes. The only repair he performed in order to abate the citation was to replace the >O= ring.

In his defense, Clovis Jewell testified that he operated the truck prior to April 23, and there were no problems stopping. Accordingly to Jewell, William Jewell, the operator of the truck, never expressed to him any problems with the truck. Clovis Jewell specifically denied telling Braneff to stop the truck with a bucket. However, it is most significant that Clovis Jewell did not contradict Braneff=s testimony that he (Clovis Jewell) had stated that there were problems with stopping the truck, and to stop it with the bucket of the track hoe.

[3]J.E. Jewell testified in the initial proceeding commenced by the Secretary against the Blue Bayou (16 FMSHRC supra). He died after that hearing, and it was stipulated that his testimony at that initial proceeding be admitted herein.

Within the above context, I find that it has been established that Clovis Jewell knew that there were problems with the truck=s brakes. Since as foreman, he allowed this condition to continue and did not repair it, I find that it has been established that he violated Section 110(c) supra.

B. Penalty

Petitioner seeks a penalty from Respondent of $1,000. The Commission, in Secretary v. Sunny Ridge Mining Co. Inc.., 19 FMSHRC 254, 272 (Feb 28, 1997), set forth as follows the penalty criteria that apply to individuals when a judge makes findings assessing a penalty pursuant to 110(c) of the Act:

> In making such findings, judges should thus consider such facts as an individual=s income and family support obligations, the appropriateness of a penalty in light of the individual=s job responsibilities, and an individual=s ability to pay. Similarly, judges should make findings on an individual=s history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be make on the same record evidence that is used in assessing an operator=s penalty for the violation underlying the section 110(c) liability.

The facts relating to Respondent=s history of violations would appear to be within the control of Petitioner. However, Petitioner did not adduce any facts concerning this criteria. As set forth above, Respondent did not contradict Braneff=s testimony that he had told him to watch the brakes on the truck as there were problems stopping the truck. Nor did Respondent impeach the credibility of this testimony. I therefore accept it. Since Respondent permitted the truck to operate knowing that there problems with the brakes I find his negligence to be of relatively high level.

According to Ritchey, the leading cause of fatalities are mobile equipment accidents. In this connection, Slycord testified that the truck could roll back to the track hoe, and cause injuries to either or both operators. Ritchey indicated an MSHA study revealed that in six years there were eight fatalities and 47 serious injuries where trucks have traveled through and over berms. Slycord noted that since the truck had problems with its brakes, it could have rolled over the block at the hopper, and injured the hopper operator, or the truck operator. I find that the operator of the truck used the transmission to hold it. Hence, such an accident could have occurred only if the transmission failed to operate. In this connection, I note that there is no evidence that there were any problems with the transmission.

According to both Inspectors, because there were problems with the brakes, the

truck could have hit persons who were working approximately 20 feet from the roadway. Such an accident could have occurred only if the truck could not have been steered correctly. There is no evidence that the truck=s steering was defective.

Additionally, the seriousness of the violative condition, i.e., a leak in a brake pod, is mitigated somewhat by noting Clovis Jewell=s uncontradicted testimony that proper use of a retarder operates to slow the truck.

Based on all the above, I find that the record establishes that the gravity of the violation was only moderate.

The violation was abated in good faith as the defect in the brakes, i.e., the leaking pod, was replaced the following day.

The facts concerning Respondent=s income, family support obligations, and ability to pay appear to be within control of Respondent. However, he did not adduce any evidence regarding these criteria. I find that he has not come forward with any evidence to mitigate a penalty based upon his ability to pay.

In assessing a penalty I take in account the high level of Respondent=s negligence and the fact that he was the foreman at the site. I also consider the fact that Respondent has not adduced any evidence to mitigate a penalty based upon lack of ability to pay. On the other hand, the violation was abated in good faith, and the gravity of the violation was only moderate. Also, Petitioner has failed to adduce any evidence to establish that a penalty is to be increased based upon Respondent=s history of violations. Taking all these into consideration, I find that a penalty of $200 is appropriate.

ORDER

It is **ORDERED** that Respondent, within 30 days of this decision, pay a civil penalty of $200.

Avram Weisberger
Administrative Law Judge

Distribution:

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