FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 15, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-394-M
Petitioner	:	A.C. No. 41-01684-05508
v.	:	
	:	
BILBROUGH MARBLE DIVISION,	:	
TEXAS ARCHITECTURAL AGGREGATE,	:	
Respondent	:	Roper Quarry

DECISION

Appearances: Ronald M. Mesa, Conference & Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Dallas, Texas, on behalf of Petitioner;
David M. Williams, Esq., San Saba, Texas, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that Bilbrough Marble Division, Texas Architectural Aggregates ("TAA"), is liable for two violations of mandatory safety and health standards applicable to surface metal and nonmetal mines. A hearing was held in Austin, Texas. The parties submitted briefs following receipt of the transcript. The Secretary proposes civil penalties totaling $110.00 for the alleged violations. For the reasons set forth below, I find that Bilbrough did not commit the alleged violations and vacate the citations.

Findings of Fact - Conclusions of Law

On April 11, 2001, MSHA inspector Jerry Anguiano conducted an inspection of Bilbrough Marble's Roper Quarry. The quarry produces a buff-colored dolomite marble known as "DeMarco Botticino." It has been operated only intermittently since April, 2000, when TAA lost its contract with the major consumer of the uniquely colored marble. In April of 2001, work at the quarry was limited to the reclaiming of existing stock, which was done only on weekends.

At about 8:00 a.m., on Wednesday, April 11, 2001, Bilbrough Marble's General Manager, Joe R. Williams, Jr., drove Anguiano to the quarry and opened the locked gate

admitting them to the facility. In the course of the inspection, Anguiano observed a CAT 950 front end loader that had a severely cracked windshield. He requested that Williams start it up and move it forward to check the brakes. When Williams placed the transmission of the loader into reverse to return it to its parked location, the back-up alarm did not function. Anguiano issued citations based upon the condition of the windshield and the inoperable back-up alarm.

Citation No. 6206421

Citation No. 6206421 alleged a violation of 30 C.F.R. § 56.14103(b), which provides, in pertinent part: "If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed." Anguiano described the violation in the "Condition or Practice" section of the citation as follows:

> Front end loader #140 has the windshield cracked. There were (5) vertical cracks. The cracks range approximately 30 inches to 35 inches. The glass was flexing and could break in the operator's face while operating the loader. The operator could sustain severe eye injury and/or cuts, lacerations to the face. The loader was not operating at the time of the inspection.

He determined that it was unlikely that the violation would result in an injury, but that an injury could reasonably be expected to be permanently disabling, that one person was affected, and that the operator's negligence was moderate.

As Anguiano noted, the loader was not being operated at the time of the inspection, and no miners were at the site who could have operated it. As he reviewed records of operations at the quarry, he noted a sheet of paper referred to as a truck and bucket count sheet that purported to show that a number of truck loads and bucket loads had been processed on March 31, and April 7 and 8, 2001. (Ex. R-4). Because the loader had a bucket and normally would have been used to load the crusher hopper and the haul truck, he concluded that the loader had been operated in its defective condition on April 8, 2001.[1] (Tr. 54-55).

Anguiano also concluded that the loader was readily available for use by miners. Though not mentioned in his notes, he testified that the loader was parked "where it seemed to be at a ready-to-use line" (Tr. 43), a term that had been used by his supervisor in earlier testimony.[2]

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[1] Anguiano recorded his conclusion that the loader had been operated on April 8, 2001, in the companion citation. (Ex. S-8).

[2] Anguiano's supervisor, Ralph Rodriguez, testified that a "ready line" is an area where mobile equipment that is ready to be used by any miner is parked. At small operations such an area is typically not formally posted with signs but is understood by employees to be a place where equipment available for use is located. He had inspected the Roper quarry some five or six years earlier and stated that there was a "ready line" area at the quarry where two haul trucks and

Anguiano explained, in reference to his use of the term "ready-to-use line," that when equipment is parked and not tagged-out, it is ready for an employee to operate. (Tr. 43). He did not further describe the area or the basis of his conclusion that the loader was parked on what appeared to be a ready-to-use line. There were no signs stating that equipment in the area was not available for use and there was no tag or other marking on the loader stating that it could not be used. Based upon his conclusions that the loader had actually been used in its defective condition on April 8, 2001, and that it was available for use by a miner, he issued the subject citation.

Bilbrough's defense to the alleged violation is that the loader had not been used in its defective condition, was not available for use, and would not have been used before the windshield was replaced. Williams testified, based upon conversations with miners and a review of records, that the loader was last used on Saturday, April 7, 2001. A crack in the windshield was noted during a pre-shift inspection that day, but was not thought to be hazardous. Toward the end of the shift, the crack "spider-webbed," and the loader was taken out of service until the windshield was replaced. A "Yard Dump Driver's Report," dated April 7, 2001, noted a crack in the loader's windshield and that the windshield needed to be replaced. (Ex. R-1). The loader was parked in a back area, out of the way of traffic. (Tr. 137-39). According to Williams, employees of Bilbrough who might work at the quarry understood that equipment parked in that area was effectively out of service and also understood that the loader was not to be used because of the cracked windshield. (Tr. 165-66).

Ollie Conely, who had been the foreman of the quarry when it was operating on a full-time basis, was one of four or five Bilbrough employees who worked at the mine on April 7 and 8, 2001. He operated a Link-Belt excavator – a tracked vehicle that was also equipped with a bucket. On April 8, 2001, he used the excavator to load the crusher hopper and the haul truck. Normally those tasks would have been performed with the loader, but it was unavailable due to the cracked windshield, and the excavator was the only other operable piece of equipment at the site that had a bucket and was capable of performing those operations. (Tr. 176-77). Conely described the area where the loader was parked as the "dead zone," an area where equipment that was not available for use was placed. The loader was parked next to an excavator that had no engine and had been parked there for several years. (Tr. 184). He had telephoned Marble Falls Glass & Mirror, Inc. on Monday, April 9, 2001, and ordered a replacement windshield for the loader. That firm had been routinely used by Bilbrough for such tasks, and replacements were usually done on the day they were ordered or within a day or two thereafter. Respondent's exhibit R-2 includes a bill for replacement of the windshield on April 11, 2001, and a statement signed by the owners that the order had been placed by phone on April 9, 2001.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v.*

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two front end loaders were generally parked. He did not further describe the area or identify where it was located. (Tr. 16, 24-25, 28, 31).

Keystone Coal Mining Corp., 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987). I find that the Secretary has not carried her burden with respect to this citation.

As to actual use, I find that the loader had not been used while in a defective condition on April 8, 2001. The only evidence suggesting that it had been used is the reference to "buckets" on the count sheet for that date. Respondent's unrebutted evidence established that that reference was to the excavator's bucket, not the loader's, and that the loader was not used after the windshield crack "spider-webbed" on April 7, 2001. Even though not actually used in a defective condition, however, Respondent would have violated the standard if the defective equipment had not effectively been taken out of service.

The standard at issue, like other safety standards applicable to mobile equipment, is intended to protect miners from being exposed to hazards caused by the operation of defective equipment. In general, such standards must be complied with even though the equipment is not actually being used or is not intended to be used during a particular shift. *Allen Lee Good*, 23 FMSHRC 995 (Sept. 2001); *Mountain Parkway Stone, Inc.,* 12 FMSHRC 960 (May 1990). In *Mountain Parkway*, the term "used" was interpreted broadly to include equipment that was "parked in the mine in turn-key condition and had not been removed from service." *Id.* at 963. The Commission relied on *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843 (April 1981), which held that "the fact that the equipment was located in a normal work area, was capable of being used, and had not been removed from service" meant that it had been "used" within the meaning of the standard there at issue.[3] In *Good*, the Commission reiterated that "[a]s long as the cited equipment is not tagged out of operation and parked for repairs" a standard requiring that braking systems be maintained in functional condition was fully applicable. These cases make clear that the operator could properly be cited for any defective conditions unless the loader had been effectively taken out of service.

The Secretary relies on *Mountain Parkway* and argues that the loader was parked in the mine in a turn-key condition,[4] did not bear a tag noting that it had been taken out of service, and the claimed "dead zone" was not posted. However, being "tagged-out" or placed in a posted area are not the exclusive means of removing equipment from service. The applicable standard, 30

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[3] The standard at issue in that case, 30 C.F.R. § 56.9-2 (1978), required that defects be corrected "before the equipment is used."

[4] Williams testified that, in addition to the ignition switch, the master switch was also turned off. The master switch was located in a covered compartment on the floor of the loader's cab. Conely, however, testified that when he operated the loader, the normal procedure was to turn off the master switch, in addition to the ignition switch. The key to the master switch was left in the switch to avoid loss. Consequently, the loader was in a turn-key condition when it was inspected.

C.F.R. § 56.14100(c), also provides that equipment can be taken out of service by use of some "other effective method of marking the defective items." Respondent contends that it employed an effective method of prohibiting further use of the loader because it was parked in an area that was understood by all of the miners who might work at that site to be a "dead zone." Additionally, it contends that all of its employees knew that the loader was not to be used until the windshield had been repaired.

I find that the loader had been effectively taken out of service. The area where the loader was parked was understood by Bilbrough's small number of employees to be a place where equipment was not available for use and they actually knew that the loader could not be operated until the windshield was repaired. The Secretary's attempt to characterize the area as a "ready line" must be rejected. Her witnesses provided no description of the area and the only other piece of equipment located in the area was an excavator that had no engine and had been parked there for years.

Because the loader had not been used in a defective condition and had been effectively taken out of service, Bilbrough did not violate the standard at issue.[5] Accordingly, Citation No. 6206421 is dismissed.

Citation No. 6206422

Citation No. 6206422 alleged a violation of 30 C.F.R. § 56.14132(a), which provides: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." Anguiano described the violation in the "Condition or Practice" section of the citation as follows:

> The back-up alarm on the #140 front end loader was not operating. The loader was not operating at the time of the inspection. The loader is used to haul rock and feed the hopper. The plant was not in operation and no miners were in the area at the time of the inspection. According to the crusher operator truck count list, the loader was last operated on April 8, 2001.

He determined that it was unlikely that the violation would result in an injury, but that an injury could reasonably be expected to be fatal, that one person was affected by the violation, and that the operator's negligence was moderate.

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[5] Respondent's defense that the loader's windshield would have been repaired prior to any potential use also carries considerable weight. A similar defense was rejected in *Mountain Parkway* because there was no evidence that repairs to the equipment were being made or had been scheduled. Here, Bilbrough introduced unrebutted evidence that it had called its regular repair company on the first work day following discovery of the defect, and that it had a reasonable expectation that the windshield would be replaced prior to the next potential use of the equipment the following weekend.

There is no dispute that the loader's back-up alarm did not operate when Williams placed the transmission in reverse to back the loader into its parking place. When the malfunction occurred Williams telephoned the plant to request that a mechanic come out and repair or replace the alarm. Conely and a mechanic went to the quarry that afternoon. Anguiano observed them working on the loader and noted the presence of a replacement alarm. He assumed that the alarm had been replaced when he terminated the citation the following day. However, the alarm had not been replaced. When the mechanics attempted to diagnose the malfunction, they were unable to do so because the alarm functioned properly. It appears that the malfunction of the back-up alarm during the inspection was an isolated occurrence.

As noted above, Commission precedent is clear that standards like § 56.14132(a) must be complied with for all equipment located on mine property that might be used. Only if equipment has been effectively taken out of service can an operator avoid the consequences of defective conditions. The conclusion that the loader had been effectively taken out of service at the time of the inspection dictates that this citation also be dismissed. While the loader had not been taken out of service because of an inoperable back-up alarm, there was no reasonable possibility that it would be used, and the apparently isolated failure of the alarm while the equipment was out of service was not a violation of the standard.

ORDER

Citation Nos. 6206421 and 6206422 are hereby **VACATED** and the petition for assessment of civil penalties is **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

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