

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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April 27, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 94-236-M  
Petitioner : A.C. No. 45-03086-05507  
v. :  
: Docket No. WEST 94-265-M  
GOOD CONSTRUCTION, : A.C. No. 45-03086-05508  
Respondent :  
: Mine: Good Portable Crusher

DECISION

Before: Judge Amchan

These cases are before me upon a stipulated record. They involve three non-significant and substantial citations issued to Respondent on November 4, 1993, about which there is no material factual dispute. Citation No. 4128396 was issued because the manually-operated horn on Respondent's Dresser front-end loader did not work when tested (Agreed Statement of Facts, No. IV). There is no indication as to how long the horn was not working prior to the issuance of the citation (Ibid.)

The violation was cited as a violation of 30 C.F.R. ' 56.14132(a). The cited regulation requires that "[m]anually operated horns or other audible warning devices provided as a safety feature shall be maintained in functional condition." A \$50 civil penalty was proposed for this alleged violation.

Respondent's primary contention is that the cited regulation must be read in conjunction with ' 56.14100(b), which provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent creation of a hazard to persons." Thus, Respondent argues that unless the Secretary can show that it failed to correct the defective horn in a timely manner, the instant citation should be vacated.

I reject Respondent's contention. Section 56.14132(a) imposes upon an operator a duty to keep a vehicle horn or other audible warning equipment in working condition. This duty imposes obligations that are to some extent different from the

obligation to timely correct defects. It may require, for example, preventative maintenance. An inoperative horn could form the basis in some situations for citation under both regulations, if the horn did not work and the operator also failed to fix it in a timely manner.

Underlying Respondent's argument is the concept that an inoperative horn by itself cannot establish a violation. Good Construction suggests that a citation is valid only if the horn was inoperative due to an act or omission on its part.

However, under the Mine Safety and Health Act an operator is liable for a violation regardless of fault. For example, in El Paso Rock Quarries, Inc., 3 FMSHRC 35, at 38-39, 2 BNA MSHC 1132 at 1135 (January 1981), the Commission reversed a judge who vacated a citation for the absence of a reverse signal alarm on the grounds that the Secretary failed to establish that the operator knew or should have known that a reverse signal alarm was inoperative. I find this decision indistinguishable from the instant case and therefore affirm Citation No. 4128396.

While the fault of the operator is irrelevant to the validity of the citation, it is relevant to the assessment of a civil penalty. As the record herein is silent as to the negligence of Respondent, I assess a \$25 civil penalty after considering the penalty criteria in section 110(i) of the Act. I would assess an even lower penalty if the record demonstrated an absence of fault on the part of Respondent. Such a situation, for example, would be one in which the operator established that the horn was working properly when that day's pre-shift examination was performed.

#### The Parking Brake

Citation No. 4128397 was issued pursuant to 30 C.F.R. ' 56.14101(a)(2) because the parking brake on the same front-end loader was not able to hold its typical load on the maximum grade it travels (Agreed Statement of Facts, page 2, para. 6). I assume, for the purposes of this decision, that the parking brake on this loader met its manufacturer's specifications, and that it was capable of holding its typical load on level ground (Affidavit of Alan Good, page 3).

Respondent's challenge to this citation and the \$50 proposed penalty is essentially an attack on the wisdom of the standard's requirements. This is outside the jurisdiction of the Review Commission. Section 56.14101(a)(2) was promulgated as the result of notice and comment rulemaking on August 25, 1988, 53 Fed. Reg. 32522. Exclusive jurisdiction of challenges to its

validity must be made to an appropriate court of appeals, within 60 days of promulgation, Section 101(d) of the Act, 30 U.S.C. ' 811(d).

The preamble to the final rule indicates that comments were in fact received on the proposal that was promulgated as section 56.14102(a)(2). At 53 Fed. Reg. 32505, column one, MSHA discussed comments asking the agency to limit this requirement to testing up to a maximum grade of 15 percent. This discussion establishes that MSHA gave serious considerations to objections concerning the proposal. It also demonstrates why the undersigned should not evaluate the wisdom of the regulation when he does not have before him the rulemaking record that led to the promulgation of the standard.

As Respondent admittedly violated the standard, I affirm the citation and assess the \$50 penalty proposed. Respondent certainly had the capability to test the parking brake to see whether it complied with section 56.14101(a)(2) before the citation was issued. Its failure to do so warrants a penalty of this magnitude<sup>1</sup>.

#### The Part 50 Reports

Citation No. 4128400 was issued because Respondent did not have copies of the reports that it is required to submit to MSHA pursuant to sections 50.20 and 50.30 at the quarry site where

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<sup>1</sup>The standard does not require or encourage, as Respondent suggests, that an operator get out of his vehicle while testing the parking brake. I also reject Respondent's contention that the standard is unconstitutionally vague because its requirements are different depending on the terrain on which a vehicle travels and the manner in which it is used. I find the regulation provides an operator with sufficient notice of what constitutes compliance, Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990).

the instant inspection took place. These records were kept at Respondent's business office in Toledo, Washington, and MSHA inspectors had reviewed these reports at that location previously (Affidavit of Pam Good, page 1)<sup>2</sup>.

The cited regulation, 30 C.F.R. ' 50.40(b), requires that these reports be kept at the office closest to the mine. Respondent argues that there was no office at the quarry and that it complied with the regulation by maintaining these records at its business office. I conclude that the terms of this regulation must be read in conjunction with Section 109(a) of the Act. That provision states that, "[a]t each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine."

Thus, I find that Respondent was required to maintain an office at the quarry site and to maintain the part 50 records at that location. Previously, I reached the same conclusion in Mechanicsville Concrete, 16 FMSHRC 1444, 1448-9 (ALJ July 1994).

As noted in that case, there is a Commission judge's decision, Sierra Aggregate Company, 9 FMSHRC 426, 430 (ALJ March 1987), which reaches the opposite conclusion.

MSHA proposed a \$100 civil penalty for this violation, characterizing Respondent's negligence as "high." Respondent had the reports, which indicates no intent to conceal information. Moreover, the wording of the standard is very confusing and other MSHA inspectors apparently reviewed the company's reports at the business office. I conclude therefore that Respondent's negligence was very low. As a result I assess a \$10 civil penalty after consideration of all six factors in section 110(i) of the Act.

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<sup>2</sup>For purposes of this decision, I am assuming that the factual matters in Respondent's affidavits are established.

**ORDER**

Citation Nos. 41288396, 4128397 and 4128400 are affirmed. Respondent shall pay the \$85 assessed civil penalties within 30 days of this decision.

Arthur J. Amchan  
Administrative Law Judge

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