FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 7, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-314-M
Petitioner	:	A.C. No. 24-01889-05515
v.	:	
	:	Montgomery Crusher
MONTGOMERY CONSTRUCTION,	:	
Respondent	:	

DECISION

Appearances: Gary L. Grimes, Conference and Litigation Representative, U. S. Department of Labor, Denver, Colorado, on behalf of Petitioner;
Larry J. Bowser, Office Manager, Montgomery Construction, Hilger, Montana, on behalf of Respondent.

Before Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Montgomery Construction pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 815. The petition alleges a single violation of the Secretary's mandatory health and safety standards and proposes a civil penalty of $55.00. A hearing was held in Lewistown, Montana on February 8, 2000. For the reasons set forth below, I affirm the citation and assess a penalty of $25.00.

The Evidence

Montgomery Construction operates a crusher in Hilger, Montana. Three employees normally work at the site. Richard Bowser, the crusher superintendent, controls the crusher and the other two individuals operate loaders feeding the crusher and doing stockpiling. On March 3, 1999, David Huston, an inspector employed by the Department of Labor's Mine Safety and Health Administration (MSHA), conducted an inspection of Montgomery's crusher. He was accompanied by Richard Bowser. Both individuals observed a Terex 70C, front end loader in operation with a non-functional back-up alarm. Inspector Huston issued Citation No. 7903260, charging Montgomery with a violation of 30 C.F.R. § 56.14132(a), a mandatory health and safety standard applicable to surface metal and non-metal mines. Inspector Huston did not observe any other infractions.

Section 56.14132 provides, in pertinent part:

§ 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.

The citation issued by Inspector Huston stated:

> The backup alarm installed on the Terex 70C, 5 yard front end loader in operation at the mine site was not maintained in a functional condition. The backup alarm did not give any sound as the front end loader is put into reverse motion. The operator of the front end loader did have an obstructed view to the rear from the cab location of the loader. The warning system shall be maintained to warn of the reverse motion of the mobile equipment. No foot or other mobile equipment was observed in the vicinity where the loader was being operated. The chance of an incident resulting in injury to an employee was unlikely.

In assessing the gravity of the violation, inspector Huston concluded that it was not significant and substantial and that it presented an unlikely probability of a fatal injury affecting one person. He rated the operator's negligence as "moderate" because he determined that the operator of the equipment should have noticed that the backup alarm was non-functional and taken steps to have it repaired prior to the inspection. Richard Bowser testified that he conducts daily pre-shift inspections of the crusher and mobile equipment and that he did so on March 3, 1999. When he inspects the mobile equipment he performs a visual inspection, starts the engine and checks the operation of the backup alarm by putting the transmission into reverse. The backup alarm sounds when the reverse gear is engaged, regardless of whether the equipment is actually moving backward. He testified that he inspected the Terex 70C loader on the morning of March 3, 1999, that the backup alarm was functioning at the time, and that records of his inspections, which he discussed with inspector Huston, did not note an inoperable backup alarm. Huston testified that he did not recall having the discussion, although he did review pertinent records prior to commencing a physical inspection of the premises. Richard Bower also confirmed that the backup alarm was not functioning at the time of the inspection, which commenced around 2:00 p.m. Upon examination, it was found that a wire leading from the cab of the loader to the backup alarm had become disconnected. The wire was re-connected and secured and the violation was terminated shortly after the citation was issued.

Findings of Fact and Conclusions of Law

The relevant facts are largely undisputed. I credit Mr. Bowser's testimony and find that he inspected the loader that morning and that the backup alarm was working at that time. The parties agree that the backup alarm was not functional at the time of the inspection, which was based upon observations of the loader being operated in reverse. There was testimony by Richard Bowser that it is difficult for the operator of the loader to hear the backup alarm when

the loader's engine is running at or above half-throttle. However, the alarm sounds as soon as the reverse gear is engaged, an action that would normally be taken a low engine speeds.

The testimony and exhibits introduced by Respondent establish that it is cognizant of safety issues and has attempted to achieve and maintain compliance with applicable health and safety standards. Exhibit R-1 includes a letter dated October 15, 1999, from MSHA congratulating Montgomery Construction for receiving "the Joseph A. Holmes Safety Association, Certificate of Honor, for 50,425 manhours without incurring a lost time injury." Respondent's primary objection to the citation and proposed penalty goes more to the procedures followed by MSHA and the philosophy behind the basic enforcement scheme of the Act. Respondent complains that it is subject to varying interpretations of the standards by different inspectors and objects to the civil penalty enforcement mechanism, questioning whether MSHA benefits from civil penalty collections. It also complains about the burden imposed by the inspection process and responded to the proposed assessment by indicating that it would pay the proposed assessment in this case when it's "invoice" in the amount of $24,906.08, for "down time created by MSHA inspections" was paid. It has sought legislative action from it's representative in the United States Senate, proposing that a "partnering" relationship be established, similar to that used in federally funded highway projects, in lieu of the civil penalty mechanism.

These issues are, of course, beyond the jurisdiction of the Commission and the undersigned Administrative Law Judge, as Respondent understands. Nevertheless, it has raised them in this proceeding, in an attempt to further it's efforts to change the Act's enforcement scheme. The only issues properly before me are whether Respondent committed the violation as alleged and, if so, the appropriate civil penalty to be imposed.

I find that Respondent violated 30 C.F.R. § 56.14132(a) on March 3, 1999. The front end loader was being operated with a non-functional backup alarm. While the alarm may be difficult for the operator to hear when the engine is being operated at half throttle or more, a properly operating alarm will sound when the vehicle's transmission is placed into reverse. Shifting is not typically done at high engine speeds and the operator should have been aware that the alarm was not functioning and taken steps to have it repaired. There is no evidence that the crusher superintendent, or any other supervisory employee of Montgomery, was negligent or otherwise at fault. However, it is well settled that under the Act mine operators are subject to a strict liability standard, i.e. an operator is liable for a civil penalty, even though it's supervisory employees are without fault with respect to a violation of a mandatory health and safety standard. *Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir 1989)(*aff'g* 8 FMSHRC 1632) and cases cited therein. The degree of fault of the operator is, however, taken into account in determining the amount of any civil penalty to be imposed. *Id*.

Civil Penalty Assessment

The Secretary has proposed a penalty of $55.00 for the violation at issue. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six criteria itemized in § 110(i) of the Act. 29 C.F.R. § 2700.30;

Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 482-83 (April 1966).

Montgomery Construction's crusher operation is a small business entity. It has been cited for eight violations of mandatory health and safety standards in the twenty-four months preceding the violation at issue here. It has attempted, in good faith, to comply with mandatory health and safety standards and it's efforts have been very effective in avoiding lost-time injuries. I find that inspector Huston correctly assessed the gravity of the violation and that, while any potential injury would have been very serious, the probability of injury was unlikely because of the absence of pedestrian and vehicular traffic in the area where the loader operated. The parties have stipulated that Montgomery demonstrated good faith in rapidly abating the violation. Montgomery does not contend that the civil penalty proposed here would threaten it's ability to remain in business. I do not agree with inspector Huston's assessment of negligence. I find that Montgomery Construction was not negligent with respect to this violation.

Upon consideration of these penalty criteria, I find that a penalty of $25.00 is appropriate for the violation.

ORDER

Citation No. 7903260 is **AFFIRMED**. Montgomery Construction is **ORDERED** to pay a civil penalty of $25.00, within 30 days of the date of this decision.

Michael E. Zielinski
Administrative Law Judge

Distribution:

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