FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-75-M
Petitioner	:	A. C. No. 43-00509-05501
v.	:	
	:	Car-O-Lin Mine
CAR-O-LIN,	:	
Respondent	:	

DECISION

Appearances: Kathryn A. Joyce, Esq., Office of the Solicitor, U. S. Department of Labor, Boston, Massachusetts, for the Secretary;
Lester Corwin II, Esq., South Royalton, Vermont, for the Respondent.

Before: Judge Weisberger

I. Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging that CAR-O-LIN violated 30 C.F.R. §§ 56.14107(a) and 56.14132(a). Subsequent to notice, a hearing was held in Burlington, Vermont, on August 3, 1999.

II. Findings of Fact and Discussion

A. Background

CAR-O-LIN operates a sand and gravel pit in Turnbridge, Vermont. On June 18, 1997, Edward M. Blow, an MSHA inspector, presently retired, inspected the site at issue and issued a backup alarm notice for an Allis-Chalmers 645-B wheel loader. He told Linclon Chambers, who had informed him that he was working for Brent Lindstrom, that it would be at least 4 weeks before someone would be back to reinspect the premises. Blow informed Lindstrom, CAR-O-LIN's owner, that he was issuing only notices, not citations, in order to give him (Lindstrom) time to comply. On May 7, 1998, Kathleen Robinson, an MSHA inspector, inspected the site. She testified that a backup alarm, that had been installed in a Fiat Chalmers front-end loader was not working. Robinson issued a citation alleging a violation of section 56.14132(a), supra. In addition, according to Robinson, there were not any guards in place on a crusher that was not in operation. She testified that several guards were on the ground.

Robinson testified that Chambers told her that there was no guard for the chain drive. She issued a citation alleging a violation of section 56.1417(a), supra.

B. Jurisdiction

CAR-O-LIN asserted, in its closing argument, that it is not subject to the jurisdiction of the Act, as no coal is extracted from the site. There is no merit to this argument. Sections 103 and 104 of the Federal Mine Safety and Health Act of 1977 ("the Act") authorizes the Secretary of Labor to inspect, and issue citations to operators of "coal or other mines." Section 3(h)(i) of the Act defines "coal or other mine" as pertinent, as ". . . (A) an area of land from which minerals are extracted in nonliquid form . . . ." The common meaning of the term "mineral," as defined in *Webster's New Collegiate Dictionary*, as pertinent, is as follows: ". . . *broadly*: any of various naturally occurring homogeneous substances (as stone, coal, salt, sulfur, sand, petroleum, water, or natural gas) obtained for man's use usu. from the ground . . . ." Hence, it is clear that CAR-O-LIN's operation is a mine as defined in the Act.

In essence, CAR-O-LIN further argues that since its products are not sold outside Vermont, it is not involved in interstate commerce, and is not subject to the Act. In this connection, Lindstrom testified that CAR-O-LIN's permit from the State of Vermont allows it to sell only 15, 000 cubic yards of sand and gravel a year, that it sells this material only to customers living in Turnbridge and the surrounding towns, and that it uses only one delivery truck and it can only be operated in the State of Vermont.

In *Jerry Ike Harless Towing, Inc., and Harless, Inc.*, (16 FMSHRC 683 (April 11, 1994)), the Commission analyzed the scope of the Commerce Clause of the Constitution as follows:

> The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. *Fry* v. *United States*, 4221, U.S. 542, 547 (1975); *Wickard* v. *Filburn*, 317, U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted Section 4 of the Mine Act. *Marshall* v. *Kraynak*, 604 F.2d 231, 232, (3d Cir 1979), cert. denied 444 U.S. 1014 (1980); *United States* v. *Lake*, 985 F.2d 265, 267-69 (6th Cir. 1993). In *Lake*, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." Id. *Harless*, supra at 686.

Based on the broad principles enunciated by the Commission in *Harless Towing*, supra,

and based upon the authority of the Sixth Circuit in *Lake*, supra, I am constrained to find that although CAR-O-LIN's operation is small, and no products are sold outside Vermont, it was engaged in interstate commerce "because such small scale efforts, when combined with others could influence interstate [sand and gravel] pricing and demand" *Harless*, supra, at 686. I thus find that CAR-O-LIN's operation is a mine subject to the Act's jurisdiction.

C. Violation of Section 56.14132(a), supra

Section 56.14132(a) provides as follows: "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

According to Robinson, the backup alarm on the Fiat Chalmers front-end loader was in place, but was not working. CAR-O-LIN did not impeach this testimony, nor did it offer a witnesses to contradict it, and accordingly I accept it. I thus find that since the backup alarm on the loader did not function, it was not maintained in a functional condition, and thus was in violation of section 56.14132(a), supra.

The record does not contain any clear convincing evidence as to the length of time the backup alarm had not been working, and the length of time CAR-O-LIN should have known of this functional defect. Blow testified that when he had inspected the subject site in June 1997, a year prior to the inspection at issue, he issued a "backup alarm notice" for an Allis-Chamlers 645-B wheel loader. However, he did not testify as to whether the loader's alarm was not functioning, or whether an alarm had not been installed.[1] Neither did the Secretary proffer in evidence the written Notice given to CAR-O-LIN which might contain a description of the specific condition that provided the basis for the Notice. Lindstrom testified that Chambers, who was not an employee of his and who just did repair work for him, had disconnected the alarm in order to locate a noise in the transmission. Robinson testified that Chambers had told her that the alarm had worked the day before the inspection. However, neither the Secretary nor CAR-O-LIN produced Chambers to testify. I thus find that it has not been established that the level of CAR-O-LIN's negligence was more than low. The Secretary did not adduce any evidence as to the gravity of this specific violation. Hence I conclude that the it has not been established that the level of the gravity was more than low. The record establishes that the violation was abated timely, and in good faith. Also the record establishes that CAR-O-LIN does not have any history of violations. Additionally, based upon Lindstrom's uncontradicted and unimpeached testimony, I conclude that the size of CAR-O-LIN's operation is small. Considering all the above factors, I find that a penalty of $25.00 is appropriate for this violation.

[1]/ Lindstrom testified that when Blow inspected the front-end loader, it had not been provided with a backup alarm.

D. Violation of 30 C.F.R. § 56.14107(a)

Section 56.14107(a) provides as follows: "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

In essence, according to Robinson, there was no guard for the chain drive area of the crusher. CAR-O-LIN did not impeach this testimony, nor did it proffer any testimony or evidence that would tend to negate Robinson's testimony that on the date in question, the chain drive area of the crusher was not guarded. I thus find that CAR-O-LIN did violate section 56.14107(a), supra.

According to Robinson, Chambers told her that the guard for the area at issue did not exist, and that the crusher had last been operated a week prior to the inspection. She asked Chambers why the guard had not been "repaired." According to Robinson, Chambers stated that "they had not gotten around to it" (Tr. 35). The Secretary did not call Chambers to testify, nor did the Secretary indicate why it had failed to do so. There is nothing in the record to establish that Chambers would have had personal knowledge as to why a guard had not been installed. Therefore, this hearsay testimony was accorded little weight. On the other hand, Lindstrom testified that the area in question was provided with a guard, and that approximately a week prior to Robinson's inspection, the guard had been removed in order for a defective chain to be removed and a new one to be installed. He also testified that the crusher had not been run without a guard in place, and that the guard had been installed immediately after Blow's inspection in June 1997. This testimony has not been impeached or contradicted by the Secretary and accordingly I accept it. Within this context, I find that the level of CAR-O-LIN's negligence was no more than low. The Secretary did not offer any evidence specifically detailing the gravity of the instant violation. I thus find that it has not been established that the gravity of the violation was more than low. The remaining factors set forth in section 110(i) of the Act are as set forth above (II(C) (infra). Based upon all these factors, I conclude that a penalty of $25.00 is appropriate for this violation.

ORDER

It is **ORDERED** that CAR-O-LIN shall, within 30 days of the date of this decision, pay a total civil penalty of $50.00.

Avram Weisberger
Administrative Law Judge

Distribution:

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