FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N WASHINGTON, D.C. 20004-1710

SEP 0 1 2015

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. LAKE 2011-957-M

:

BEVERLY MATERIALS, LLC

v.

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The citation at issue alleges that Beverly Materials, LLC, ("Beverly") violated 30 C.F.R. § 56.14132(a) by failing to maintain a manually-operated horn on a scraper in functional condition. At issue is whether the Administrative Law Judge erred by finding that the horn's intermittent functioning satisfied section 56.14132(a). For the reasons that follow, we hold that the operator violated the standard, and that the Judge should not have vacated the citation. Accordingly, we reverse the Judge's decision and remand the case for assessment of a penalty.

I.

Factual and Procedural Background

Beverly Materials operates the Beverly Materials West Pit, a surface sand and gravel operation in Illinois. In 2011, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6555598 to Beverly. The citation alleged that the horn on the scraper did not function when tested. After the initial test, the inspector heard the horn function when the scraper operator subsequently drove it around the pit. The horn again failed to function, however, when re-tested. The inspector concluded that the horn

¹ Section 56.14132(a) states that "[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."

functioned only intermittently and, as a result, issued the citation. The inspector determined that the negligence level was moderate, and MSHA proposed a penalty of \$100.

The factual dispute between the parties centered on whether the scraper's horn functioned when tested by the inspector. Beverly argued that the horn worked when it was tested during a pre-operation examination and that it worked while the scraper was operating. The inspector acknowledged that he heard the horn work while the scraper was operating, but testified that it never worked during his testing. Tr. 229. Beverly's production superintendent testified that the horn worked intermittently during the inspector's testing, and conceded that at times it did not work. Tr. 239. Ultimately, the horn was replaced because it was found to be unreliable.

The Judge vacated the citation. According to the Judge, "the horn was working when the shift began and only later started acting up, working intermittently thereafter." 35 FMSHRC 88, 98 (Jan. 2013) (ALJ). The Judge found that the horn's intermittent functioning satisfied section 56.14132(a)'s requirement that horns on mobile equipment "be maintained in functional condition." As a result, he vacated the citation. *Id*.

The Secretary of Labor filed a petition for discretionary review, which we granted.

II.

Disposition

We conclude that the Judge erred in vacating the citation. The language of section 56.14132(a) is clear and imposes a continuing responsibility on operators to ensure that horns function at all times. Our cases have uniformly applied the plain language of such standards. In *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014), the Commission held that the plain language of section 56.14132(a) requires that horns or other audible warning devices must function at all times unless the equipment has been taken out of service for repair. The Commission further held that the term "maintain' [means] that warning devices shall be capable of performing on an uninterrupted basis." *Id.* (citations omitted). Thus, the standard "imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair." *Id.* (citations omitted). *See also Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1762-63 (Aug. 2011) (finding that the words "maintain" and "functional" in 30 C.F.R. §77.410(c) plainly require that warning devices be capable of uninterrupted performance at all times).

Nally & Hamilton is closely analogous to the present matter. The mine operator in that case argued that it had not violated the standard, because the back-up alarm on a piece of equipment worked during the operator's pre-operation examination even though it did not work when tested by an MSHA inspector. Id. at 1761-64. As in Nally & Hamilton, we reject the operator's argument here, as it would likewise create an exception to the express requirements of the standard and contravene the strict liability principles and safety objectives of the Act. See also Lopke Quarries, Inc., 23 FMSHRC 705, 708 (July 2001) ("The inclusion of the word 'maintain' in the standard . . . incorporates an ongoing responsibility on the part of the operator").

Because the manually operated horn in the present case worked only intermittently (Tr. 232, 239), we hold that Beverly violated the standard and that the Judge erred in vacating the citation.

III.

Conclusion

For the reasons stated above, we reverse the Judge's decision and rule that section 56.14132(a) was violated. We remand the case to the Judge to assess a civil penalty.

Mary Lu Jordan, Chairman

Michael G. Young Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Distribution:

Dave Zumbrunn
General Mngr.
Beverly Materials, LLC
1100 Brandt Drive
Hoffman Estates, IL 60192
dzumbrunn@plote.com

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
201 12th St., South, Suite 500
Arlington, VA 22209-3939

W. Christian Schumann, Esq. Office of the Solicitor U.S. Department of Labor 201 12th St. South, Suite 500 Arlington, VA 22209-2247

Administrative Law Judge William B. Moran Federal Mine Safety & Health Review Commission Office of Administrative Law Judges 1331 Pennsylvania Avenue, N. W., Suite 520N Washington, D.C. 20004