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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

v.

OWL ROCK PRODUCTS COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 86-124-M  
A.C. No. 04-03821-05506

Azusa Plant

DECISION

Before: Judge Morris

The Secretary of Labor on behalf of the Mine Safety and Health Administration, charges respondent with violating 30 C.F.R. 56.9087, a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq., (the Act).

The parties waived their right to a hearing and submitted the case for a decision on stipulated facts.

Issues

The issues are whether respondent violated the regulation, if so, what penalty is appropriate.

Stipulation

The parties stipulated as follows:

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977 (hereinafter called the Act) and the Federal Mine Safety & Health Review Commission (FMSHRC) has jurisdiction over the subject matter of this action and over the parties.
2. A citation was issued to Respondent alleging a violation of 30 C.F.R. 56.9087 in that a number 8247 service repair truck, (a one-ton Ford pickup), which had a partially obstructed rear view was operated without an audible reverse signal alarm on the day of the inspection. A proposed civil money penalty of \$56.00 was assessed and timely contested.

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3. The standard allegedly violated, 30 C.F.R. 56.9087 provides as follows:

56.9087 – Audible warning devices and back-up alarms.

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

4. The payment of \$56.00 civil money penalty will not affect respondent's ability to stay in business.

5. The size of respondent's company was 233,367 production tons or hours worked per year at the time of the citation.

6. The size of respondent's mine was 29,526 production tons or hours worked per year at the time of the citation.

7. In the 24 months preceding the issuance of the instant citation the total number of assessed violations against respondent is one.

8. Respondent abated the instant citation by installing an electric back-up alarm on the truck.

9. The truck in issue which is equipped with extended side mirrors on both sides, is a number 8247, Ford one-ton pickup truck.

10. Respondent uses this truck as a service repair vehicle. As such it loads and carries service equipment where needed throughout the mine. The majority of the time it is parked by the mechanics' shop.

11. The vehicle is not used for loading, hauling or dumping activities.

12. The drivers' tools are carried in the bed of the pickup. The bed is in the back. The driver can observe hazards to the rear prior to moving the pickup, when he replaces the tools, after completing whatever job he was performing.

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13. The judge may consider MSHA's policy memorandum (Exhibit R1) in ruling on respondent's position.

14. The Mesa Health and Safety report, Exhibit P2, may be considered by the judge concerning the issue of gravity if a violation is established.

#### Discussion

The issue in this case focuses on whether a one-ton Ford pickup truck qualifies as heavy-duty mobile equipment within the meaning of 30 C.F.R. 56.9087.

I conclude it does. In *King Knob Coal Company, Inc.*, 3 FMSHRC 1417 (1981) the Commission construed a similar regulation, 30 C.F.R. 77.410. (FOOTNOTE 1) In that case the Commission ruled that ["t]ruck is a generic term and, of course, pickups are a familiar type of light truck." Further, the Commission observed that

"the obvious purpose of 77.410 is to protect miners from vehicles of various size moving in reverse. The standard is premised on the general recognition that a driver's rear view is ordinarily not as good, and hence as safe, as the forward view. Even if their role at a mine is primarily auxiliary, three-quarter ton pickups are nevertheless medium-sized vehicles whose relative speed compared with heavier vehicles constitutes a hazard in the busy mine setting."

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Respondent argues that MSHA's policy memorandum excludes the necessity of compliance. The policy memorandum provides as follows:

12,258 MSHA Policy Memorandum Explains  
Mobile Equipment Reverse Alarm  
Requirements for Metal and Non-Metal  
Metal Mines

Mobile equipment engaged in "loading, hauling and dumping" at surface mines or surface areas of underground mines must have either back-up alarms or signalmen to comply with 55/56/57.9087 if rear view is obstructed, according to the March 26, 1981, MSHA Policy Memorandum No. 81-3 MM. Text is as follows:

Subject: Program Directive: Citation of Standard 55/56/57.9087, Audible Reverse Alarms

This document provides guidance for the uniform application of standard 55/56/57.9087 and reflects recent Administrative Law Judge decisions which relate to the subject matter.

The standard is applicable only to surface mines and surface operations of underground mines. The heavy duty mobile equipment addressed by the standard must be engaged in "loading, hauling, dumping" activities and must present an obstructed view to the rear.

(Exhibit R1)

In King Knob the Commission noted that MSHA's policy is not binding on the Commission, 3 FMSHRC at 1420.

Respondent's further argument is that the pickup was not engaged in any "loading, hauling or dumping." Particularly, respondent relies on the scope-note containing 30 C.F.R. 56.9087. Specifically, the scope-note reads, "Subpart H - Loading, Hauling and Dumping."

As a general rule of statutory construction a scope-note does not prevail over the text of a regulation.

Finally, respondent argues that the truck driver can "observe" hazards to the rear prior to moving the pickup when he replaces the tools after completing whatever job he was performing.

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Respondent's argument on this issue arises from paragraph 12 of the stipulation. However, observations by the truck driver prior to moving the truck do not assist him when he is actually moving the vehicle to the rear. It is at that point that his vehicle must have an unobstructed view to the rear or a backup alarm.

For the foregoing reasons, Citation No. 2671370 should be affirmed.

#### Civil Penalty

The statutory authority to assess a civil penalty is contained in Section 110(i) of the Act.

The stipulation of the parties addresses most of the statutory criteria. However, the issues of negligence, gravity and abatement should be considered.

The operator's negligence is minimal since it relied on MSHA's policy memorandum in determining potential liability. The gravity is high. Exhibit P2 focuses on a MESA investigation of a fatality involving the failure to have an audible backup alarm on an International "CargoÄStar" Model 1950 maintenance truck. The operator is to be credited with statutory good faith in promptly abating the violative condition.

Considering all of the statutory criteria, I conclude that a civil penalty of \$25 is appropriate.

#### Conclusions of Law

Based on the entire record and the stipulation of the parties the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. 56.9087 and Citation No. 2671370 should be affirmed.

Based on the stipulation of the parties and the conclusions of law I enter the following:

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ORDER

Citation No. 2671370 is affirmed and a civil penalty of \$25 is assessed.

John J. Morris  
Administrative Law Judge

FOOTNOTE\_ONE

1 The standard reads:

Mobile equipment; automatic warning devices.

Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.