

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

UNITED STATES CUSTOM HOUSE
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July 7, 2011

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

v.

LAFARGE NORTH AMERICA,
Respondent

CIVIL PENALTY PROCEEDING

Docket No.: CENT 2010-4-M
A. C. No.: 13-00125-197511

Davenport Plant

(Judge Patrick B. Augustine)

Appearances:

Joshua Raines Patrick, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado
For the Petitioner

Mark Savit, Esq. and Donna Vetrano Pryor, Esq., Patton Boggs LLP, Denver, Colorado
For the Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This case is before the court upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et. seq.* (the “Act”). This case involves the issuance of citations by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under Section 104(a) of the Act alleging four separate violations of 30 C.F.R. §56.14100(c) (“Citations”) at the Respondent’s Davenport Plant. On February 18, 2011 the court approved a Partial Settlement Agreement entered into between the parties in which all the other citations subject to this case were settled. Respondent timely contested the remaining Citations and a trial was held in Davenport, Iowa on May 4, 2011.

Stipulation of Facts

The parties stipulated to the following facts which were accepted into the Record at Tr.7:

1. The Lafarge North America, Inc. Davenport Plant, Mine ID 13-00125 (hereinafter “Lafarge”) is a Portland cement facility located in Iowa which operates on three, eight-hour shifts, working seven days a week. Total employment at the site is approximately 100 persons.
2. Lafarge is engaged in mining in the United States and its mining operations affect interstate commerce.
3. Lafarge is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et. seq.
4. The Federal Mine Safety and Health Review Commission has jurisdiction in this matter.
5. Citation Nos. 6413382, 6413383, 6413384 and 6413385 were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Lafarge on the dates and places stated therein and were admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.
6. With the exception of Petitioner’s Exhibit 10, which was admitted into evidence at the trial on May 4, 2011, the exhibits offered by the parties were stipulated to be authentic but no stipulation was entered into as to their relevance or the truth of the matters asserted therein.
7. The proposed penalties will not affect Lafarge’s ability to continue in business.
8. The operator demonstrated good faith in abating the violations.

9. Unless otherwise stated, all the below stipulated facts were extant in 2009.
10. Citation No. 6413382 relates to the Chevy 2500 pick-up Co. #70161.
11. Citation No. 6413383 relates to the Ford F 250 pick-up Co. # 70152.
12. Citation No. 6413384 relates to the Ford F 250 pick-up Co. #70147.
13. Citation No. 6413385 relates to the Euclid haul truck Co. #70144.
14. There have been no fatal accidents at the Lafarge Davenport Plant.
15. There was no injury or accident in relation to Citation Nos. 6413382, 6413383, 6413384 and 6413385.
16. When performing the inspections that resulted in the issuance of Citation Nos. 6413382, 6413383, 6413384 and 6413385, Inspector Howard Wood used no instruments to take measurements of the alleged movement in the ball joints and/or tie rods.
17. When performing the inspections that resulted in the issuance of Citation Nos. 6413382, 6413383, 6413384 and 6413385, Inspector Howard Wood did not have the subject vehicles raised in any manner.
18. Inspector Howard Wood performed the inspection of the vehicles indicated in Citations 6413382, 6413383, 6413384 and 6413385 while the subject vehicles were on the ground as he was trained to do.
19. Inspector Howard Wood did not rely on the service manual procedures or specifications for the above-referenced vehicles when performing his inspections of the steering linkages or when making the determination that a violation had occurred.

The Cited Regulation

The Petitioner alleges four separate violations of 30 C.F.R. §56.14100(c) which states as follows:

when defects make continued operation hazardous to persons, the defective items, including self-propelled mobile equipment, shall be taken out of service and placed in a designated area posted for that purpose, or tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

In order to establish a violation of the above regulation, the Petitioner must prove by a preponderance of the evidence; (i) the existence of a defect; (ii) continued operation would be hazardous to persons and (iii) the defective item was not removed from service until the defects were corrected.

Discussion and Analysis

The Petitioner has the burden of establishing some objective or reasonable standard which provides notice to the Respondent that certain actions or inactions would result in non-compliance with the standard. *Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (“[D]ue process...prevents...deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.”); *see also Sec’y of Labor v. Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Comm’n August 31, 1995).

Inspector Howard Woods (the “Inspector”) testified that to test the ball joints, he looked under the cited vehicles while all four tires were on the ground and instructed a Lafarge employee to move the steering wheel. (Tr. 30). The Inspector admitted that he was looking for an excess of 1/8-inch movement in the ball joints. (Tr. 39). He testified that he relied on the measurements set out in the Commercial Vehicle Safety Alliance (“CVSA”), which requires

maintenance of ball joints where there is movement in excess of 1/8-inch “measured with hand pressure only”. (Ex. C-4; Tr. 39).

Mr. Ron Medina, the Petitioner’s expert witness, also an employee of MSHA, suggested that the CVSA guidelines were not applicable to any of the vehicles subject to the Citations because the CVSA guidelines generally apply to heavy equipment in excess of 26,000 lbs. (Tr. 171). Mr. Medina found, in his expert opinion, that the 1/8-inch standard used by the Inspector was not applicable. In addition, Mr. Medina could not state any measurement or standard that would be considered objective or reasonable to test the ball joints. (Tr. 194).

Mr. Medina then went on to address tests, standards, methods and measures set forth in service manuals of the respective vehicles. However, none of these tests were applied by the Inspector in the issuance of the citations. (Ex. C-5, C-8, C11 and C-12 and Tr. 145). The court notes the attempt to make these service manuals applicable after the fact to support the issuance of the Citations does not provide the Respondent with objective notice of the criteria applicable in order to assess compliance with the cited standard before the issuance of the Citations. In short, if MSHA’s own employees could not agree by the time of trial on the proper basis and standards for examining vehicle ball joints, how could Respondent have proper notice of the appropriate standard of compliance?

The Petitioner has the burden of demonstrating some consistent and objective measure of establishing a violation of the cited standard. When the Inspector and the Petitioner’s expert witness disagree on what the consistent and objective criteria should be in order to determine compliance, the court finds it a violation of fair notice and due process to hold the Respondent to

a moving target. Accordingly, the Petitioner has failed to carry its burden and Citations 6413382, 6413383, 6413384 and 6413385 will be VACATED.

ORDER

Based upon the foregoing, it is ORDERED that Citations 6413382, 6413383, 6413384 and 6413385 are VACATED.

Patrick B. Augustine
Administrative Law Judge

Date:
Denver, Colorado