

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 6, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2010-95-M
Petitioner,	:	A.C. No. 31-02071-197617
	:	
v.	:	
	:	
WAKE STONE CORPORATION,	:	Mine: Nash County Quarry
Respondent	:	
	:	

Decision
Procedural and Factual History

This case is before the court on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (the “Act”). The parties filed cross-motions for summary decision. This case involves a citation issued by the Department of Labor's Mine Safety and Health Administration (“MSHA”) under Section 104(a) of the Act alleging two violations of 30 C.F.R. §56.14132(a). The parties presented the following facts:

- On July 14, 2009, MSHA issued Citation Nos. 6512366 and 6512367 to Respondent at the Nash County quarry.
- Both Citations allege a violation of 30 C.F.R. §56.14132(a).
- Citation No. 6512366 was issued for failure to maintain a Caterpillar 345 B excavator’s service horn in working condition.
- Citation No. 6512367 was issued for failure to maintain a Komatsu D65Px dozer’s service horn in working condition.
- According to the Respondent, the vehicles were not in operation during the course of the shift.
- When the inspector asked to inspect the vehicles, Chris Pons, a Superintendent at the Nash County Quarry, insisted the vehicles be taken through their pre-shift examination, as required by 30 C.F.R. §56.14100, prior to being operated.
- According to the Respondent, it was during the pre-shift examinations that the malfunctioning horns were discovered.
- The defects were indicated in the Respondent’s pre-shift report and the vehicles were tagged as non-operational.

Relevant Regulations

29 C.F.R. §2700.67(b):

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

30 C.F.R. §56.14132(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.

30 C.F.R. §56.14100:

(a) Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.

(b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

(c) 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 a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

(d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

Discussion

The crux of the Secretary's argument is that Section 56.14132(a) should be construed irrespective of other parts of the Act. In this case, that means that if a vehicle's horn breaks for whatever reason, an operator has violated the Act. I reject this argument and embrace the notion that it is necessary to look at the Act as a whole. The Act was created to enforce and encourage miners' safety. When interpreting the Act, operators, regulators, and courts need to do so in a manner that best serves to protect miners. With regard to Section 56.14132(a), interpreting it in such a strict manner would be contrary to Congress's intention when it drafted the Act and, in my view, contrary to the overall intent of the Act to protect miners' safety.

Statutory construction requires that we look at the whole and not just a part of a statute. To do otherwise would distort the statute's true meaning. *United States Nat. Bank of Oregon v. Ind. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). In this matter, Section 56.14132(a) and other vehicle maintenance requirements are the reason Section 56.14100 exists. To focus on one and not

the other in this situation would be contrary to the intent of Congress. Section 56.14100 requires that “[s]elf-propelled mobile equipment [. . .] be inspected by the equipment operator before being placed in operation on that shift.” Consequently, Section 56.14100 requires “horns or other audible warning” be inspected because these parts are required to be on vehicles and to be maintained by Section 56.14132(a). These two requirements compliment each other and should be viewed in concert.

According to the Secretary, the “plain meaning” of Section 56.14132(a) is if a horn fails, then the horn has not been maintained and a violation has occurred. This understanding is misguided for these reasons: First, one of the few ways an operator can determine that a horn is malfunctioning is when he tries the horn and it does not make a sound. Second, it is hard to believe that it was Congress’s intention that the phrase, “shall be maintained in functional condition,” did not include replacing the horn if necessary. 30 C.F.R. §56.14132(a). Congress, when drafting the Act, presumably cared about the condition of the overall vehicle more than the condition of the horn. Third, if an operator discovered a problem with a horn during a pre-shift inspection and subsequently corrected the problem, then the operator has *maintained* the horn. It is unrealistic to expect that a horn, or any piece of equipment, will last forever.

Section 56.14100 was created to catch a malfunctioning vehicle before it has the opportunity to endanger miners’ lives. To interpret the Act as the Secretary wishes would diminish the operator’s motivation to conduct a thorough examination of equipment, because the operator loses an incentive. It is best not to trivialize Section 56.14100 for two reasons: First, it encourages operator to find malfunctions because the operator will not be found in violation of the Act if it places the vehicles out-of-service until repaired. Second, and most importantly, it is safest for the miners to find a malfunction prior to placing a piece of equipment into service.

The Secretary argues that standards need to be interpreted to impose liability without regard to fault because it creates an incentive for the operator to ensure safety. To bolster her argument, the Secretary cited *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982).¹ I agree with the Circuit Court’s belief that liability without regard to fault creates an incentive for the operator “to take all practicable measures to ensure the workers’ safety.” However, my finding here does not contradict *Allied Products*. In fact, it compliments it because this decision gives incentives to keep miners safe. Not punishing operators for finding malfunctioning equipment during pre-shift examinations is an incentive to thoroughly conduct such examination. A pre-shift examination is an operator’s chance to discover malfunctions prior to violating the act: i.e., operating a malfunctioning vehicle.

The Secretary argues that the two vehicles in question were not tagged out of service when the inspector arrived and asked to inspect the equipment. This, according to the Secretary, means that the vehicles were eligible for inspection and, if found, subsequent violations. Otherwise, the

¹ Two decisions cited by the Secretary, *Sec’y of Labor v. Giant Cement Co.*, 13 FMSHRC 286 (Feb. 1991) (ALJ) and *Sec’y of Labor v. Martin Marrietta Aggregates*, 23 FMSHRC 533 (May 2001) (ALJ) are not relevant here because of factual and evidential differences to the facts at hand.

Secretary argues, the Respondent and future operators may “escape” strict liability for the alleged violations by declaring pre-shift examination and tagging the vehicles out of service while the inspector stands by. This is a reasonable concern that should not be taken lightly. In support of her argument, the Secretary also cited *Secretary of Labor v. Bilbrough Marble Div., Texas Architectural Aggregate*. In this decision, Administrative Law Judge Zielinski noted “Commission precedent is clear that standards like § 56.141132(a) must be complied with for all equipment located on mine property that *might be used*. Only if equipment has been effectively taken out of service can an operator avoid the consequences of defective conditions.” *Sec’y of Labor v. Bilbrough Marble Div., Texas Architectural Aggregate*, 24 FMSHRC 285 (2002) (ALJ). I agree with my colleague’s view to a point, however, it is important to also encourage thorough pre-shift examinations and I believe to place strict liability in this situation would have the opposite effect.²

Section 56.14100 and mandatory equipment safety standards need to coexist because of the importance of a harmonized and coherent treatment of all portions of the Miner Act and related regulations to miners’ safety, overall. In this matter, after construing the facts in the light most favorable to the Secretary’s position, I am not convinced nor can I reasonably infer that the operator was trying to “escape” strict liability by feigning the need for a pre-shift examination, and/or that the vehicles “might be used.” I decline to construe the conflicting legal standards in such a way as to effectively write Section 56.14100, the maintenance provision, out of the Regulations or seriously diminish its effect.³

ORDER

For the reasons set forth above, the Secretary's motion for summary decision is **DENIED**, the Respondent’s motion for summary decision is **GRANTED**, Citation Nos. 6512366 & 6512367 are **VACATED**, and these proceeding are **DISMISSED**.

L. Zane Gill
Administrative Law Judge

Distribution List: (Certified Mail)

Mark N. Savit & Caroline Davidson-Hood, Patton Boggs LLP., 1801 California St., Suite 4900,
Denver, CO 80202

² Administrative Law Judges are not bound by their counterpart’s decisions.

³ This ruling does not trivialize or diminish Section 56.14132(a). Instead it recognizes that Section 56.14132(a) and Section 56.14100 can and should coexist.

Brooke McEckron, Esq, Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W.,
Room 7T10, Atlanta, GA 30303
