

CLIENT ALERT

Federal Mine Safety and Health Review Commission Holds that Mine Operators Can Be Cited for Violations Discovered During Pre-Op Examinations

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The Federal Mine Safety and Health Review Commission held that a regulation that requires a mine operator to maintain manual horns and other audible warning devices on self-propelled mobile equipment in functional condition means that the horns or warning devices must be functional at all times, and that the operator can be cited for violating the regulation even where the defective condition of the horn is found in the course of a mandatory pre-operation equipment examination. The case is *Wake Stone Corp.*, SE 2010-95-M, decided April 18, 2014.

The case stems from a 2009 inspection at a crushed stone quarry in North Carolina. While inspecting the quarry, the MSHA inspector said he wanted to examine two pieces of parked mobile equipment, neither of which had been tagged out of service. Before the equipment was operated for the inspector, the mine superintendent insisted on performing the pre-operation examination required by regulation. It was during that exam that the operator discovered that the service horns on the vehicles did not work. The inspector issued two citations for violations of 30 C.F.R. § 56.14132(a).

The operator argued that no violation had occurred because the defective horns were found during the mandatory pre-op examination. According to the operator, the requirement that horns be kept functional should be read in conjunction with the regulation requiring pre-op examinations of mobile equipment. In other words, the operator argued that if a problem with the horn is found during the pre-op examination, and the vehicle is then taken out of service (as is routine and would have been done in this instance once the defect was identified), there is no violation of § 56.14132(a).

Although the administrative law judge who initially heard the case agreed with Wake Stone, a unanimous Commission disagreed, reversing the judge and remanding the case for the determination of a civil penalty. The Commission held that the plain language of § 56.14132(a) did not limit the applicability of the regulation only to equipment that is to be used during a shift. According to the Commission, the strict liability scheme of the Mine Act means that an operator cannot avoid liability even if the defective horn is found during the pre-op examination. The Commission saw no conflict between the cited regulation and the requirement for a pre-op examination, and said that allowing a mine operator to avoid liability where a violative condition is caught while performing a pre-op examination, prior to the official MSHA inspection, would permit operators to engage in "gamesmanship." Because the cited equipment had not been removed from service, the Commission rejected the operator's argument that the equipment was not in service, citing its own precedent that vehicles located in normal work areas and not locked and tagged out are considered to be "in use" and thus subject to inspection.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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