

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 30, 1997

WHAYNE SUPPLY COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 94-519-R
	:	Citation No. 4011760; 1/25/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Job No. 17A
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-556
Petitioner	:	A.C. No. 15-17434-03501 A25
v.	:	
	:	Job No. 17A
WHAYNE SUPPLY COMPANY,	:	
Respondent	:	

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Andrew J. Russell, Esq., Smith & Smith, Louisville, Kentucky, on behalf of
Wayne Supply Company.

Before: Judge Melick

These consolidated Contest and Civil Penalty proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act," are before me upon remand by the Commission on March 7, 1997, to evaluate the issues of "unwarrantable failure", negligence and a civil penalty based on the present record and within the specified guidelines.

The relevant factual and procedural background is set forth by the Commission as follows:

Wayne [Wayne Supply Company] is a contractor that sells and services Caterpillar machinery and equipment in Kentucky and Indiana. 17 FMSHRC at 1575. On January 19, 1994, Wayne dispatched James Paul Blanton, an experienced field service

technician with 16 years of service with Whayne, to Addington Mining Inc.'s Job #17A, a surface coal mine in Pike County, Kentucky. *Id.* at 1574-75; Tr. 244. On January 20, Blanton drove his Whayne truck to Job #17A. 17 FMSHRC at 1575. The truck was equipped with a crane (or "boom"), chain and cable "come-along" for securing raised loads. *Id.* at 1575, 1577. Addington personnel directed Blanton to repair a disabled Caterpillar D10N bulldozer. *Id.* at 1575. Blanton examined the D10N dozer and concluded that the torque converter was defective and needed to be removed. 17 FMSHRC at 1575; Tr. 155-56.

In order to gain access to the torque converter on the D10N bulldozer, one of three belly pans on the underside of the dozer had to be lowered. 17 FMSHRC at 1575n.2. The belly pan is hinged on one side and secured to the bulldozer by three bolts each on two other sides. *Id.*; Tr. 51. When the belly pan is freed from the bolts, it swings down on its hinge. *Id.* The belly pan weighs about 500 lbs. 17 FMSHRC at 1576.

The normal practice for removing the belly pan in the field is to first dig a trench and place the vehicle over it. Tr. 61-62. Then a chain is run from the crane on the truck, passed under the belly pan and attached to the opposite bulldozer track to prevent the pan from falling abruptly when the bolts are loosened. 17 FMSHRC at 1575. An alternate method involves use of the come-along to secure a cable beneath the pan. *Id.* at 1577. After the pan is loosened from the bolts, the crane or come-along is used to slacken the restraint and allow the belly pan to safely swing open. *Id.* at 1575; Tr. 79-80, 160.

Consistent with this procedure, Addington employees dug a trench and then pushed the bulldozer over it so Blanton could begin removing the torque converter. 17 FMSHRC at 1575; Tr. 62-66. Blanton moved his truck so that the right rear portion, where the crane was located, was next to the bulldozer. 17 FMSHRC at 1575. The Addington employees left Blanton alone to repair the bulldozer. *Id.* at 1575-76. Shortly before noon, Blanton was discovered pinned under the belly pan, which had swung down on its hinges. *Id.* at 1576. Blanton was pulled from underneath the bulldozer but could not be revived, and probably died at the scene. *Id.*; Tr. 71-73, 138-39. Before the pan fell, Blanton had removed the nuts securing the pan to the bolts. Tr. 73-74; Gov't Ex. 6, p.4. In addition to the nuts, an air hose, air gun or air wrench, power drill, socket and screwdriver were discovered under the dozer at the time of the accident. Tr. 27-28, 73-74, 139-40, 158. There was no evidence that Blanton had attempted to secure the belly pan with the crane and chain, cable come-along, or any other device. 17 FMSHRC at 1576. The crane was not "on," and was not extended, but instead was in the "down" position. Tr. 227-28.

Whayne gives its field mechanics general verbal instructions to minimize the time spent under raised equipment; however, its employees receive no formal training regarding the proper procedures for lowering belly pans in the field, nor does Whayne maintain a written policy on this subject. 17 FMSHRC at 1579; Tr. 216, 218, 349. Whayne did supply formal training on removing belly pans when the vehicle is in the shop; however,

the procedure for removing belly pans in the shop differs from that used in the field. Tr. 216-17, 344-45, 383-85.

Wayne hires experienced mechanics for its field service positions, and relies heavily on on-the-job training for these employees. 17 FMSHRC at 1579. New field mechanics begin as "helpers" and are assigned to jobs with more experienced field technicians. Tr. 208-09, 372. After gaining experience in the field, field mechanics may be assigned to jobs alone, or with less experienced helpers. *Id.* The field mechanic tells the helper what to do when they get to the job. Tr. 245. Wayne field mechanics are dispatched by and receive performance evaluations from the field service foreman, a supervisor. Tr. 242-45, 254. Field mechanics are dispatched to a customer's premises, and assigned by the customer to work on a particular piece of equipment. Tr. 212-13. Wayne field mechanics are not supervised by mining company employees while on mine property. *Id.* The field mechanic evaluates the problem and corrects it, without direct supervision from the field service foreman. Tr. 209, 254.

MSHA inspector Buster Stewart issued several citations and orders to Addington and Wayne on January 25, including Citation No. 4011760 to Wayne under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), for violating section 77.405(b). Gov't Ex. 6, p.5. The citation alleged that blocking was not provided by Wayne to secure the belly pan. Gov't Ex. 3. Stewart also drafted an Accident Investigation Report, which stated, *inter alia*: "The cause of the accident was the failure to use blocking material to prevent movement of the belly pan while work was in progress." Gov't Ex. 6, p.3.

Following an evidentiary hearing, the judge concluded that Wayne violated section 77.405(b). [footnote omitted] He ruled that any negligence on Blanton's part could be "imputed" to the operator if the operator has not "taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Id.* at 1578. The judge found that, although Blanton was not a "supervisory employee," his negligence could be imputed to Wayne because the operator did not take "such reasonable steps in training and supervising Blanton[] that it should be completely absolved of responsibility for his violative conduct. . ." *Id.* at 1578-79. Examining Blanton's conduct in light of his finding that "Blanton's actions did not compromise the safety of others," the judge found that Blanton's conduct "defie[d] explanation: and characterized it as "thoughtless, rather than inexcusable or aggravated." *Id.* at 1580 & n.6. He concluded that Blanton's negligence did not rise to the level of unwarrantable failure. *Id.* [footnote omitted] The judge rejected the Secretary's proposed \$50,000 penalty. *Id.* at 1582. Characterizing Wayne's negligence as "moderate," considering "both the thoughtlessness of Mr. Blanton and the lack of formal training provided by Wayne Supply regarding belly pan removal[,] the judge assessed a civil penalty of \$1500. *Id.*

The Commission thereafter remanded for a new analysis, considering that since Blanton was a rank-and-file miner and not an agent of Wayne, Wayne could not be held liable for negligence or aggravated conduct based on the actions of Blanton but that Wayne could

nevertheless be held responsible for unwarrantable failure and negligence based upon its own conduct under *Southern Ohio Coal Company*, 4 FMSHRC 1459(August 1982). In *Southern Ohio Coal Company* the Commission stated that in the context of evaluating operator conduct for purposes of penalty assessment "where a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miners' violative conduct".¹ In accordance with the remand order, "unwarrantable failure", negligence and the assessment of an appropriate civil penalty are here evaluated in light of Wayne's "training and supervision of Blanton".

It is noted preliminarily that, as the moving party, the Secretary has the burden of proof to establish all elements on the issues of unwarrantability and negligence and therefore also has the burden as to the limited issues now on review i.e., on the alleged inadequacy of Wayne's supervision and/or training of Blanton. 5 U.S.C., ' 556(d). The Secretary acknowledges that he has the burden of proof on these issues (Oral Argument Tr. 36-37). I should also note that the parties indicated at oral argument that additional evidence existed beyond the present record on these issues. However the Commission has specifically limited the analysis on this remand to the present record.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). Relevant issues therefore include such factors as whether an operator has been placed on notice that greater efforts are necessary for compliance, *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994). On the present record in this case I find that not only has the Secretary failed to have met her burden of proving aggravated or inexcusable conduct by Wayne in relation to its supervision and training of Mr. Blanton but she has also failed to sustain her burden of proving that there was anything more than moderate negligence in this regard.

As the Commission itself observed, Blanton was "a highly experienced repair person who needed little supervision". The Secretary also agrees that, as a field technician, she would not have expected constant supervision over Blanton. However the Secretary nevertheless maintains that

¹ The Commission in this case remanded only for consideration of the operator's supervision and training of Blanton. Accordingly, the operator's discipline of its employees is not here considered. In any event the Secretary has not sustained her burden of proving that Wayne's progressive disciplinary procedures were inadequate.

Blanton's supervisor could have conducted "spot" inspections of Blanton's work (Oral Argument Tr. 32, 50, 52, 64, 76) Wayne notes that the Secretary has never required such spot inspections.

It is noted moreover that the Secretary did not, as a condition of abatement require any change in the supervisory practices of the operator, that there is no specific regulatory requirement for spot supervision, and that Wayne was apparently following industry practices in its minimal supervision of an experienced field technician.

With respect to Blanton's training the Commission observed as follows:

"The Secretary's assertions that Blanton was not trained by Wayne, and did not receive performance appraisals, are inaccurate. In addition to the on-the-job training Blanton would have received on removing belly pans in the field, the record shows that Wayne field technicians received formal training on repair in the shop and from Caterpillar itself."

The Secretary nevertheless maintains that the lack of classroom training for Blanton regarding the removal of belly pans in the field by the boom and chain method is evidence of a deficient training program. Aside from the obvious difficulty, if not impossibility, of reconstructing field conditions such as Blanton encountered in this case in a classroom setting, I cannot agree with the Secretary that the lack of classroom training on belly pan removal using the boom and chain method is, in itself, evidence of a deficient training program. The record shows that newly hired field technicians work with experienced mechanics and receive on-the-job training and instructions on these procedures. Indeed the deceased himself was an experienced technician who had been observed using the boom and chain method of belly pan removal in the field and who himself had trained other employees. In addition, it is noted that the Secretary, as a condition of abatement, did not require Wayne to make any change in its training of field technicians. Moreover there is no regulatory requirement that training in such procedures be provided in a classroom setting. Finally, the record shows that the deceased had in fact successfully completed his required annual refresher training, including hazard recognition and accident prevention (Exhibit C-1).

On the other hand, the fact remains that Wayne did not have any written policy or rules governing belly pan removal in the field. This may be considered one aspect of training. Wayne was therefore not without negligence in this regard, and, under the circumstances, I find that a civil penalty of \$750 is appropriate. I note that when the presiding judge found a civil penalty of \$1,500 to be appropriate he also considered the moderate negligence of the deceased, Mr. Blanton, and imputed that negligence to Wayne. Eliminating Blanton's negligence from consideration of a civil penalty for Wayne warrants an appropriate reduction in penalty amount.

ORDER

"Section 104(d)(1)" Citation No. 4011760 is hereby modified to a "Section 104(a)" Citation and Whayne Supply Company is hereby directed to pay a civil penalty of \$750 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Yoor Kim, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Suite 400,
Arlington, VA 22203

Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones
Road, Suite B-201, Nashville, TN 37215

Andrew J. Russell, Esq., Smith & Smith, 400 North, First Trust Centre, 200 South Fifth Street,
Louisville, KY 40202

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