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SOL (MSHA) V. TURNER BROTHERS  
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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.

CIVIL PENALTY PROCEEDING

Docket No. CENT 85-2  
A.C. No. 34-01357-03507

Welch Mine No. 1

TURNER BROTHERS, INC.,  
RESPONDENT

Appearances: Ann Maria Soares, Esq., and Jack F. Ostrander, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Dallas, Texas,  
for Petitioner;  
Robert J. Petrick, Esq., Muskogee, Oklahoma,  
for Respondent.

DECISION

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," for two violations of regulatory standards. The general issues before me are whether Turner Brothers Inc. (Turner) has violated the regulations as alleged, and if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation Number 2218067, issued under section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. 77.1601(c) and reads as follows:

Employee Doug Brush (Front-End Loader Operator) supervised by Roger Regan was observed (on the left platform holding the handrail) outside the cab of the 992-C Front-End Loader. The Front-End Loader was operating at pit 001-0 by Roger Regan (Mine Superintendent) and was being used to load over-burden into rear dump trucks.

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The cited standard states that "no person shall be permitted to ride or be otherwise transported on or in the following equipment whether loaded or empty; . . . (c) outside the cabs and beds of mobile equipment. . . ."

It is not disputed that the noted employee was in fact standing on the platform of the front-end loader while it was being operated by the mine superintendent. The door to the operator's cab was closed and the employee was holding onto a handrail with one hand. The platform surface was 30 by 36 inches and was elevated 6 to 8 feet above ground. The loader was being used to scrape ground material to form a dam to keep water off a roadway. According to MSHA inspector Johnny Newport there was a serious hazard to that employee from falling and suffering broken bones.

Respondent argues that it was necessary for the employee to be positioned on the loader platform for instructional purposes. The employee was the regular loader operator and was being shown by the mine superintendent how to use the minimum amount of ground material to form a dam. The Respondent is accordingly raising the affirmative defense of "impossibility of compliance". In order to establish that defense the Respondent must prove that (1) compliance with the cited standard either would be functionally impossible or would preclude performance of required work and (2) alternative means of employee protection are unavailable. Secretary v. Sewell Coal Company, 3 FMSHRC 1380 (1981), aff'd 686 F.2d 1066 (4th Cir.1982).

In this case the mine operator has failed to prove either of the two requisite elements of the defense. I find greater credibility in the testimony of Inspector Newport that the mine superintendent could have successfully demonstrated the techniques of manipulating the front-end loader to the regular operator while that operator was safely observing from the ground. The purpose of instructing the regular loader operator was not so much to observe the manipulation of controls within the cab but to observe the manipulation of the scoop in such a way as to construct a dam by scraping up ground material. Since Respondent has also failed to show that alternative means of employee protection were unavailable, the asserted defense cannot be sustained. The citation is accordingly affirmed.

In light of the undisputed evidence that Respondent has been previously cited for the same type of violation and that Inspector Newport had previously warned the mine superintendent against employees riding outside the equipment, and indeed had given him copies of MSHA bulletins citing

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fatalities caused by those practices, I conclude that the mine superintendent was grossly negligent in directing his employee to ride outside the cab of the loader. That negligence is imputed to the mine operator. Secretary v. Ace Drilling Co., 2 FMSHRC 790 (1980).

I also conclude from the uncontested evidence that the circumstances presented a reasonable likelihood that the employee would suffer serious injuries such as broken bones as a result of the cited practice. Accordingly the citation and the attendant "significant and substantial" findings are affirmed. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).(Footnote.1)

Order Number 2218074, also issued pursuant to section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. 77.404(a) and charges as follows:

The Ford 600 flat bed vehicle (used to carry explosives and detonators) operating on the haulroad near Pit 001-0 was not being maintained in a safe operating condition in that the steering wheel would turn approximately 360 degrees before the front wheels would turn left or right. A steering box was observed in the bed of the vehicle. The steering box was used as parts to repair the vehicle.

The cited standard requires in relevant part that "mobile . . . equipment shall be maintained in safe operating condition and . . . equipment in unsafe condition shall be removed from service immediately."

According to the undisputed testimony of MSHA Inspector Johnny Newport the subject vehicle was operating on the haulage road toward the explosives magazine. Although the truck was then empty it was regularly used to carry detonator caps, primers and "wet bags" containing an explosive known as "AMFO". It is further undisputed that its steering wheel could be turned 345 to 350 degrees in either direction without any response from the wheels.

The haulage road over which the truck was operating was approximately 25 feet wide, 1 mile long and was composed of rock and dirt. It had at least one turn, and one 300 foot stretch with a 10 to 20 degree grade. The road also had some bumps, provided for two way traffic and was used by various equipment including pickup and dump trucks, a grader, and inspector's vehicles. Within this framework Inspector Newport opined that there was indeed a "significant and substantial" hazard of serious or fatal injuries from an accident regardless of whether the truck was carrying explosives. He concluded that it was reasonably likely that the cited vehicle would be unable to avoid a collision with another vehicle using the road.

While not denying the existence of the cited conditions Superintendent Regan felt that no hazard existed from the defective steering condition. He reached this conclusion from his understanding that the truck was never driven more than 15 miles an hour. Regan also opined that since the brakes were operational the truck could stop within 10 feet. Regan observed that since the caps, detonators and explosives are kept separately on the truck it was highly unlikely that any explosion would result from any truck accident. Inspector Newport agreed that there was little likelihood of an explosion absent a fire.

Within this framework it is clear that a serious hazard of collision existed from the defective steering on the cited truck. While superintendent Regan felt that no hazard existed because the truck could be stopped within 10 feet there was such a serious lack of control in the ability to steer the vehicle that even such a distance on a two-way road only 25 feet wide could be fatal. It is highly unlikely that the cited truck was capable of turning fast enough to avoid an emergency such as a swerving vehicle or pedestrian suddenly stepping in its path. Under the circumstances it is clear that a "significant and substantial" hazard existed. Mathies Coal Company, supra. Order Number 2218074 is accordingly affirmed with its attendant "significant and substantial" findings.

The government also claims that the mine operator was negligent in allowing the cited violation because of the negligence of the explosives truck driver. Under certain circumstances a violation committed by a non-supervisory employee may result in a finding of operator negligence. See Secretary v. A.H. Smith Stone Company, 5 FMSHRC 13 (1983). Among the factors to be considered are the supervision, training and discipline of employees to prevent violations of the standard at issue. A.H. Smith Stone Company, supra. The

