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SOL (MSHA) V. VALDEZ MINING
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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	CIVIL PENALTY PROCEEDING Docket No. WEST 85-179-M A.C. No. 50-01315-05503
v.	
VALDEZ CREEK MINING COMPANY, RESPONDENT	Denali Mine

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Mr. Don H. Schultz, Valdez Creek Mining Company, Anchorage, Alaska, pro se.

Before: Judge Lasher

This proceeding was initiated by the filing of a proposal for assessment of a civil penalty by the Secretary of Labor (herein the Secretary) on November 5, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (1977) (herein the Act). A hearing on the merits was held in Anchorage, Alaska on September 8, 1986.

In this matter, the Respondent admits that the violations charged actually occurred but questions the amount of MSHA's administrative penalty assessments. (FOOTNOTE 1)

The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a violation, the business size of the operator, and the number and nature of violations previously discovered at the mine involved. Mitigating factors include the operator's good faith in abating violative conditions and the fact that a significantly adverse effect on the operator's ability to continue in business would result by assessment of penalties at a particular monetary level. Factors other than the above-mentioned six criteria which are expressly provided in the Act are not precluded from consideration either to increase or reduce the amount of penalty otherwise warranted.

The Respondent concedes that payment of penalties will not jeopardize its ability to continue in business. At the outset of the hearing, it was determined that Respondent has no history of violations occurring prior to the issuance of the Citations here involved.

The Respondent is the largest placer gold mine in the State of Alaska and had 100 employees on its payroll at the time of the violations. Respondent pointed out, however, that compared to gold mines in the lower 48 states it was not a particularly large gold mine, and on the basis of all the evidence it is concluded that Respondent is a medium-sized mine operator.

No challenge to the so-called "significant and substantial" charges contained on various of the Citations was made by Respondent. The Secretary alleged that several of the violations, which were issued during the period July 10 through August 9, 1985, by MSHA Inspector James B. Hudgins, were not abated promptly and in good faith and such contention will be determined where appropriate in the discussion of the 16 remaining violations which follows. Unless specifically discussed and determined otherwise, the Respondent is found to have proceeded in good faith to promptly abate the violations in question upon notification thereof by the Inspector.

FINDINGS, CONCLUSIONS AND DISCUSSION

Citation No. 2393637

The standard infracted, 30 C.F.R. | 56.9087 provides:

> "Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up."

MSHA Inspector James B. Hudgins, who issued all 17 Citations involved in this matter on two different inspections, testified that he commenced the first of the two inspections on July 10, 1985, and the second inspection on August 8, 1985 (T. 17).

The violative condition (or practice) involved is described in the subject Citation as follows:

> "The 988 CAT Front-end loader equipment No. 203 loading trucks in the B channel section of the pit did not have a operable reverse signal alarm nor was an observer being used. The equipment operator has an obstructed view to the rear (blind spot)"

The Secretary established that Respondent's mine superintendent at the time, Dennis Babcock, "didn't believe" in the automatic back-up alarm requirement and that the loader operator had turned the equipment in for repair several times without success. This is a willful violation which was also serious since a fatality could have resulted had a miner been run over by the loader while it was backing up. Since there was no "foot traffic", that is miners working in the area on foot, the probability of such an accident was not likely, and thus a low or moderate degree of seriousness is attributed.

Based on these findings as to negligence (willfulness), gravity, and the other 4 assessment criteria required by the Act, a penalty of $30.00 is found appropriate.

Citation No. 2393638

The standard infracted, 30 C.F.R. | 56.9087 is set forth above in connection with the discussion of Citation No. 2393637.

The violative condition (or practice) is described as follows:

> "The 35 ton DJB CAT haul truck equipment No. 307 operating in the pit did not have a operable reverse signal alarm nor was an observer being used. The truck driver has an obstructed view to the rear (blind spot)."

While there was no evidence as to the length of time this violation existed, such is nevertheless found to be willful in view of the mine superintendent's statement to the Inspector that he "did not believe" in such automatic back-up alarms and that such alarms were a "nuisance".

There were no miners working foot around the equipment. However, had the equipment backed over a miner a serious (injury) or fatality could have occurred. Because the occurrence of such an accident was unlikely, a penalty of $30.00 is assessed.

Citation No. 2393639

The standard infracted, 30 C.F.R. | 56.9087 is the same as that involved in the first two citations herein discussed.

The violative condition (or practice) is described in the Citation as follows:

> "The Galion Road Grader operating at the mine did not have a operable reverse signal alarm nor was an observer being used. The operator has an obstructed view to the rear. Equipment No. 502."

This violation is found to be of a low degree of gravity since the Inspector testified that there was no foot traffic in the area where the grader was operating and that the hazard envisioned was "not likely" to occur. Based on my prior findings concerning this operator's intransigence with respect to installing automatic backup alarms, this violation is found to be willful. The violation was not abated in good faith within the time established by the Inspector, and the cavalier attitude of the mine operator with respect to this mine safety standard was again in evidence in this respect. A penalty of $50.00 is found to be appropriate.

Citation No. 2393640

The standard infracted, 30 C.F.R. | 56.9022 provides:

> "Berms or guards shall be provided on the outer bank of elevated roadways."

The violative condition (or practice) is described as follows:

> "The elevated roadway from the plant to the slurry tank with a drop off on both sides upto approximately 50 feet was not bermed. The road was being used daily by various pieces of equipment."

The evidence adduced with respect to this violation indicated that the dropoff on one side of this 175-foot long roadway was approximately 50 feet and was from 10-15 feet on the other side. The roadway appeared to have been used for approximately one month-from the time it was built-and the Inspector indicated that had a vehicle gone over the side, the resultant injury could "very likely" be expected to be fatal. This is found to be a very serious and obvious violation which resulted from the negligence of the mine operator. The violative condition described in the Citation was not abated in good faith by the operator since berms were not installed until approximately three weeks after the period for abatement had run and only after the Inspector had returned to the mine site. This violation is thus found to have not been promptly abated in good faith by the mine operator after being notified thereof. Respondent presented no rebuttal to the Secretary's allegation that this was a "serious and substantial" violation. In view of the deteriorating condition of the roadway, the severity of the hazard posed by the violation, and the operator's apparent lack of concern for compliance with mine safety standards, it is concluded that the Secretary established the prerequisite elements of proof for "significant and substantial" violations mandated by the Federal Mine Safety and Health Review Commission in its decision in Mathies Coal Co., 6 FMSHRC 1 (1984) to wit:

> "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure

> of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be a reasonably serious nature."

In the premises, the Citation is affirmed in all respects and a penalty of $150.00 is assessed.

Citation No. 2393643

The standard infracted, 30 C.F.R. | 56.9011 provides:

> "Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

The violative condition (or practice) is described as follows:

> "The windshield on the Teres 72-61 front-end loader (equipment No. 201) was severlly (sic) fractured through out the viewing area of the operator. The front-end loader was used daily at the plant stockpile area."

According to the Inspector, the windshield was severely fractured, visibility was very poor, the loader's driver had complained about it for "some time", and the condition could "reasonably likely" result in an accident which "could very well be fatal." It also appears that the windshield became in such condition as a result of sun heat or some trauma-not gradually-and that the Respondent had ordered a new windshield which had not arrived by the time the inspection was conducted. The violative condition was abated promptly and in good faith. The Inspector, upon observing the windshield, determined not to remove the vehicle from use. While this was a serious, and "significant and substantial" violation, I find no evidence it resulted from Respondent's negligence. A penalty of $75.00 is assessed therefor.

Citation No. 2393544

The standard infracted, 30 C.F.R. | 56.9011 provides:

> "Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

The violative condition (or practice) is described as follows:

> "The front windshield on the 988 B Caterpillar front-end (equipment No. 203) was fractured through out the operations viewing area. The loader was operated in the pit area."

While the entire windshield was fractured, visibility through this windshield-unlike that involved in the preceding violation-was, according to Inspector Hudgins, "still fairly decent" and the fractures would not increase the possibility of an accident. No evidence of negligence was proferred. Since this was not a serious violation, the penalty sought by the Secretary, $20.00, is found appropriate and is assessed.

Citation No. 2394341

The standard infracted, 30 C.F.R. | 56.12025 provides:

> "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment."

The violative condition (or practice) is described as follows:

> "The 110 volt power cable from wash plant control box to the outside lights was not grounded. The green ground wire was not connected."

The Inspector testified that while it was unlikely that an accident would occur as a result of this violation, the hazard contemplated by the Inspector was "shock" which the Inspector noted on the Citation could be "fatal." The condition had existed "a few days or a few shifts" before the inspection and was due to an electrician's failure to tape up and finish the connection in question. I find no basis in the record for attributing the electrician's negligence to Respondent's management. The violation is found to be but moderately serious and the penalty sought by the Secretary, $20.00, is assessed.

Citation No. 2394342

The standard infracted, 30 C.F.R. | 56.12032 provides:

> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

The violative condition (or practice) is described as follows:

> "The door for the 220 volt distribution box in the wash plant electrical control room was not in place. (The box was energized)."

This violation could have resulted in a fatal electrical shock hazard. Several employees were exposed to the hazard and it was very likely such could come to fruition. This serious

violation is thus found to be "serious and substantial", Mathies Coal Co., supra. There was no evidence of specific negligence on the part of the mine operator. A penalty of $100.00 is assessed.

Citation No. 2394344

The standard infracted, 30 C.F.R. | 56.9087 provides:

> "Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up."

The violative condition (or practice) is described as follows:

> "The D-8K Cat dozer equipment No. 402 operating in the pit did not have a reverse signal alarm nor was a spotter in use at this time. The operator has an obstructed view to the rear. The Ripper screen and size of machine create a blind spot to the rear from the operator's."

The hazard envisioned by the Inspector was that the dozer "could back over someone entering the area" and cause fatal injuries. However, the Inspector also concluded that it was not likely that such an accident would occur. As in the case of the 30 C.F.R. | 56.9087 violations previously discussed, this violation is found to be willful in view of the mine superintendent's lack of belief in back up alarms (T. 99). A penalty of $30.00 is assessed for this moderately serious violation.

Citation No. 2394378

As previously noted, this Citation was vacated at the hearing and my bench order approving such (T. 107) is here affirmed.

Citation No. 2394379

The standard infracted, 30 C.F.R. | 56.11001 provides:

> Safe means of access shall be provided and maintained to all working places.

The violative condition (or practice) is described as follows:

> "Safe means of access was not provided to the work area in back of the feed hopper where the operator stands to control the amount of material the trucks dump when dumping in the hopper."

The employee directing the dumping could have fallen 35 feet since there was no ladder or work platform for him to stand on. This practice occurred continually during the shift and had been going on for one or two months. Had the employee lost his balance it was reasonably likely that he would fall backwards and sustain injuries which could have been fatal (T. 121). The mine superintendent admitted to the Inspector that he should have noticed the hazard and conceded that it was very likely that someone could have fallen and sustained very serious injuries. Accordingly, this serious violation is also found to be "significant and substantial" and to have resulted from Respondent's negligence. A penalty of $125.00 is assessed.

Citation No. 2394561

The standard infracted, 30 C.F.R. | 56.15003 provides:

> All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

The violative condition (or practice) is described as follows:

> "The warehouse person was wearing tennis shoes in the warehouse storage and shop area. This person is required to lift and store various heavy items that could injure a persons feet."

The warehouseman, who customarily handled heavy objects, had been issued steel-toed safety shoes by Respondent which he had available at the mine. However, mine supervision had not required him to wear the safety shoes even though the warehouseman regularly wore the tennis shoes (T. 124). This is found to be a moderately serious violation jeopardizing but one miner which resulted from supervisorial negligence. A penalty of $30.00 is assessed.

Citation No. 2394562

The standard infracted, 30 C.F.R. | 56.9054 provides:

> Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

The violative condition (or practice) is described as follows:

> "The bumper block at the main feed hopper was covered with material and no longer effective to prevent overtravel and overturning at this dumping location. This dumping location was used on a daily basic [sic] by 25 ton and 35 ton haul trucks."

The Inspector testified that it was likely that a truck might back into the hopper. A remote possibility existed that an employee who regularly works on a shaker screen in back of the hopper might become apprehensive and fall or leap from his position to the ground--a 25-35 foot drop. There was no specific evidence as to negligence. The violation was abated approximately two hours after the abatement period expired. I find that the Respondent was not negligent in the commission of this violation and that Respondent, in a relatively reasonable manner, abated the same. The $20.00 penalty urged by the Secretary is assessed.

Citation No. 2394564

The standard infracted, 30 C.F.R. | 56.11002 provides:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

The violative condition (or practice) is described as follows:

> "The walkway from the wash plant control booth to the walkway around the dump hopper has the middle section of handrail missing and no toeboards were provided. Falling rock was observed falling from the trucks when dumping on this walkway and rolling over the edge approximately 25 feet below where clean up work is required."

The purpose of a toeboard is to prevent rocks, tools and other materials from falling on miners working 25 feet below the walkway; the purpose of handrails (midrails) is to prevent persons from falling off the walkway. The record does not permit a finding of negligence on the part of Respondent in the commission of this serious violation. A penalty of $50.00 is assessed.

Citation No. 2394565

The standard infracted, 30 C.F.R. | 56.16005 provides:

> Compressed and liquid gas cylinders shall be secured in a safe manner.

The violative condition (or practice) is described as follows:

> "One compressed gas cylinder located in the shop at the welding station was not secured."

The Inspector testified that the unsecured 80-lb cylinder could have fallen on someone's foot with the possible result of a bruised foot or broken toe. This violation is found to have a

low degree of gravity due to the remoteness of the hazard and the type of injuries which might have resulted therefrom. The violation is solely attributable to the unforeseen negligence of an employee who apparently went on a break without first securing the cylinder. Accordingly, I find no negligence imputable to Respondent for this violation. A penalty of $10.00 is assessed.

Citation No. 2394566

The standard infracted, 30 C.F.R. | 56.18006 provides:

> New employees shall be indoctrinated in safety rules and safe work procedures.

The violative condition (or practice) is described in the Citation as follows:

> "A employee was observed standing on the top handrail of the railing around the main feed hooper. It is approximately 30 feet to the ground behind where the employee was standing. Also there is steel beams, electric motors and pumps located at the bottom. The employee was not properly trained in safe work procedures for this job."

The record indicates that the employee in question advised the Inspector that he engaged in the unsafe practice "frequently," that he had not been trained in this aspect of his job, and that he had never been told not to stand on the handrail. The Inspector indicated that it was very likely that the employee could have fallen because of the vibration and the employee's wet shoes. Respondent is found to have been negligent with respect to this violation which also is found to have created a serious safety hazard. In view of the likelihood of the accident contemplated actually happening, this violation is found to be significant and substantial. The Citation is affirmed in all respects and a penalty of $200.00 is assessed.

Citation No. 2394567

The standard infracted, 30 C.F.R. | 56.12016 provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The violative condition (or practice) is described as follows:

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"Lock out measures was not done by the wash plant operator when cleaning the water nozzels (sic) from the shaker screen. The power switch was in the energized position. Employee was observed standing in the screen plant."

This Citation was issued on August 9, 1985, the final day of Inspector Hudgins' second inspection. The hazard contemplated by the Inspector was the shaker screen becoming energized-which could have thrown the miner in question off balance leading to a fall of some 6 to 15 feet. The Respondent had not instructed the miner to lock out the main control switch and Respondent's superintendent, Babcock, admitted it had not been policy to lock out in such circumstances. There is no specific evidence in the record from which to gauge the likelihood that the hazard contributed to would result in an injury. However, Respondent did not challenge this allegation and accordingly, it is concluded that this violation was significant and substantial. The violation, otherwise, is found to be but moderately serious and to have resulted from Respondent's negligence. A penalty of $50.00 is assessed.

ORDER

1. Citation No. 2394378 is vacated.

2. The remaining 16 Citations hereinabove discussed are affirmed in all respects.

3. Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days from the date hereof the penalties hereinabove individually assessed in the total sum of $990.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE

1 One of the 17 Citations involved, No. 2394378, was vacated on the record by the Secretary at the instance of the undersigned since it appeared that the pertinent standard had not been infracted.