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SOL (MSHA) V. INDUSTRIAL CONSTRUCTORS
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEST 88-256-M A.C. No. 04-04917-05501
v.	Docket No. WEST 88-311-M A.C. No. 04-04917-05502
INDUSTRIAL CONSTRUCTORS, RESPONDENT	Colosseum Mine

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Michael Tanchek, Esq., Industrial Constructors Corporation, Missoula, Montana, for Respondent.

Before: Judge Lasher

This matter was commenced by the filing of proposals for assessment of civil penalties by Petitioner, seeking penalties for two alleged violations described in two Citations -numbered 3286940 in Docket No. WEST 88-256-M and 3286684 in Docket No. WEST 88-311-M -issued by MSHA Inspector Vaughn D. Cowley on February 3, 1988 and May 11, 1988, respectively.

Separate discussion of these Citation follows.

Docket No. WEST 88-256-M

Citation No. 3286940, alleging a "significant and substantial" violation was issued pursuant to Section 104(a) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801 et seq., and charges Respondent with an infraction of 30 C.F.R. 56.9022, as follows:

> "The wash water pond located at the shop area was not provided with a berm or guard to prevent equipment from driving into the pond."
>
> 30 C.F.R. 56.9022 provides:
>
> "Berms or guards shall be provided on the outer bank of elevated roadways."

Respondent concedes that there were no berms around the wash pond in question, but alleges that because it intended to build a fence around the pond and had materials present with which to do, that the "significant and substantial" (S & S) designation on the Citation was not warranted (T. 11-12).

Inspector Cowley described the activities conducted at the shop area which he observed on his inspection on February 3, 1988, as follows:

> "Maintenance of the mining equipment, servicing of equipment, maintenance, breakdowns, hoses break, brakes fail, whatever, they have mechanics working there, service equipment working." (T. 14)

Located in this shop area, which is about 1 acre in size (T. 34), is a "wash pad" where trucks and equipment are washed (T. 15 Ex. P-3). Adjacent to the wash pad is the subject water collection pond or wash pond into which the wash water runs and which is about 28 feet x 28 feet in dimension and 10 feet deep (T. 15, 32, 38, 52, 60, 66). The pond is created by the runoff from wash water (T. 38, 41). The depth of the water in the pond would not have been ascertainable by the operator of a vehicle traveling along an adjacent roadway (T. 32, 33, 38).

Inspector Cowley indicated that running a "complete circle" around the flat shop area is this gravel roadway which extends "right to the edge of the pond" and on which various types of vehicles frequently travel (T. 16, 17., 18, 20, 21, 33, 34, 35, 39). Traffic flows in both directions adjacent to the pond (T. 25, 27) and runs along 2 sides of the pond (T. 33, 35).

At the time of his inspection (a) there was a drop of one to two feet from the roadway to the water level of the wash pond and there was 8 to 9 feet of water in the pond (T. 17, 32), and (b) there were no berms, guards, fences or other obstacles between the roadway and the pond (T. 17, 21, 24). Inspector Cowley observed vehicle tire tracks-rubber tire tracks-- within approximately 3 feet of the northwest corner of the pond (T. 19, 22, 31).

The roadway, which was wide enough to accommodate 4 pickup trucks- or two 15-foot wide haulage trucks -- side by side (T. 43, 70) did not have marked lanes, nor were there "Red lights" or flagmen present to control traffic (T. 47). Respondent did post a 5 mph speed limit for the area and its drivers were instructed in its "left-hand traffic" rule (T. 52, 70).

Inspector Cowley described the hazard presented by the violative condition in this manner:

> "A vehicle running off into the pond, overturning, -- seriously injuring a person or even possibly in the event he went in and overturned, was trapped in the cab, he could possibly drown.
>
> Q. So the basic hazard would be going over the edge into the pond and sinking to the bottom?
>
> A. Yes." (T. 17)

It was the Inspector's opinion that a serious injury, i.e., one resulting in "lost time (T. 25, 47), was posed by the hazard (T. 25). He explained further:

> "It would be a serious injury if a guy was in the truck and it went into the pond and tipped over, the least that could be expected would be at least a lost time accident, and a very possible fatal if he was trapped in the---cab went under water and the guy was trapped in the cab, it could have been a drowning." (T. 25, 26)

From the outer edge of the pond, the slope of the pond drops off sharply to its maximum depth (T. 36, 37, 65). Because of the severity of the drop off, a vehicle is more likely to flip over (T. 36-38).

The violative condition was abated immediately by Respondent by having a front-end loader put up a berm (T. 22).

Although Respondent contends that it was planning to install a fence around the wash pond, Inspector Cowley did not observe fence materials in the area (T. 23, 44), he was not advised on the inspection day that management was planning to install such a fence (T. 24, 25), and it was his opinion, and conceded by Respondent--that a fence would not have been sufficient to have stopped large equipment having mechanical failure (T. 24, 55, 56).

Respondent's Maintenance Superintendent, Lewis Young, testified that fence materials had been acquired for the pond which were stacked alongside a building (T. 50) on the day the Citation was issued. However, no part of the fence had been constructed (T. 50, 55), and all of the materials for the fence had not been acquired (T. 55)(FOOTNOTE 1).

Mr. Young offered only the following explanation as to why the fence (not berms or guards) had not been put up:

> "We had been busy, we'd just moved into the new shop. We were trying to get our maintenance program, the equipment, on line. We were still organizing in the building." (T. 50).

Water had been in the pond for approximately two weeks (T. 51).

Respondent established that some of the larger vehicles-because of the height of their cabs-- would not have exposed their drivers to the drowning hazard mentioned by the Inspector had such vehicles tipped over into the pond (T. 26). Nevertheless Respondent's witness, its Maintenance Superintendent, admitted that small vehicles were subject to the hazard described by the Inspector (T. 51) and that such vehicles did traverse the area around the pond (T. 51, 52).

Discussion

It was conceded and the evidence clearly established that there were no berms or guards provided on the outer bank of the roadway at the time the condition was cited. There is no question but that the violation charged did occur and that it was very serious and resulted from Respondent's negligence since it had existed for approximately two weeks without the hazard being recognized. Respondent's primary, if not sole contention, involves the propriety of the "significant and substantial" (S & S) designation to the violation.

A violation is properly designated S & S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission listed four elements of proof for S & S violations:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (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 of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (1985), the Commission expounded thereon as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

It is concluded that Petitioner carried its burden of proof under Mathies, supra, with respect to this violation since the violation was clearly established and the violative condition involved contributed a "measure of danger" to the vehicle operators who were exposed to the hazard credibly described by the Inspector. There is no question but that had an accident occurred, the miners (employees) involved would have been exposed to injuries ranging from broken bones to fatalities. Because of the slope of the pond from its outer edge, the likelihood that a vehicle might overturn was increased. In addition, the likelihood of a vehicle going into the pond was increased not only by the absence of berms and guards, but by the absence of other warning respect to the nature of the hazard posed by the pond. The roadway itself was relatively uncontrolled and a vehicle operator could not visibly determine the depth of the water because of its muddy (T. 33) constituency. Thus, I conclude that there was a reasonable likelihood that the hazard contributed by by the violation would result in an injury, and also that such injury would be of a reasonably serious nature, including fatalities.

The designation of this violation as "significant and substantial" is affirmed.

Docket No. WEST 88-311-M

Citation No. 3286684, also alleging a "significant and substantial" violation was issued pursuant to Section 104(a) of the 1977 Mine Act, and charges Respondent with an infraction of 30 C.F.R. 56.9087, as follows:

"The backup alarm was not operating on the large service truck."

30 C.F.R. 56.9087, pertaining to "Audible warning devices and back-up alarms", 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."

Respondent concedes the occurrence of this violation but challenges its designation as "significant and substantial" (T. 89).

During the course of an inspection of the Colosseum mine on May 11, 1988, Inspector Cowley again inspected the shop area and observed a large flat-bed service truck parked outside the shop area (T. 80, 85). The truck, which travels all over the mine and over grades, carries diesel fuel and oil (T. 80-81).

At this time, the Inspector saw the driver of the truck get into the truck and he asked the driver if his back-up alarm worked. The driver said yes. Inspector Cowley then asked him to put the truck in reverse and the alarm did not work. (T. 82).

The driver's view to the rear was obstructed because of the oil barrels, fuel tanks mounted on the back of the truck (T. 82). There is no question but that the vehicle operator had an obstructed view to the rear. The Inspector actually described the nature of the visibility obstruction in this manner:

> "Standing behind the truck approximately 25 feet looking you could not see either one of the mirrors on the truck at an angle, a "V" shape, from the back of the truck back to where I was standing approximately 25 feet, both mirrors was out of sight. Both mirrors was out of sight, he couldn't see." (T. 82)(FOOTNOTE 2)

The area of the mine most susceptible to the hazard posed by this violation was the pit area (T. 84, 86). The driver told the Inspector at the time that he was on his way to the pit area to service equipment there during the lunch hour (T. 83). During the lunch hour, various employees are in the pit area--normally 6 in number -- and they are free to go where they want (T. 84).

The Inspector gave this description of the hazard posed by the violation:

> "Employees on foot being in the area is the biggest danger of not -- of the truck backing up and them not being -- the alarm not going off, or the bell going off, buzzer, whatever, not making noise to warn whoever was behind the truck that it was backing up. (T. 82-83).
>
> XXX XXX XXX XXX XXX
>
> "Well if the vehicle backed over an employee, hit him, knocked him down and backed over him, it very likely be fatal, or at least broken legs, or if he run over his legs, or whatever.
>
> (Pause)
>
> Judge Lasher: What are the dimensions, weights approximately of this vehicle?
>
> The Witness: Of this vehicle? Well, approximately eight feet wide and maybe 20 feet long, and the weight with a full load on it, probably 30,000 pounds, would that be close? I don't -- I don't know. With a full load of diesel fuel and oil and --? (T. 85).

The Inspector gave this description of the pit area and the service truck's function there:

> "The pit area itself depends on which level they're working on. Most of the areas are large, open, flat areas where they're mining ore or waste out of a blast area, there's a large area behind them, possibly in front of them, possibly on three sides of this work area, where the trucks come in, back up, the shovels load them. The trucks will leave the shovel area, come over and park away from the work area. The truck drivers will -- some of them stay in their truck. I talk to them generally. Some of them get out, they walk around their trucks, they generally eat lunch at this time. The service truck comes into the pit area at that time, pulls up and greases, changes oil, pumps oil in or whatever is necessary as far as servicing goes, during this lunch break."

The Inspector was of the opinion that the service truck would be required to back under certain situations obtaining in its operation (T. 93) and he also indicated that there was no alternate means of alerting someone behind the truck when the truck was backing up (T. 100-101).

Other factors bearing on the question of the likelihood of the hazard coming to fruition were the presence of extraneous noise in the pit area beyond that created by the service truck

(T. 101, 103) and the significant level of foot traffic in this area (T. 91, 102-103, 104-106, 113). Thus, the Inspector testified:

> "The fact that the truck in question, the service truck, works in the pit area during the noon hour when there is quite a bit of exposure of employees on foot in the area. Employees not only of Industrial Constructors, but Bond Gold Corporation's engineers and geologists in the area during the lunch hour when the service truck is in the process of servicing the large mining equipment in the pit area."

While Respondent's Maintenance Superintendent, Lewis Young, was of the opinion that there would "normally" (T. 109) be no reason for the service truck to back up while servicing other equipment in the pit area, he also conceded the likelihood of the truck's striking employees had it been put in reverse (T. 112).

Discussion

The issue presented with respect to this Citation is whether the Inspector's determination that the violation was significant and substantial (S & S) should be upheld. Applying the Commission's analytical formula for making such determination -- set forth succinctly in its Mathies decision, supra, it is readily seen that there is no question as to the establishment of three of the four prerequisite elements. Thus, Respondent admits that the violation occurred, and the record strongly supports the finding that the violation contributed a measure of danger to safety. Had the violative condition resulted in an accident, it is equally clear that an injury of a reasonably serious nature would have resulted therefrom (T. 85, 86).

The question remains: Was there a reasonable likelihood that the hazard contributed to by the violation would result in an event in which there would have been an injury?

Here, the record is clear that there was considerable foot traffic in the area in which this large truck was operating -- which must be considered in conjunction with the size of the pit area and the potential proximity of employees to the truck (T. 91, 94, 101-103, 112). The nature of the violation itself inherently carries a considerable threat of risk to the safety of miners: (1) a large piece of mobile equipment, (2) operating without a backup alarm, where (3) the operator's vision is obstructed to the rear. Add to this mix the presence of a considerable number of miners on foot in proximity to the truck, no alternate means of alerting such employees of the vehicle's being put into reverse, extraneous noise, and one must conclude

that a reasonable likelihood existed that the hazard contributed to by the violation would occur and cause an injury. The Inspector's determination that this violation was significant and substantial is affirmed.

Penalty Assessment Factors

The parties stipulated that Respondent,(FOOTNOTE 3) a large company (T. 73) with a large mine, had no history of assessed violations within the pertinent 24-month period preceding the occurrence of the violations in question (T. 13, 76). It was also stipulated that (1) Respondent, after notification of the violations, proceeded in good faith to abate the same and (2) that assessment of penalties would not jeopardize Respondent's ability to continue in business (T. 13, 76). Both violations involved have been previously found to be "significant and substantial". I have also previously found that the violation charged in Citation No. 3286940 was very serious and resulted from Respondent's negligence.

In connection with Citation No. 3286684, the parties stipulated that the violation resulted from a "low degree of negligence" and I so find. It is also found that this violation was very serious.

Having considered the above mandatory penalty assessment criteria, penalties of $150.00 for Citation No. 3286940 and $100.00 for Citation No. 3286684 are found appropriate and are here assessed.

ORDER

Citations numbered 3286940 (Docket No. WEST 88-256-M) and 3286684 (Docket No. WEST 88-311-M), including the designations "Significant and Substantial" thereon, are affirmed.

Respondent is ordered to pay the Secretary of Labor within 30 days from the date hereof the total sum of $250.00 as and for the civil penalties above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. It is thus found that even had the fence been in place it would not have complied with the berm/guard standard, and further, by Respondent's own admission, that all the fence materials for the fence had not been acquired on the day the hazard was observed and the violation cited.

~FOOTNOTE_TWO
2. I infer from this testimony that if one standing behind the truck at a given point cannot see the mirrors that the driver--looking through the mirrors--- could not see the reflected image of someone standing at such point.

~FOOTNOTE_THREE

3. Respondent operates a "multiple bench level type" of gold mine and at material times had a payroll of approximately 50 employees (T. 14).