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SOL (MSHA) V. NOONE ASSOCIATES
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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 PROCEEDING Docket No. WEVA 90-6 A. C. No. 46-07679-03501 Z2J
v.	Wolfe Mine
NOONE ASSOCIATES, INC., RESPONDENT	

DECISION

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Mr. Robert A. Kaufman, Treasurer, Noone Associates, Inc., Stanaford, West Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) seeks a civil penalty for the alleged violation by the Operator (Respondent) of 30 C.F.R. 48.26(a). Pursuant to notice, the case was heard in Charleston, West Virginia, on April 3, 1990. Ronald Vincent Marrara and Thomas P. Stockdale testified for Petitioner, and Clifford William Farris testified for Respondent. At the hearing, time was reserved for the Parties to submit Proposed Findings of Fact and a Brief. Petitioner submitted its Proposed Findings of Fact and Memorandum of Law on May 9, 1990. Respondent did not file any Proposed Findings of Fact or Brief, but filed, on May 16, 1990, a rebuttal to Petitioner's submission.

Stipulations

At the hearing, the Parties indicated that they entered into the following stipulations:

1. The Administrative Law Judge has the jurisdiction to hear and decide this case.

2. Inspector Ronald Marrara was acting in his official capacity when he issued Citation No. 3114222.

3. Citation No. 3114222 was properly served to the Respondent's agents.

4. Abatement of the conditions cited in Citation No. 3114222 was timely.

5. The proposed penalty of $56.00 will not adversely affect the Respondent's ability to continue in business.

6. If the Secretary establishes that the violation existed, then the amount of $56.00 is an appropriate civil penalty under 30 U.S.C. 820(i).

7. As of this date, the Respondent has no history of previous violations.

8. The training requirements under 30 U.S.C. 825(a) and 30 C.F.R. 48.21 et seq. were in effect at the time the Citation was issued.

9. The employee had not received training under 30 C.F.R. 48.26 prior to the date of the Citation.

10. On the date of the alleged violation, the employee was performing the same duties as a coal sampler that he had performed at other mine sites.

11. The employee was working as a coal sampler on the mine site at the time that the Order was issued.

12. For purposes of 30 U.S.C. 713(d) and 30 C.F.R. 48.21- 48.31, on the date of the alleged violation, the Respondent was operating as an independent contractor who was performing coal testing/sampling services.

13. The Respondent had an agreement with a third party to perform coal testing/sampling at the Wolfe Mine site.

Findings of Fact and Discussion

I.

In May of 1989, Respondent had an agreement with a third party to perform coal testing/sampling at the Wolfe Mine site. On May 30, 1989, Respondent's employee, Clifford William Farris, was working at the Wolfe Mine site performing modified flow sampling, which required him to take coal samples from the pile.

Farris had approximately 5 years experience as a coal sampler and in addition, performed this type of testing approximately 100 times at other localities. Farris indicated that, as part of his duties, at each site that he takes coal samples, he is required once a year to sign a form indicating that he had received hazard training. When he entered the site in question on May 30, he received and read a one page statement entitled Hazard Training (Surface). Among the items set forth in this document is a Section entitled "Heavy Equipment Hazards." (Secy. Ex. 6, Page 2). Subparagraph C. provides as follows: "Beware of where equipment is moving at all times and make sure the operator is aware of your presence before boarding any equipment." (Secy. Ex. 6, page 2). In essence, Farris indicated that when he entered the subject site, he asked the end-loader operator where he should stand, and he informed the latter what he planned to do at the site that day.

Ronald Vincent Marrara, an MSHA Inspector, indicated that when he inspected the pit area on May 30, 1989, he observed Farris taking samples out of the pile and that ". . . it seemed to me that he was not aware of his surroundings." (Tr. 11). Thomas P. Stockdale, the Owner and President of Tri-State Safety Services, Incorporated, who provides safety training to employees of the Wolfe Mines, indicated that he had also observed Farris. He opined that Farris was ". . . not really observant about the end-loader," and was ". . . more concerned with his sampling." (Tr. 66). According to Marrara, Farris was not making eye contact with the end-loader operator. He indicated that he observed Farris walking away from the coal pile and the end-loader. He said that Farris did not look around at the end-loader which was backing up, and that the loader stopped within a few feet of Farris before it went forward to drop its load of coal. According to Stockdale, the end-loader was a new machine and the operator had been on that machine for only 2 weeks. According to Marrara, the manner in which the end-loader was being operated, i.e., backing up and turning around at the same time after picking up a load of coal, was not unusual.

Marrara indicated that he was of the opinion that there was not adequate communication between Farris and the end-loader operator. When he ascertained from Farris that the latter did not have training pursuant to 30 C.F.R. 48.26(a), he issued a Section 104(a) Citation and a Section 104(g)(1) Order.

Subsequent to the issuance of the Citation and Order, and in order to abate the same, Stockdale conducted oral training with Farris. He indicated that in his opinion Farris was knowledgable and had told him (Stockdale) that he knew the machine (end-loader), and the work that was being performed at the site. According to Stockdale, he reviewed with Farris the particulars of safety pursuant to Section 48.26, supra. Specifically, with regard to hazards

occasioned by the work environment and the end-loader, he explained to Farris that the end-loader was a new machine, and the work being performed at the site constituted a new job. He indicated that he told Farris to make sure that he caught the eye of the end-loader operator, to keep a safe distance back of the end-loader, and not to approach until the operator waved him on. He explained, that due to the height at which the end-loader sits on the machinery, it is difficult for the operator to see an individual close to the loader. He explained to Farris various head movements in order to signal the operator. He indicated that, if the safety training had not been provided, then the following could have happened: "If Mr. Farris was unobservant as to the danger in the pit" he could be "obviously" hurt by the end-loader or one of the environmental hazards of the highwall (Tr. 64).

Farris was asked, essentially, to indicate the matters contained in Stockdale's training that he was not familiar with. As a response, he indicated the location of an emergency telephone, and the fact that the operation at the site did not involve shooting dynamite. Marrara indicated that after the Citation and Order in question had been abated, the basic procedures at the site were the same. He offered his opinion that, after the citation had been abated, and Farris resumed working, he was "more alert to his surroundings." (Tr. 90).

II.

At the hearing, the Parties indicated that they stipulated that the only issue was that of the gravity of the violation, and Respondent indicated that it conceded that it did violate Section 48.26(a), supra. Based upon the evidence of record, as well as Respondent's concession, I find that Respondent did violate Section 48.26(a) as alleged.

III.

It is the position of Petitioner that the violation herein should be considered to be significant and substantial. An analysis of this aspect of the case is to be governed by the principles set forth by the Commission, in Mathies Coal Company, 6 FMSHRC 1 (January 1984). In Mathies, supra, the Commission set forth the elements of a "significant and substantial" violation as follows:

> 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. (6 FMSHRC, supra, at 3-4.)

As set forth above, (II., infra), the evidence has established that Respondent did violate Section 48.26(a), supra, and as such the first element of Mathies, supra, has been met. The Secretary, pursuant to Mathies, supra, must now establish "a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation;" (Mathies, supra, at 3-4). In essence, according to Marrara, a hazard was present inasmuch as Farris did not have eye contact with the end-loader operator, was not fully aware of his surroundings, and that accordingly, "it was most probably highly likely", that he was going to be seriously injured. (Tr. 17). In this connection, Farris did not contradict the version testified to by Marrara, that he (Farris) was not looking at the end-loader when it backed up, and stopped within a few feet of him. Also, according to Marrara, inasmuch as Farris did not make eye contact with the operator, to ensure that the latter would know his location, the operator would worry as to the former's location, could be distracted, and thus an accident causing an injury to the operator was likely to occur. In essence, Marrara was asked specifically to indicate how Farris' lack of training contributed to the hazard involving the end-loader. He indicated, in essence, that the safety training, (Section 48.26(a), supra), as contrasted to the hazard training contained in the document read by Farris on the morning of May 30, is "in greater depth and detail" (Tr. 19). Stockdale, who actually gave the training under Section 48.26(a), supra, noted that training thereunder is specific for a particular job site and its hazards. Further, with regard to the impact of the Section 48.26(a) training, Marrara opined that prior to such training, Farris was not fully aware of his surroundings, and Stockdale indicated that he (Farris) was more concerned with sampling. Marrara indicated that subsequent to the training, Farris was more alert to the surroundings.

I find this evidence inadequate to positively establish that the lack of training in the specifics contained in Section 48.26(a), contributed to the hazard of Farris being injured by the end-loader. The fact that Farris appeared more alert to Marrara after the Section 48.26(a) training was provided to him, does not establish that the specific information provided to him by Stockdale minimized the hazard of an injury caused by the end-loader. It is conceivable that the enhanced alertness exhibited by Farris, was as the result of his performing in the presence of the MSHA Inspector Marrara and the Safety Instructor Stockdale. Further, it might be implied that the lack of Section 48.26(a) training contributed to the hazard of an injury occasioned by the end-loader, based upon proof that such

training did decrease the risk of such a hazard. However, I find that the evidence has not established such an effect of the Section 48.26(a) training. Specifically, I find that the evidence has not established that the Section 48.26(a) training provided to Farris by Stockdale inparted to Farris any new information which minimized the hazard of an injury from the end-loader. In this connection, I note that Petitioner did not offer any evidence to impeach the credibility of Farris' testimony or to rebut his testimony, that the only new information contained in Stockdale's training to him that he was not familiar with, had to do with the location of an emergency telephone, and the fact that the mine was not involved in shooting dynamite. Further, although Stockdale indicated that the end-loader operator was new to the job, and was operating a new machine, Marrara indicated on cross-examination that the manner in which it was operated, i.e., the operator backing it up and turning it around at the same time, was not unusual. Further, Farris' testimony has not been impeached or contradicted that he had performed similar work in the past, informed the end-loader operator what he intended to do on the day in question, asked the latter where he was supposed to stand, and felt that he was aware of the end-loader at all times. In addition, although Stockdale indicated that he informed Farris to be sure and catch the operator's eye, to stay back a safe distance from the end-loader, not to approach the end-loader until the latter waved him on, and he related the usage of various head signals, Stockdale did not indicate that Farris did not already have knowledge of these particulars. I thus conclude that it has not been established that the training provided to Farris by Stockdale, i.e., training under Section 48.26(a), contained any significant new information that Farris was not previously aware of. It thus has not been established that the Section 48.26(a) training significantly decreased the hazard of an injury.

I also find that the record does not establish that there was a reasonable likelihood that the hazard of an injury in the pit area would result in an injury producing event. Marrara opined that it was reasonably likely that Farris would have been injured or killed if he continued working in the pit area. He also noted the possibility of an injury to the end-loader operator. However, taking into account Farris' experience, and the fact that it has not been established that the Section 48.26(a) training imparted any significant information that Farris did not already know with regard to the hazards at the pit area, I conclude that it has not been established that an event causing injury was reasonably likely to occur.

Thus, I conclude that the evidence has failed to establish that the failure of Respondent to have provided Farris with Section 48.26(a) training contributed to the hazard of an injury

from the operation of the end-loader. Thus, I conclude that it has not been established that the violation herein was significant and substantial (See, Mathies, supra).1

IV.

The Parties have stipulated that if it is established that the violation herein existed, then $56 is an appropriate civil penalty. Based upon the evidence of record and the statutory factors contained in Section 110(i) of the Act, I too, conclude that a penalty of $56 is appropriate.

ORDER

It is ORDERED that Order No. 3114221 be AFFIRMED. It is further ORDERED that Citation No. 3114222 be AMENDED to reflect the fact that the violation described therein was not significant and substantial. It is further ORDERED that Respondent shall, within 30 days of this Decision, pay $56 as a penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. I reject Petitioner's argument, as advanced in its brief, that, in essence, failure to provide training under Section 48.26(a) supra, per se, constitutes a significant and substantial violation. In support of its position, Petitioner relies on Dolet Hills Mining Venture, 11 FMSHRC 1122 (1989) decided by Judge Koutras. Inasmuch as Dolet Hills, supra, involved a failure to provide annual refresher training pursuant to 30 C.F.R. 48.28(a) which inter alia mandates a minimum of 8 hours training in session not less than 30 weeks if given periodically, it is not relevant to the instant proceeding which involves a violation of 48.26, supra, which does not contain such mandates. Similarly, Westwood Energy Properties, 11 FMSHRC 105 (1989), rev'd on others grounds, 11 FMSHRC 2408 (1989), is not relevant to the instant case. In Westwood, supra, Judge Broderick, in concluding that the violations of Section 48.26 therein were necessarily likely to result in a serious injury, found that the newly employed experienced miners therein had not previously worked in a culm bank, which in the opinion of the inspector presented unique hazards. In contrast, in the case at bar, Farris had significant experience at sites similar to Respondent's operation. Lastly, Frank Irey, Jr., Inc., 11 FMSHRC 990 (1989), is not relevant to the instant case. In Frank Irey, supra, Judge Melick found that the significant and substantial nature of the violation of Section 48.28, supra, was indicated by the existence of another violation at the same site where the untrained miners were working, for burning and welding in the presence of coal dust. Such evidence is lacking in the case at bar.