FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 18 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. YORK 91-35-M
	:	A. C. No. 30-01185-05538
v.	:	
	:	Docket No. YORK 91-43-M
ZCA Mines, Inc. (formerly NJZ MINES, INC.), Respondent	:	A. C. No. 30-01185-05540
	:	
	:	Balmat No. 4 Mine & Mill

DECISION

Appearances: James A. Magenheimer, Esq., Office of the Solicitor, U. S. Department of Labor, New York, New York, for Petitioner;
Sanders D. Heller, Esq., Gouverneur, New York, for Respondent.

Before: Judge Maurer

These cases are before me based upon petitions for assessment of civil penalty filed by the Secretary alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations.

Pursuant to a notice of hearing, these cases were heard on December 19, 1991, in Watertown, New York. At that hearing, the parties proposed to settle one of the citations at issue in these cases (Citation No. 3592372) with a reduction in the civil penalty from $68 to $20. Based on the Secretary's representations, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act. The terms of this settlement agreement will be incorporated into my order at the end of this decision.

There remained for trial three section 104(a) citations. The operator does not dispute the violations, but only the special "significant and substantial" (S&S) findings and of course, the amount of the civil penalty.

Neither party wished to file post-hearing submissions, but both made closing arguments on the hearing record, which I have considered along with the entire record in making the following decision.

DISCUSSION AND FINDINGS

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "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 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further 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).

Citation No. 3592371

On February 6, 1991, while conducting an inspection of respondent's facility, MSHA Inspector Stephen Field issued section 104(a) Citation No. 3592371, charging a violation of 30 C.F.R. § 57.14107(a), which alleges the following condition or practice:

> The head pulley, tail pulley and impact rollers of the mine ore apron feeder were not guarded to prevent persons from inadvertently contacting the pinch points. The pulleys were 31 inches above the walkway. The impact rollers were 45 inches above the walkway. Persons travel the walkway adjacent to the feeder daily.

The violation of the cited standard is essentially admitted. The real issue is whether or not it amounts to an S&S violation in these particular circumstances.

I find that it does not because the feeder only moves "inches per minute" and then only intermittently throughout the day depending on ore demand. The inspector had no idea how often it would move or when for that matter during a shift. The record is also rather fuzzy on when and how many employees ever walk by this feeder in any event. The Secretary simply has not met her burden of proving up the S&S special finding in this instance. My impression from reading the record as it concerns this citation as a whole is that any kind of an accident involving an employee becoming entangled in this tortoise-like feeder is extremely unlikely.

Therefore, based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for this non-S&S violation is $20.

Citation No. 3592378

On February 6, 1991, while conducting an inspection of respondent's facility, Inspector Field issued the instant citation which alleges the following condition or practice:

> The headlights of the Waldon 5000 front end loader, observed being operated in the mill basement, were not functional. One headlight was missing. Darkened areas of the mill basement would require the use of headlights to assure appropriate visibility and to alert persons in the area of the loaders presence. Several persons were observed in the area.

The testimony from the inspector was to the effect that the mill basement had some dimly-lit areas where this front end loader was operated. I concur with him that it is a hazardous situation to have this vehicle, without functioning headlights, moving around an area where other employees are working in darkened conditions. There was also testimony from the inspector that the company's safety director had told him that the equipment was also used outside at night without benefit of headlights.

The hazard presented by this violation, of course, was the danger that the front end loader operator, unable to properly see or be seen would hit a person traveling by foot. If that happened, which I find to be reasonably likely in these circumstances, it would also be reasonably likely to cause serious injury. Accordingly, I conclude that this violation was therefore "significant and substantial" and serious.

Based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $91, as originally proposed by the Secretary.

Citation No. 3592742

On February 12, 1991, while conducting an inspection of respondent's facility, Inspector Field issued the instant citation, which was subsequently modified to charge a violation of 30 C.F.R. § 57.15005 and alleges the following condition or practice:

> Safety belts and lines were not worn to prevent persons from falling from the top of the two 30,000 gallon diesel fuel storage tanks located behind the oil storage building, in that a means was not provided to secure the lines. The tanks were 10 feet in height and were provided with caged ladders. An employee is required, every 2 to 3 months to access the top of the tank to make checks.

These tank tops are 10 feet off the ground, 20 feet in diameter and surrounded by a soft sand surface. The man who goes up there every so often to "stick the tank" for a manual fuel quantity check testified that he climbs up the caged ladder, walks approximately to the center of the tank and performs his check. The whole process takes him about 5 minutes. He also testified that he has been doing this since 1971 and has never fallen or slipped on top of these tanks. Nor to his knowledge has anyone else ever fallen or slipped on the top of these tanks. He believes the likelihood of falling off those tanks is absolutely nil. "If you're sticking them like that you can't get anywhere near the edge, so the possibility of falling is nil. There is no possibility." (Tr. 24). I concur with Mr. Zeller. This citation will be modified to reflect that it is non-S&S.

Therefore, based on the criteria contained in section 110(i) of the Act, I conclude that an appropriate penalty for this non-S&S violation is $20.

ORDER

1. Citation Nos. 3592372, 3592371, and 3592742 are modified to delete the characterization "significant and substantial" and, as so modified, **ARE AFFIRMED.**

2. Citation No. 3592378 **IS AFFIRMED.**

3. Respondent shall, within 30 days of the date of this decision, pay the sum of $151 as a civil penalty for the violations found herein.

4. Upon payment of the civil penalty, these proceedings **ARE DISMISSED.**

Roy J. Maurer
Administrative Law Judge

Distribution:

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