

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

MAY 19 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-2077
Petitioner	:	A. C. No. 46-00506-03519
v .	:	
	:	Docket No. WEVA 91-2123
STEELE BRANCH MINING,	:	A.C. No. 46-00506-03520
Respondent	:	
	:	Surface Mine No. 927

DECISION.

Appearances: Patrick L. DePace, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for Petitioner:  
Roger L. Sabo, Esq., Schottenstein, Zox, and Dunn, Columbus, Ohio for Petitioner.

Before: Judge Weisberger

Statement of the Case

These two civil penalties proceedings, which were consolidated for hearing, are before me based upon petitions filed by the Secretary (Petitioner), alleging violations by the Operator (Respondent) of 30 C.F.R. § 77.404(a) and 30 C.F.R. § 50.11(b), and seeking the imposition of civil penalties. Pursuant to notice, the cases were heard in Charleston, West Virginia on March 18, 1992. James E. Davis and Donald R. Mills, testified for the Secretary. Wiley Queen, Bobby Edward Casto, Frederick R. Miller, Steven L. Kittle, Mark Potnick, and William Roberts testified for Respondent. The parties filed post hearing briefs on May 11, 1992.

Findings of Facts and Discussion

I. Violation of 30 C.F.R. § 77.404(a)

On April 23, 1991, Donald R. Mills an MSHA investigator of heavy machines and coal mine inspector, inspected the primary fuel filter of a No. 16 caterpillar road grader (No. 009), which had been involved in a fatal accident earlier that day involving

the Operator of the grader, **Rayburn** Browning.' Mills removed the filter case assembly and observed that the retainer, spring, and ring, were all missing and that the element assembly (filter) was no longer properly connected, and was lying on the bottom of the case assembly. He indicated that the filter was not performing its function, and that accordingly the engine of the grader could stall, or shut down, as a result of being injected with fuel containing contaminants. According to Mills, should this occur while the grader is going around a curve, an accident could occur causing injuries or death.

Mills also indicated that the steering wheel had between 270 to 300 degrees of slack, in that the wheel had to be turned to that extent in order for it to respond. He indicated that a delay in steering could cause an accident should this occur while the vehicle is being driven around a blind curve. Mills issued a Citation alleging a violation of 30 C.F.R. § 77.404(a) which, as pertinent, provides that mobile equipment "...shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service **immediately.**"

a. The primary filter

The filter at issue is a primary filter designed to remove scabbing, rust, dirt, and particulate from the **fuel**<sup>2</sup>. Before the fuel in the grader is pumped into the engine, it is first pumped through the primary filter in question. Then the fuel goes through two secondary filters whose function is to remove fine particles. James Davis, an MSHA inspector, indicated that all three filters are needed to insure that clean fuel will enter the injection pump where it is then pumped to the engine. He was unable to state whether the secondary pumps will adequately remove contaminants in the event that the primary filter does not operate. However, he indicated on cross examination that material not trapped by the primary filter would then enter the secondary filters where the materials would then be trapped.

Wiley Queen, head mechanic at the mine in question, indicated that the purpose of the primary filter is to screen

---

'The Citations that **were issued** as a consequence of an MSHA investigation of this fatality are not the subject of the instant proceeding.

<sup>2</sup>**James** Davis, an MSHA inspector, indicated that the filter is also designed to remove water. William Roberts, the equipment manager of Geupel Construction Company, the parent company of Respondent, testified that the filter is not designed to remove water, but rather that water settles to the bottom of the case assembly. I accord more weight to the testimony of Roberts due to his expertise.

large debris. William Roberts, equipment manager for Geupel construction Company, Respondent's parent, indicated that secondary filters are meant to remove fine particles. Hence, it would appear that the contaminants which would not have been screened by the primary filter which was not in its proper place, would, a fortiori, have been screened and trapped by the two secondary filters that are designed to screen smaller particles.

b. Excessive play in the steering wheel

Mills did not drive the grader, and did not start the engine. However, when he turned the wheel he observed between 270 to 300 degrees of slack through which the steering wheel had to be turned before the wheels responded. He indicated that the slack in the steering wheel should be "10 degrees, 20 degrees". (Tr. 88) According to Queen, if the engine on the grader is in operation all the slack in the steering wheel would be taken up except for about a third. In the same connection, Roberts indicated that due to the gear system the grader is equipped with, if the engine off, there is more play in the steering wheel. He indicated that with **the engine** off the play in the steering wheel is about 120 degrees, whereas if it is on there is only 45 degrees of play. Bobby Edward Casto, a field serviceman employed by Walker Machinery, which services the grader in question, testified that if the engine in the grader is not on, there is about 100 to 180 degrees of play in the steering wheel before movement of the wheels is felt. Casto indicated that on April 23, he drove the grader up a hill, and there was only about one degree of play. I do not assign much probative weight to this testimony with regard to the play of the steering wheel with the engine on, as Casto did not specifically test the steering wheel for play. Also, there is no indication that when Casto drove the vehicle uphill any curves were encountered which necessitated the turning of the steering wheel.

Queen also indicated that he had driven the grader sometime prior to the time the citation was issued, and did not notice any slack in the steering. However he could not indicate with any degree of specificity when this occurred. Accordingly, not much weight was accorded his testimony in this regard.

Queen indicated that he had worked with Browning for a year, and that if Browning experienced any problems he brought them to his (Queen's) attention. Queen stated that on the morning of the fatality, Browning returned grader No. 007 as there was a problem with the brakes, and instead was given the grader in question to operate. Queen indicated that Browning did not state that there were any problems with the steering of the vehicle. Queen said that, in his opinion, Browning would not have operated the vehicle in question if it was unsafe. In the same fashion Frederick R. Miller, who was the mine superintendent from October 1989 through September of 1991, indicated that Browning

was "real good" at making preshift examinations, and that he would normally bring any problems to attention of the mechanic (Tr.274).

According to Miller, the vehicle in question was inspected by MSHA and State inspectors three weeks prior to April 23, 1991, and no violation was cited. Respondent's records indicate that the vehicle was operated only 17.5 hours subsequent to the date of this inspection up until April 23 (Exhibit F).

In analyzing whether the evidence establishes that the grader was "unsafe" within the purview of Section 77.404 § 77.404(a) supra, the common meaning of the term "safe" is to be considered. Webster's Third New International Dictionary (1986 edition) ("Webster's") defines "safe" as "2. Secure from threat of, danger, harm or loss:", Webster's defines "Secure" as "2 a: free from danger." "Danger" is defined in Webster's as "3. a: liability to injury, pain, or loss: PERIL, RISK... ."

I find the testimony of Respondent's witnesses insufficient to contradict or impeach the specific testimony of Mill that, on April 23, 1990, when he tested the steering there was between 270 to 300 degrees of play. Although the steering wheel might exhibit more slack when the engine is off, I conclude that play in the steering wheel of approximately 270 degrees when the engine is off, is clearly evidence of play in the steering wheel to a more than non-significant degree when the engine is on. Inasmuch as the grader was being operated on an access road that, according to the uncontradicted testimony of Mills, contained curves, and a 8 to 9 percent grade in some areas, an accident could have resulted from a delay in the steering caused by the play in the steering wheel. Hence, applying the common usage of the term "safe" as defined in Webster's infra, I conclude, that due to the play in the steering wheel, the grader in question was not in safe operating condition. Since it was in operation, I find that Respondent herein did violate section 77.404(a).

c. Significant and substantial

The grader was being used to grade and maintain a 6 mile road which provided the only access to the mining operation. As such, the road was used by trucks carrying coal from Respondent's operation, as well as by other vehicular traffic. According to the uncontradicted testimony of Mills, the road had a 8 to 9 percent grade in some areas, and portions of the roadway that curved were only 20 to 25 feet wide. Given the degree of the excessive play in the steering wheel, and the road and traffic conditions, I conclude that the violation herein was significant and substantial. (See Turner Brother, Inc., 7 FMSHRC 424 (1985) (Judge Melick)).

Taking into account the statutory factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act), I conclude that a **penalty of \$85** is appropriate for this violation.

## II. Violation of 30 C.F.R. § 50.11(b)

James E. Davis, an MSHA inspector and accident investigator, indicated that on April 23, 1991 an investigation commenced with regard to the fatality that had occurred at Respondent's site on that date. He indicated that at the start of the investigation, he requested of Frederick R. Miller, and Mark **Potnick**, the Director of Human Resources of Geupel Construction Company to provide an investigation report including a description of steps taken to prevent a similar occurrence in the future. Davis indicated that he made follow-up requests on April 23, April 24, and April 26. He indicated that on April 29, he spoke with **Potnick**, who oversees the mine safety programs at the Steel Branch operation, concerning preventive measures Respondent would take to avoid a recurrence of a fatal accident. Davis said that he and **Potnick** discussed "**the subject of seat belts**", re-instructing miners in the safe operating and emergency procedures **and the** examinations of equipment and "**relevant**" training (Tr.41). He indicated that he made follow-up requests of Respondent on May 8 and May 9, and that the only reasons offered to him by Respondent to excuse its not having filed a report were that the father-in-law of **Potnick** had died, and that the report was being worked on "**or** passed through the appropriate channels" (Tr.48). He further stated that **Potnick** never told him when the report was going to be submitted. Davis indicated that normally reports are submitted 3 to 4 days after the conclusion of the investigation.

On May 13, 1991, Davis cited the operator for violating Section 50.11(b) supra. The report was submitted 3 days later on May 16.

Section 50.11(b) sunra, as pertinent, provides as follows: "**An operator shall submit a copy of any investigation report to MSHA at its request.**" Section 50.11(b) supra does not expressly require the operator's report to be submitted within any time frame subsequent to the occurrence of the accident or investigation. It requires only that the report "**shall**" be submitted at the "**request**" of MSHA. Respondent has not contradicted or impeached the testimony of Davis that he initially requested of Respondent to submit a report at the commencement of the investigation on April 23, and made follow-up requests on April 24, 26, May 8, and May 9. Nor has Respondent impeached or contradicted the testimony of Davis that **Potnick** had never told him when the operator's report was to be submitted. Further, the record is clear that no report had been submitted by the Operator by May 13, the date the Citation was issued by Davis.

Respondent appears to rely on the testimony of **Potnick** that a delay in the submission of a copy of its report was not unreasonable, taking into account **Potnick's** numerous other responsibilities, the desire to prepare the report after a review by him of transcripts of interviews with various witnesses during the investigation, the need to submit the report to his superiors for review, and the delay occasioned by the death of his **father-in-law**. These factors are germane to the issue of the amount of the penalty to be imposed and will be discussed in that connection. However, these factors are insufficient to rebut Petitioner's case that by May 13, 1991, Respondent had failed to submit a copy of its investigation report **inspite** of numerous requests by MSHA. Accordingly, I find that Respondent herein did violate Section **50.11(b)** supra.

Davis testified that he considered the violation to be significant and substantial. In essence, he explained that failure to submit the report was highly likely to result in a fatality, because there could be a reoccurrence if MSHA is not advised of the steps taken to prevent a recurrence. (Tr. 36,42).

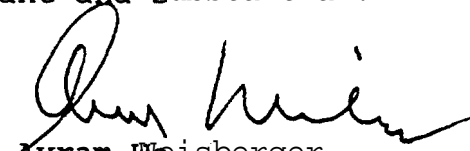
Having observed the demeanor of **Potnick**, I find his testimony credible that, on April 29, at the closeout conference of the investigation, he informed Davis orally that the operator intended to have its employees instructed by Walker Machinery on the functions of the particular heavy equipment in question, the use of the seat belts, and the dangers of jumping out of moving heavy equipment. In the written report submitted on May 16, the operator reiterated these steps and did not set forth any others. Hence, since the operator did orally report to MSHA, as early as the closeout of the investigation six days after the accident, on the steps that it intended to take to prevent a similar reoccurrence, I find that the violation herein to be not significant and substantial.

In evaluating the amount to a civil penalty to be imposed herein, I place emphasis on the fact that six days subsequent to the accident the operator orally reported to MSHA with regard a description of the steps to be taken to prevent a similar occurrence in the future. Also, I note the good faith of the operator as manifested by **Potnick's** uncontradicted testimony that a delay in submitting the written report was caused by the desire of the operator to have a complete set of facts prior to the submission of the report. In this connection, **Potnick** indicated that he wanted to study the typed transcript of questions and answers of various persons interviewed during the investigation. Also, due to company policy, **Potnick** had to submit the entire completed written report to his supervisors for their review. In addition, delay was contributed to by **Potnick's** numerous responsibilities, as well as the fact that his father-in-law had died unexpectedly sometime after the investigation. I thus find that Respondent was not negligent to any degree in connection

with the violation herein, and that the violation itself was not **very** serious considering the fact that the critical aspects of the report **i.e. a** description of steps taken to prevent a similar occurrence, were orally reported to MSHA six days after accident. Taking into account the other factors set forth in Section **110(i)** of the Act I conclude that a penalty herein of \$10 is appropriate.

ORDER

It is ORDERED that Respondent shall pay a civil penalty of \$95, within 30 days of this decision. It is further ORDERED that citation No. 2956463 be amended to reflect the fact that the cited violation is not significant and substantial.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

Patrick L. DePace, Esq., Office of the Solicitor, U. S.  
Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington,  
VA 22203 (Certified Mail)

Roger L. Sabo, Esq., Schottenstein, Zox and Dunn, 41 South High  
Street, 2600 Huntington Center, Columbus, OH 43215-6105  
(Certified Mail)

nb