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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
v.	Docket No. YORK 92-40-M A. C. No. 30-01688-05506
Z C A MINES, INCORPORATED, RESPONDENT	Hyatt Mine

DECISION

Appearances: William G. Staton, 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 Weisberger

This case is before me based on a Proposal for Assessment of Civil Penalty filed by the Secretary (Petitioner). Subsequent to a telephone conference call between the undersigned and counsel for both parties, a hearing in this matter was scheduled for June 30, 1992, in Watertown, New York. At the hearing, William L. Kobel, Jr., a Mine Safety and Health Administration (MSHA) Inspector, testified for Petitioner, and David C. Roberts, Douglas L. Beachard and Ronald P. Mashaw testified for the Operator (Respondent). The parties waived their right to submit written briefs and in lieu thereof presented oral argument subsequent to the hearing.

Findings of Fact and Discussion

On July 30, 1991, William L. Kobel, Jr., in inspecting Respondent's Hyatt mine, observed Ronald P. Mashaw operating a front-end loader. Although the loader was equipped with a functioning seat belt, Mashaw was not wearing it while operating the loader. Mashaw was in the process of operating the loader by picking up a load of coal from an ore pile, reversing, and then going forward to dump the load of ore in a truck. In continuing this operation, the loader would then be backed up and returned again to the ore pile where the process would be repeated. The distances traversed by the loader are depicted on Respondent's Exhibit No. 1. I find the depictions of these distances to be accurate, inasmuch as they are based upon actual

measurements taken by Respondent's witnesses David C. Roberts and Douglas L. Beachard. I find these measurements more credible than the estimates testified to by Kobel.

Kobel issued a citation alleging a violation of 30 C.F.R. 57.14130. Respondent does not contest the fact of the violation, but seeks to challenge the finding made by Kobel that the violation was significant and substantial.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

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).

In essence, Kobel testified that he concluded that the violation was significant and substantial, inasmuch as there was a reasonable likelihood of an injury resulting in a loss of work. He indicated that, specifically, his conclusion in this regard was based on the fact that the main access road was nearby, and was used by at least two trucks travelling more than 10 miles an hour. He also indicated that trucks were going to the far side of the waste pile, and travelling 4 to 5 miles an hour. According to Kobel, should the loader go to the garage to obtain fuel as part of its normal operation it would have to cross a line of traffic. In essence, he indicated that due to the presence of this traffic there existed the possibility of a collision. He indicated that should the loader hit another object, it is "quite likely" that the operator, not wearing a seat belt, would be "tossed into one of the structures, or his knee would strike underneath the steering wheel." (Tr. 18)

He further indicated that the roadway on which the loader was operating was full of loose zinc ore with the largest material approximately 8 inches x 10 inches x 3 inches. He stated that this spillage adds to the chance that a tire will be blown. He indicated that should this occur when the bucket of the loader is raised as part of the normal operation, the loader could sway, or tip over. Should this occur an injury could occur to the operator as a result by his being tossed around, or ejected should the door of the loader be open.

I find the testimony of Kobel insufficient to establish a reasonable likelihood that, considering all the circumstances herein, the hazard contributed to would have resulted in an event in which there is an injury (See U.S. Steel Mining Company, 6 FMSHRC supra). Any other vehicular traffic in the area was not in the path or line of travel of the loader, which operated in a most circumscribed area travelling an extremely short distance as depicted in Respondent's Exhibit No. 2. The terrain was level, not elevated, and there were no berms in the areas. The surface itself consisted of crushed rock, packed fairly hard. The speed at which the loader was operating was estimated Kobel to be a little faster then a fast walk.

On cross-examination Kobel indicated that a lot of the loose zinc ore spillage was crushed. Further, although Kobel indicated that blowouts do happen, he indicated that the tires were reasonably well maintained. Also, Roberts, who has worked for Respondent 20 years, indicated that in his experience at Respondent's operation, there has not been any tire failure from the use of the roadway in question. Mashaw, who also has worked for Respondent 20 years, indicated that, in driving a front end loader, he has never known "of a tire to blow out". (Tr. 97) Beachard who has worked for Respondent 22 years, indicated that he never heard of a front end loader "blowing out a tire" at Respondent's premises. (Tr. 106). Further, Roberts and Mashaw operated the loader in question, and described it as being stable. In this connection Kobel indicated that the loader did not appear unstable when the bucket was raised, or when it dumped. Also it stopped fairly smoothly.

For all these reasons, I conclude that the third element set forth in Mathies supra., has not been met. Therefore I conclude that it has not been established that the violation herein was significant and substantial.

I find that there was only a small degree of negligence on the part of the Respondent herein, inasmuch as the credible testimony establishes that Respondent has a good safety record, and was diligent in instructing employees to use a seat belt. I find that a penalty of $20 is appropriate for the violation herein.

ORDER

It is ORDERED that Citation No. 3592398 be amended to reflect the fact that violation cited was not significant and substantial. It is further ORDERED that Respondent pay a civil penalty of $20 within 30 days of this decision.

Avram Welsberger
Administrative Law Judge