

CCASE:
SOL (MSHA) V. FORD CONSTRUCTION
DDATE:
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TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 21, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 90-346-M
Petitioner :
 :
v. :
 :
FORD CONSTRUCTION COMPANY, :
Respondent :

DECISION AFTER REMAND

Before: Judge Morris

On December 2, 1992, the Commission remanded the above case. In its decision the Commission concluded Respondent's scraper (Co #8-7) and its bulldozer (Co #5-1) were within the coverage of 30 C.F.R. 56.14130(g). The Commission further directed the Judge to determine whether the scraper citation was properly designed as being S&S. The Commission also directed the Judge to assess civil penalties for both Citations.

In connection with the scraper Citation, the evidence shows that MSHA Inspector James Alvarez observed an employee of Ford Construction Company ("FCC") operating a CAT 637D scraper without wearing a seat belt. Inspector Alvarez described the scraper as a large piece of mobile equipment approximately 49 feet long, 13 feet wide, and 14 feet high. The equipment operator was sitting in the cab that had no door on it. It was approximately five-and-a-half to six feet from the operator's position to the ground. The scraper was being operated on a steep, declining road which was in poor condition, with pot holes, bumps, and loose material (Tr. 17). After speaking to management Inspector Alvarez issued a Section 104(a), S&S Citation in which he stated:

The operator of the CAT-637-D (Co. No. 8-7) scraper was observed driving this vehicle on steep, up and down grades on a bumpy roadway, which could easily cause him to be knocked or bumped out of the driver's seat because he was not wearing his seat belt as required.

Significant and Substantial

A violation is properly designated as being of an S&S nature "if, based on the particular facts surrounding that 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 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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 at 3-4. See also Austin Power Co. v. Secretary, 861. F.2d 99,104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

Following the Mathies formulation, the record here establishes (1) an underlying violation of the seat-belt regulation, 30 C.F.R. 56.14130(g); (2) a measure of danger to the CAT operator was contributed to by the violation; (3) The steep declining road and the lack of a door subject the CAT operator to falling approximately five-and-a-half to six feet to the ground--the condition of the road would render the CAT unstable; (4) if the driver fell from the CAT, there is a reasonable likelihood that such a fall itself could cause an injury of a reasonably serious nature. In addition, a fatality could result if the driver fell under the wheels of the equipment.

For the foregoing reasons, the S&S allegations should be affirmed.

Civil Penalties

Section 110(i) of the Mine Act mandates consideration of certain criteria in assessing approximate civil penalties.

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There is no evidence of the size of FCC's business, nor the effect the imposition of penalties would have on that business, nor FCC's prior history. FCC abated the violations and, accordingly, it is entitled to statutory good faith.

FCC was negligent as to both seat belt citations. A cursory check by the company would have shown the equipment operators were not wearing their seat belts.

The gravity of the situation involving the CAT operator driving the scraper (Citation No. 3458357) was discussed under the S&S designation. The gravity of the situation involving the DH8 dozer (Citation No.3458425) was less than in the previous citation. Specifically, the dozer was not moving over five miles per hour. In addition, it was being operated on level ground.

Considering the statutory criteria for assessing civil penalties, the penalties set forth in the order of this decision are appropriate.

Accordingly, I enter the following:

ORDER

1. A civil penalty of \$75 is ASSESSED for the violation of 30 C.F.R. 56.14130(g) and the S&S findings are AFFIRMED as to Citation No. 3458357.

2. A civil penalty of \$20 is ASSESSED for the violation of 30 C.F.R. 56.14130(g) as to Citation No. 3458425.

John J. Morris
Administrative Law Judge

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