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SOL (MSHA) V. VARRA COMPANIES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 29, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 92-305-M
	:	A.C. No. 05-2846-05521
v.	:	Del Camino Pit
VARRA COMPANIES, INC., Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

Thomas Ripp, Esq., Wheat Ridge, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Varra Companies, Inc. ("Varra"), with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq. (the "Act").

A hearing on the merits was held in Denver, Colorado, on December 29, 1992. Respondent filed a post-trial brief.

SETTLEMENTS

At the commencement of the hearing, Respondent moved to withdraw its contests as to Order Nos. 3905712, 3905713, and 390514.

The motion should be granted. (Tr. 8).

The remaining enforcement documents were litigated particularly as to negligence, unwarrantable failure, and civil penalties.

STIPULATIONS

The parties stipulated as follows:

1. Varra Companies, Inc., is engaged in mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of the Del Camino Pit, MSHA I.D. No. 05-2846.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation and orders were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance. Moreover, the parties hereby stipulate to the facts contained in each citation and order and the designation of significant and substantial in each citation and order. The only issue remaining with regard to each citation and order is the degree of negligence, which affects the designation of each citation and order as an unwarrantable failure.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect Respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. Respondent is a small mine operator with 13,446 tons of production or hours worked in 1990.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation and orders.

Citation No. 3905711

This citation, issued under Section 104(d)(1) of the Act, provides as follows:

> The superintendent was observed operating (tramming) the Cat 416 backhoe/F.E.L. and was not wearing a seat belt. The Cat 416 (Serial No. 5PC01511) was used for various jobs at the plant and pit and as a "Gofer") shuttle for equipment and parts, etc. Management is aware of seat belt requirements. This is an unwarrantable failure.

The regulation allegedly violated, 30 C.F.R. 56.14130(g), provides as follows:

> (g) Wearing seat belts.
>
> Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.

ARTHUR L. ELLIS, an MSHA metal and nonmetal inspector for the past five years, issued Citation No. 3905711.

The citation was issued when Mr. Ellis observed a small front-end loader being operated about the plant. The operator of the loader, Mike Ramsey, was not wearing a seat belt. It is a requirement that an equipment operator wear seat belts in these circumstances.

This particular equipment is not a grader but it is a wheel loader and wheel tractor. Seat belts are required on all mobile equipment.

Mr. Ramsey told the inspector that he knew the equipment operator is required to wear seat belts.

Mr. Ellis considered the operator's negligence to be high as there was no excuse for the violation. The only excuse offered by Mr. Ramsey was that he was only going a short distance.

The citation was abated when Mr. Ramsey stated he and all employees would wear seat belts and he would so advise the other employees.

MIKE RAMSEY is the superintendent of this sand an gravel operation. At the time of the inspection, he was loading steel into his backhoe. He observed Mr. Ellis on the premises and

drove over to talk to him. The weight of the material in the backhoe was insufficient to affect the balance of the equipment.

Mr. Ramsey described the terrain over which he drove as being smooth and it could not flip over a backhoe in any manner. As he also indicated, he had never seen any vehicle roll over on that terrain, nor had he ever received any reports to that effect. It was not his intention to flaunt the seat belt rule.

On the day of the inspection, all of the individuals at work were experienced operators who had been told about the necessity of wearing seat belts.

CHRISTOPHER VARRA testified he is the general manager of Varra Companies Incorporated.

Before the inspection by Mr. Ellis, the operators of the equipment had been told to use seat belts. The company had not received any prior seat belt citations (see Ex. G-1).

DISCUSSION

It is apparent the superintendent was not wearing a seat belt. Accordingly, the citation should be affirmed.

It is further uncontroverted, as stated in Varra's brief, that Mr. Ramsey was driving over level terrain to meet the inspector. The loader was not out of balance and a loader had never overturned in this area.

Given these circumstances, I conclude Mr. Ramsey's conduct only involved ordinary negligence. The terms "unwarrantable failure" and "negligence" are distinguished in the Mine Act. A finding by an inspector that a violation has been caused by an operator's unwarrantable failure to comply with a mandatory health or safety standard may trigger the increasingly severe enforcement sanctions of section 104(d). 30 U.S.C. 814(d). Negligence, on the other hand, is one of the criteria that the Secretary and the Commission must consider in proposing and assessing, respectively, a civil penalty for a violation of the Act or of a mandatory health or safety standard. 430 U.S.C. 815(b)(1)(B) and 820(i). Although the same or similar factual circumstances may be included in the Commission's consideration of unwarrantable failure and negligence, the concepts are distinct. See Quinland Coals, Inc., 7 FMSHRC 1117, 1122 (August 1985); Black Diamond Coal Co., 9 FMSHRC 1614, 1622 (September 1987). Nevertheless, as explained in Emery, (9 FMSHRC 1997) and Youghiogheny and Ohio, (9 FMSHRC 2007) aggravated conduct constitutes more than ordinary negligence for purposes of a special finding of unwarrantable failure. "Highly negligent" conduct involves more than ordinary negligence and would appear, on its

face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

Eastern Associated Coal Corp., 13 FMSHRC 178, 186 (February 1991).

Varra's brief observes that cases interpreting "unwarrantable failure" do not yield any facts which match the seat belt issues here. I agree. However, the Commission has recognized as relevant to unwarrantable failure determinations such factors as the extent of the violative condition, length of time it existed, whether the operator was placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. Peabody Coal Co., 14 FMSHRC 1261 (August 1992).

Mr. Ramsey's conduct involved only ordinary negligence. Accordingly, it follows that the unwarrantable failure allegations should be stricken.

Citation No. 3905711 should be affirmed.

Citation No. 3905715

This citation alleges a violation of 30 C.F.R. 56.14130(i). The citation reads as follows

> The operator of the Cat D-9 Dozer, Serial No. 66A7250, was not wearing a seat belt. The seat belt was rotten and one side was torn almost in two pieces. While examining the belt, it fell in two pieces. The dozer was being operated in the pit on sloped and uneven ground. Management was not requiring seat belt use. This is an unwarrantable failure.

The regulation provides as follows:

> (i) Seat belt maintenance.
>
> Seat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance.

Mr. Ellis indicated the D-9 dozer involved here is a crawler tractor with the blade on the front.

In Mr. Ellis's opinion, the operator was highly negligent. He based this view on the fact that the superintendent said he was aware of the defective seat belt. In addition, MSHA had issued a program manual relating to seat belts. The condition that existed here had been there for some time.

It takes five minutes to install a seat belt. Mr. Ramsey testified that he was not aware that there was anything wrong with the seat belt before the inspection. After the citation was issued, the seat belt was replaced.

Mr. Ramsey is familiar with the types of equipment that are required to have seat belts, but he was not aware that the seat belt on this equipment had anything wrong with it before the inspection. After the citation was issued, the seat belts were replaced.

At the pit there are no heavily traveled roads, although some of the heavy equipment has to go up and down the slopes.

Mr. Ramsey did not know how long it would take for a seat belt to rot.

CHRISTOPHER VARRA stated the D-9 dozer had been purchased a few months before the inspection. He was not aware that the seat belt had rotted. Before the inspection, the operator of the equipment had been told to use seat belts. Mr. Varra opined that the seat belt was probably overlooked when the equipment was purchased.

Mr. Varra agreed he is responsible for enforcing the seat belt law and if any violations are found they will be written up. However, he doesn't personally check to see that seat belts are being used by his operators.

DISCUSSION

The evidence establishes the seat belt was not maintained in a functional condition. The belt was rotten and one side was torn in almost two pieces. In fact, the belt fell in two pieces when the inspector examined it. The described conditions should have been readily observable.

Although Messrs. Ramsey and Varra testified they were not aware of the defective belt, they should have been since the equipment had been purchased only a few months before the inspection.

The above facts indicate a high degree of negligence on the part of the operator. As a result, the violation was due to the operator's unwarrantable failure.

Citation No. 3905715 should be affirmed.

Citation No. 3905716

This citation was amended to allege a violation of 10 C.F.R. 56.14130(g) (cited above). The citation reads as follows

> Seat belts were not provided on the Komatsu Dozer Model No. 355A, exposing employees to the possibility of being thrown about and from the cab of the dozer. The dozer was used in the pit to mine with. Management was aware of this condition. This is an unwarrantable failure. The dozer was provided with R.O.P.S.

MSHA Inspector Arthur Ellis issued this citation when he observed Jim Whitley, an employee, operating the Komatsu dozer without wearing a seat belt. The seat belt had been missing since a new seat had been installed on the dozer. Mr. Ellis indicated the regulations require a seat belt on this type of equipment, which is a crawler tractor.

Mr. Ellis further designated this situation as one of high negligence. This is based on the fact that Mr. Ramsey said he was aware that seat belts were required and an MSHA policy manual had been sent to all operators.

The company offered no excuse.

The violation was abated by seat belts being installed and employees being instructed in their use.

Mr. Ramsey indicated that after the seat was unbolted, a seat belt was found lying under the seat. The first time that Mr. Ramsey learned the seat belts were not visible was when Mr. Ellis so advised him.

The equipment operator, Jim Whitley, had some 40 years' experience in operating dozers, and Mr. Ramsey himself has been aware of the seat belt requirement since he has been in the sand and gravel business.

The terrain where the Komatsu dozer was operated was on about a 35 degree angle.

DISCUSSION

The operator again challenges the unwarrantable failure designation.

However, I conclude the operator was highly negligent.

The company was aware seat belts were required. An MSHA policy manual had been sent to all operators. Any cursory check would have established that the seat belt on this Komatsu dozer had been bolted under the seat.

High negligence establishes the designation of unwarrantable failure.

Citation No. 3905716 should be affirmed.

In support of its position, Varra mentioned a prior citation (No. 3905429) where the operator was cited under 104(a) for not wearing a seat belt while operating the loader. The loader was being operated on uneven ground. (Ex. R-1).

This evidence does not damage Mr. Ellis's testimony, since he explained the operator involved in the prior citation was not aware its employee was not wearing the seat belt.

CIVIL PENALTIES

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

Varra is a small operator. (Stipulation 9).

Varra has a favorable history with only 19 violations assessed in the two years ending November 4, 1991. (Ex. G-1).

The operator was negligent as to all the seat belt violations since the violative conditions were open and obvious.

Concerning the operator's gravity:

Order No. 3905711 involved a terrain where the CAT 416 would not likely turn over. As a result, the gravity should be considered as low.

In Order No. 3905715 the seat belt was not properly maintained. The inadequate belt establishes a situation of high gravity.

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In Order 3905716, the seat belt was not worn. The terrain, at 35 degrees, establishes a situation of high gravity.

Varra abated the violative conditions and the company is entitled to statutory good faith.

The penalties set in the order of this case are appropriate.

For the foregoing reasons I enter the following:

ORDER

1. Order No. 3905712 and the proposed penalty of $400 are AFFIRMED.

2. Order No. 3905713 and the proposed penalty of $400 are AFFIRMED.

3. Order No. 3905714 and the proposed penalty of $400 are AFFIRMED.

4. Order No. 3905711 is AFFIRMED and a penalty of $100 is ASSESSED.

5. Order No. 3905715 is AFFIRMED and a penalty of $400 is ASSESSED.

6. Order No. 3905716 is AFFIRMED and a penalty of $400 is ASSESSED.

John J. Morris
Administrative Law Judge

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