CCASE:
SOL (MSHA) V. GENSTAR STONE PRODUCTS
DDATE:
19930623
TTEXT:

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 92-124-M
	:	A.C. No. 18-00035-05508
v.	:	
	:	Medford Quarry
GENSTAR STONE PRODUCTS CO., Respondent	:	

DECISION

Appearances: Gayle Green, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Kevin Sniffen, Esq., Genstar Stone Products Company, Hunt Valley, Maryland, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a)of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of $168 for an alleged violation of mandatory safety standard 30 C.F.R. 56.14131(a), which requires seat belts to be provided and worn in haulage trucks. The respondent filed a timely contest and answer conceding the fact that the cited truck operator was not wearing the seat belt, but contesting the inspector's finding that the violation was "significant and substantial" (S&S). A hearing was held in York, Pennsylvania, and the parties filed posthearing briefs which I have considered in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the cited standard as alleged in the proposal for assessment of civil penalty, (2) whether the violation was "significant and substantial", and (3) the appropriate civil penalty that should be assessed based on the criteria found in section 110(i) of the Act. Additional issues

raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. 30 C.F.R. 56.14131(a).

4. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties filed the following prehearing stipulations:

1. Medford Quarry is owned and operated by the respondent.

2. Medford Quarry is subect to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Act").

3. The presiding Administrative Law Judge has jurisdiction over the proceeding pursuant to 105 of the Act.

4. The citation and termination were properly served by a duly authorized representative of the Secretary upon an agent of the respondent at the date, time, and place stated therein and may be admitted into evidence for the purpose of establishing their issuance.

5. The parties stipulate to the authenticity of their exhibits but not to the relevance or the truth of the matters asserted therein.

6. The alleged violation was abated in a timely manner.

7. The violation of 30 C.F.R. 56.14131(a), occurred as described in Citation No. 3869428, issued March 24, 1992. The parties do not agree, however, with respect to the Inspector's assessment of the gravity and negligence of the violation.

8. The computer printout reflecting the respondent's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and health Administration.

With regard to the proposed stipulations concerning the Quarry production, Nos. 8 and 9, the respondent's counsel stated that the total annual production of the Medford Quarry is

approximately 600,000 to 700,000, tons per year, rather than the 65,630, stipulated amount previously submitted by the parties, and that the total company production is greater than the 1.8 million production figure submitted by the parties (Tr. 7).

Discussion

The contested section 104(a) "S&S" Citation No. 3869428, issued by MSHA Inspector Elwood S. Frederick, on March 24, 1992, citing an alleged violation of mandatory safety standard 30 C.F.R. 56.14131(a), states as follows:

> The operator of the stock truck company No. 603 was not wearing his seat belt. This truck was being operated in and around the plant area hauling material to stockpiles.

Petitioner's Testimony and Evidence

MSHA Inspector Elwood S. Frederick confirmed that he issued the citation in question in the course of a regular inspection at the respondent's quarry site on March 24, 1992, and that he was accompanied by the mine superintendent. Mr. Frederick stated that while with the superintendent in his pickup truck in the bin area he noticed that the cited truck that had just dumped a load of crushed stone material was proceeding down the slight grade from the stockpile with the truck bed in the air. The driver was lowering the bed as he was traveling down the road. Mr. Frederick stated that he waited until the truck pulled into the bin area, and as it was pulling in under the bin he walked toward the truck and motioned the driver to open the door because he wanted to speak with him about traveling with the truck bed in the air. When the driver opened the door Mr. Frederick observed that the seat belt was hanging down between the door and the seat. When he asked the driver about it, the driver informed him that he unhooked the seat belt when Mr. Frederick motioned to him and that the belt fell down. Mr. Frederick stated that he observed that the driver had both hands on the steering wheel as he was pulling into the bin area and he informed the driver that he was issuing a citation for not wearing his seat belt and told him that he was not to travel around the plant with the truck bed in the air (Tr. 14-16).

Mr. Frederick stated that the superintendent informed him that his people are instructed not to travel with truck beds raised in the air (Tr. 17). Mr. Frederick did not believe that the driver had just unhooked his seat belt after he motioned to him because he observed the driver with both hands on the wheel and that the driver "had to be pretty fast to unbuckle that" (Tr. 18). Mr. Frederick stated that "the road was fairly wide and in fairly decent shape", and that the cited truck was

traveling approximately ten miles an hour and one other truck was also hauling material (Tr. 20-21).

Mr. Frederick stated that he considered the violation to be significant and substantial because the truck bed was raised and the driver was coming down a slight grade. With the bed in the air, the center of gravity of the truck changed and it could upset very easily. Mr. Frederick was aware of documented accidents where trucks have hit potholes and overturned, or a driver applies his brakes to avoid another truck and loses control of the vehicle (Tr. 22). Mr. Frederick did not cite the truck for having the bed raised, but in hindsight, stated that "I should have issued an imminent danger order" (Tr. 24).

Mr. Frederick stated that traveling with the truck bed raised was not a good safety practice, and MSHA requires that the bed be down to the horizontal position after a driver dumps a load at the stockpile and leaves the area. He also alluded to several hazards associated with stockpiles, and confirmed that the stockpile in question was well-maintained (Tr. 25-29). He confirmed that he based his "S&S" finding on the raised bed of the truck changing the center of gravity of the truck, and not because of any stockpile conditions. He also indicated that there was one other vehicle in the area, and that if the driver hit a pothole or something in the road, "he has more likelihood of upsetting that truck" (Tr. 30). He also believed that by allowing the driver to continue to operate the truck with the bed in the air "it's reasonably likely if nothing's ever done that there will be an accident". The failure to wear a seat belt would contribute to the severity of an accident if one were to occur, and he was aware of accident reports where a driver not wearing a seat belt was propelled about his cab and was killed after striking his head. He believed that a driver with his seat belt fastened "stands a greater chance of not coming out with serious injury or fatality than he does if he's not wearing a seat belt" (Tr. 31-33).

Mr. Frederick stated that he based his "moderate" negligence finding on the fact that the respondent "does a good job", and had a seat belt policy which it enforced, including disciplinary action against its employees (Tr. 34, 37). Mr. Frederick stated that if the truck bed were not raised, he would not consider the failure to wear a seat belt to be "S&S" because the truck would have been stable with the bed down (Tr. 42). The violation was abated the same day it was issued after he instructed the truck driver to hook up his belt and the driver was disciplined by the respondent (Tr. 44).

On cross-examination, Mr. Frederick confirmed that he was familiar with MSHA's policy guidelines concerning "S&S" violations, and the requirement that any "S&S" finding should be consistent with the information recorded in his notes and

evaluation of all of the facts. He confirmed that the citation and his notes do not mention that the raised truck bed was the basis for his "S&S" finding (Tr. 47). He stated that the fact that the bed was raised was significant, but that " a lot of things we don't put in our notes", and he conceded that "to a certain degree", he did not comply with MSHA policy in this regard (Tr. 48).

Mr. Frederick confirmed that when he issued the citation, the stockpile was in good shape and the road was smooth and well-maintained "to a degree", and the truck was traveling on a slight incline at a safe speed (Tr. 52). He reiterated that he based his "S&S" finding on the fact that the truck bed was in the air, thereby changing the center of gravity of the truck, and the presence of other vehicles in the area (Tr. 57). The raised truck bed was a contributing factor to his "S&S" finding, and the failure to wear a seat belt contributed to the severity of any accident (Tr. 57-59). Mr. Frederick confirmed that he has issued seat belt violations which he did not consider were "S&S" violations (Tr. 63-64).

In response to further questions, Mr. Frederick confirmed that the truck driver in question was beginning to lower his truck bed as he drove away from the stockpile, and it was down when he pulled into the bin area (Tr. 67-68). He confirmed that the respondent had established "rules of the road and traffic patterns" for its vehicles (Tr. 71). He confirmed that the other truck that he previously referred to was not in close proximity to the truck that he cited, but it was possible for both trucks to pass each other in opposite directions on the roadway (Tr. 71). Mr. Frederick also explained the dumping of material at the stockpile, and he conceded that he had no knowledge as to whether the driver was wearing his seat belt while operating at the stockpile area (Tr. 75-77). Mr. Frederick was not aware of any prior seat belt violations at the respondent's quarry (Tr. 81).

Respondent's Testimony and Evidence

Gene Larrick, quarry superintendent, confirmed that he was with Inspector Frederick at the time the citation was issued. Mr. Larrick confirmed that he observed the truck leaving the stockpile with the truck bed up, but he did not observe the driver without his belt on. Mr. Larrick also confirmed that the driver was disciplined for driving with his truck bed raised and for the seat belt violation (Tr. 90). He confirmed that the respondent has a policy that drivers not leave dumping areas with their truck beds raised, and that he and his supervisors periodically check to see that employees wear their seat belts. He stated that the respondent has a mandatory policy requiring the wearing of seat belts at all times on equipment without rollover protection (Tr. 91). He also confirmed that the

respondent has a Job Safety Analysis (JSA) for employees covering safety procedures at dumping areas and that seat belt training is provided to employees (Tr. 91-92).

Mr. Larrick stated that he remained in his pickup truck in the bin area while Mr. Frederick went to the truck to speak to the driver, and that Mr. Frederick returned and told him that the driver did not have his seatbelt on. Mr. Larrick confirmed that he did not speak to the driver himself, and that Mr. Frederick served the citation on him at the end of his inspection review. Mr. Larrick stated that he spoke to the driver at a later time and the driver told him that he had his seat belt on (Tr. 100). Mr. Larrick confirmed that the driver received a written warning for "a combination of the bed up and not wearing the seat belt" (Tr. 105). Mr. Larrick stated that he used the inspector's observation to support the warning given to the driver for not wearing a seat belt (Tr. 106).

On cross-examination, Mr. Larrick agreed that driving a truck with the bed raised is a poor safety practice and against company policy. The policy is based on safety considerations (Tr. 107-108). Since he did not accompany the inspector when he approached the truck to speak with the driver, Mr. Larrick could not give an opinion as to whether or not the driver had just disconnected his seat belt at that time (Tr. 109). Mr. Larrick agreed that a raised truck bed could cause a problem with the truck's center of gravity under certain conditions. Insofar as the truck striking a pothole and becoming unstable is concerned, Mr. Larrick stated that one would have to define a "pothole" and stated "yes, it could happen. Anything can happen" (Tr. 110-111)

Jeff Carrey, respondent's safety supervisor, explained the respondent's training policy with respect to safety and seat belts (Tr. 112-114). He confirmed that he was familiar with the citation issued by Mr. Frederick in this case and that he participated in the closing inspection conference and discussed the citation with the inspector (Tr. 115). He stated that he was told at these meetings that "it was being written as "S and S" because the program policy manual indicated that they had to write it "S and S" and that the inspector's "hands were tied" because of the policy. The raised truck bed was discussed as a separate issue (Tr. 115).

On cross-examination, Mr. Carrey confirmed that he was aware of MSHA's program policy concerning seat belts and whether it should be an "S&S" violation, and he stated that "I see a lot of MSHA inspectors, and their interpretation to me has been that the seat belt violation is always an "S&S" violation (Tr. 119). He confirmed that his understanding of the policy language is that "under most circumstances", such a violation is "S and S" (Tr. 119).

Mr. Carrey confirmed that the truck driver who was warned took the matter no further (Tr. 120). He also confirmed that the driver had previously been disciplined for leaving work early, and that he had been involved in past accidents when he collided with two county trucks (Tr. 128-129). Mr. Carrey further confirmed that the quarry had never been previously cited for any seat belt violations (Tr. 129).

Inspector Frederick was recalled by the presiding judge, and he reiterated how he determined that the truck driver in question was not wearing his seat belt. Mr. Frederick stated that the driver told him that he had his seat belt on, and Mr. Frederick stated that he informed the driver that "the indications to me as an inspector, you did not" (Tr. 123). Mr. Frederick stated that the driver was not sitting on the seat belt, that it was hanging down between the door and the seat, and he explained further as follows at (Tr. 125):

> A. Well, I based everything on the fact that when he opened the door that I seen the seat belt hanging down. Now, if it was laying up on his lap, it's very possible that he could have unhooked it and it was unhooked laying on his lap. But with the belt hanging down between the seat and the door it was an indicator to me that he did not have it on. He was not getting out of the truck. He was still sitting in the seat of the truck.

Roger McClintock, MSHA Special Investigator, was called as a rebuttal witness by the petitioner. He explained his duties and confirmed that he was familiar with MSHA's enforcement policies. He stated that he has also served as an MSHA inspector and training specialist, and he explained that the seat belt policy is only a "guideline" for an inspector to use when evaluating a seat belt violation. Mr. McClintock explained his understanding of why Inspector Frederick found the violation to be "S&S", and he indicated that if an accident occurs without the driver wearing a seat belt, "the severity of that accident is going to be much greater" (Tr. 135). He agreed with Mr. Frederick's "S&S" finding because "he knew the operator did not have his seat belt on . . . and he suspected that he came off the . . .possibly came off the pile with the bed in the air and with the machine in an unstable, you know, condition" (Tr. 138).

On cross-examination, Mr. McClintock confirmed that he was aware of the definition of "significant and substantial", and in his opinion, although the failure to wear a seat belt may not cause an accident, it can affect an accident (Tr. 139). Mr. McClintock further confirmed that there has to be a reasonable likelihood of an accident and not just a remote possibility. He confirmed that he was not present at the time

the citation was issued and could not attest to the prevailing conditions
(Tr. 142).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory standard 30 C.F.R. 56.14131(a), which states that "Seat belts shall be provided and worn in haulage trucks". In support of the violation, the petitioner points out that in its answer filed in this case the respondent stated that it "does not dispute the fact that the operator of the stock truck was not wearing his seat belt". The petitioner also relies on the inspector's testimony that when the driver opened the truck cab, he observed that the seat belt was hanging down between the door and the seat, and that when the driver was pulling his truck into the bin area just prior to stopping and opening his door, both of his hands were on the steering wheel. The petitioner concludes that the clear inference from the time sequence of these observations by the inspector is that the driver was not wearing his seatbelt while driving the truck.

The petitioner asserts that the only indication of record that the facts were not as stated above is the signed statement of the truck driver, Mr. Francis Dorsey (Exhibit R-1). The statement, which is dated March 9, 1993, reads in relevant part as follows:

> . . . .The safety inspector Gene Larrick was setting in Gene's truck talking about 50 Ft. away. The inspector got out was (sic) coming toward my truck being (sic) loaded. I open my door starte (sic) out to meet (sic) because in our J S A no one should walk under bins when plant (sic) in operator (sic). He pointed and yelled get back in and close door. I did not put my seat back (sic) on. Its Genstar's rule that everyone must wear seat belts when driving truck and etc.

The petitioner maintains that Mr. Dorsey's statement is mere hearsay and is entitled to little, if any, weight. In addition to the fact that the statement was not given under oath, the petitioner asserts that it is also ambiguous and unclear. As an example, the petitioner states that it is unclear who Mr. Dorsey was referring to in the phrase "he pointed and yelled get back in" or what the statement "I did not put my seat back on" means. Under the circumstances, the petitioner concludes that Mr. Dorsey's statement is highly unreliable evidence, and that it contradicts the other evidence in the record. The petitioner

points out that neither the inspector, nor superintendent Larrick, who waited in his truck while the inspector and Mr. Dorsey talked, reported seeing Mr. Dorsey make any attempt to get out of the truck.

The petitioner concludes that Mr. Dorsey's statement cannot overcome the sworn testimony of the inspector, which was subject to cross examination, as to what happened. Further, given the fact that Mr. Dorsey was disciplined for not wearing his seat belt, the petitioner concludes that even the respondent believed the inspector's conclusion that Mr. Dorsey was not wearing his seat belt, and did not believe Mr. Dorsey's story.

Relying on Mr. Dorsey's statement, the respondent maintains that Mr. Dorsey was wearing his seatbelt at the time of the alleged violation. The respondent asserts that Mr. Dorsey's explanation is logically supported by the facts presented, and it relies on Mr. Dorsey's contention that he was attempting to get out of the truck when the inspector motioned for him to open the door of the truck, and concludes that it was then that Mr. Dorsey most likely unbuckled his seatbelt. Since the seatbelt was between the door and the seat, the respondent believes that the belt was buckled and then fell off Mr. Dorsey's lap when he unbuckled it, as opposed to not having been worn at all and found on the seat under him.

The respondent points out that the inspector admitted that he did not actually see Mr. Dorsey operating the truck without wearing his seatbelt, and simply observed that the belt fell out of the truck when Mr. Dorsey opened the door. Under the circumstances, the respondent concludes that the inspector relied on circumstantial evidence that Mr. Dorsey was not wearing his seatbelt. Acknowledging the fact that it is almost impossible to catch a driver "in the act" of not wearing his seatbelt, the respondent contends that the inspector ignored persuasive and convincing evidence that Mr. Dorsey had his seatbelt on and unbuckled it to open the door when the inspector approached his truck, as he was trained to do under the respondent's policy and common practice. The respondent believes that Mr. Dorsey's story is the more credible and logical explanation of the facts and refutes the circumstantial evidence presented by the petitioner. Finally, the respondent asserts that Mr. Dorsey contested the violation and the reprimand he received "by writing and meeting with MSHA (the MSHA inspector and his supervisor) and Genstar's representatives to discuss the alleged violation".

In its answer filed on October 8, 1992, the respondent stated as follows: "Genstar does not dispute the fact that the operator of the stock truck was not wearing his seat belt".

Further, the record reflects that on February 18, 1993, the petitioner's counsel submitted prehearing stipulations agreed to by the parties, and included therein is stipulation No. 7, which states as follows:

> The violation of 30 C.F.R. 56.14131(a), occurred as described in Citation No. 3869428, issued March 24, 1992. The parties do not agree, however, with respect to the inspector's assessment of the gravity and negligence of the violation.

I take note of the fact that at the time the stipulations were submitted the parties reserved the right to amend or supplement their prehearing statements following further trial preparation and within a reasonable time before the hearing. However, during opening statements at the hearing, the previously filed stipulations were reviewed by the parties, and except for a minor disagreement concerning the respondent's production, respondent's counsel agreed with the remaining stipulations, including Stipulation No. 7, quoted above (Tr. 6-8). Further, at the close of the petitioner's case, the respondent's counsel agreed that there was no dispute as to the fact of violation (Tr. 82). However, he then proceeded to rely on Mr. Dorsey's statement in support of his motion for summary judgement, and argued that the statement establishes that Mr. Dorsey unbuckled his seat belt when he got out of his truck, or was exiting the vehicle, "the inference being that he was wearing his belt up to that point" (Tr. 83). The motion for summary judgement was denied (Tr. 85), and counsel's alternative motion for judgement on the ground that the evidence did not support the inspector's "S&S" finding was taken under advisement, and counsel proceeded with his defense (Tr. 87-88).

Mr. Dorsey was not called to testify in this proceeding, nor was he deposed by either party. Insofar as his unsworn statement is concerned, I find it lacking in reliability and somewhat confusing and I have given it little weight. Although the respondent's counsel suggested that the statement was prepared and witnessed by Mr. Larrick, when asked if this was true, Mr. Larrick responded "it was just prepared and then I did read the statement" (Tr. 92). Further, although Mr. Larrick confirmed that he questioned Mr. Dorsey after the citation was issued and stated that Mr. Dorsey told him that he did have his seat belt on, I take note of the fact that Mr. Dorsey's statement is dated March 9, 1993, more than a year after the issuance of the citation.

Mr. Larrick testified that he remained in his own pickup truck while the inspector approached Mr. Dorsey's truck, and although Mr. Larrick stated that most drivers will get out of their trucks and come to his truck when he is in the bin area, he did not state that this was case with Mr. Dorsey. Indeed,

Mr. Larrick doubted that Mr. Dorsey knew that Mr. Frederick was an inspector when he approached his truck, and he indicated that Mr. Dorsey initially opened the door as the inspector approached his truck, and then closed it again (Tr. 94).

Inspector Frederick testified that as he approached Mr. Dorsey's truck, he motioned for him to open his door because he wanted to discuss his travelling with the truck bed in the air. When the door was opened, Mr. Frederick noticed the seat belt hanging down between the door and the seat, and he stated that Mr. Dorsey told him that he had just unhooked it after Mr. Frederick had motioned to him (Tr. 15-16). However, Mr. Frederick obviously did not believe him since he issued the citation, and he did so because he observed that Mr. Dorsey had both hands on the steering wheel as he pulled into the bin area and did not believe that he had time to unhook his belt as he claimed (Tr. 16, 18).

Mr. Larrick testified that Mr. Dorsey was disciplined for having his truck bed up as well as not having his seat belt on (Tr. 105). Mr. Larrick confirmed that he did not personally see the seat belt when Mr. Dorsey opened the truck door for the inspector and that he could not state an opinion as to whether or not Mr. Dorsey had just disconnected his seat belt before opening the door. Mr. Larrick further confirmed that he relied on the inspector's observations to support the disciplinary action taken against Mr. Dorsey (Tr. 106).

The respondent's assertion that Mr. Dorsey contested the violation and the company's disciplinary action taken against him suggests that Mr. Dorsey formally appealed his reprimand and therefore lends credence to his claim that he was wearing his seat belt. I reject any such conclusion. The respondent's safety supervisor, Jeff Carrey, explained that in addition to the inspection closing conference, Mr. Dorsey sent a letter to MSHA, and met with the inspector and his supervisor, to state his position and disagreement with the inspector's finding that he did not have his seat belt on (Tr. 114). However, Mr. Carrey confirmed that since no company official observed the incident regarding the seat belt citation, the respondent agreed with the inspector and gave Mr. Dorsey a warning, and the matter went no further within the company (Tr. 120-121). Mr. Larrick confirmed that Mr. Dorsey has been involved in other "incidents" with the truck other than seat belts, including collisions with two county trucks (Tr. 128-219).

After careful review of all of the testimony and evidence adduced in this proceeding, and apart from any admissions and stipulations made by the respondent with respect to the violation, I conclude and find that the petitioner has established through a preponderance of all of the credible evidence and testimony, albeit circumstantial, that Mr. Dorsey

was not wearing his seat belt when he drove his truck into the bin area after departing from the stockpile area on the day in question. I further conclude and find that the failure by Mr. Dorsey to wear his seat belt constitutes a violation of the cited section 56.14131(a), and the violation issued by the inspector IS AFFIRMED.

Significant and Substantial Violations

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 822, 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, 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).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Company, 6 FMSRC 1573, 1574 (July 1984); U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

The Petitioner's Argument

The petitioner maintains that the violation was significant and substantial (S&S). In support of its position, the petitioner asserts that the record reflects the existence of a discrete safety hazard, or a measure of danger to safety, contributed to by the violation. The petitioner argues that there was extensive testimony concerning the safety effects of not wearing seat belts in haulage truck accidents, and it cites Inspector Frederick's testimony concerning accident reports that he had studied and reviewed showing injuries and fatalities resulting from the failure to wear seat belts, and establishing that a person secured in a seat belt stands a greater chance of avoiding serious injury or death in an accident. The inspector alluded to operators being propelled around inside their truck cab or being ejected from the truck and either sustaining serious injuries on impact from the fall or being struck or run over by the truck itself. The petitioner also cites the testimony of Supervisory Special Investigator McClintock concerning his review of numerous haulage truck accidents, both fatal and non-fatal, which the petitioner believes establishes that the failure to wear seat belts constitutes a discrete safety hazard that contributes to a measure of danger to safety because it contributes to the severity of an injury suffered in an accident, and can mean the difference between severely disabling injuries and minor injuries.

The petitioner further argues that the facts presented in this case support a conclusion that there was a reasonable likelihood that the hazard contributed to by the violation would result in a reasonably serious injury from a haulage truck accident, and that it was reasonably likely that such an accident, and resulting injury, would occur. In support of this conclusion, the petitioner asserts that a truck travelling with its bed in the air causes the center of gravity of the truck to shift, and it becomes less stable and easily subject to upset. The petitioner points out that the respondent admitted that travelling with the bed up is an unsafe practice that affects the stability of the vehicle, that it is against company policy, and that employees have been instructed not to do it.

The petitioner maintains that the practice of traveling with the truck bed raised itself makes it more likely that a haulage accident will occur, and that other factors observed by the inspector, in combination with the raised bed, made an accident reasonable likely. These "other factors" included two-directional traffic on the same road going to the stockpile, another haul truck operating in the same area and at the same time hauling from the bins to the stockpile, a slightly graded roadway, and the existence of a stockpile which is made of material that is not compacted and is affected by weather conditions. The petitioner asserts that all of these factors contributed to the inspector's assessment that an accident was reasonably likely, and that any injury received as a result of the accident would be reasonably serious.

The petitioner denies the respondent's contention that Inspector Frederick based his "S&S" findings on MSHA's June 27, 1990, Program Policy Letter regarding the wearing of seat belts, and his belief that the policy required all seat belt violations to be cited as "S&S", rather than on the facts and conditions that he observed at the time the citation was issued. The petitioner points out that the policy letter does not state that all seat belt violations are "S&S", and merely states that the failure to provide, maintain, or wear seat belts is a serious safety hazard and under most circumstances should be a significant and substantial violation. The petitioner agrees that the appropriateness of an "S&S" designation depends on the facts and circumstances observed at the time a citation is issued, and it maintains that the inspector's testimony establishes that he relied on all of the aforementioned conditions he observed. The petitioner also points out that Inspector Frederick has issued non-"S&S" seat belt citations in the past and confirmed that he would not have designated the contested citation as "S&S" if the conditions had been different.

Commenting on three cases cited by the respondent's counsel in the course of the hearing in which seat belt violations were found not to be "S&S", the petitioner points out that in two of those cases, the inspectors did not cite the violations as "S&S" (Island Construction Co., Inc., 11 FMSHRC 877 (April 1990); Brown Brothers Sand Co., 12 FMSHRC 877 (April 1990). In Brown Brothers, the petitioner states that the violation was not "S&S" because the loader was being operated in a level area and there were no facts that would make it likely that it would strike other equipment or roll over. In the third case, Bennett Trucking Co. and B & S Trucking Company, 12 FMSHRC 1038 (May 1990), the petitioner points out that the cited regulation, section 77.1710(i), applied only to vehicles where there was a danger of overturning, which was not established in that case, whereas the language of the cited seat belt regulation in the instant case is mandatory for all haulage trucks. Further, as previously discussed, the petitioner states that there were a

combination of factors, the most important one being the fact that the truck was travelling with its bed raised, in itself an unsafe practice against company policy, that made it reasonably likely that an accident would occur. Under the circumstances, the petitioner concludes that the cases relied on by the respondent do not lend support to its position that the violation should not have been cited as "S&S".

The Respondent's Argument

Citing the Commission's National Gypsum Company decision, supra, and MSHA's policy manual guidelines for determining "S&S" violations, the respondent maintains that it must be shown that there was a reasonable likelihood of a serious accident, based on the surrounding facts of the case, before the contested violation can be designated as "S&S". The respondent asserts that an objective standard of reasonable likelihood requires that the probability of a serious accident resulting from a violation be more than just remote or speculative. On the facts of this case, the respondent concludes that there did not exist a reasonable likelihood that a hazard or accident would have occurred on the day in question.

The respondent further argues that MSHA's policy manual states that before designating a violation as "S&S", a serious injury must be "reasonably likely" to occur if the violation is not abated. Citing Bennett Trucking Company, 12 FMSHRC 1038 (May 1990), the respondent maintains that the petitioner must first establish the danger of the truck overturning before a seatbelt violation could be designated as "S&S". The respondent submits that MSHA's policy, and the case law, require that such danger be reasonably likely, not just possible, and that the inspector supported this position by admitting that he had first determined that an accident was reasonably likely from the truck's bed being in the air before stating that the seatbelt violation would only then contribute to the severity of any injuries.

The respondent contends that the evidence in this case does not support the inspector's application of the "reasonable likelihood" standard. In order for the inspector to have properly determined that the violation was "S&S", the respondent believes that he would have been required to find that there existed the "reasonable likelihood" that the truck would have overturned simply from having its bed being lowered as it pulled away from a stable stockpile. The respondent asserts that there was no evidence of any other unsafe conditions that could have contributed to a potential accident, and that without the presence of other factors, such as an unstable stockpile, or a roadway pot hole, the probability of the truck overturning is speculative at best, much less reasonably likely to have occurred.

The respondent concludes that the petitioner offered no other evidence to support the inspector's "S&S" finding other than references to irrelevant cases and studies which involved factors not present in the instant case.

The respondent emphasizes the fact that there has never been an instances at its quarry where a truck has overturned from lowering its bed while safely proceeding down a slight grade, and that the inspector could not recall of any instances in his experience where this has occurred without some other unsafe force or factor involved.

The respondent points out that MSHA's policy manual dealing with "S&S" violations provides that an inspector shall include all of the factors relevant to his evaluation of a violation as "S&S" in his inspection notes. Although the inspector claimed at the hearing that he based his "S&S" finding on the fact that the truck bed was up, and that he tries to include pertinent information in his notes "right there on the spot", the respondent points out that he made no mention of the truck bed being up in the air in his notes or in the citation. The respondent contends that the inspector gave little weight to the raised truck bed when he designated the violation as "S&S". In support of this conclusion, the respondent relies on the absence of this information in the inspector's notes, and his statement at the closing conference that his hands were tied because of MSHA's seatbelt policy. The respondent submits that the raised truck bed only became a significant factor once it decided to challenge the seatbelt policy.

Finally, the respondent maintains that on the basis of its dealings with MSHA, it believes that the inspectors are overzealously assessing all alleged seatbelt violations as "S&S" pursuant to its policy statement, irrespective of mitigating circumstances. Even assuming the existence of mitigating circumstances, the respondent still believes that MSHA's policy does not state the proper standard by which "S&S" violations should be judged as required by its own policy that requires an inspector to find that there is a "reasonable likelihood" of an injury or illness in order to designate the violation as "S&S", and not just a remote possibility of an accident, or the presumption of an "S&S" violation based on the policy manual. The respondent concludes that the inspector in this case improperly applied MSHA's policy, as well as the case law, in finding that the violation was "S&S".

I conclude and find that whether or not Inspector Frederick relied on MSHA's policy manual as the basis for his "S&S" finding is not particularly critical. The Commission has held that such policy instructions "are not officially promulgated and do not prescribe rules of law binding upon an agency" (Commission). Old Ben Coal Company, 2 FMSHRC 2806, 2809 (October 1980). However,

since the policy manual guidelines and instructions are intended to provide instructions and assistance to inspectors as they go about their daily inspection duties, and are relied on by the industry so that it may be aware of MSHA's interpretations and applications as a means of staying in compliance, I would expect an inspector to follow the policy. In this case, the inspector conceded that he failed to follow the policy with respect to noting and documenting each essential factor that prompted him to make his "S&S" finding.

Although I find some merit in the respondent's suggestion that MSHA's policy guidelines with respect to seat belt violations provide a ready formula for an inspector to conclude that all such violations are per se "S&S", I cannot conclude that the inspector in this case made a per se finding of "S&S" based solely on such a policy. However, I do take note of the fact that the policy instructions which state that "the failure to wear seat belts is a serious hazard and under most circumstances should be a significant and substantial violation"; that "all citations issued for failure to wear seat belts should be reviewed for special assessment", e.g., violations cited as contributing to serious injury or fatality, or violations evaluated as having extraordinarily high gravity (highly likely and fatal); and that "without mitigating circumstances, the gravity evaluation of reasonably likely or highly likely, and fatal would usually be justified" (without identifying examples of mitigating circumstances), are rather suggestive and do provide convenient and expedient ingredients for an inspector to conclude that all seat belt violations are per se "S&S", without considering all of the prevailing conditions mandated by the case law to support such a finding.

At the heart of the petitioner's case is its contention that the raised truck bed, in combination with other factors, such as two-directional traffic of the roadway, another truck hauling from the bins to the stockpile, a slightly graded roadway, and a stockpile made of material that is not compacted and is affected by weather conditions, support the inspector's belief that an accident was reasonably likely. However, as indicated by the discussion which follows below, the testimony of the inspector himself does not support the petitioner's suggestions that these "other factors" made it reasonably likely that an accident would have occurred. Having viewed the inspector in the course of the hearing, and having carefully reviewed his testimony, I find it to be rather contradictory, equivocal, and lacking in credible support for his asserted reasons for his "S&S" finding.

Inspector Frederick initially testified that he based his "S&S" finding on the fact that the truck driver was travelling down a slightly graded roadway with his truck bed in a raised position, and the inspector believed that the truck could easily upset because its center of gravity would shift with the bed in

the air (Tr. 22, 45). Although the inspector suggested that this was an imminently dangerous situation, he did not issue an imminent danger order or otherwise cite the raised truck bed condition (Tr. 24). The inspector later testified that the raised truck bed "was one of the contributing factors", rather than "the direct cause" for his "S&S" finding (Tr. 57). He also stated that any determination as to the type of citation he would issue would depend on "the conditions at the time that the violation is cited", and that MSHA's seat belt policy statement "is only a guidance, it's not a set forth enforcement tool" (Tr. 64).

Inspector Frederick testified that the roadway was "fairly wide and in fairly decent shape" (Tr. 19). Although Mr. Frederick relied on several accident reports concerning incidents at other mining operations where truck drivers hit potholes and lost control of their vehicles, causing an overturn, or encountered other vehicles on a roadway and lost control after hitting their brakes (Tr. 22), there is no evidence that any of these conditions ever existed at the respondent's mine or at the time of the inspection. Indeed, while testifying that he also relied on a general "history" of poorly maintained stockpiles and trucks encountering overhead wires, the inspector conceded that these conditions were different and distinguishable from those presented in this case (Tr. 64-65). With regard to the accident reports mentioned by special investigator McClintock, there is no evidence that any of the conditions that may have been present during those events were present in the instant case, and Mr. McClintock confirmed that he was not present when the citation was issued by Inspector Frederick,and Mr. McClintock could not attest to the conditions that prevailed at that time (Tr. 142).

There is no evidence in this case to establish that the raised bed of the truck in question in fact changed its center of gravity or affected its stability. Although the respondent conceded that driving with the truck bed up was an unsafe practice and against company policy, superintendent Larrick testified that whether or not the truck's center of gravity could be affected would depend on certain conditions. The evidence establishes that the driver was lowering the truck bed as he departed the stockpile area at a low rate of speed and there is no evidence that he travelled for any substantial distance with the bed completely in the air. Under the circumstances, I cannot conclude that in the normal course of mining activities the driver would have driven the truck with the truck bed continuously in a raised position. Indeed, the evidence establishes that when the truck reached the bin area, the truck bed was completely down, and the inspector conceded that with the bed down the truck would have been stable and he would not have considered the fact that the driver did not have his seat belt fastened to be an "S&S" violation (Tr. 41-42).

Inspector Frederick confirmed that the driver "wasn't really travelling fast", and he estimated the speed of the truck at 8 to 10 miles an hour as it left the slight incline away from the stockpile area. The inspector also confirmed that the driver did not travel the entire distance of 150 to 200 feet from the stockpile area to the bin area with his truck bed raised, and that he was lowering the bed as he left the stockpile area (Tr. 68). The inspector further confirmed that the respondent had established "rules of the road", passing routes, and a right-hand traffic pattern in place (Tr. 70). Although he alluded to other vehicle traffic on the roadway in question, he could not recall any traffic in close proximity to the cited truck at the time of his inspection (Tr. 71).

The inspector conceded that he did not observe the driver dumping his load at the stockpile, and that he did not know whether he had his belt on or off when he was at the stockpile area prior to pulling the truck into the bin area (Tr. 76-77). The inspector also confirmed that the stockpile area "was well maintained" (Tr. 28) and I find no evidence to support the petitioner's suggestion that the stockpile materials in question were not compacted or otherwise unstable.

In view of the foregoing, and after careful consideration of all of the evidence and testimony adduced in this case, including the arguments advanced by the parties in support of their respective positions, I conclude and find that the petitioner has failed to make a case in support of its contention that the violation cited by the inspector was significant and substantial (S&S). Accordingly, the inspector's "S&S" finding IS VACATED, and the contested citation IS MODIFIED to a non-"S&S" section 104(a) citation.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

I conclude and find that the respondent is a small-to-medium size operator, and I find nothing to suggest that the payment of the civil penalty assessment for the violation in question will adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated to the admissibility of a computer print-out purportedly containing a record of the respondent's compliance record (Exhibit G-3). However, the document contains no meaningful information. The inspector had no knowledge of the respondent's compliance record and was unaware of any prior seat belt citations issued at the quarry (Tr. 80-81). The petitioner's counsel and MSHA supervisory Inspector McClintock agreed that the document reflects no prior history of violations

for the two-year period preceding the issuance of the contested citation in this case (Tr. 148-150). Under all of these circumstances, and for purposes of a civil penalty assessment for the violation which has been affirmed, I conclude and find that the respondent has no history of prior assessed violations.

Negligence

The inspector found that the violation resulted from a "moderate" degree of negligence on the part of the respondent. He confirmed that the respondent did a good job with its seat belt program and that it held safety meetings, instructed its drivers in the use of seat belts, periodically checked to make sure its employees were in compliance, and disciplined them if they were not (Tr. 34). The inspector testified that the respondent "did a lot of things to protect their employees. They had the seat belt policy, they enforced the seat belt policy, they disciplined the people" (Tr. 37). The inspector indicated that the cited driver "for some reason, I guess, forgot or didn't pay much attention to what was going on and drove with the bed in the air" (Tr. 67-69). Under all of these circumstances, I conclude and find that there was a low degree of negligence on the respondent's part.

Good Faith Compliance

The parties have stipulated that the violation was abated in a timely manner, and the inspector confirmed that it was terminated the same day it was issued. I conclude and find that the respondent demonstrated rapid good faith compliance in taking the appropriate action to abate the cited condition.

Gravity

I conclude and find that on the facts of this case, the violation was non-serious.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $50 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $50, within thirty (30) days of the date of this decision and order. Payment is to be made to the petitioner (MSHA), and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Gayle M. Green, Esq., U.S. Department of Labor, Office of the Solicitor, 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Kevin E. Sniffen, Esq., Genstar Stone Products Co., Executive Plaza IV, Hunt Valley, MD 21031-1091 (Certified Mail)

/ml