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SOL (MSHA) V. ROBERT L. WEAVER
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19931004
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. YORK 93-25-M
	:	A. C. No. 30-02333-05506
v.	:	
	:	Docket No. YORK 93-26-M
ROBERT L. WEAVER, Respondent	:	A. C. No. 30-02333-05507
	:	Weaver Pit No. 2

DECISION

Appearances: Jane Snell Brunner, Esquire, Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner; Karen Weaver, Hastings, New York, for Respondent

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging mine operator Robert L. Weaver (Weaver) with seven violations of mandatory standards and seeking civil penalties of $638 for those violations. The general issue is whether the violations were committed as charged and, if so, what is the appropriate civil penalty for such violations. Additional specific issues are addressed as noted.

Docket No. YORK 93-25-M

Citation No. 4080929 alleges a violation of the mandatory standard at 30 C.F.R. 56.14132(a) and charges as follows:

> The back-up alarm of the International Hough 550 front-end loader was not functional. The loader was being used to feed the screening plant and to load haul trucks. Foot traffic in this area was slight.

The cited standard provides that "manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

The testimony of Inspector Stephen W. Field of the Mine Safety and Health Administration (MSHA) regarding this citation is not disputed. Field was inspecting the Weaver Pit No. 2 on September 2, 1992, when he observed the cited front-end loader loading a customer's haulage truck. When the machine was placed in reverse the alarm did not activate and accordingly the citation herein was issued. Inspector Field noted that without a functioning back-up alarm reverse movement of the loader might not be detected and persons unaware could be struck. The loader was operating in an area of customer truck drivers and plant helper Chuck Fuller. The condition was obvious according to Inspector Field in that when the machine was placed in reverse no alarm could be heard. Under the circumstances I find that the violation was serious and that the operator is chargeable with negligence. There is no dispute that the violation was abated in a timely manner.

Citation No. 4080930 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 56.14103(b) and charges as follows:

> The windshield of the International Hough 550 front-end loader was severely cracked, offering the operator limited visibility. The windshield was cracked in several directions from two sources near the top. A large crack across the bottom half of the windshield caused the windshield to buckle when pressure was applied. This condition has existed for about 3 months.

The cited standard provides as follows:

> If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

According to the undisputed testimony of Inspector Field the entire windshield of the Hough 550 front-end loader was shattered from top to bottom thereby seriously impairing operator visibility. The cracking was so severe that safety plastic material between the glass layers was exposed. According to Field, the windshield was so shattered and the framework so broken it was likely that the windshield would fall onto the operator. Field concluded that the violation was "significant and substantial" because of this extreme obstruction to the visibility of the machine operator. It may reasonably

be inferred under the circumstances that the loader operator could strike another vehicle working on the premises causing serious injuries.

A violation is properly designated as "significant and substantial" 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 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission 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.
>
> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).
>
> 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 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991).

Within this framework I find that this violation was "significant and substantial."

Field also concluded that the violation was the result of operator negligence in that the condition of the wind-shield was obvious. Foreman Richardson himself was operating the loader with this defect directly in his view. It is not disputed that the violation was abated in a timely manner.

Citation No. 4080934 charges a violation of the standard at 30 C.F.R. 56.1000 and charges as follows:

> The operator did not notify MSHA prior to commencement of mining operations. The portable screening plant has been operating for about 3 months. The operator also did not notify MSHA of a temporary closure of mine operations during the previous winter months. The mine operator was unaware of this requirement.
>
> The cited standard provides as follows:
>
> > The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company mine name, mailing address, person in charge, and whether operations will be continuous or intermittent.
> >
> > When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

The Secretary argues in this matter that the Weaver Pit No. 2 Mine was "closed" in November 1991 and reopened in May 1992 and that accordingly the operator failed to notify MSHA in accordance with the above noted regulation about such closure and such reopening. I do not find, however, that the Secretary has sustained her burden of proving that the Weaver Pit No. 2 Mine ever in fact "closed" between November 1991 and May 1992. The term is undefined in the regulation and the only credible evidence in this regard was the testimony of Inspector Field that sometime during the winter months he had approached the entrance to the mine and noted that a cable was strung across the entrance road. Field apparently also relied upon an alleged out-of-court statement attributed to Foreman Richardson that the plant was closed in November 1991 and was reopened in May 1992. However, I can give but little weight to this alleged hearsay statement since Richardson was laid off in November 1991 and was not working at the plant until recalled in May 1992.

Moreover, according to Karen Weaver, the spouse of mine operator Robert Weaver, mine product was sold throughout the period between November and May and that although employees had been laid off during that time both she and her husband continued to fill orders by loading from mine stockpile during that time. She further testified that mine product, both sand and stone, was also processed during that time, including "maybe a week" in December and two or three weeks in February.

The credible evidence clearly demonstrates that the subject mine was therefore operating intermittently from November 1991 through May 1992. Since the regulation itself requires notification to MSHA that a mine is in operation whether "continuous or intermittent," the intermittent operation in this case is consistent with an operating rather than closed mine. Indeed, the Secretary has failed to sustain his burden of proving that the mine had ever been "closed." Since it has not been proven that the mine ever was in fact "closed" as alleged, there was accordingly no need for MSHA to be notified that the mine had been "reopened" in May 1992. Under the circumstances, there was no violation and Citation No. 4080933 must be vacated.

Citation No. 4080934 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 56.14130(a)(3) and charges as follows:

> The Trojan 3000 front-end loader was not provided with seatbelts. The loader was being used to load a customer haul truck and does travel elevated incline roadways. The loader had previously been equipped with seatbelts and is occasionally used at the mine site.

The cited standard provides that "roll-over protection structures (ROPS) and seatbelts shall be installed on ... wheeled loaders and wheeled tractors; ..."

According to the undisputed testimony of Inspector Field there were in fact no seatbelts provided on the Trojan 3000 wheeled front-end loader and that the loader was being used by Foreman Richardson at the time it was cited. Field concluded that the condition was hazardous and a "significant and substantial" violation because the loader was operated in an area of inclined roadways and was used in the loading of other vehicles. In the event of overturning or accident with another vehicle the loader operator could, in Field's opinion, be ejected from his seat causing serious injuries. I conclude under the circumstances that the violation was indeed serious and "significant and substantial." Mathies Coal Company, supra. Because of the obvious nature of the violative condition it is clear that the operator is also chargeable with negligence.

Citation No. 4080935 charges a violation of the standard at 30 C.F.R. 56.14101(a)(2) and alleges as follows:

> The Trojan 3000 front-end loader was not provided with a functional parking brake. The loader was being used to load a haul truck. The loader is parked on level ground with the bucket lowered to ground level when the loader is left unattended.

The cited standard provides that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

According to the undisputed testimony of Inspector Field the parking brakes on the cited loader were not at all functional because the linkage between the brake handle and the brake cable had been disconnected. It was a serious hazard according to Field because it could result in uncontrolled movement of the loader while parked. He found that the hazard was somewhat mitigated by the fact that the loader was parked on level ground with the bucket down and therefore movement was inhibited. Field concluded that the operator was negligent in that the condition was obvious. I accept his undisputed findings.

Citation No. 4080936 alleges that a violation of the standard at 30 C.F.R. 56.14132(a) and charges as follows:

> The horn of the Trojan 3000 front-end loader was not functional. The loader was being used to load haul trucks. Foot traffic in this area was slight."

The cited standard provides that "manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

According to the undisputed testimony of Inspector Field the horn on the Trojan 3000 loader was in fact not functioning at the time it was cited. According to Field the loader therefore was unable to warn persons in an emergency situation and it was in fact being used to load customers' haulage trucks. He felt that injuries were unlikely because the cited loader was used in a low traffic area. He concluded that the operator was negligent because the condition was obvious. I accept Field's undisputed findings.

Citation No. 4080932 issued pursuant to Section 104(d)(1) of the Act(Footnote 1) alleges a "significant and substantial" violation of the standard at 30 C.F.R. 56.14112(b) and charges as follows:

> The L.B. Smith portable screener chain drive feeder sprockets were not guarded to protect persons against contact. The sprockets were about 2 and 3 feet above ground level. The guard was lying on the ground about 4 feet away and was about half covered with material built-up. This condition has existed for about 3 months. The sprockets were easily accessible to foot traffic. This condition was cited on two occasions during previous inspections. This is an unwarrantable failure.

The cited standard provides that "guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

According to the undisputed testimony of Inspector Field the guard for the cited sprockets was indeed four feet away from its proper location lying on the ground and partially

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1 Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

covered with sand and gravel. He noted that the chain drive feeder sprocket was therefore exposed creating a hazard from pinch-points. According to Field, material was being screened and loaded while he was present and Chuck Fuller, one of the mine employees, was working in the area. Field observed Fuller's footprints only one foot from the exposed sprockets. According to Field there was a serious potential for loss of fingers or arms and even death from the hazard.

The condition, according to Field, was readily observable and the operator had twice before been cited for failure to guard chain drive sprockets at the same mine and for the same type of screening plant. Field maintains that Foreman Richardson also told him that the guard had been off since his return to work at the end of May 1992. Karen Weaver, testifying on behalf of the operator, disputes Richardson that the guard had been off for three months but concedes that the guard had been off for about a week.

Within the above framework of evidence it is clear that the violation was indeed "significant and substantial." There was indeed a reasonable likelihood of reasonably serious injuries resulting from the exposed working sprocket in close proximity to working miners. Mathies Coal Company, supra.

I also find that the violation was the result of the operator's "unwarrantable failure" and of gross negligence. Unwarrantable failure has been defined by the Commission as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (1987); Youghiogheny and Ohio Coal Company, 8 FMSHRC 2007 (1987). In the latter decision the Commission further stated that whereas negligence is conduct that is "inadvertent, thoughtless, or inattentive, unwarrantable conduct is conduct that is described as not justifiable or is inexcusable."

The fact in this case that the guard had been removed from the operating plant for at least one week prior to its discovery by the Inspector in this case and remained off while the machinery continued to operate with miners plainly working in the vicinity of the machinery clearly supports a finding of gross negligence and "unwarrantable failure." The existence of two similar violations in the recent past also supports the unwarrantable finding.

ORDER

Docket No. YORK 93-25-M

Citation No. 4080933 is hereby vacated. The remaining citations are affirmed and the mine operator, Robert L. Weaver, is hereby directed to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 4080929	$50
Citation No. 4080930	$69
Citation No. 4080934	$69
Citation No. 4080935	$50
Citation No. 4080936	$50

Docket No. YORK 93-26-M

Citation No. 4080932 is affirmed as a citation pursuant to section 104(d)(1) of the Act and Robert L. Weaver is hereby directed to pay a civil penalty of $200 for this violation within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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