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SOL (MSHA) V. CORTEZ GOLD MINES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 19, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-634-M
Petitioner : A.C. No. 26-00827-05519
 :
v. : Cortez Gold Mine
 :
CORTEZ GOLD MINES, :
Respondent :

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California,
for Petitioner;
Laura E. Beverage, Esq., JACKSON & KELLY, Denver,
Colorado,
for Respondent.

Before: Judge Morris

The Secretary of Labor on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the "Act").

A hearing on the merits was held in Elko, Nevada, on October 6, 1993. The parties filed post-trial briefs.

Citation No. 3928117

This citation issued under Section 104(a) of the Act alleges Respondent violated 30 C.F.R. 56.14207.(Footnote 1) It is further alleged the citation was significant and substantial.

The citation reads as follows:

The # M-6 pickup truck was observed parked on a grade while the wheels were not chocked or turned into the bank. This vehicle was left unattended. The vehicle transmission was placed in natural (sic) and the park brake released, at this time the vehicle started to roll down the grade.

STIPULATION

The parties stipulated as follows:

1. The mine site and history of violations is as contained in the proposed assessment. (Tr. 8).
2. Cortez showed good faith in abating the violation.
3. Payment of the proposed penalty will not adversely affect the operator's ability to continue in business. (Tr. 8).
4. Cortez is covered by the Act and subject to its regulations. (Tr. 56).

MSHA's EVIDENCE

JERRY MILLARD, an authorized representative of the Secretary of Labor, has conducted several hundred inspections over 13 years. (Tr. 9, 10).

On June 10, 1992, he inspected the Cortez site. (Tr. 10). In the inspection he observed a half-ton pickup truck (F-150)

1 The cited regulation reads as follows:

56.14207 Parking Procedures for unattended equipment.

Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

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located on an access road between the thickner tanks and the grinding plant. (Tr. 11, 15).

The truck was parked facing downhill on 5 to 6 degree grade. The inspector did not see any chocks and the vehicle's wheels appeared to be in a straight forward position.

The inspector asked company representative Pruitt to test the vehicle by putting it in neutral and then releasing the brake to see if it would roll. These functions verify whether there was a grade that would permit the truck to roll. (Tr. 11, 15).

The inspector was concerned because in the past six to eight months there had been three fatalities in MSHA's Western District. All three fatalities were related to small vehicles and service type vehicles.

In cross-examination Mr. Millard clarified that he could not say if the brakes on the vehicle failed, but he could only determine that the vehicle had rolled. (Tr. 19).

The inspector believes that if a truck is parked unattended on a grade the park brake should be set and the transmission put in the "park" position. In addition, the wheels should either be turned into a berm or chocked.

The vehicle here lacked chock blocks. There was a berm two feet away but the truck wheels were not turned into it. (Tr. 12).

When the described test was performed by Mr. Pruitt the vehicle started rolling forward and picking up speed. It rolled about 50 feet. (Tr. 13, 14).

After the described test they repositioned the vehicle; the front wheels were turned into the berm and parked within two feet of it. (Tr. 13, 28).

The inspector then issued a citation. (Tr. 14, Ex. P-1).

When the inspector parked his vehicle on the day of the inspection a similar test indicated his vehicle would not roll. (Tr. 17).

The inspector admitted he couldn't say if the fatal accidents he referred to involved a vehicle with a park brake failure. However, the vehicles had rolled.

Mr. Millard's MSHA supervisor originally brought the matter of chocking to the inspector's attention. (Tr. 19).

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The inspector's first citations for similiar violations were issued between 1988 and the early 1990's after the three fatalities had been reviewed. (Tr. 22).

Mr. Millard designated Citation No. 3928117 as an S&S violation. (Tr. 29). This evaluation was based on the gravity involved and an injury could reasonably be expected. (Tr. 29).

The standard is intended to protect against a vehicle rolling. (Tr. 30).

Prior to 1992, the inspector did not issue citations for this type of violation involving pickup trucks such as the Cortez Ford F-150. (Tr. 23, 24).

Mr. Millard was not aware of performance standards for parking brakes applicable to self-propelled mobile equipment. He always goes by the manufacturer's recommendations but he did know what they were on the F-150. (Tr. 27).

The issuance of a citation in this situation was a change in enforcement policy ordered by his supervisor, Paul Belanger. (Tr. 24).

Mr. Millard had not seen any written documentation advising operators of the change in enforcement policy. (Tr. 24). There was nothing in writing concerning the change in applying such a standard to require manual chocking to F-150 type vehicles. (Tr. 24-25).

When the inspector came on the stationary vehicle at the Cortez site it was in a parked position and the park brake was set. (Tr. 25, 26). He did not have any reason to suspect the parking brake was not adequate to hold the vehicle. (Tr. 26).

PAUL BELANGER, a supervisory special investigator, is employed at MSHA's office in Vacaville, California. (Tr. 33). He is required to carry out all of the mandates of the 1977 Mine Act.

He reviews citations issued by the inspectors as well as the characterizations of negligence, gravity and S&S. (Tr. 34).

Mr. Belanger assumed the vehicle in question was a half-ton pickup or three-quarter ton, standard sized pickup truck. He also studied the regulation. (Tr. 35, 36).

In Mr. Belanger's opinion a pickup truck in the half ton range is not excluded from the regulation. (Tr. 36).

After conferring with his District Manager, Vern Gomez, Mr. Belanger confirmed that the standard applied to the truck. (Tr.

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36). The national MSHA office has expressed no concern as to this enforcement policy. (Tr. 37).

The standard was changed in 1988 from Section 9 to Section 14. It was also combined from two separate standards. It now consists of a single standard. Mr. Belanger did not consider there had been change in enforcement policy. (Tr. 38).

Two of the three fatalities in MSHA's Western District involved small vehicles of this type; another was a small utility type vehicle. (Tr. 39).

Concerning the three fatalities: all the vehicles rolled independently of a driver; they were parking on grades and all three resulted in a worker being crushed or run over by the equipment.

In connection with this citation Mr. Belanger was in agreement with the inspector's characterization of "moderate negligence" and reasonably likely "gravity." (Tr. 39, 40).

Mr. Belanger believed that if an accident occurred it would be permanently disabling. (Tr. 41). Accidents involving vehicles of this type usually resulted in a fatality.

The standard was changed in 1988 as indicated in the Federal Register. (Tr. 42, 53, Ex. P-2).

Other mine operators raised the question whether there had been a change in policy. (Tr. 52).

MSHA has no written policy relating to chocking a vehicle on grades. (Tr. 53).

CORTEZ'S EVIDENCE

TIM PRUITT, has been the Cortez safety training coordinator for three years. (Tr. 57).

He is familiar with the requirements of Part 56 and he accompanies MSHA inspectors on the job site. (Tr. 58).

He and mill foreman, Gary McGill, were traveling with Inspector Millard.

The Ford F-150 supervisor's truck was parked on a gravel access road. The hill where the truck was located was sloped between 4 and 6 percent. The truck was not pointing straight down slope but somewhat across the hill. (Tr. 59, 60). It was approximately 15 feet from the descaling pond and berm that goes around the pond. (Tr. 60-61).

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Photographs were taken of a similiar vehicle. (Exs. R-1 through R-9).

The foremen use the road at least once a day. There have not been any changes in the gravel roadway or the berm around the pond. (Tr. 66-68).

The F-150 truck is appropriate for highway travel.

On the day of the inspection the truck was in second gear. Either first or second gear would be a standard park position for this type of transmission. In addition, the emergency brake was set. With a manual type transmission the witnesses' definition of a park position would be a gear low enough to prohibit the transmission and the engine from turning over. (Tr. 69, 70).

With the exception of a shovel there was nothing in the back of the truck. (Tr. 70).

In Mr. Pruitt's opinion the park position of the truck would hold the truck in place.

Mr. Pruitt had previously worked on and driven trucks of this type. (Tr. 70).

On this type of truck when the operator depresses the pedal, the cable pulls on a lever inside the brake drum. In turn the brake pads are pushed against the brake drum. This prevents the wheels from turning. (Tr. 71).

The setting of the park brake is similiar to an automobile when the operator depresses the pedal inside the cab.

On this roadway the maximum grade would be 10 percent. (Tr. 71). Five hundred pounds would be the maximum load for this type of truck. (Tr. 72).

Manual chocking is when you physically use some mechanical device to prevent the wheels from turning. This generally has the same effect of setting a park brake. (Tr. 72). The park brake is more effective because it locks both rear wheels. On the other hand you manually chock one wheel. (Tr. 73).

Mr. Pruitt was not aware of any history of accidents in a mine where a park brake failed. (Tr. 73).

When Mr. Pruitt released the parking brake the truck in five to six seconds at a walking speed of two to three miles per hour rolled 15 feet to the berm. (Tr. 74, 78).

Mr. Pruitt had never previously conducted a similiar test. (Tr. 75).

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Manual chocking had never been previously required and he believed this was a change in MSHA policy. (Tr. 75).

Prior to 1992 it was not common practice in the industry to manually chock transportation-type vehicles such as the one in question.

Prior to June 10, 1992, Cortez had not been cited for such a violation. (Tr. 76). No MSHA representative said pickup trucks were excluded from the regulation. Not since the change of 1988 had he seen anything written indicating pickup trucks were excluded from the standard. (Tr. 77).

Mr. Pruitt has seen a parking-brake failure on five-ton trucks. He described such failure as the truck being unable to hold the load on the grade where it was parked. (Tr. 78).

As a mechanic he has seen parking-brake failures where brakes were worn out and had to be replaced. (Tr. 78).

Cortez has a preventative maintenance program. Most P.M. is at 3,000 miles. This includes a check of the brakes.

It is a common practice to leave a vehicle of this type unattended with the parking-brake set and in a park position. (Tr. 80).

Performance standards on self-propelled mobile equipment require that parking-brakes hold a vehicle from moving on the maximum incline or slope where it would be parked and also with a typical load. (Tr. 81). In Mr. Pruitt's opinion the parking-brake would meet the performance standard. Mr. Pruitt was also familiar with the standard that requires all brakes to be main-tained in an operating condition.

Mr. Pruitt has seen chock failures occur but not on the type of vehicle involved here. (Tr. 81).

JOHN BUNCH has been the Director of Safety, Security and Training at Cortez for over four years. He is familiar with Parts 56 and 57 of MSHA's regulations. (Tr. 82-84).

In addition, he is familiar with MSHA's enforcement policies and he has traveled with MSHA inspectors many times. (Tr. 84).

Mr. Bunch is familiar with 30 C.F.R. 56.14207. It is his understanding that the F-150 Ford pickup was in a park position prior to the issuance of the citation. (Tr. 84). In addition, the parking-brake was engaged.

The pickup was parked diagonally on a 4 to 5 percent slope. (Tr. 86, Ex. R-1).

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Prior to June 10, 1992, MSHA had never raised an issue as to a manual chocking requirement for these types of vehicles. (Tr. 87). Mr. Bunch believed that applying a manual chocking standard to a Ford F-150 would be a change in policy. (Tr. 87-88).

It is not standard mining practice to manually chock vehicles like this at other mines. Further, MSHA did not apply such a requirement at other facilities or at Cortez prior to the time the citation was issued.

Prior to 1992 MSHA inspectors have not carried manual chocks nor had Mr. Bunch ever seen a chock on a MSHA vehicle. (Tr. 88-89).

If a parking brake is provided it must be maintained in an operating condition. Some self-propelled equipment do not have a parking brake. (Tr. 89-90).

Considering the mechanics of the truck park position and the load (none) the park position would be sufficient to hold the truck stable. (Tr. 90, 91).

The truck was a 1988 Ford F-150. Mr. Bunch identified the 1988 Service Manual for such vehicles. (Tr. 91-92, Ex. R-10). When the pedal in the cab is depressed the levers pull forward. This activates the brake shoe against the inside of the drum and stabilizes both rear wheels. (Tr. 92-93). (Page 5 illustrates the brake pedal and the control assembly as shown in View W, Ex. R-10).

The parking brakes on the Ford F-150 truck serve as a mechanical inhibitor for the wheels. (Tr. 95). Chocking is manually placing a device against a wheel to prevent the wheel from turning and the vehicle from moving. The effect of chocking is not different than the effect of setting a parking brake automatically.

The park brake was adequate to hold this vehicle. (Tr. 95).

Mr. Bunch was not aware of any incidents where parking brakes had failed. (Tr. 96).

In this case the pickups have a regularly scheduled P.M. program where fluids are changed and brakes are checked. (Tr. 96).

During the conference it was not implied there was a change in the enforcement practice; however, Mr. Bunch understood there had been such a change. There had been no written documentation announcing this change.

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Finally, Cortez had never been charged with a violation of 30 C.F.R. 56.14207 in a situation involving a Ford F-150 truck. (Tr. 97).

Mr. Bunch agreed that since 1988 MSHA had never told him that F-150 trucks were excluded from this regulation.

Eighty-five percent of the trucks are equipped with power steering and weigh about 2,100 pounds. (Tr. 99, 100).

When Mr. Bunch has seen brakes become inoperable he would chock them. (Tr. 100).

DISCUSSION AND FURTHER FINDINGS

The evidence is essentially uncontroverted.

ISSUE

The issue is whether the wheels of a F-150 Ford pickup truck must be chocked or turned into a bank when the vehicle is parked on a grade.

Cortez initially argues the 1988 revisions to Subpart M and Subpart H whereby the previously distinctive rules for mobile and self-propelled equipment were merged into a single category of mobile equipment created vagueness as to the inclusions of passenger pickup vehicles under 30 C.F.R. 56.14207.

I am not persuaded the revisions created any vagueness. Prior to August 25, 1988, the precursor standard of 30 C.F.R.

56.14207 was codified at 30 C.F.R. 56.9037. The initial standard and the revisions in 1988 were essentially the same. Each standard began with the term "mobile equipment." While "mobile equipment" was not further defined until 1988 it would have a common dictionary meaning of "capable of moving or being moved." (Footnote 2)

In 1988 the revision the new subparts define "mobile equipment" as "wheeled, skid-mounted, track-mounted or rail-mounted equipment capable of moving or being moved." Further, "whenever the final rule refers to equipment capable of moving itself, it uses the term "self propelled mobile equipment, for which a separate definition is not necessary." (Subpart E Definitions, Ex. D-2).

In sum, the F-150 mobile pickup truck was mobile equipment under 30 C.F.R. 56.9037 and under 30 C.F.R. 56.14207. No

2 Webster's New Collegiate Dictionary at 732.

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vagueness was created by the Secretary's revisions in August 1988.

I agree with Cortez that the evidence establishes that MSHA did not enforce this regulation as to F-150 pickup trucks before the August 1988 revision. However, it has been established that non-enforcement does not bar MSHA from citing violations. Conesville Coal Preparation Company, 12 FMSHRC 639, April 1990.

Cortez further argues that since 30 C.F.R. 56.14207 fails to provide adequate notice it is necessary to apply the reasonably prudent person test in determining the interpretive validity of the regulation.

Many of the Secretary's regulations are designed to deal with the myriad of circumstances that can arise in the mining industry. For example, see the leading case of Ideal Cement Company, 12 FMSHRC 2409, (November 1990) involving 30 C.F.R. 56.9002 (Footnote 3) (1987). As a result of the design of the regulations many of them are subject to the claim that they are overly broad or vague.

This case is no different. Cortez asserts it did not have fair notice that its F-150 half-ton pickup truck was subject to the contested regulation.

In such circumstances, the Commission has ruled that the appropriate test in interpreting and applying such broadly worded standards is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Ideal, 12 FMSHRC at 2416; Cyprus Tonopah Mining Corporation, 15 FMSHRC 367, 375 (March 1993).

In support of its position that it did not have fair notice of the requirement Cortez relies on Lanham Coal Co. Inc., 13 FMSHRC 1710 (October 1991).

Lanham was remanded by the Commission to Judge James A. Broderick to "determine, through application of the reasonably prudent person test, whether Lanham had fair notice that 30

3 The standard provided that: Equipment defects affecting safety shall be corrected before the equipment is used.

C.F.R. 77.1710(g) (Footnote 4) required the use of safety belts or lines under the circumstances of this case." 13 FMSHRC 1341.

In his decision after remand (13 FMSHRC 1710) Judge Broderick vacated the citation on the basis of several findings. Those were that (1) prior to the accident, neither the operator nor the MSHA inspector who issued the citation considered the cited standard applicable to the tarping of trucks, (2) the inspector had never previously cited the practice and had never used safety belts in such circumstance, (3) MSHA had no standards or guidelines that covered the practice and (4) Lanham had no specific notice that the practice violated the standard that dealing with safety belts and lines.

In this case the facts fairly establish (1), (2) and (4). However, Cortez knew or should have known of MSHA's requirements of parking procedures for unattended equipment because MSHA's regulation fairly covered the practice. As a result Lanham is not controlling.

Cortez further contends that even if 30 C.F.R. 56.14207 could be read to encompass passenger pickup vehicles, the operator complied with the regulation.

Specifically, it is asserted that the vehicle's engine was off, the transmission was in the park position and the manual brake was cable activated.

Cortez's argument does not address the relevant portion of the regulation; namely, the last sentence of 30 C.F.R. 14207 which provides:

When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked (Footnote 5) or turned into a bank.

4 The regulation involved 30 C.F.R. 77.1710 entitled "Protective Clothing; requirements provides in pertinent part:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

5 Webster's New Collegiate Dictionary at 194 defines a chock as "a wedge or block for steadying a body (as a cask) and holding it motionless, for filling in an unwanted space, or for blocking the movement of a wheel."

It is clear from the evidence that the pickup was parked on a 5 to 6 degree grade. In addition, its wheels were neither chocked or turned into a bank.

Cortez has attached to its post-trial brief as Exhibit A MSHA's Program Information Bulletin No. P93-29 dated November 4, 1993.

I decline to take official notice of the bulletin. Its subject matter does not appear relevant to this case since it deals with automatic transmission defects in certain named Ford vehicles.

Cortez finally claims the violation was not Significant and Substantial.

A violation is properly designated S&S "if, based upon 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, 3-4 (January 1984), the Commission explained:

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.

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 Commission has held 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)(emphasis in original).

In the instant case the Secretary failed to establish the third facet of the Mathies formulation. The inspector noted the pickup was stationary and he saw no reason to suspect the brake was not adequate to hold the weight of the vehicle on the existent grade. (Tr. 26).

Evidence was offered by the Secretary concerning prior fatalities involving unattended vehicles running over workers.

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The comparison fails. The credible evidence establishes the vehicle was stationary with adequate transmission and brakes. (Tr. 25, 54).

The S&S allegations should be stricken.

For the foregoing reasons the citation should be affirmed.

CIVIL PENALTY

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

The size of Cortez is stipulated to be 1,221,241 production tons and the size of the mine itself is 362,640.

The payment of the proposed penalty will not adversely affect Cortez's ability to continue in business.

There is no evidence of the operator's prior history.

Cortez was negligent as company vehicles were left unattended without taking the necessary precautions as required by the regulations.

The gravity of the violation was low since the parking and transmission adequately held the pickup truck on the grade.

Cortez demonstrated good faith in abating the violative condition.

Considering the statutory criteria I conclude that a civil penalty of \$75.00 is appropriate.

Accordingly, I enter the following:

ORDER

Citation No. 3928117 is affirmed and a civil penalty of \$75.00 is assessed.

John J. Morris
Administrative Law Judge

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