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SOL (MSHA) V. G&C MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 93-356-M
Petitioner	:	A.C. No. 38-00344-05509
v.	:	
	:	Docket No. SE 93-384-M
G & C MINING COMPANY, INC.,	:	A.C. No. 38-00344-05510
Respondent	:	
	:	G and C Quarry

DECISIONS

Appearances: Stanley E. Keen, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for
the Petitioner;
Walden B. Graham, President, G & C Mining
Company, Aynor, South Carolina, pro se, for
the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties 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 civil penalty assessments for six (6) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Florence, South Carolina. The parties waived the filing of posthearing briefs, but I have considered their oral arguments at the hearing in the course of my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether one of the alleged violations was "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

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 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 3):

1. The respondent is a small limestone mine operator and its mining operation is subject to the jurisdiction of the Mine Act.
2. The presiding Commission judge has jurisdiction to hear and decide these matters.
3. Payment by the respondent of the proposed civil penalty assessments for the violations in question in these proceedings will not adversely affect its ability to continue in business.
4. All of the cited conditions were timely abated by the respondent in good faith.
5. The MSHA computer violations history print out covering the period April 12, 1991, through April 11, 1993, reflects the respondent's relevant compliance record (Exhibit ALJ-1).

Discussion

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Section 104(a) non-"S&S" Citation No. 3881004, April 12, 1993, cites an alleged violation of 30 C.F.R. 56.9100(a), and the cited condition or practice states that "the mine site was not provided with traffic control rules governing speed".

Section 104(a) non-"S&S" Citation No. 3881005, April 12, 1993, cites an alleged violation of 30 C.F.R. 56.12018, and the cited condition or practice states that "5 circuit breakers located in the mine shop building were not labeled to show which units they control".

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Section 104(a) non-"S&S" Citation No. 3881006, April 12, 1993, cites an alleged violation of 30 C.F.R. 56.14132(b)(1), and the cited condition or practice states as follows:

The service truck at the mine site was not provided with a backup alarm system, and the operator has an obstructed view to the rear. The service truck was parked at the shop, and was not tagged out, and was ready for use.

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Section 104(a) non-"S&S" Citation No. 3881007, April 12, 1993, cites an alleged violation of 30 C.F.R. 56.14101(a)(2), and the cited condition or practice states as follows:

The parking brake on the cat road plow at the mine site was not capable of holding the road plow with its typical load on the maximum grade it travels. The road plow was parked at the time, and was not tagged out, and was ready for use.

Section 104(a) "S&S" Citation No. 3881008, April 12, 1993, cites an alleged violation of 30 C.F.R. 56.14101(a)(1), and the cited condition or practice states as follows:

The service brakes on the cat road plow were not capable of stopping and holding the road plow with its typical load on the maximum grade it travels. The road plow was parked at the time, not tagged out, and was ready for use. The road plow was also taken out of service, and was tagged out.

Section 104(a) non-"S&S" Citation No. 3881009, April 12, 1993, cites an alleged violation of 30 C.F.R. 56.14132(a), and the cited condition or practice states as follows:

The backup alarm on the cat road plow was not properly maintained as an automatic reverse activated alarm. The backup alarm was being manually operated. The road plow was parked at the time, was not tagged out, and was ready for use. The road plow also was removed from service and was tagged out.

Petitioner's Testimony and Evidence

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MSHA Inspector Salvador Iturralde confirmed that he inspected the respondent's mining operation on April 12, 1993, and that he was accompanied by foreman Mike Graham, the mine operator's son (Tr. 8). The inspector stated that as he drove up

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to the mine entrance he observed two loaded dump trucks traveling out of the mine "stirring up quite a bit of dust", and he got out of the way to allow them room. He then proceeded to the shop and did not observe any posted speed limit signs and found none posted on the property. Under the circumstances, he issued citation No. 3881004, because the respondent had no posted speed limit sign (Tr. 8-9).

The inspector confirmed that during his inspection of the mine shop he found that certain circuit breakers were not labeled, and when he asked Mr. Mike Graham to identify the electrical units controlled by the circuit switches, Mr. Graham stated that he did not know. The inspector issued the citation for failure to label the circuits (Tr. 10).

The inspector stated that he next inspected a long bed pickup truck and found that the brakes were fine. However, the truck was not equipped with a backup alarm, and the inspector determined that the view directly to the rear of the truck was obstructed by a square fuel tank mounted in the truck bed behind the operator's cab (Tr. 11-12). He cited the truck because it had no backup alarm.

On cross-examination, the inspector stated that he did not observe a master disconnect switch on the ground circuit breaker box in question (Tr. 14-16). He was informed that the breakers controlled a water pump, the shop lights, and other shop equipment, and he believed that there were six unlabeled switches (Tr. 18).

The inspector stated that the cited truck was used for fueling equipment at the mine. He confirmed that he got into the truck and determined that there was an obstructed view directly to the rear because of the full tank mounted behind the cab. The inspector confirmed that the truck had side view mirrors, but the fuel tank obstructed the driver's view directly to the rear of the truck, and he confirmed this by sitting in the truck and turning and looking to the rear (Tr. 25-26).

The inspector estimated that the trucks he observed leaving the mine were traveling about 30 to 35 miles an hour, and he did not stop the trucks or speak with the drivers (Tr. 38-39).

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Inspector Iturralde stated that he observed the cited cat road plow parked at the shop area, and Mike Graham confirmed that he had used it during the past week or weekend. The machine was not tagged out, and he informed Mr. Graham that he wanted to

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inspect the machine. Mr. Graham started the machine and tested the parking and service brakes, and they would not hold the machine. The inspector found that two of the hydraulic brake lines had been "pinched off" at the two rear wheels (Tr. 42-45).

The inspector believed that the lack of operable service brakes made it reasonably likely that an accident would occur if the vehicle were placed in service and operated on mine property and that "permanently disabling" bodily injuries would result from the lack of operable service brakes (Tr. 46-47). He confirmed that customer trucks travel in and out of the mine property, but he did not observe the grader in operation at the time of the inspection. However, given the layout of the mine, he believed that in the absence of any brakes, it was reasonably likely the machine in question would encounter another vehicle and that an accident would occur at one time or another (Tr. 59-60).

The inspector confirmed that the road plow was equipped with a backup alarm, but he did not believe it was properly maintained because it was operated manually and was not automatic. He confirmed that he observed Mr. Graham activate the alarm manually (Tr. 47).

The inspector confirmed that the parking brake was tested on a slope and would not hold the plow which was described as a "regular" sized motor grader with a blade mounted on the front (Tr. 54-56). He confirmed that the machine was taken out of service after all three of the citations were issued. He also confirmed that the machine had no brakes and "was free wheeling" when the brake pedal was applied (Tr. 57-58).

Respondent's Testimony and Evidence

The respondent opted not to call any witnesses in defense of the citations (Tr. 64). However, mine operator Walden Graham asserted that he is a safety minded operator and he was afforded an opportunity to state his case and explain the circumstances under which the citations were issued with respect to the lack of circuit breaker labels. Mr. Graham asserted that his personnel are trained to disconnect the main power switch located on the breaker box if there is a problem. He also believed that a backup alarm on a vehicle "doesn't make it safe" (Tr. 16-17). Mr. Graham did not deny the absence of the labels, but he took the position that his employees are trained to use test equipment and to disconnect the main power switch rather than relying on labels, but he did not disagree that a breaker may be mislabeled (Tr. 23-24).

Mr. Graham produced photographs of the cited truck, and he pointed out the side view mirrors (Exhibits R-1 through R-3; Tr. 28-29). Mr. Graham stated that the mirrors were installed as a safety measure for a view to the rear beyond the view obstructed by the fuel tank. He also indicated that he wanted his drivers to be able to see to the rear for themselves rather than to depend on a backup alarm for safety, particularly when the noise level of other equipment is such that the alarm cannot be heard (Tr. 31).

Mr. Graham stated that all of the drivers and operators that come on his property are given safety training and are advised of the mine safety rules. He stated that the roads are such that drivers maintain a prudent speed, and trespassing signs are posted (Tr. 33-36; Exhibits R-5 through R-7).

With regard to the citations concerning the road plow, Mr. Walden Graham did not dispute the inspector's findings with respect to the cited brake and backup alarm conditions that he observed (Tr. 52). Mr. Graham stated that the machine was a 1963 model, and he admitted that the brake lines were blocked off, but he denied that he did it, or that they were intentionally pinched off. He explained that certain adjustments were made to the lines to provide better braking, and that moisture affects the brakes (Tr. 52-54).

Mr. Graham stated that the cited road grader was repaired and returned to service, and he confirmed that there have been no road grader accidents at the mine (Tr. 61). He also indicated that his operators are trained to keep the scraper blade down, and he did not believe that graders and plows should be treated like trucks because "they don't move as fast" (Tr. 63).

Mr. Graham stated that he was concerned about the citations that were issued in these proceedings because he believes that he conducts a safe mining operation and has always complied with MSHA's regulations and taken the necessary corrective action (Tr. 65).

Mr. Graham's son, Kenneth, confirmed that the motor grader backup alarm was operational and that it was activated manually by "a little switch" (Tr. 68). With regard to the lack of circuit breaking labeling, Mr. Graham stated that nothing was hooked up to the breakers, but he admitted that they were not tagged or labeled. He suggested that the breakers were labeled at one time, but that the labels fell off (Tr. 69). He did not dispute the other cited conditions and stated that "they were like he (the inspector) said" and that had he known the brakes did not work, he would not have started up the engine for the

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inspector and would have tagged it out (Tr. 69-70). He stated that he or his brother operated the grader "once every two months" to grade off the road and that he "felt comfortable" operating it with no brakes, and that "all you got to do is mash the clutch for it to stop" (Tr. 70).

Findings and Conclusions

All of the citations in these proceedings were issued by Inspector Iturralde in the course of an inspection on April 12, 1993. With the exception of Citation No. 3881006, citing an alleged violation of section 56.14132(b)(1), for failure to provide a backup alarm for the service truck which purportedly had an obstructed view to the rear, the respondent did not dispute the remaining existing conditions (Tr. 4-5; 67-69).

With regard to the cited fuel service pickup truck, the respondent took the position that the two side view mirrors installed on either side of the driver's cab (photographic Exhibits R-1 through R-3) provided an unobstructed view to the rear of the truck. However, the credible testimony of the inspector, who got into the truck and turned to the rear, establishes that he had no clear view directly to the rear of the truck because of the presence of a large full tank that was installed in the bed of the truck directly behind the driver's rear window compartment. The photographs, particularly R-2 and R-3, corroborate the inspector's testimony, and having viewed them, I agree with the inspector. Although the side view mirrors may have provided the driver with a "line of sight" view directly to the rear of the mirrors, I cannot conclude that the driver had a clear and unobstructed view directly to the rear of the truck bed because of the large fuel tank which obviously blocked the driver's view through the rear cab window. Under the circumstances, I conclude and find that a violation has been established and the citation IS AFFIRMED.

Citation No. 3881004. 30 C.F.R. 56.9100(a).

The respondent here is charged with a violation for not providing the traffic control rules governing speed at the mine. Section 56.9100, provides as follows:

To provide for the safe movement of self-propelled mobile equipment-

- (a) Rules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine; and
- (b) Signs or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine.

The inspector testified that he cited the respondent with a violation of subsection (a), of section 56.9100, because he found no posted speed limit sign at the mine (Tr. 8-9). The citation was abated after "a sign governing speed was posted at the mine site".

Mr. Walden Graham testified credibly that all drivers on mine property are given safety training, which includes written notice of the mine speed limit of 25 miles per hour, and he produced a file which contained a company memorandum dated August 3, 1992, advising truck drivers of the hazard training required by MSHA (Exhibit R-7). He also produced two signed hazard training forms dated August 10, and October 13, 1992, signed by drivers who apparently received the training (Exhibits R-5 and R-6). The form specifically states that the mine speed limit is 25 miles per hour, and it contains a list of safety procedures and rules applicable to vehicles and other mobile equipment operating on mine property. Mr. Graham confirmed that these hazard training forms are given to all drivers and customers (Tr. 37). The inspector did not dispute the fact that the respondent had such a training program (Tr. 35).

Mr. Graham explained that speed limit signs have been posted at the mine but that "we've had a hurricane or two and our mine hasn't been as active as it was before we had the recession" (Tr. 34). He also confirmed that trespassing signs are posted, that there are a limited amount of visitors to the mine site, and that it is difficult to speed on the mine roads because of their configuration (Tr. 34-35).

I find nothing in the cited section 56.9100(a), that requires the posting of a speed limit sign. The only requirement for posting signs is found in subsection (b), and that only requires signs warning of hazardous conditions.

The respondent's credible and un rebutted evidence establishes that it had a safety hazard training program at the mine, and it included notice of the mine speed limit and other "rules of the road". Although the copies produced by Mr. Graham, who represented himself in this case, are dated in 1992, they stand un rebutted, and the petitioner has not proved that this training program was not in effect at the time the citation was issued. Under the circumstances, and after careful evaluation of all of the available evidence, I conclude and find that the respondent was in compliance with the cited standard, and that the petitioner has failed to prove a violation. Accordingly, the citation IS VACATED.

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Citation No. 3881009. 30 C.F.R. 56.14132(a)

In this instance, the respondent is charged with an alleged violation of section 56.14132(a), for failing to properly maintain the manually operated backup alarm on the cited road grader "as an automatic reverse activated alarm". The cited standard section 56.14132(a), provides as follows:

(a) 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 inspector confirmed that he issued the citation because the backup alarm that was on the grader in question was not properly maintained in that it had to be operated manually rather than automatically (Tr. 47). He confirmed that he interpreted the cited standard to require an automatic reverse alarm, and suggested that the grader operator had an obstructed view to the rear because "the machine engine is in the back and they can't see directly behind them" (Tr. 51-52).

I find no credible evidence to establish that the grader operator had an obstructed view to the rear of the machine that would require an automatic reverse-activated signal alarm pursuant to section 56.14132(b)(i). However, in this case, it would appear to me that the grader was equipped with a reverse-activated automatic alarm that was being operated manually rather than automatically. The cited section 56.14132(a), requires that such an audible warning device be maintained in functional condition. Since the evidence shows that the alarm had to be manually operated, I conclude and find that it was not maintained in a functional condition in that it did not function as an automatic "other audible warning device" as required by the standard. Accordingly, the citation IS AFFIRMED.

Citation Nos. 3881005, 3881007, and 3881008.

I conclude and find that the credible and un rebutted testimony of the inspector supports each of these citations, and THEY ARE AFFIRMED.

Significant and Substantial Violation. Citation No. 3881008.

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

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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 nature of a violation must be made in the context of continued normal mining operations. National Gypsum, 3 FMSHRC 327, 329 (March). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

Citation No. 3881008

Based on the inspector's credible and un rebutted testimony concerning the lack of service brakes on the cited road grader, I conclude and find that his "S&S" finding was warranted. The evidence establishes that the grader was "free wheeling" because it had no brakes, and I agree with the inspector's belief that an

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accident was reasonably likely if the machine were placed in service and operated on the roadways that were used by vehicular traffic. If an accident had occurred, I believe it would be reasonably likely that injuries of a reasonable serious nature would result. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessments on the Respondents Ability to Continue in Business

The parties stipulated that the respondent is a small mine operator and that payment of the proposed civil penalty assessments will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions.

History of Prior Violations

The MSHA computer printout concerning the respondent's compliance record reflects that for the period April 12, 1991 through April 11, 1993, the respondent paid a civil penalty assessment of \$50, for one (1) section 104(a) non-"S&S" citation for a violation of mandatory safety standard 30 C.F.R.

56.12025. I conclude and find that the respondent has a excellent compliance record and I have taken this into account in these proceedings.

Good Faith Compliance

The parties stipulated that the respondent timely abated all of the cited conditions in good faith, and I adopt this stipulation as my finding and conclusion on this issue.

Gravity

I conclude and find that all of the non-"S&S" violations were nonserious, and that the "S&S" violation concerning the lack of brakes on the cited road grader was serious.

Negligence

I agree with the inspector's "moderate" negligence findings, and I conclude and find that all of the violations were the result of the respondent's failure to exercise reasonable care.

Penalty Assessments

In view of the foregoing findings and conclusions, and taking into account the civil penalty criteria found in section 110(i) of the act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable.

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Citation No.	Date	30 C.F.R. Section	Assessment
3881005	4/12/93	56.12018	\$25
3881006	4/12/93	56.14132(b)(1)	\$35

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Citation No.	Date	30 C.F.R. Section	Assessment
3881007	4/12/93	56.14101(a)(2)	\$25
3881008	4/12/93	56.14101(a)(1)	\$75
3881009	4/12/93	56.14132(a)	\$25

ORDER

The respondent IS ORDERED to pay the aforesaid civil penalty assessments within thirty (30) days of these decisions and Order. Payment is to be made to MSHA, and upon receipt of payment, these matters are dismissed.

Section 104(a) non "S&S" Citation No. 3881004, April 12, 1993, citing an alleged violation of 30 C.F.R. 56.9100(a), in Docket No. SE 93-356-M, IS VACATED, and the proposed civil penalty assessment is DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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