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SOL (MSHA) V. PITTSBURG AND MIDWAY COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 21, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 91-197-A A.C. No. 29-00845-03540
v.	:	
PITTSBURG AND MIDWAY COAL, MINING COMPANY-YORK CNYN COMPLEX, Respondent	:	York Canyon Underground Mine

DECISION AFTER REMAND

Before: Judge Morris

After the remand of the above case, the parties were granted an opportunity to file supplemental briefs.

The Secretary declined to file a supplemental brief but stated in a letter filed on December 14, 1994, that the truck in question did not have an "unobstructed rear view" and that an S&S designation should be affirmed.

Respondent filed a statement in lieu of a supplemental brief and relied on its petition for discretionary review filed with the Commission.

In its remand of Citation No. 3293236 the Commission stated that the Judge relied on an outdated standard.(Footnote 1) The updated standard provides as follows:

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1 77.410 Mobile equipment; automatic warning devices.

Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.

Section 77.410

(a) Mobile equipment such as front-end loaders, forklifts, tractors and graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that--

(1) Gives an audible alarm when the equipment is put in reverse; ... .

The issues here are whether Pittsburg and Midway ("P&M") violated the regulation and, if so, was the violation S&S. If a violation occurred, what penalty is appropriate?

MSHA INSPECTOR DONALD JORDAN issued Citation No. 3243235 because P&M's explosives truck had a non-functioning backup alarm.

He further opined that pickup trucks are required to have a backup alarm if vision is not clear to the rear.

The updated standard provides an exception to the requirement for audible alarms on mobile equipment. The exception excludes from coverage "pickup trucks with an unobstructed rear view."

MICHAEL KOTRICK, P&M safety manager, identified photographs that show a relatively clear view looking to the rear of the explosives truck. (See R-1, R-2, R-3). In his opinion, the wire mesh on the truck permits a greater "see through" than does a standard pickup truck with an ordinary tailgate.

It is true that Exhibits R-1 and R-2 show a relatively clear view to the rear. This relatively clear view is the result of a see-through wire mesh screen in lieu of a solid metal tailgate on most pickup trucks. However, the regulation requires "an unobstructed(Footnote 2) rear view." The rear view of P&M's truck is at least partially obscured by explosive boxes on each side of the truck bed. (Exhibits R-2 and R-3 show the boxes.)

The boxes are explosive magazines used to transport detonators, boosters, primer cord, etc. They extend 2/3ds of the length of the truck bed from the cab towards the rear. (Tr. 60, 61). Each storage compartment is 2 to 2.5 feet wide. The bed of the truck is 4 to 6 feet wide and the width of the truck bed between boxes is 4 feet. (Tr. 82, 83).

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2 "Unobstructed" means "not obstructed, clear, unhindered [an view]." Webster's Third New International Dictionary, unabridged, 1976, at 2505.

The above uncontroverted facts establish the view to the rear was not "unobstructed." Accordingly, the exception in Section 77.410(a) does not apply.

A further issue to be determined is whether the violation was "S&S." A violation is properly designated as being "S&S" "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 an illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (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.

Following the above criteria, it appears there was an underlying violation of Section 77.410.

Further, there was a discrete safety hazard contributed to by the violation.

In its appeal, P&M asserts the Judge failed to address whether the violation presented a reasonable likelihood of injury and failed to address how the relatively clear rear view would bear upon the risk of injury.

The third facet of the Mathies formulation is established by these facts: The truck was in use in the pit. (Tr. 17-18). The workers were off-loading explosives. (Tr. 18). Inspector Jordan testified he could not see anything from a point 8 to 10 inches below the waist of the man shown in Exhibit P-9. (Tr. 19). Workers were exposed to the hazard since they were off-loading explosives in preparation for charging the holes. This occurred in the area behind the truck. (Tr. 20-21). There are always workers around the truck. (Tr. 21). The workers take priming materials off the truck and put the materials into the hole. (Tr. 21-22). After they put the priming materials into the hole, they kick the dirt in and curl up the cords. Normally, they must kneel to do this and they are behind the truck. (Tr. 22).

Contrary to Inspector Jordan's testimony, Mr. Kotrick, P&M's manager for safety, testified that kneeling by workers is not

part of the procedure in drilling and blasting.(Footnote 3) In addition, backing up the explosives truck to a hole is not standard proce- dure. (Tr. 61-62). Finally, the truck is stationary, does not straddle any holes, and boosters are hand-delivered. (Tr. 62, 63).

I am not persuaded by Mr. Kotrick's testimony. Workers do not always follow "standard procedure." Further, I do not find it credible that workers could prepare a hole for blasting (as described here) without kneeling. In addition, the explosives truck is not always stationary as its very purpose is to deliver explosives to the blasting site. Finally, Mr. Kotrick's testi-mony does not reduce the activities by the workers in close proximity to the truck.

The credible evidence establishes the third element of Mathies.

The relatively clear view to the rear (as a result of the mesh screen) does not affect the S&S designation. The explosive boxes on each side substantially obstruct the rear view. A worker kneeling behind the truck could be out of sight and in danger of being run over.

The fourth element of the Mathies formulation is apparent. If a truck backed over a worker, the result would reasonably be a fatality or an injury of a reasonably serious nature. In sum, I note that, based on MSHA's experience, there have been many fatal accidents or serious injuries from violations of this type. (Tr. 20).

In sum, I agree with Inspector Jordan that the violation was S&S.

For the foregoing reasons, Citation No. 3243236 should be affirmed.

CIVIL PENALTIES

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

1. P&M is a large operator. (Stip. 5).

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3 I credit Mr. Jordan's testimony that he observed the workers putting priming materials into the hole and kneeling to curl up the cords. (Tr. 22).

2. The assessment of a civil penalty in this case will not affect P&M's ability to continue in business. (Stip. 3).

3. P&M's previous adverse history at York Canyon Surface Mine, as evidenced by Exhibit P-3, indicates P&M paid penalties for 43 violations in the period between March 12, 1989, and February 21, 1991.

4. P&M was negligent as it should have known the backup alarm was inoperative.

5. The gravity of the violation has been discussed under the S&S issues.

6. P&M demonstrated good faith in achieving prompt abate- ment of the violation.

In view of the statutory criteria, I believe a penalty of $200.00 is appropriate.

Based on the foregoing findings, I enter the following:

ORDER

In Docket No. CENT 91-197-A, Citation No. 3243236 is AFFIRMED and penalty of $200.00 is ASSESSED.

John J. Morris
Administrative Law Judge

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