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SOL (MSHA) V. BLUE BAYOU SAND & GRAVEL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 93-216-M
	:	A. C. No. 03-01619-05502
v.	:	
	:	Docket No. CENT 93-238-M
BLUE BAYOU SAND & GRAVEL, Respondent	:	A. C. No. 03-01619-05503
	:	
	:	Blue Bayou Sand and Gravel

DECISION

Appearance: Nancy B. Carpentier, Esq., Office of the Solicitor U.S. Department of Labor, Dallas, Texas for Petitioner;
David J. Potter, Esq., Texarkana, Texas for Respondent

Before: Judge Weisberger

Statement of the Case

The Respondent, Blue Bayou Sand and Gravel, operates a gravel mine on a 10 acre portion of the subject site.(Footnote 1)(Footnote 1) At issue herein is whether Respondent violated various mandatory regulatory standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, a hearing was held in Little Rock, Arkansas on February 9, 1994. Subsequent to the hearing, Respondent waived its right to file a post-hearing brief, and in lieu thereof presented oral argument, and reserved the right to file a reply to Petitioner's brief within seven days after service of the brief. Petitioner's brief was to have been filed three weeks after receipt of the transcript. The transcript was received by the Commission on March 3, 1994. To date, Petitioner has not filed any brief.

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1 Danny Jewell took over the operation of the subject site on April 13, 1993. On May 6, 1993, Articles of Incorporation were issued to D. Jewell Co., Inc., ". . . a corporation owned and created for D. Jewell Co., Inc. for the purpose of owning this mine owned by Danny Jewell" (sic) (Tr. 6). A fictional name, Blue Bayou Sand and Gravel, was issued on December 18, 1993.

Findings of Fact and Discussion

I.

Citation No. 4116494

Larry D. Slycord has been an MSHA inspector for the last three years. Prior to that time, his work experience included working in a quarry for 12 years as a mechanic and, as a supervisor in the maintenance department.

On April 28, 1993, at approximately 9:30 a.m. Slycord, in the presence of his supervisor, Billy G. Ritchey, inspected the subject site. He observed a pump located on a barge. The barge was floating in a creek that was approximately 4 feet deep. The barge was secured by cables that ran from each of the two front corners of the barge to the bank where they were attached to steel stakes. Slycord said that he "would guess" (Tr. 27) that the barge was 10 feet from the shore.

According to Slycord, the pump, which is attached to a pipe, pumps water from the creek to the shore. Slycord said that the pipe was above the water, but he did not recall if it was suspended. He estimated that the diameter of the pipe was between 8 to 10 inches.

According to Slycord, when he made his inspection, he was told that persons go to the barge for maintenance purposes, but he could not recall the source of this information. Slycord assumed that Respondent's employees walked on the pipe to get to the barge to perform maintenance on the pump. He said there were no handrails on the pipe, nor was there any walkway or catwalk to the barge. Slycord said that, in essence, a person walking on the pipe would have been reasonably likely to have slipped and fallen. In this event, the person could have hit his head on an object, or could have drowned. He issued a citation alleging a violation of 30 C.F.R. 56.11001 which provides as follows: "Safe means of access shall be provided and maintained to all working places." (Emphasis added.) The term "working place", is defined in 30 C.F.R. 56.2 as follows: ". . . any place in or about a mine where work is being performed."

J.E. Jewell, Respondent's safety supervisor, who works at the site in question, explained that the hose (pipe) running from the pump to the shore is 6 inches in diameter and

flexible. According to J.E. Jewell, because the pumps' valves are located underwater, repairs to the pump are made on the shore.(Footnote 2)(Footnote 2) J.E. Jewell indicated that he has not observed anyone
walking on the pipe to go from the shore to the barge.

Slycord did not observe any person working on the pump while it was on the barge in the creek. Nor has his testimony established that, in Respondent's normal operations, persons go to the barge. I do not accord any weight to his hearsay testimony that someone whom he could not identify informed him that such was Respondent's practice. I thus conclude that it has not been established that the barge, when located on the creek with a pump on it, was a "working place." Accordingly, there was no requirement, pursuant to Section 56.1101 supra, to provide access to the barge while it was floating in the water. Hence, citation no. 4116494 should be dismissed.

Citation No. 4116495

Slycord testified that on April 28, he climbed on the loader platform of a K-85ZII loader. He noticed that the windshield, which he described as having an irregular shape that he estimated to be 30 inches high at the highest point, and 26 inches wide at the widest point, had several cracks that extended from the top to the bottom, and from one side to the other side. Slycord said that when he observed the windshield, he was outside the loader, but that his field of vision was level with the operator's field of vision. According to Slycord, he looked through the windshield from the inside out. He indicated that it was his opinion that visibility was obscured by the cracks to the extent that the operator of the vehicle could not operate it safely. He said that the glare of the sun on the cracks would "impede" the safe operation of the loader. (Tr. 67) According to Slycord, due to the impeded vision, a crushing injury could result if the operator did not see a person in the area, and ran over him, or ran into another vehicle.

Slycord issued a citation alleging a violation of 30 C.F.R. 56.14103(b). Section 56.14103(b), supra, as pertinent, 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."

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2 J.E. Jewell indicated that the pump is picked up from the water by a front-end loader located on the shore, and then set out on the bank to be serviced. He indicated that, in addition, it is possible to move the barge to the shore by pulling it in by its cables. Also, a board, 2 inches by 12 inches, located on the shore can be used to gain access to the barge.

Danny Jewell testified that he saw the windshield on April 28, after it was cited. He opined that vision was not obscured. He testified that the previous Saturday he had operated the loader lifting motors out of a houseboat. He said that, in general, vision was not obscured. Specifically he said he was able to see chains, and persons in the area. He said that he could see everything, and nothing was blocking his vision.

J.E. Jewell testified that he operated the loader before the windshield had been replaced. He testified that there was nothing outside the vehicle that he could not see due to cracks. He opined that the cracks did not obstruct vision.

Section 56.14103(b), supra, provides that, in essence, damaged windows shall be replaced or removed, if they either obscured visibility, or created a hazard to the equipment operator. The evidence does establish that the windshield was cracked as described by Slycord. His testimony, however, does not establish with any degree of specificity, the extent of the cracks, i.e., the percentage of total windshield space that was cracked. He opined, in essence, that the cracks would "impede" an operator's vision creating the hazard of an injury to another person. However, he indicated that although he observed the cracks, he did not look at anything through the windshield from the operator's position inside the cab. Hence, his opinion that vision was impeded, is not supported by his own observations, I also take cognizance of the testimony of Respondent's witnesses who operated the vehicle in question, looked through the windshield, and did not have their vision obscured. On this record, I find that it has not been established that the cracks in the windowshield obscured visibility necessary for safe operation. Slycord does not allege, nor does the evidence establish, that the cracks created any hazard to the equipment operator as opposed to a hazard to persons outside the vehicle. I thus conclude that it has not been established that Respondent violated Section 56.14103(b) supra. Accordingly, Citation No. 4116495 shall be dismissed.

Order/Citation No. 4116491, Citation No. 4116493, and Citation No. 4116492.

Slycord testified that he observed a Euclid haul-truck loaded with material. He indicated that the material had been loaded on the truck by a "track hoe" (Tr. 100) that had removed the material from the pit. When Slycord observed the truck it

was going up an incline, but it had not yet reached the crest.(Footnote 3)(Footnote 3) Slycord motioned for the driver of the truck to stop, and the truck stopped. Slycord said that he told the driver, William Jewell(Footnote 4)(Footnote 4), (W. Jewell) that he wanted to test the service and parking brakes of the vehicle, and W. Jewell said that they do not work. Slycord related that W. Jewell told him that he uses the transmission to hold the truck.

Slycord then asked W. Jewell to continue driving along the next portion of the road which, according to Slycord, was almost level. As the truck continued, Slycord motioned for W. Jewell to stop. Slycord then heard "air exhaust" (sic) (Tr. 106). He estimated that the truck, which was going 2 to 4 miles an hour, continued to move, but eventually did stop. Ritchey also indicated that he heard an exhaust of air from the rear of the truck that sounded like the sound that air brakes make when they are applied. Ritchey said that the truck's wheels did not stop or slow down, and that it looked like the vehicle went faster. Slycord then had the truck continue down the road. He estimated that the road was at a 3 percent decline. According to Slycord, the truck's speed was 2 to 4 miles an hour, when he motioned for W. Jewell to stop. Slycord indicated that the truck continued to roll, and came to a stop when the truck reached a level portion of the road. Ritchey, in essence, corroborated Slycord's testimony regarding his observations.

Slycord said that he asked W. Jewell if he had inspected the brakes, and reported the problem with the brakes to the mine operator. According to Slycord, W. Jewell said that he did not, and that everybody on the job knew that the brakes did not work. Slycord indicated that W. Jewell also told him that the truck did not have any brakes when he was laid off the previous January.

Ritchey testified that when he informed the plant operator that the truck did not have any brakes, the latter said that everybody around the plant knew it did not have any brakes. Neither W. Jewell, nor the plant operator testified. I thus do not accord much weight to the hearsay testimony of Slycord and Ritchey.

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3 He estimated that the distance from the point where the truck was loaded by the track hoe at the pit to the crest in the road was 40 to 50 feet. He also estimated that the road rises in elevation approximately 7 feet from the point where the Euclid truck was loaded, to the crest of the road.

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4 William Jewell is not related to Danny Jewell. The date the citation at issue was issued was his first day back on the site after having been laid off, during the previous winter.

According to Slycord, he also asked W. Jewell to apply the parking brake and he tried, but it did not hold.

Slycord issued an imminent danger withdrawal order under Section 107 of the Act, and citations alleging violations of 30 C.F.R. 56.14101(a)(2), 56.14101(a), and 56.14100(d).

A. Section 107(a) Withdrawal Order (Order/Citation No. 4116491).

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

The term "imminent danger" is defined in Section 3(j) of the Act to mean ". . . the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j).

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector abuses his discretion when he orders the immediate withdrawal of a mine under Section 107(a) in circumstances where there is not an imminent threat to miners. Utah Power & Light Co., 13 FMSHRC 1617 (1991).

Due to the presence of inclines and declines in the road on which the truck in question travels as part of its normal operations; the presence of persons working in proximity to the location of the truck at the track hoe and hopper, both of which are down an incline from the area where the truck parks in performance of its work at these locations; the possibility of another vehicle being on the road at the same time as the truck in question; and the presence of persons performing construction work in the area of the route taken by the truck, it is possible that because a truck at issue had inadequate brakes it might hit one another object and thus cause injuries. However, the record

before me does not establish that such an event was imminent given continued mining operations. Indeed, after Slycord had observed the truck not stopping, and after he was aware of the comment by W. Jewell that the truck did not have brakes, he allowed the operator to drive the truck down a grade to dump its materials at the hopper.

B. Citation/Order No. 4116491

1. Violation of 30 C.F.R. 56.14101(a).

Citation/Order No. 4116491, as modified on May 18, 1993, in addition to alleging an imminent danger also alleges a violation of 30 C.F.R. 56.14101(a). Section 56.14101(a), as pertinent, provides as follows: "(a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels."

J.E. Jewell testified that prior to April 28, 1993, the date Respondent was cited, he was not aware of any problems concerning the brakes on the truck. On April 29, he inspected the service brakes. He said that the only problem that he found in the brakes was that "there was an 'o' ring out in the air pod." (Tr. 219) According to J.E. Jewell, this leak would have affected braking ability only if the brakes were applied for about 15 minutes. The only repair he performed in order to abate the citation was to replace the "o" ring. Danny Jewell, indicated in response to leading questions, that prior to the issuance of the citation he had observed the truck operating, and it operated in a proper fashion.

In essence, Respondent argues that the citation should be dismissed because Petitioner did not perform any testing of the brakes as required by 30 C.F.R. 56.14101(b). Section 56.14101(b), supra provides, as pertinent, that "service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, ..." Section 56.14101(b) supra, further provides that the testing shall be evaluated according to stopping distances set forth in Tables M-1 and M-2. In essence, Respondent argues that had such testing been performed as required the vehicle would have stopped as required according to the tables in Section 56.14101(b) supra, and the citation would not have been issued.

While it is true that Petitioner did not test the brakes in spite of the inspector's conclusion that the service brake system did not function as required, Respondent is not relieved of its responsibilities to comply with Section 56.14101(a) supra. (Conco-Western Stone Co., 13 FMSHRC 1908 (December 1991) (Judge Maurer)). To hold, as apparently being argued by Respondent, that Section 56.14101(a) is not violated in absence

of proof that the vehicle in question had been tested pursuant to Section 56.14101(b), would render meaningless the plain language of Section 56.14101(a) which provides that the truck in question "shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade of travel."

The truck stopped on an incline road when initially observed by Slycord. However, both Slycord and Ritchey testified that when Slycord directed the truck to be stopped, they heard noise indicating to them that the brakes were applied, but that the truck did not stop, and it continued to roll forward. Their testimony was not contradicted or impeached. I find that the weight of the evidence establishes that Respondent did violate Section 56.14101(a) supra.

2. Significant and Substantial

Essentially, according to Slycord, the violation he cited is significant and substantial.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation 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: (l) 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), 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, 1336 (August 1984).

Clearly the failure of the service brakes to stop the vehicle in question violates Section 56.14101(a), and contributes to the hazard of the truck hitting and injuring a person. However, the record fails to established that such an event was reasonably likely to have occurred. In this connection, I take cognizance of the following conditions: the amount of dirt placed

between the truck and the track hoe; the placement of a "bump block" between the area where the truck stops to load in to the hopper, and the hopper; the fact that vehicle normally operates, at a speed of only, at the most, 10 miles an hour; and the lack of evidence of steep grades, or the presence of significant traffic on the road during times which the vehicle in question travels. Accordingly, I find that the violation was not significant and substantial.

3. Penalty

In evaluating the gravity of this violation, I consider the above conditions and take into account (1) the testimony of J.E. Jewell, that has not been contradicted, that the only thing wrong with the brakes was a leak in the brake pod which under normal operations would not affect the brakes; and (2) the fact that after the leak had been repaired the order at issue was terminated. I find that the violation was only of a low level of gravity. Since the problem with the brakes appears to have been only minor, and there is not sufficient evidence that the truck continued to roll for any significant distance after the brakes were applied, I conclude that Respondent's negligence was only a low degree. Taking into account the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty of $50.00 is appropriate for the violation.

C. Citation No. 4116493.

Citation No. 4116493 alleges a violation of Section 56.14100(d) which requires as follows:

> (d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

According to Slycord, he asked W. Jewell, if he did an inspection of the brakes and reported to the mine operator, and W. Jewell indicated that he did not. Slycord did not ask to examine the operator's records. He was informed by Danny Jewell subsequent to the issuance of this citation, that the latter was not aware of recordkeeping requirements. Since the service brakes did not function as required by Section 56.14110(a) supra, and since no report was made of this condition to the mine operator, I find that Respondent did violate Section 56.14100(d) supra. However, I take note of the parties' stipulation that Danny Jewell took over the operation of Respondent only 11 days prior to the issuance of the citation at issue. I also find Danny Jewell's testimony reliable that prior to the issuance of the citation, he watched the truck in operation, and did not see

any indication that the brakes were not working properly. Accordingly, I find Respondent's negligence herein to be extremely low, and find that a penalty of $20.00 is appropriate for this violation.

D. Citation No. 4116492.

Slycord testified that when he initially spoke to W. Jewell, the driver of the truck in issue, and told him that he wanted to test the service brakes and parking brake the latter driver told him that "he didn't have any brakes" (Tr. 101). According to Slycord, at the point in the road before it reaches the crest in the incline away from the track hoe, he asked W. Jewell to apply the parking brake. Slycord indicated that the latter tried to apply the parking brake, "and it wouldn't hold." (Tr. 129).

Slycord issued a Citation No. 4116492 alleging a violation of 30 C.F.R. 56.14101(a)(2) which provides as follows:

> "(a) If 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." Respondent, in its defense, cites the fact that when the inspector initially motioned the truck to stop on the incline up from the track hoe, it came to a stop. Slycord did not indicate that once the truck had stopped, the parking brake at that time did not hold the truck. Also, J.E. Jewell testified that to abate the citation the day after the citation was issued, he inspected the parking brake. He explained that the parking brake is set by pulling on a stick located inside the truck. He said that when he examined the stick it was loose and, would not pull up the parking brake, and set it. J.E. Jewell tightened the stick to get the parking brake to work. He explained that this procedure is to be performed by the driver of the truck. No further repairs were performed on the parking brake, and when reinspected by the inspector the citation was abated.

The record before me does not contain any specific contradiction or impeachment of the inspector's testimony that after he asked W. Jewell to apply the parking brake it would not hold. I give considerable weight to the disinterested testimony of the inspector (See, Texas Industry Inc., 12 FMSHRC 235 (February 1990) (Judge Melick)). I thus find that Respondent herein did violate Section 56.14101(a)(2) as alleged.

Considering the mound of dirt protecting the truck from rolling into the track hoe when parked to receive a load from the track hoe, and the fact that a bump block protected the truck

from rolling into the hopper when parked in front of the hopper to dump into the hopper, I find that the violation was of a low level gravity. I find that a penalty of $20.00 is appropriate.

ORDER

It is ordered as follows:

1. Citation numbers 4116494, 4116495, and the imminent danger order set forth in Order/Citation No. 4116491 be dismissed;

2. Order/Citation No. 4116491 be amended to a non significant and substantial citation; and

3. Within 30 days of this decision, Respondent shall pay a penalty of $90.

Avram Weisberger
Administrative Law Judge

Distribution:

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