

CCASE:  
MSHA V. CATENARY COAL CO.  
DDATE:  
19941027  
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 94-237  
Petitioner : A.C. No. 46-08146-03505  
v. :  
: Campbells Creek Surface  
CATENARY COAL COMPANY, : Facilities  
Respondent :

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for the Petitioner;  
Frenchette C. Potter, Esq., St. Louis, Missouri,  
for the Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," to challenge a citation issued by the Secretary of Labor against Catenary Coal Company (Catenary) for one violation of the standard at 30 C.F.R. 77.1600(b). The general issue before me is whether there was a violation as alleged and, if so, what is the appropriate civil penalty for that violation. Additional specific issues are addressed as noted.

The citation at issue, No. 3743671, alleges a "significant and substantial" violation of the noted standard and charges as follows:

It was revealed during a fatal powered haulage accident, that standardized traffic rules and warning signs had not been posted along the roadways to warn drivers to use lower gears, to travel at slow speeds, to indicate proper CB channel to monitor, and to warn that specific locations are only suitable for one way traffic. This condition was one of the contributing factors to the issuance of Imminent Danger Order No. 3743670 therefore no abatement time is set.

The cited standard provides that "[t]raffic rules, signals and warning signs shall be standardized at each mine and posted."

Two haul roads at the Campbells Creek Surface Facilities are at issue. The Point Mine Road runs from the Campbells Creek No. 3 Mine approximately .4 miles to the Campbells Creek Preparation Plant over a 12 percent average downgrade. On April 23, 1993, there were no signals or warning signs anywhere on that road. The Winchester Mine Road runs approximately 2.3 miles from the Campbells Creek No. 2 Mine to the Campbells Creek Preparation Plant and over an average downgrade of 13.24 percent. On the Winchester Mine Road there was a section approximately 3,800 feet long, having a maximum downgrade of 17 percent. As of April 23, 1993, there were five signs posted along this road (identified on Respondent's Exhibit No. 1 with blue "X"s). The location of the signs and the captions on the signs are not in dispute. Near the Winchester Mine there was a sign captioned "speed 25 limit." Approximately two-thirds of the way down the Winchester Mine Road there was a yield sign and a sign labeled "one lane traffic loaded trucks have rt. of way" (Gov't Exhibit No. 3). At the bottom of the Winchester Mine road and facing uphill was a sign "CB 18 channel" and a "stop" sign.

Mine Safety and Health Administration (MSHA) Coal Mine Inspector Paul Hess, Jr. conducted an investigation on April 23, 1993, of a fatal accident at the subject complex. He issued the citation at bar upon his belief that the signage at the mine was inadequate. The 25-mile-per-hour speed limit was, according to Hess, too fast for loaded coal trucks and, in particular, much too fast for loaded trucks in the downgrade area. Truck drivers interviewed by Hess, reported they ordinarily drove only five to 15 miles-per-hour on this road.

Hess further opined that the sign designating "one lane traffic loaded trucks have rt of way" was not readily visible and could be read only if you were close to it. In addition, Hess found that a sign should have been at the bottom of the hill where the Winchester Road intersects near the preparation plant identifying the proper CB channel to be monitored. He believed that the existing sign was facing the wrong way on Winchester Road. Hess also opined that a sign was needed to warn drivers against shifting gears while proceeding downhill. He testified that if you are unable to engage a gear in the shifting process on the "Autocar" haul trucks and your speed builds up, the service brakes may not be sufficient to stop on the downgrade. I accept the testimony of Inspector Hess and find that the violation existed as charged.

Hess opined that the violation was also "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable

~2181

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 (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 the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1473, 1574 (1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (1991).

In this regard, Hess testified that without warning signs and proper reminders, there was a particular danger to new drivers unfamiliar with the mine property. Hess was particularly concerned with the sign indicating the right-of-way for loaded trucks. Hess believed that the fatal haulage accident that occurred on April 23, 1993, was caused by the driver's attempt to shift gears on the downgrade and his inability to engage a gear thereby resulting in a runaway truck. Hess opined that fatal injuries were indeed highly likely with a resulting run-away truck. More particularly, Hess testified that the fatality was the result of the truck out-of-gear and losing control. This conclusion was the result of examination of the truck's gears, which were neither scorched, discolored nor chipped and interviews of witnesses that the truck was moving at 70 to 80 miles per hour when it struck the coal stockpile.

Hess acknowledged that he attributed only low negligence to the operator because of frequent prior inspections by MSHA at this mine without any indication or citations for inadequate signage. The operator had not previously been cited for any

~2182

similar violations and indeed it is stipulated that, while Respondent is a large operator, it has an "excellent history." Hess also attributed low negligence to the operator because of the acknowledged ambiguity and lack of clear guidance in the cited standard.

I agree with the inspector's assessment that a violation occurred and that the violation was "significant and substantial." In particular, a new driver at the mine site would not on April 23, 1993, have been warned of any hazards on the Point Mine Road since no signs then existed. On the Winchester Road, there were seriously deficient signs. The 25-mile-per-hour speed limit sign could easily have lulled a new driver into exceeding a safe speed. It is undisputed that this speed well exceeded the safe limits on the downgrade section of the haul road. In addition, I accept the inspector's credible testimony corroborated by the photograph in evidence (Exhibit No. 3), that the sign indicating "one lane traffic loaded trucks have rt. of way" was too small to be readily observed (Gov't Exhibit No. 3). Moreover, there were no signs warning new truck drivers not to change gears in the approaching downgrade of the Winchester Mine Road. It may reasonably be inferred from the investigation conducted in part by Inspector Hess that indeed the fatal haulage accident at that location was caused by an attempt to change gears while proceeding into that downgrade.

Finally, it may reasonably be inferred that confusion could have been engendered by the absence of signs to indicate the appropriate CB channel for drivers to monitor. This confusion could very well have been furthered by the "hazard training" program at the subject mine and in particular the contradictory terms of Item No. 16 of that program which indicates as follows: "Citizen band channel 16 is utilized by off-road haulage trucks. Citizen band channel 18 is utilized by the Prep. Plant and on road haulage trucks while on the property" (Respondent's Exhibit No. 3).

In reaching the above conclusions, I have not disregarded the Respondent's argument that the hazard training document (Respondent's Exhibit No. 3) would have sufficiently warned new truck drivers of the hazards on the haulage roads at the mine prior to April 23, 1993. I simply disagree with this argument. In particular, the ambiguities, if not contradictions, in the hazard training document (see Statement Nos. 4, 11 and 16) could easily lead to confusion in the traffic rules further aggravating the absence of appropriate signs.

In proposing a penalty in this case however I give significant weight to the fact that MSHA had frequently inspected this mine without any indication or citations for inadequate signage and to Inspector Hess' admission that the cited regulation was both ambiguous in its requirements and provided little guidance

~2183

to mine operators. In King Knob Coal Co., Inc., 3 FMSHRC 1417, 1422 (1981), the Commission held that unclear or confusing MSHA policies may be a factor mitigating operator negligence. In the instant case, the lack of clear guidance and the ambiguities in the Secretary's regulation and his lack of prior enforcement may similarly be considered in mitigating operator negligence. Within this framework and considering all of the criteria under section 110(i) of the Act, including the stipulation that this operator has an "excellent history," I conclude that a civil penalty of \$250 is appropriate for the violation.

ORDER

Citation No. 3743671 is AFFIRMED and Catenary Coal Company is hereby ordered to pay a civil penalty of \$250 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge

Distribution:

Patrick L. DePace, Esq., Office of the Solicitor,  
U.S. Department of Labor, 4015 Wilson Blvd., Room 516,  
Arlington, VA 22203 (Certified Mail)

Frenchette C. Potter, Esq., CityPlace One, Suite 300,  
St. Louis, MO 63141 (Certified Mail)

/lh