FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 16, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2012-922-M
Petitioner,	:	A.C. No. 04-02542-287276-01 S314
	:	
	:	Docket No. WEST 2012-923-M
v.	:	A.C. No. 04-02542-287276-02 S314
	:	
	:	Docket No. WEST 2012-1026-M
	:	A.C. No. 04-02542-290124-01 S314
CONSOLIDATED REBAR, INC.,	:	
Respondent.	:	Mt Pass Mine and Mill

DECISION

Appearances: Bryan Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David W. Donnell, Esq., Robert D. Peterson Law Corporation, Rocklin, California, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Consolidated Rebar, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Henderson, Nevada, and submitted post-hearing briefs.

A total of two section 104(a) citations and a citation and order issued under section 104(d) were adjudicated at the hearing. The Secretary proposed a total penalty of $5,696 for these matters.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation Nos. 8689027 and 8689028

On March 23, 2012, Inspector Eric P. Wiedeman issued Citation No. 8689027 under section 104(a) of the Mine Act, alleging a violation of section 56.14100(b) of the Secretary's safety standards. (Ex. G-4). The citation stated that a rental forklift had a broken horn that

required touching a wire to ground to operate. It also had exposed broken glass upon a fuel gauge. Respondent operated the cited forklift with these conditions. *Id*. Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was Significant and Substantial ("S&S"), the operator's negligence was high, and that one person would be affected. Section 56.14100(b) of the Secretary's regulations requires "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). The Secretary proposed a penalty of $1,304.00 for this citation.

On March 23, 2012, shortly after issuing Citation No. 8689027, Inspector Wiedeman issued Citation No. 8689028 under section 104(a) of the Mine Act concerning the same underlying conditions as Citation No. 8689025, alleging a violation of section 56.14100(d) of the Secretary's safety standards, which requires, in part, "[d]efects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator." 30 C.F.R. § 56.14100(d). The citation states that "the equipment operator failed to note on the pre-operational exam that the defects existed and put the unit in operation." (Ex. G-5). Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of $392.00 for this citation.

Discussion and Analysis

Respondent's argument that the cited defects did not affect safety fails. Respondent argues that Guy Kaawaloa, the foreman, and Brensin Kamanu,[1] the forklift operator, testified that Respondent's horn use complied with Mine requirements. Kamanu also testified that when the forklift transported loads, he used a spotter or a leading vehicle. (Tr. 201-02). The forklift had operational service brakes and a flashing light. (Tr. 187). Kamanu positioned the boom attached to the forklift in a manner that did not obstruct his view while driving. (Tr. 190-91). Kamanu placed cardboard over the broken gauge to keep dirt out of it. (Tr. 197). He always wore gloves while working at the Mine. (Tr. 194). Respondent's efforts to avoid injury may make an injury less likely, but they also show that these defects do affect safety. Complying with safety measures is necessary because operating heavy equipment is dangerous if safety precautions are not followed. *See Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995). Although the above practices make the cited vehicle safer, the absence of a safety precaution, such as an easily accessible horn to use during an emergency, adversely affects safety.

I find that the conditions described in Citation No. 8689027 presented a violation of section 56.14100(b). The defective horn and the gauge affect safety. I credit Inspector Wiedeman' s testimony that the horn of the forklift is a signaling device that alerts people of the

[1] Kaawaloa and Kamanu were employees of Harris Rebar at the time the inspector issued the citations. It appears that Harris Rebar acquired Consolidated Rebar, retained the services Kaawaloa and Kamanu, and continued to use Consolidated Rebar's Mine ID number. The parties were aware of this relationship and did not raise any issues about it. (Tr. 150).

forklift's presence, especially during an emergency. (Tr. 25). Attempting to maintain control of the vehicle while trying to touch a wire to a grounding nut could result in the equipment overrunning a person. (Tr. 25-26). Flashing lights or a spotter may reduce this hazard, but it still exists. Inspector Wiedeman also stated that the broken glass on the gauge presented a hazard of causing lacerations to the hands and fingers of miners. (Tr. 27). The piece of cardboard covering the gauge was not secured to prevent its movement. (Tr. 28-29). These two defects made crushing and lacerating of miners more likely and the defects existed for days. The cited defects affected safety and were not corrected in a timely manner, which establishes a violation of section 56.14100(b).

I find that Citation No. 8689027 was S&S[2] because it was reasonably likely that the cited violation would contribute to a serious injury. The defective horn contributed to the hazard of a miner being fatally crushed in a collision between the cited vehicle and a pedestrian or another vehicle. I credit the undisputed testimony of the inspector that the Mt. Pass Mine, owned by Molycorp, had thousands of contractor employees on site at any given time. (Tr. 15). The areas where contractors worked, including the cited area, were "saturated" with people. (Tr. 16, 27). There were many pieces of equipment in the cited area. (Tr. 27). At the time of the inspection, the mine was on a hillside of different grades with numerous work levels. (Tr. 16). The vehicle moved between areas of the mine. (Tr. 32-33). The defective horn was reasonably likely to contribute to an injury because the cited vehicle traveled upon various grades in crowded areas. In the event the operator lost control of the forklift, the inability to warn equipment or pedestrians in its path was likely to cause an injury. The defective horn of the forklift, furthermore, could lead to an injury if the cited vehicle never lost control and was operated with the utmost care because it lacked the ability to warn operators of other pieces of equipment, which may be out of control or carelessly driven, of its presence.

I find that Citation No. 8689028 is a violation of section 56.14100(d) because the violations cited in Citation No. 8689027 were not recorded in a timely manner. Operators are responsible for the violations of safety standards by foremen. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). The defects were never recorded despite Kamanu' s testimony that the foreman knew that they had existed for days. (Tr. 198). Respondent argues that it did not violate section 56.14100(d) because the operator of the forklift verbally reported

[2] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

the defects to foreman Kaawaloa.[3] Respondent's argument fails, however, because Respondent deliberately did not record the defects that were reported to it. The argument that the foreman knew of the conditions but neither abated nor recorded them does not undermine the violation; rather, it suggests that a foreman was highly negligent and failed to record conditions because he knew that the conditions required service but did not stop production to address those conditions.

Citation No. 8689028 is S&S. The underlying conditions alone created hazards that were reasonably likely to seriously injure miners. The deliberate failure to record or abate violations, however, is more dangerous than the underlying conditions because in addition to perpetuating the underlying conditions, it can lead to the creation of additional and more dangerous conditions. Recording safety defects lessens the likelihood that other hazardous conditions will arise. The unwillingness of Kaawaloa to record or address hazardous conditions was reasonably likely to result in an injury of a reasonably serious nature and would likely contribute to the creation of additional hazardous conditions. Citation No. 8689028 was a violation of section 56.14100(d) that was reasonably likely to contribute to a forklift crushing and killing a miner.

I find that both Citation Nos. 8689027 and 8689028 were the result of Respondent's high negligence because its agent, foreman Kaawaloa, admittedly knew of the violations but did not abate them and affirmatively avoided recording defects. (Tr. 175). Foremen are the agents of the operator and their negligent actions can be imputed to the operator. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 329 (2009). The failure to address known conditions due to a desire to continue production is highly dangerous to miners. Not recording conditions is also dangerous, as it allows those conditions to exist and multiply without abating the hazards. Both conditions existed for several days and multiple shifts. Both conditions posed serious safety risks.

A penalty of $1,200.00 is appropriate for Citation No. 8689027 and a penalty of $1,200.00 is appropriate for Citation No. 8689028.

B. <u>Citation No. 8689025 and Order No. 8689026</u>

On March 23, 2012, Inspector Wiedeman issued Citation No. 8689025 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.14101(a)(2) of the Secretary's safety standards. The citation states, in part, that the parking brake on a Ford F-450 service truck failed to function when tested. The truck traveled upon multiple grades and in areas with heavy foot traffic. Kaawaloa knew for at least a week that the parking brake was defective. (Ex. G-1). Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that one person would be affected, and that the violation was the result of Respondent's unwarrantable failure to comply with a mandatory safety standard. Section 56.14101(a)(2) of the Secretary's regulations requires, in part, "[i]f 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." 30 C.F.R. § 56.14101(a)(2). The Secretary proposed a penalty of $2,000.00 for this citation.

[3] Verbal notice is not sufficient because section 56.14100(d) requires that "[d]efects …shall be reported to *and* recorded by the mine operator." 30 C.F.R. § 56.14100(d) (emphasis added).

On March 23, 2012, shortly after issuing Citation No. 8689025, Inspector Wiedeman issued Order No. 8689026 under section 104(d)(1) of the Mine Act concerning the same underlying conditions as Citation No. 8689025, alleging a violation of sections 56.14100(d) and 56.14100(a) of the Secretary's safety standards, in the alternative. The order states, in part, "The foreman knew the parking brake was not functioning properly and did not record it on the exam." (Ex. G-2). Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that one person would be affected, and that the violation was the result of Respondent's unwarrantable failure to comply with a mandatory safety standard. Section 56.14100(a) of the Secretary's regulations requires, in part "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 56.14100(a). Subsection (d) is set forth above. The Secretary proposed a penalty of $2,000.00 for this order.

Discussion and Analysis

The parking brake cited in Citation No. 8689025 violated section 56.14101(a)(2) because it was not capable of holding the cited vehicle on the steepest grade it traveled. Although they disagree about the circumstances of the brake test, Inspector Wiedeman and Kaawaloa agree that the parking brake was unable to stop the motion of the cited vehicle. (Tr. 43, 171). I credit both Inspector Wiedeman's and Kaawaloa's testimony that the parking brake was defective and I credit the inspector's testimony that the brake defect prevented the brake from holding the vehicle on the steepest grade it traveled.

I find that Citation No. 8689025 was S&S. Respondent argues that the defective parking brake did not pose a hazard; I disagree. I credit the inspector's testimony that defective parking brakes can cause fatalities; MSHA's "Rules to Live By" fatality prevention list includes section 56.14100 because brake problems are a leading cause of fatalities in mines.

The cited brake defect was reasonably likely to contribute to an injury. Respondent argues that a defective parking brake is unlikely to cause injury because a vehicle would not "pop-out of gear," but defective parking brakes are a leading cause of fatalities in mines according to the "Rules to Live By." The cited vehicle, furthermore, traveled upon various grades. (Tr. 181). The vehicle was likely to stop upon one of those grades. Inspector Wiedeman testified, and Respondent did not dispute, that the Mine was "saturated" with people, which increases the likelihood of an injury being suffered in the event of a mishap. (Tr. 16, 27, 49-50). Respondent's argument that the safe operation of the vehicle by Kaawaloa meant that the defective parking brake had no likelihood of contributing to an injury fails. Chocking of tires and turning wheels into berms should be used in addition to a parking brake. Kaawaloa, furthermore, admitted that he failed to follow safety regulations by not fixing the brake, which makes it uncertain that he would adhere to other safety practices. (Tr. 167). The busy area where the vehicle operated made it reasonably likely that Citation No. 8689025 would contribute to fatally crushing a miner.

I find that Order No. 8689026 was a violation of section 56.14100(d). As stated above, defective parking brakes affect safety. Kaawaloa and the inspector both testified that Kaawaloa

examined the truck and knew of the condition of the brake, but did not record the defect. (Tr. 42-43, 166-167). Kenneth Windham, Respondent's safety coordinator, also admitted that the defective parking brake of the cited truck was not documented. (Tr. 145). Respondent argues that Kaawaloa's knowledge of the defect undermines the violation, but making a record of defects found during preoperational examinations is required, even if a foreman is aware of a particular defect.[4]

I find that Order No. 8689026 was S&S. Respondent misinterpreted the nature of a section 56.14100(d) S&S violation. Respondent essentially argues that because the foreman was aware of the defective parking brake, failing to inspect the vehicle and record defects did not make the parking brake more likely to injure a miner. A violation of section 56.14100(d), however, relates to performing proper examinations upon equipment. The parking brake defect underlies Order No. 8689026 and provides both proof of a failure to record a defect as well as a specific example of the hazards likely to exist due to failing to properly examine vehicles. The violation and its S&S designation, however, are based upon the failure to record hazardous defects found during an examination. Not recording defects increases the likelihood that dangerous conditions will not be found or repaired, which is why the examination records are required. Failing to create records of hazardous defects is dangerous. Citation No. 8689026 is likely to cause a serious injury for the same reasons as Citation No. 8689025, but under continued normal mining operations Order No. 8689026 is also likely to contribute to an injury because the failure to record defects can lead to numerous and multiple hazards remaining unrepaired or unaddressed, as discussed with respect to Citation No. 8689028, above.

I find that both Citation No. 8689025 and Order No.8689026 were the result of Respondent's high negligence and unwarrantable failure.[5] Respondent's argument that an

[4] Respondent's argument that it did not violate section 56.14100(d) because it is "irrelevant" whether Kaawaloa recorded the defective brake because he knew that the condition existed and that it did not affect safety is inaccurate. As stated above, a defective parking brake does affect safety. The deliberate failure to record defects also affects safety regardless of the underlying condition because a failure to record any defect can lead to the creation of other hazardous conditions exposing miners to danger for a longer period of time.

[5] Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

unwarrantable failure designation requires a high degree of danger is inaccurate. Although a high degree of danger posed by a cited condition is an important factor when considering an unwarrantable failure designation, it is not a requirement. It is one of several factors that must be considered in light of the facts of the case. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). I find, furthermore, that the cited conditions did pose a high degree of danger because the failure to record the defective parking brake could contribute to a fatal injury. Respondent's foreman admitted that he knew of the defective parking brake and admitted that he did not record the defect. Both were obvious, Respondent made no effort to abate them, and the defective brake existed for at least several days. There are no mitigating circumstances. High negligence and unwarrantable failure designations were designed for situations where an operator is aware of conditions that pose safety hazards, but chooses to ignore those conditions for the sake of production, which Respondent's agent admitted was the situation presented here. The agent demonstrated aggravated conduct because his actions were intentional and reckless.

A penalty of $2,000.00 is appropriate for Citation No. 8689025 and a penalty of $2,000.00 is appropriate for Order No. 8689026.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Respondent has no history of previous violations as set forth in Exhibit G-17. At all pertinent times, Respondent was a small operator. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Respondent's ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

For the reasons set forth above, Citation Nos. 8689025 and 8689027 and Order No. 8689026 are **AFFIRMED**. Citation No. 8689028 is **MODIFIED** to increase the negligence from Moderate to High. Consolidated Rebar, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of **$6,400.00** within 30 days of the date of this decision.[6]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

[6] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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