FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 28, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-161-M A.C. No. 42-02457-302532 A
v.	:	Grantsville Sand
COLE PILLING, employed by TM Crushing, Respondent.	:	

DECISION

Appearances: Jason S. Grover, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Jackie Pilling, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Manning

This case is before me under 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (the "Mine Act"). The Secretary proposed civil penalties against Cole Pilling, a former pit manager for TM Crushing, in connection with Citation No. 6425164 and Order No. 6425171. Pilling contested the proposed penalties filed by the Secretary of Labor. The parties introduced testimony and documentary evidence at a hearing held in Salt Lake City, Utah, and submitted post-hearing briefs. I find that Pilling did not commit a 110(c) violation associated with either Citation No. 6425164 or Order No. 6425171. I therefore **VACATE** the 110(c) violations and penalties against Cole Pilling.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 3, 2010, Inspector Curtis Pittman issued Citation No. 6425164 to TM Crushing under section 104(d)(1) of the Mine Act, alleging a violation of section 56.14100(b) of the Secretary's safety standards. (Ex. G-1). The citation stated that the operator failed to correct, in a timely manner, a soft left brake, missing steps, and a broken backup alarm upon a loader. *Id*. Section 56.14100(b) of the Secretary's safety standards 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). On the same day, Inspector Pittman also issued Order No. 6425171 to TM Crushing under section 104(d)(1) of the Mine Act, alleging a violation of section 56.14101(a)(2) of the Secretary's safety standards, which requires that parking brakes hold equipment carrying a typical load upon the steepest grade it travels. 30

C.F.R. § 56.14101(a)(2), (Ex. G-4). The order stated that when tested, the parking brake of a haul truck that was used the day of the inspection failed to hold the empty vehicle. *Id*. TM Crushing did not contest the citation or the order.

After a special investigation, the Secretary charged Cole Pilling with two 110(c) violations concerning the conditions documented in Citation No. 6425164 and Order No. 6425171. The Secretary proposed penalties for the 110(c) violations of $2,300.00 for Citation No. 6425164 and $3,100.00 for Order No. 6425171.

I reject the Secretary's assertion that Pilling violated 110(c)[1] based upon his general knowledge of TM Crushing equipment. The Secretary argues that because Pilling "was on notice of problems with the equipment generally" he had knowledge of the ineffective parking brake of a haul truck as well as an ineffective left brake, missing step, and inactive back up alarm of a loader. (Respondent's Br. at 11). A history of varied conditions upon various pieces of equipment does not put an operator's agents on notice of every violation that may occur. Pilling, however, used his general knowledge to attempt to address the problems at TM Crushing by performing frequent repairs, lobbying ownership to purchase better equipment, and examining equipment himself. (Tr. 80, 101). A mechanic was at Gransville Sand almost daily repairing equipment. (Tr. 79). Pilling could not prevent the cited conditions from occurring or predict which condition might occur next, if any. Although Pilling knew that TM Crushing's old equipment posed a risk of developing conditions that violate the Secretary's safety standards, he

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[1] The Commission summarized the law applicable to a Section 110(c) violation as follows:

> Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

Cougar Coal Company, 25 FMSHRC 513, 516 (Sept. 2003).

addressed that risk with his best efforts; he was not "willfully ignorant" of the conditions and he did not know or have reason to know of the conditions cited in Citation No. 6425164 and Order No. 6425171 based upon his general knowledge of TM Crushing's equipment. *See Freeman United Coal Min. Co.*, 108 F.3d 358, 363-64 (D.C. Cir 1997). General knowledge that equipment is old and frequently requires repair does not rise to the level of aggravated conduct.

The secretary failed to show that Pilling's actions relating to Citation No. 6425164 constituted greater than ordinary negligence. [2] The Secretary argues that the inspector's testimony shows that Pilling knew of the cited violation and was guilty of aggravated conduct. I find that the Secretary did not fulfill his burden to show that Pilling knew or had reason to know of the cited conditions that violated section 56.14100(b).[3] I credit Pilling's testimony that he had no knowledge of the conditions cited in Citation No. 6425164; no employee told Pilling that the loader was defective and Pilling did not operate or examine the loader prior to the inspection. (Tr. 92-93). Pilling, furthermore, was not the on-site foreman of the Grantsville Sand Pit; he oversaw three pits and was present at Grantsville only about two days each week. (Tr. 48, 76). Brannigan Hunter, the on-site foreman of Grantsville Pit, testified that he did not know of the conditions and therefore did not inform Pilling of their existence. (Tr. 120). Although the Secretary argues that Inspector Pittman testified and Pilling admitted that he referred to the brakes as "soft," the inspector was not certain that Pilling intended the word "soft" to mean broken or hazardous. (Tr. 47-48). I credit Pilling's testimony that he believed that the brake felt a little different than brakes on other loaders but that he did not believe that the left brake was a defective, hazardous, or violative condition. (Tr. 94). The loader was frequently repaired during this period. (Tr. 79). Pilling had no information or knowledge that indicated he knew or had reason to know of the cited conditions. His actions did not exhibit aggravated conduct or greater than ordinary negligence. The 110(c) matter relating to Citation No. 6425164 is **VACATED**.

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[2] Pilling argues that the Secretary did not establish a violation of section 56.14100(b) because he did not show that the left brake of the loader was defective or that the cited condition existed from 2009 to 2010. I credit the inspector's testimony that the left brake was defective. Any of the cited problems, including a brake that functioned but was not in perfect condition, affect safety. I credit the inspector's testimony that he issued Citation No. 6425164 because the cited vehicle had several violations, but was in use. As the equipment was used before these conditions were corrected, the conditions were not corrected in a timely manner to prevent the creation of a hazard to persons. Moreover, TM Crushing did not contest the violation, which suggests that Citation No. 6425164 represents a violation of section 56.14100(b).

[3] In order to find individual liability in a 110(c) action, the Secretary bears the burden to show by a preponderance of the credible evidence that the conduct at issue was aggravated. *Maple Creek Mining*, 27 FMSHRC 555, 570 (2005).

The Secretary did not fulfill his burden to show that Pilling knew or had reason to know of TM Crushing's violation cited in Order No. 6425171.[4] The Secretary again argues that the inspector's testimony shows that Pilling knew of the cited violation and was guilty of aggravated conduct. When asked if Pilling's personal conduct, apart from the conduct of the entity of TM Crushing, was aggravated, the inspector only testified that Pilling was "part of the entity" and had "some culpability." (Tr. 53). The inspector seemed to attribute the negligence of the entire entity of TM Crushing to Pilling, which does not show that Pilling had any knowledge of the violation or was guilty of aggravated conduct under 110(c). *Charles Clevinger*, 26 FMSHRC 485, 500 (Oct. 2004) (ALJ). Furthermore, I credit Pilling's testimony that he believed that the parking brake was not defective. (Tr. 102). Although he noted that the preshift examination document for the cited equipment referenced a weak parking brake, Pilling tested the brake and reasonably believed in good faith that it functioned properly. *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1150 (Oct. 1998), (Tr. 97-98, 102-03). I conclude that Pilling tested the parking brake upon a grade that was lower than the steepest that it traveled. The parking brake was effective during this test so it did not alert Pilling to the fact that the brake was defective. Pilling genuinely believed that the parking brake worked. An insufficient examination of equipment may be negligent, but it is ordinary negligence and not aggravated conduct. The Secretary did not fulfill his burden to prove that Pilling knew or had reason to know of the cited condition. The 110(c) matter relating to Order No. 6425171 is therefore **VACATED**.

The Secretary failed to establish that Pilling acted with aggravated conduct that was greater than ordinary negligence with respect to either Citation No. 6425164 or Order No. 6425171. *Beth Energy Mine, Inc.*, 14 FMSHRC 1232, 1245 (1992). Although some of Pilling's actions may have been negligent, the Secretary presented scant evidence and made no showing that Pilling "knowingly violated" the safety standards. *Id*.

II. ORDER

For the reasons set for above, the 110(c) violations and penalties based upon the underlying facts of Citation No. 6425164 and Order No. 6425171 are hereby **VACATED**. This case is hereby **DISMISSED**.

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

[4] I find, for the purposes of this hearing, that Order No. 6425171 was a violation of section 56.14101(a)(2). I credit Inspector Pittman's testimony regarding this matter. Pilling did not argue the contrary and TM Crushing did not contest Order No. 6425171.

Distribution:

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