FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 23, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-712
Petitioner	:	A.C. No. 15-19076-141789
	:	
v.	:	
NALLY & HAMILTON	:	
ENTERPRISES, INC.	:	Chestnut Flats
Respondent	:	

DECISION

Appearances: Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Roy Timothy Cornelius, Billy Parrott, Peggy Langley, Conference and Litigation Representatives, MSHA, U.S. Department of Labor, Barbourville, Kentucky, for the Petitioner;
C. Bishop Johnson, Esq., Stephen C. Cawood, Esq., Cawood & Johnson, PLLC, Pineville, Kentucky, for the Respondent.

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Nally & Hamilton Enterprises, Inc. (N&H). The petition seeks to impose a civil penalty of $3,095.00 for three alleged violations, designated as significant and substantial (S&S), contained in 30 C.F.R. Part 77 of the Secretary's mandatory safety standards governing mining operations at surface coal mines.[1]

This matter was heard in Richmond, Kentucky on March 24, 2009. The parties stipulated that N&H is a mine operator subject to the provisions of the Mine Act, and that N&H abated the alleged violations in a timely manner. The parties' post-hearing briefs have been considered in the disposition of this case.

I. Findings and Conclusions

[1] Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

Mine Safety and Health Administration ("MSHA") Inspector David A. Faulkner inspected N&H's Chestnut Flats surface mine from January 3 to January 5, 2008. Faulkner has been an MSHA coal mine inspector for approximately three years. Prior to his MSHA employment, he worked in the coal mining industry for seventeen years. Faulkner's family owned a trucking company and he drove and maintained coal trucks for the family business.

a. Citation No. 7557475

During the course of his January 2008 inspection, Faulkner observed the production pit where trucks and loaders are operated to remove overburden in order to expose the coal seam. Faulkner observed a white RD-600SX Mack lube truck that carries liquids such as fuel, oil, and antifreeze, which is used to service mobile equipment at the pit. Specifically, Faulkner viewed the lube truck as it serviced a Caterpillar loader, three Caterpillar haul trucks, and three dozers. At that time, while the lube truck was servicing mobile equipment, Faulkner observed three people, on foot, adjacent to the mobile equipment, who were on the opposite side of the lube truck. The individuals apparently were operators of the equipment being serviced.

At approximately 2:15 p.m., Faulkner inspected the lube truck after it had completed servicing the mobile equipment. Faulkner noted that the back-up alarm on the lube truck was not operational. Faulkner explained that a back-up alarm is important because it warns individuals
in high noise environments to avoid walking in the truck's path as it is operated in reverse. The back-up alarm is particularly important because of the obstructed view resulting from the position of the tanks on the back of the truck. Consequently, the lube truck operator must rely on his rear and side view mirrors when backing up.

As a result of his inspection, Faulkner issued Citation No. 7557475 citing an alleged violation of the mandatory safety standard in 30 C.F.R. § 77.410(c) that provides that "[w]arning devices [on mobile equipment] *shall be maintained* in functional condition." (Emphasis added). Specifically, Citation No. 7557475 states:

> The operator *failed to maintain* the automatic reverse warning device in a functional condition on the White RD-600SX lube truck, S/N 2189, that is in operation at this mine. Warning devices *shall be maintained* in functional condition. The truck is being used around employees on foot and [in] congested equipment areas while performing routine maintenance.

(Gov Ex. 2). (Emphasis added).

Faulkner designated the violation as significant and substantial because he believed it was reasonably likely that mine personnel in the pit area will be struck by the lube truck if they are not warned to stand clear by the back-up alarm. The cited condition was attributed to a moderate degree of negligence. The citation was abated on January 5, 2008, after the back-up alarm was repaired. The Secretary proposes a civil penalty of $946.00 for Citation No. 7557475.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). The obligation imposed on a mine operator by section 77.410(c) of the Secretary's regulations is to maintain equipment in "functional condition." "Maintenance" has been defined as "the labor of keeping something (as building or equipment) in a state of repair or efficiency: care, upkeep ..." and "[p]roper care, repair, and keeping in good order." *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), quoting *Webster's Third New Int'l Dictionary, Unabridged* 1362 (1986), aff'd, 156 F.3d 1076 (10th Cir. 1998).

Thus, the question is whether N&H failed to keep the back-up alarm in "good [working] order." Answering this question requires determining the length of time of the back-up alarm malfunction. The back-up alarm was the subject of a pre-shift examination that was performed at 6:00 am on January 3, 2008. Faulkner examined the pre-shift report and determined that the pre-shift examiner noted that the back-up alarm was functioning properly. As previously noted, Faulkner determined that the back-up alarm was not functioning at 2:15 pm.

Faulkner initially testified that, as a general proposition, it is not uncommon for pre-shift examiners to perform perfunctory examinations by checking boxes on the examination report that all systems are functioning properly. (Tr. 45-46). I too recognize that perfunctory pre-shift examinations are not uncommon. However, in this case, Faulkner does not question the accuracy of the pre-shift notation that the back-up alarm was operating normally. Specifically, Faulkner testified:

> THE COURT: [The attorney for N&H] asked you do you have any reason – he said that the back-up alarm was checked off as operational on the pre-shift and he asked you if you have any reason to believe otherwise. And you said no, were you referring to you have no reason to believe otherwise that it was checked off, or you have no reason to believe otherwise that it was not working at the time of the pre-shift?
>
> THE WITNESS: I have no reason to believe that the operator did an inadequate examination. The record is what I look at is the record, that's his record. When he checks that - -

THE COURT: Right. So I'm asking you do you believe that the warning device was working at the time of the pre-shift?

THE WITNESS: According to the record it was.

THE COURT: I didn't ask you what the record said. I asked you do you believe it was working?

THE WITNESS: I don't have no reason not to believe it.

THE COURT: So in other words, what time would the pre-shift have occurred?

THE WITNESS: Probably 6 o'clock

THE COURT: 6 a.m.?

THE WITNESS: 6 a.m.

THE COURT: What time were you there?

THE WITNESS: 14:15 when the citation was issued.

THE COURT: That would be 2:15 p.m.?

THE WITNESS: That's correct.

THE COURT: So is it your belief that between 6 a.m. and 2:15 p.m. on January 3rd, 2008, the back-up alarm became dysfunctional?

THE WITNESS: That's correct.

(Tr. 47-49).

The Secretary does not contend that the severity of the hazard posed by the inoperable back-up alarm required the lube truck to immediately be removed from service.[2] Thus, Citation No. 7557475 concerns a proper maintenance issue rather than a removal from service question. I am constrained by Faulkner's testimony. While ignoring a pre-shift report that noted a defective back-up alarm clearly would constitute a violation of section 77.410(c), Faulkner does not contend that pre-shift examiner determined that the back-up alarm was inoperable.

[2] The mandatory safety standard in section 77.404(a), 30 C.F.R. § 77.404(a), requires that mobile equipment that is in an unsafe condition must be immediately removed from service.

The pre-shift examination is a means to identify defects requiring repair that occurred during the previous shift. Fundamental fairness dictates that a mine operator must be given a reasonable period of time to address defects after they are noted by the pre-shift examiner, an opportunity that the evidence reflects was unavailable to N&H in this case. As the record does not reflect that the needed repair was not performed in a timely manner, the Secretary has not demonstrated that N&H failed to maintain the back-up alarm in functional condition. **Accordingly, Citation No. 7557475 shall be vacated**.

b. Citation No. 7557476

The RD-600SX Mack lube truck is a tandem three axle vehicle with six brake assemblies. The three axles are the front steering axle and the two rear drive axles. The six brake assemblies consist of two brakes on the front wheels of the steering axle, and four brakes on the rear wheels of the two rear drive axles. Each brake assembly consists of a clamp type brake chamber. When the brakes are applied by the truck operator, air pressure, held in place by a rubber diaphragm, accumulates. The air pressure pushes a slack adjuster out which, in turn, is attached to a push rod that turns a cam shaft that engages the brake shoe. (Tr. 87-88).

During his inspection, Faulkner conducted a brake function test on the Mack lube truck. Faulkner asked the operator of the truck to operate the engine until a maximum of 120 psi was achieved which pressurized the braking system. The truck operator was then requested to turn off the truck engine, place the transmission in low gear, and release the parking brake. Faulkner then walked around the truck and measured the stroke distance on the brake push rods to determine the effectiveness of each brake. Excess travel of the push rod causes metal to contact metal that results in a loss of compression. This condition is corrected by adjusting the slack adjuster to limit the push rod travel to under two inches. (Tr. 97).

Faulkner testified that he relied on the North America out-of-service criteria guideline for commercial vehicles. This guideline limits the maximum allowable travel of the push rod for normal rear brake function is two inches. (Tr. 104, 123-24). Faulkner believed the front drive axle brake assembly needed adjustment because it had two and one half inches of travel in the push rod. However, Faulkner conceded that the North America out-of-service guideline is not in MSHA's policy manual, and it has not otherwise been adopted as an MSHA safety standard. (Tr. 123).

Faulkner opined that, if there is one maladjusted slack adjuster on a truck with five otherwise functioning brakes, it would have a negative impact on the overall braking system because it puts additional stress on the five functioning brakes. (Tr. 91-92). Faulkner was particularly concerned with the loads that the truck carried. He estimated that the truck contained approximately 4,000 gallons of diesel fuel, 200 gallons of 15-40-oil, 200 gallons of anti-freeze, 200 gallons of transmission fluid, 200 gallons of hydraulic oil, and 200 gallons of used motor oil.
However, Faulkner apparently did not consider the service brakes to be "unsafe" as contemplated by section 77.404(a) because he testified the condition of the brakes "did not meet out-of-service criteria." (*See* fn. 2; Tr. 110).

As a result of his inspection, Faulkner issued Citation No. 7557476 citing an alleged violation of the mandatory standard in section 77.1605(b), 30 C.F.R. § 77.1605(b). This mandatory standard states, in pertinent part, "[m]obile equipment shall be equipped with adequate brakes. . . ." The citation states:

> The operator failed to maintain the White RD-600SX Mack lube truck, S/N 2189, in a safe operating condition. The following condition exist[s] on the truck[:] (1) When checked the drivers' side front drive [rear] axle brake assembly has more than the allowed 2 inches of travel in the brake chamber push rod. The truck is used in adverse conditions up and down steep inclines on elevated roadways at this mine. Mobile equipment shall be equipped with adequate brakes.

(Gov. Ex. 5).

Faulkner designated the violation as significant and substantial because he believed it was reasonably likely that a lube truck operator will sustain serious or fatal injuries if he lost control because the brakes ultimately failed due to the compromised brake assembly. The cited condition was attributed to a moderate degree of negligence. The citation was abated on January 5, 2008, after the movement in the push rod was corrected by adjusting the slack adjuster. The Secretary proposes a civil penalty of $946.00 for Citation No. 7557476.

Despite the alleged maladjustment in the cited brake chamber, Faulkner testified that the truck operator believed the brakes were functioning normally. (Tr. 114-15). In fact, Faulkner conceded that, unless the push rod movement was individually measured for each brake, there was no reason to believe the brakes were not functioning adequately as that term is commonly known in the industry. (Tr. 115-16). Significantly, Faulkner testified that although testing the slack adjusters during a pre-shift examination is discretionary, slack adjusters are not routinely checked when brakes are performing normally. (Tr. 113-16; 120-22). Finally, Faulkner testified that the pre-shift examination reflected that the brakes were functioning properly and that there was no reason to believe that the pre-shift examination was inadequate. (Tr. 114; 120-22).

The language of a regulation is the starting point for determining whether its provisions have been violated. *Dyer v. United States*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *See e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (Sept. 1984).

Section 77.1605(b), the cited mandatory standard, requires the subject lube truck to be equipped with "adequate brakes." The applicable meaning of the term adequate is ". . . fully sufficient for a specified or implied requirement." *Webster's Third New Int'l Dictionary, Unabridged* 25 (2002). An entity is "sufficient" when it is "marked by quantity, scope, power, or quality to meet with the demands, wants, or needs of a situation or of a proposed use or end." *Id. at 2284.*

The plain use of the terms "adequate" and "sufficient" reflects that section 77.1605(b) is

a functional standard. In other words, service brakes can be deemed adequate as contemplated by section 77.1605(b) even if a component part is in need of adjustment. Thus, the dispositive question is whether the braking system on the lube truck was functioning adequately.

The Secretary has not adopted the North America out-of-service criteria guideline for commercial vehicles relied on by Faulkner to determine if service brakes are adequate. Rather, in addressing the issue of when brakes are deemed to be inadequate, it is instructive to consider the Secretary's mandatory safety standard in section 56.14101, 30 C.F.R. § 56.14101, governing the minimum requirements and testing for service brakes on trucks that are operated in surface metal and non-metal mines. The pertinent provisions are:

> **§ 56.14101 Brakes**
>
> (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. . . .
>
> * * * *
>
> (3) All braking systems installed on equipment shall be maintained in functional condition.
>
> (b) *Testing.* (1) 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, unless the mine operator removes the equipment from service for the appropriate repair.

Thus, the Secretary's criteria for determining whether the minimum requirements for service brakes are satisfied requires ascertaining whether a truck's service brake system is capable of stopping and holding the vehicle with its typical load on the maximum grade it typically travels. Although Faulkner expressed his concern with respect to the large capacity of fluids and load weight carried by the lube truck, the Secretary does not contend the service brakes were incapable of stopping and holding the vehicle under normal operating circumstances. Significantly, the Secretary concedes that the lube truck operator believed the brakes were functionally normally.

In the final analysis, the issue is not whether the pre-shift examiner conducted a rigorous enough test to determine if the braking system was adequate. In fact, under the testing provisions of section 56.14101(b)(1), there is no requirement to conduct a thorough brake test unless there
is reasonable cause to believe that the "brake system does not function as required." Rather, the issue is whether the Secretary has met her burden of proof of demonstrating that the brakes were inadequate. Although Faulkner speculated about the additional stress placed on five operational brake assemblies when the sixth is out of adjustment, there is no meaningful evidence of inadequate brake performance. Significantly, even Faulkner admitted the condition of the service brakes did not warrant the lube truck to be removed from service.

Thus, the Secretary has failed to demonstrate the fact of occurance of a section 77.1605(b) violation. **Accordingly, Citation No. 7557476 shall be vacated**. In reaching this conclusion I recognize that the Mine Act is a strict liability statute. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986)**,** aff'd, 868 F.2d 1195 (10th Cir. 1989). Under strict liability, one could argue that N&H is liable, even though the service brakes were capable of stopping and holding the lube truck with its typical load on the maximum grade it travels, if the braking system needed an adjustment. However, as the Commission has acknowledged, an operator may be held liable regardless of fault only "if a violation of a mandatory standard occurs." *Spartan Mining Company, Inc.*, 30 FMSHRC 699, 706 (Aug. 2008). Here, the Secretary has failed to prove the fact of occurrence of the cited violation as she has failed to demonstrate that the lube truck was not "equipped with adequate brakes."

c. Citation No. 7557479

During his inspection, Faulkner observed removal of the overburden from the coal seam at the base of the pit. The equipment consisted of a 992 Caterpillar loader and three Caterpillar 777D haulage trucks. Faulkner initially stood at one end of the pit, approximately 700 feet from the other end of the pit where the loader was loading overburden material into the haul trucks for transportation to the dump. (Tr. 140). Faulkner testified the Caterpillar loader was not visible from one end of the pit to the other because of the dust created by the truck loading process. (Tr. 139-40).

After the trucks were loaded, they proceeded to the dump from the pit area over a dirt road. (Tr. 148). Faulkner estimated the trucks traveled at a maximum speed of 20 miles per hour. (Tr. 161-62). As the trucks were leaving and approaching the loading site during the overburden removal cycle, the trucks passed each other on the road. As the trucks approached each other from opposite directions, the truck operators were side by side in their respective positions on the left side of the cabs of their trucks. Faulkner observed that the trucks slowed as they passed each other. Faulkner attributed the reduction in speed by the truck operators to the dust that was created as the trucks approached. (Tr. 141-42).

Faulkner compared the dust to the cloud of dust created behind a passenger vehicle when it travels down a gravel road. (Tr. 147-48). Faulkner testified the dusty road conditions were caused by the loosening of the dirt on the road that occurred as a result of truck traffic rather than by dust accumulations that resulted from removal of the overburden at the pit. (Tr. 146-47). Faulkner used a wooden ruler to determine the dust in the roadway was approximately two to four inches deep. (Tr. 139-40).

Faulkner conceded that dust on a dirt road is a natural consequence of truck traffic. (Tr. 164-65). However, Faulkner explained:

> I understand the mining process and when I see trucks traveling in a straight line and there's no traffic around them I'll allow some dust. But when I see trucks passing in close proximity and they're having to slow and it's limiting those operators to what they can see and do then I'll issue a citation. I'm very lenient as an inspector on dust. There's other people that are probably a lot harder than I am.

(Tr. 165).

As a result of his observations, Faulkner issued Citation No. 7557479 citing an alleged violation of the mandatory standard in section 77.1607(i) that provides: "[d]ust control measures shall be taken where dust *significantly* reduces visibility of equipment operators (emphasis added)." Citation No. 7557479 states:

> Road dust has been allowed to accumulate about 2 to 3 inches in depth on the pit floor and haul road exiting the No. 01 coal pit of the mountain top cut through, and proceeding to the truck dump significantly reducing the visibility of the operators. There are three Cat 777D haul trucks and a Cat 992G wheel loader using this area which consists of limited passing and turning areas in the pit, elevated inclines, and curves that require proper visibility during operation. Should this condition be allowed to continue a collision will result. Dust control measures shall be taken where dust significantly reduces visibility of equipment operators.

(Gov. Ex. 6).

Faulkner designated the violation as significant and substantial because he believed a collision of haulage trucks was likely to occur as a result of the hazard caused by limited visibility. If a collision were to occur Faulkner opined that a truck operator would sustain at least broken bones as a result of the accident. Faulkner attributed the alleged violation to a moderate degree of negligence. The alleged violative condition was abated when N&H applied water to the pit floor and haul road. The Secretary proposes a civil penalty of $1,203.00 for Citation No. 7557479.

The Commission has addressed the burden the Secretary must carry to demonstrate the fact of the occurance of an alleged violation in its decision in *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819 (Nov. 1995). The Commission stated:

> The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989). The preponderance standard, in general, means proof that something is more likely so than not so. *See* 3 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 72.01 (1987); 2 Kenneth S. Brown et al., *McCormick On Evidence* § 339, at 439 (4th ed. 1992); *Hopkins v. Price Waterhouse*, 737 F.Supp. 1202, 1206 (D.D.C. 1990).

17 FMSHRC at 838.

As a threshold matter it is not surprising that Faulkner's view of the Caterpillar loader, from a distance of approximately 700 feet, was obscured from the dust generated by loading overburden material into haulage trucks. Rather, the issue is whether the Secretary has demonstrated a violation of section 77.1607(i) because the dust created by truck travel on the dirt road "significantly" reduced the visibility of the haulage truck operators.

It is significant that Faulkner did not speak to any of the truck operators to determine if they felt their vision was impaired. (Tr. 162). Nor is there any evidence that Faulkner observed the truck operating conditions from the cabs of the trucks, or from an area in close proximity to where the trucks were operating. Significantly, Faulkner did not recall whether the truck operators had turned on their headlights, which would indicate reduced visibility. (Tr. 162). Dust in depths of approximately two to four inches on a dirt road churned by the tires of haulage trucks, alone, is inadequate to establish a section 77.1607(i) violation.

It would be easy to prevail if prosecutorial officials could demonstrate an alleged violation by simply opining that they believed that the violation occurred. However, due process requires more. In the final analysis, the Secretary must present adequate evidence to support the inspector's subjective opinion that a violation, namely a significant impairment of visibility, existed.

In other words, the Secretary must present supporting evidence that the alleged violation occurred. In this regard, Faulkner failed to obtain the opinion of the truck drivers to corroborate his belief that visibility was significantly affected. Moreover, it has neither been contended, nor shown, that the operators relied on their headlights because they believed their visibility was impaired. Consequently, the Secretary has failed to satisfy her burden of proof. **Accordingly, Citation No. 7557479 must be vacated**.

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 7557475, 7557476, 7557479 **ARE VACATED.** Accordingly, Docket No. KENT 2008-712 **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

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