FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 18, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2009-126
Petitioner,	:	A.C. No. 15-14728-162918
	:	
v.	:	
	:	
FOX KNOB COAL COMPANY	:	Mine: Foresters Creek Strip
Respondent,	:	

DECISION

Appearances: Robert Motsenbocker, Esq. Office of the Solicitor, U.S. Department of Labor, Nashville, Tenessee, on behalf of the Secretary of Labor;
Julia L. McAfee, Esq., Carl R. McAfee, P.C., Norton Virginia, for the Respondent

Before: Judge Gill

This case arises from petitions for civil penalties filed by the Secretary of Labor under Section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq., (the "Act"). They charge the operator, Fox Knob Coal Company ("Fox Knob"), with three violations of mandatory standards and seek civil penalties for those violations. The general issue before me is whether Fox Knob violated the standards as alleged and, if so, what is the appropriate civil penalty for those violations. Additional specific issues are addressed as noted.

The case was heard on October 28, 2010, at the Bell County Courthouse in Pineville, Kentucky. Respondent agrees in its Answer to the Secretary's Petition for Assessment of Penalty that it is subject to the jurisdiction of the Mine Safety and Health Administration and that the Administrative Law Judge has jurisdiction to issue this decision.

Findings of Fact - Conclusions of Law

Respondent Fox Knob operates a surface coal mine in the vicinity of Wallins Creek, Harlan County, Kentucky. Between June 12 and 23, 2008, MSHA inspector Larry Boggs conducted inspections of portions of the Foresters Creek Strip and Wallins dump sites, operated by Fox Knob. Boggs wrote the three citations relevant to this case on June 12 and 23, 2008. (Tr. 41:7- 42:15) Two of the citations, No. 8329773 (Exhibit S3) and No. 8329782 (Exhibit S9), relate to the steering mechanism on large rock hauling trucks. The third citation, No. 8329772, (Exhibit S1) relates to a berm at the Wallins dump site.

The Citations

Citation No. 8329772, issued on June 12, 2008, reads as follows:

> Berms shall be provided to prevent overtravel and overturning at dumping locations. The berm provided for the dump site of the Wallins Pit is inadequate in that it was not midaxle height on the Eculid [sic] Rock Trucks that are using this dump site. The dump berm that was provided was missing in most places and only had two spots that had berms left from were the trucks had dumped.

Exhibit S1

The gravity of the violation was assessed as reasonably likely to result in lost workdays or restricted duty for a single person and as significant and substantial.[1] It was written as a 104(a) citation. The operator's negligence level was assessed as moderate, and the proposed fine is $946.00. (Petition for Assessment of Penalty)

The Standard

30 C.F.R. § 77.1605 (l) provides:

> (l) Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

The Evidence

Boggs testified that he personally inspected the Wallins dump site on June 12, 2008. He observed a truck rated to haul loads in the range of from 85 to 100 tons back up to the edge of the dump site and dump a load. He also observed that there was no berm where the truck dumped. There was a residual berm at two other places at this dump site where other trucks had dumped "short"[2] so as to leave part of the dump load on the dump ramp for the bull dozer operator to use to restore the berm. Boggs concluded that if a truck failed to stop at the edge of the dump site, it would fall 25 to 30 feet, or more. (Tr. 49:12-51:3) Boggs informed Henderson that he was going to write a violation citation for the lack of berm at this location. (Tr. 53:19-54:11) The citation was prepared

[1] A violation is properly designated significant and substantial, "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'! Gypsum Co.,* 3 FMSHRC 822, 825 (April 1981). The question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texas Gulf, Inc.,* 10 FMSHRC 498 (April *1988); Youghiogheny* & *Ohio Coal Co.,* 9 FMSHRC 2007 (December 1987).

[2] The process of "short" dumping is described at Tr. 39:17- 40:1 and 178:9-18.

and served on Henderson later, after the berm had been restored. (Tr. 53:7-18)[3] Boggs testified that he wrote the citation alleging a "reasonable likelihood" instead of a "high likelihood" of injury because a dozer operator was on the scene and was acting as a spotter for the dump truck drivers. (Tr. 54:25-55:17) The dozer operator was using a CB radio to communicate his spotter information to the truck drivers. (Tr. 54:25-56:12)

Fox Knob witnesses, Jeff Dean and Harvey Henderson, disputed whether a truck would fall 30 feet or more if it tipped over the edge of the dump area. Dean testified that the height of a "lift" or dump area is only about ten feet. (Tr. 154:12-158:14 and 175:16-176:4) Henderson testified that lift height is no more than ten feet due to equipment size constraints and company policy. (Tr. 224:1-15 and 228:14-19)

Henderson testified that he was with Boggs when Boggs observed the conditions that led to the berm citation. He saw a bull dozer push a large boulder over the edge of the dump area, which wiped out a portion of the berm in the process. There was intact berm remaining on either side of the disturbed area. The dump site was about 30 to 40 feet wide. The dozer had disrupted a section of berm about 10 feet wide, leaving most of the six-foot-high berm intact on both sides. (Tr. 229:7-232:4) The dozer operator pulled to one side out of the way and visually directed the next truck by CB radio to the edge of the lift to dump its load. He then used some short dumped material to rebuild the berm that had been disrupted by pushing the boulder over the edge. (Tr. 232:5-234:5)

Boggs agrees that the standard allows for means other than berms to prevent overtravel and overturning when it speaks of "similar means." He also agrees that using a spotter is such a "similar means" under his understanding of the standard. (Tr. 137:19-138:3)

Discussion

The standard mentions berms as one of several means to prevent overtravel and overturning. It also uses the general term "or similar means" to show that the purpose of the standard is to require effective means to prevent a vehicle from tipping over the edge of a work area or roadway. It does not limit those means to berms only. Fox Knob argues that using a spotter constitutes a "similar means" and fully complies with the standard. I agree.

The language of the standard is clear and unambiguous. There is no dispute between the parties that using a spotter can be an appropriate means to comply with the intent of the standard, and that berms are intended to be used only as a visual reference and not to stop trucks. (Tr. 143:2-144:14) This is also consistent with language in the MSHA Dump Point Inspection Handbook, Handbook Number PH01-I-6, September 2001:

Appendix D. Dump Point Safety: Best Practices

[. . .]

III. DOZER OPERATORS

Best practices for **dozer operators** at dump points are to :

- Maintain adequate berms at the dump points.

[3] It took only minutes for the berm to be repaired. (Tr. 62:7-63:12)

[. . .]

- Act as a spotter for the trucks and keep them back from the edge when conditions warrant.

Exhibit R10, page 31. [Emphasis in the original.]

Further clarity comes from a review of the MSHA Dump Point Inspection Handbook section dealing with berms and the testimony related to it (Tr. 135:16-20):

CHAPTER 2 - DUMP POINTS

[. . .]

G. Safe dumping practices near the edge of a pile

- **The berm should be used as a visual guide only**. The berm should not be used to help stop the truck but only as a visual guide to judge where to stop.

Exhibit R10, page 15. [Emphasis in the original.]

There is no dispute that using a berm is but one means, among several, to satisfy the intent of 30 C.F.R. § 77.1605 (l)**.** There is also no dispute that having the dozer operator act as a spotter can satisfy this regulatory intent as well. The dispute between the parties devolves to whether using a spotter during the brief period when the integrity of the berm at the Wallins dump was compromised violates the standard. I conclude that it does not. To reach this conclusion, I am mindful that the regulations and handbook guidance cannot anticipate every possible circumstance. They strive to guide those on the scene by establishing as clear an intent as possible and by bolstering it with suggested best practices. Consistent with this, it is more important to determine whether the intent of the standard is met than to argue over whether the exact means chosen by the operator to address that intent are the best. It is also important not to let disputes over best means become the primary focus. In my view, that is what has happened here. Regardless of whether it is better to use a spotter or to insist on uninterrupted berms, it is easy to conclude on these facts that there was no time in question when some approved means of providing visual guidance to dump truck drivers were not in place. Accordingly, Citation No. 8329772 will be vacated. It follows that the related issues of gravity and negligence are moot.

Citation No. 8329773, issued on June 12, 2008, reads as follows:

> Mobile equipment shall be maintained in safe operating condition and equipment in unsafe condition shall be removed from service immediately. When checked the Euclid R85 B Rock Truck had excessive slack in the steering jack on the right hand side of the truck. The steering jack moved from 1 ½ to 2 inch in a up and down manner. The operator removed this truck from service.

Exhibit S3

The gravity of the violation was assessed as reasonably likely to result in lost workdays or restricted duty for a single person and as significant and substantial. It was written as a 104(a) citation. The operator's negligence level was assessed as moderate, and the proposed fine is $3,689.00. (Petition for Assessment of Penalty)

Citation No. 8329782, issued on June 23, 2008, reads as follows:

> Mobile equipment shal1 be maintained in safe operating condition and equipment in unsafe condition hall be removed from service immediately. The steering jack on the left hand side of the Euclid R85 B Rock Truck, Co.# 28011 has ½ to 1 inch of movement in a manner affecting the steering of this truck. The operator has removed this truck from service until repairs are made.

Exhibit S9

The gravity of the violation was assessed as reasonably likely to result in lost workdays or restricted duty for a single person and as significant and substantial. It was written as a 104(a) citation. The operator's negligence level was assessed as moderate, and the proposed fine is $3,459.00. (Petition for Assessment of Penalty)

Citations 8329773 and 8327982 were written on June 12 and June 23, 2008, respectively. The factual allegations supporting these citations are essentially identical, aside from the difference in the dates. They both refer to the same safety standard and allege the same underlying factual predicate. Accordingly, I treat both citations together in the following analysis.

The Standard

30 CFR § 77.404 (a) provides:

> (a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The Evidence

The two trucks involved in these citations are the same size and model designation - Euclid R85 B dump trucks.[4] (Exhibits S3 and S9) Their steering mechanisms are essentially identical and will be treated as such here. Euclid R85 B trucks have a hydraulic steering system comprising opposing hydraulic ram cylinders that work in opposition, with one side pushing and the other side pulling, to actuate a drag link that mechanically ties together the front wheel assembly on each side of the truck so that the front wheels turn in tandem when the steering wheel is turned. (Tr. 26:6-29:20; and 164:14-165:7) The two parts of the steering mechanism central to this dispute are the "steering jacks" and the "drag link." The steering jack attaches to the moveable steering assembly through a ball-and-socket joint. (TR. 106:7-14; and 245:6-246:23)

Boggs used the same general procedure when he inspected each of the two trucks. (Tr. 71:9-18; 74:15-75:15; 84:14-23; and 101:14-102:21) He testified that when he inspected the trucks in question here, he observed excess movement or "slack" in the joint that connects the steering jack to the steering assembly. He made his assessment visually and did not use any tools or instruments. (Tr. 87:5-88:7; and 93:10-94:8) Boggs testified that he detected up to two inches of slack on truck number 28003 (Exhibit S3; and Tr. 106:15-25), and up to one inch of slack on truck number 28011 (Exhibit S9). (Tr. 75:16-25; 78:1-4; 84:24-85:6; and 106:15-25) He considered this amount of slack an obvious hazard. (Tr. 139:6-25) He ordered that the trucks be taken out of service immediately for repair. (Tr.89:19-90:12) The repairs were promptly done (Tr. 86:10-87:4), and the out-of-service orders were satisfied the same day they were issued. (TR. 88:12-89:4)

Boggs testified that if a steering jack joint were to fail, the jack on the opposite side of the truck would have to do the work of both jacks through the drag link. (Tr. 79:14-80:20) He views this as a dangerous situation that had a bearing on his assessment of severity (Tr. 114:7-115:4), particularly in light of the roads and terrain conditions where these trucks operate. (Tr. 30:16-31:24; 79:14-81:4; 80:21-81:4; and 167:25-168:10) Boggs determined that, in the event of a steering mechanism failure, serious physical injury was reasonably likely, up to and including death. (Tr. 81:5-83:5; 85:10-23; and 114:7-115:4) Boggs determined that there had been "moderate" negligence based on his conclusion that a defect of this nature and magnitude would require an extended period of time to develop, and Fox Knob purported to conduct frequent inspections that should have brought these defects to their attention. (Tr. 81:13-82:9; 82:3-84:7; 85:10-23; and 110:11-112:8) Boggs testified that, based on his own experience and common sense, a driver of a truck like these should be able to feel the amount of slack in question here; it should be obvious.[5] (Tr. 22:22-23:6; 116:7-117:5; and 139:6-25) Boggs determined that these alleged violations were significant and substantial (S&S) because of the excessive amount of slack he observed. (Tr. 83:1-5; 110:11-112:8; and 118:22-119:6)

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[4] Exhibit S3 is Citation Number 8329773 which relates to truck number 28003. Exhibit S9 is Citation Number 8329782, which relates to truck number 28011. (Tr. 68:1-69:25)

[5] Boggs agreed, on both direct and cross examination, that a truck driver would likely not notice the gradually increasing amount of slack in the steering mechanism due to habituation. (Tr. 78:20-79:13; and 142:7-18)

Fox Knob's witnesses testified that there was no obvious slack in the steering jack joints beyond what would be considered normal and acceptable. (Tr. 107:8-108:4; and 245:6-246:23) They produced evidence that MSHA has no regulatory standard that specifies how much slack is acceptable. (Tr. 108:5-9; and 130:20-131:7) They characterized Boggs' assessment of the slack in the steering mechanism as inherently unreliable because the joint would have failed long before that degree of slack could have developed. (Tr. 246:20-249:4) They dispute that Fox Knob should be found negligent based on evidence that the steering mechanisms were inspected daily by the truck operators (Tr. 109:12-21; and 189:15-191:21)[6] and service personnel (TR. 191:23-192:20) and less frequently by management and mechanics (Tr. 240:12-241:8), whose responsibility it is to look for such problems. Fox Knob's witnesses conceded that it is not optimal nor advisable to continue to operate a truck when one of the steering jacks has failed. (Tr. 165:19-169:18) However, they maintained that even if there were a total failure of one of the steering jack joints, the drag link is designed to and would, in fact, allow the truck to be steered with sufficient control to allow the driver to bring it to a safe stop on the roads and in the work areas where these trucks operate. (Tr. 165:8-14; 196:11-24; and 260:4-261:9)

Discussion

Section 77.404(a) requires that "[m]obile [. . .] equipment [. . .] be maintained in safe operating condition and [. . .] equipment in unsafe condition [. . .] be removed from service immediately." The Commission has held that section 77.404(a) imposes two duties: (1) to maintain equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately (*Peabody Coal Company*, 1 FMSHRC 1494, 1495 (Oct. 1979)) and that ""[d]erogation of either duty violates the regulation" (1 FMSHRC at 1495; see also *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1556 (Sept. 1996)).

Equipment is in unsafe operating condition under section 77.404(a) when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action. (See *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (involving identical standard applicable to underground coal mines)). The burden of proof is on the Secretary. The trucks in this case were mobile equipment. Obviously, they were not removed from service before the citations. Therefore, if the conditions cited by Boggs existed, and if they singly or in combination rendered it unsafe to operate the trucks, a violation occurred.[7]

Boggs has years of mining experience, including time driving heavy trucks such as these.

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[6] The testimony of Fox Knob witnesses Michael Patterson and Samuel L. Howard was essentially identical regarding how a truck driver does a daily pre-shift inspection and notes anything out of the ordinary in his pre-shift log book.

[7] Equipment may be defective and not be in violation of the standard if the defect does not affect safe operation of the equipment during its normal intended use (See Hobet Mining, Inc., 19 FMSHRC 411, 414 (Feb. 1997) (ALJ Maurer)).

(Tr. 22:22-23:1) Although he had limited experience as an MSHA inspector at the time of these inspections[8], he had received on-the-job training and classroom instruction regarding the safety and inspection of trucks. (Tr. 32:19-34:24) Nothing in the evidence calls into question the methods used by Boggs to inspect these trucks. His inspection methods seem reasonably conceived and executed to yield reliable observations. (Tr. 74:15-75:15; and 101:14-102:21)

In making this judgement, I am aware that these are very large trucks, capable of hauling many tons of material at a time and potentially capable of causing very serious consequences if something should malfunction. I note that the roads on which these vehicles operate are mostly unpaved work roads characterized by the presence of other trucks and moveable mining equipment and constantly changing surface conditions due to wear and weather so as to require: (1) constant driver vigilance, and (2) the ability of the mechanical systems to respond appropriately to emergent demands. Irrespective of the dispute between the parties regarding the amount of slack in the steering mechanisms, the evidence supports a finding that there was sufficient slack to justify Boggs' issuance of the citation. There is no evidence suggesting that Boggs did not conduct a competent, thorough, and reliable inspection. Giving him the general deference due to any competent MSHA inspector, I conclude that the issuance of the citation was justified and that there was enough slack present to require replacement of the defective parts.

However, testimony from Fox Knob witnesses raises questions as to the reliability of Boggs' quantification of the amount of play in the steering mechanism, but fails to undercut his observation and conclusion that the steering mechanisms were unsafe and should have been removed from service for repair. The evidence has enough probative weight to support Boggs' conclusion that a violation of the standard occurred, but not enough to support the more specific and pertinent issue that must be addressed in connection with the third prong of the *Matthies* S&S test discussed below.

The preponderance[9] of the evidence supports Boggs' conclusion that there was some degree of slack in the steering mechanism on both trucks. There is nothing in the evidence that undercuts Boggs' conclusion as to the basic violation of the standard to the degree necessary to discredit it. The dispute goes to whether the degree of slack was enough to support Boggs' conclusions as to negligence and gravity. I conclude that Boggs' decision-making and testimony overstated the degree of slack. However, the evidence is sufficiently convincing to establish that there was enough slack apparent to an earnest and competent inspection to support a finding of a violation of the standard. Thus, I conclude that the Secretary has met her basic burden. I affirm the violation in each of these two citations.

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[8] Boggs had been an MSHA inspector for only three months at the time of this dispute. He had done only a few other inspections prior to this. (Tr. 96:4-20)

[9] In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations,* 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor* v. *Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C. Cir. 1998). Moreover, the preponderance standard, in general, means proof that something is more likely so than not. *Hopkins* v. *Price Waterhouse,* 737 F.Supp. 1202,1206 (D.D.C. 1990).

Significant and Substantial

A significant and substantial violation is described in section 104(d)(1) of the Act as a violation of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.[10] 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).

The Commission has explained that:

> 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: (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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary,* 861 F.2d 99, 103-04 (5th Cir. 1988), *affg Austin Power, Inc.,* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.,* 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007 (Dec. 1987). And, when evaluating the "reasonable likelihood" element, "likelihood" is viewed in terms of continued normal mining operations without any assumption as to abatement (*U.S. Steel Mining Co., Inc*. 6 FMSHRC 1573, 1574 (July 1984); *Halfway, Inc.*, 8 FMSHRC 1, 12 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991)). The Secretary's burden of proof runs to all of the *Mathies* elements. If the Secretary fails to present preponderant evidence on one or more of the *Mathies* elements, there can be no conclusion that the violation was S&S.

The facts of this violation do not support a conclusion that these steering mechanism violations are significant and substantial. The S&S allegation fails on the third prong of the *Mathies* test. First, as discussed above, both violations - as described in the citations - are affirmed. Second, the failure of a hydraulic steering jack would, judged by common sense, constitute a discrete, albeit potential, measure of danger to safety. Third, the evidence presented at trial fails to convince as to the reasonable "likelihood" that this hazard will result in an injury that is: Fourth, of a reasonably

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[10] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a [. . .] mine safety or health hazard [. . .]."

serious nature.

The evidence presented at trial did not adequately address the element of "likelihood" as defined above. In keeping with the requirement that "likelihood" be assessed in terms of continued normal mining operations without any assumption as to abatement, the decision point here is whether it is likely that a serious injury would result if Fox Knob continued to operate, inspect, and maintain its rock trucks as the evidence showed it had and continued to do at the time of these citations. The issue is not whether a steering system failure is reasonably likely based on Boggs's conclusion about the degree of slack in the steering mechanism. The issue is whether, after factoring out the excess in Boggs' conclusion, a steering system failure is reasonably likely. It is not unreasonable to conclude that Boggs' assessment of the imminent danger arising from the condition of the steering mechanism was strongly influenced by his underlying and overstated assessment of the degree of slack in the system. Further, it is not unreasonable to conclude that if Boggs' misjudged or misperceived the degree of slack, his conclusion that it would amount to an S&S violation could and should be re-evaluated. In other words, since the facts do not support Boggs' description of the amount of slack, his S&S evaluation does not warrant particular deference, and without a significant degree of deference, the evidence does not preponderate in favor of an S&S finding.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.,* 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek coal Inc. v. MSHA,* 52 F.3d. 133, 135-136 (7th Cr. 1995). As mentioned above, this analysis does not imply that Boggs' findings and conclusions do not warrant a degree of general deference. He is a trained and adequately experienced inspector, and as such, is considered an important - though not unassailable - source of information. However, because the preponderance of the evidence

supports a finding that Boggs significantly overstated the amount of play in these steering systems, general deference does not bridge the gap.

Neil Manning's testimony is important and helpful in assessing the degree of deference to give to Boggs testimony about the amount of slack in the steering jacks. Manning has decades of experience working on a wide range of mechanical systems on trucks such as these. (Tr. 239:18-240:11) Specifically, he has replaced some 40 - 50 steering jack assemblies during that period. (Tr. 244:17-245:1) At trial he illustrated his testimony with reference to an actual replacement ball-and-socket joint from a steering jack assembly. His demonstration made it clear that the degree of slack Boggs testified to, and on which Boggs concluded that these violations justified an S&S enhancement, was simply not possible without a complete joint failure. Moreover, the failure would have occurred with much less slack in the ball joint assembly than implied in Boggs' testimony. I credit Manning's testimony that the ball-and-socket joint would have failed completely with half or less of the slack Boggs claimed he observed. (Tr. 246:20-247:23; and 272:23-273:20) I also credit Manning's and Michael Patterson's testimony and opinions about whether a driver could maintain sufficient control over one of these trucks in the event of a steering assembly failure in which one side's steering jack failed and the other side's jack had to take over the entire steering system load through the drag link. They both opined that there would be sufficient, though substantially

compromised, steering control to bring a truck to a safe stop on the haul roads relevant to these citations. In fact, Patterson has experienced just such a failure and was able to safely stop. (Tr. 260:4-261:9 Manning; and 196:11-24 Patterson)

I conclude that the Secretary has not carried her burden of proof to show that this violation was significant and substantial because that conclusion must refer to Boggs' unsupported assessment of the amount of play in these steering systems. The facts of record do support a finding of a basic violation of the standard, but do not support the more demanding *Mathies* third prong test.

Penalty Assessment

Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). Sections 815(a) and 820(a) delegate the duty of proposing penalties to the Secretary. Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(I).

I find that Fox Knob acted in good faith in abating the violating conditions. Neither party adduced any evidence that justifies either an increase or decrease in penalty based on the operator's size or history of violations. No evidence was presented to imply that the proposed penalty would affect Fox Knob's ability to continue in business. I find the evidence establishes the existence of sufficient slack in the steering mechanisms to justify the issuance of citations for violations of the relevant standard at the level of moderate negligence. For the reasons set forth above, I find that Fox Knob's negligence was moderate, but that it did not reach the level of aggravated conduct.

Based on the criteria in Section 110(i) of the Act, the Secretary proposed a penalty of $3,689.00 for citation No. 8329773, and $3,459.00 for citation No. 8329782, for a total penalty of $7,148.00. Adjusting the Section 110(i) calculations to account for the lower negligence level and lack of S&S severity, I find that the appropriate penalty amount is $745.00 for citation No. 8329773 and $687.00 for citation No.8329782, for a total assessed penalty of $1,432.00.

Order

Citation No. 8329772 is hereby vacated. Citations No. 8329773 and 8329782 are modified as explained above. Fox Knob is directed to pay a civil penalty of $1,432.00 within 40 days of the date of this decision on Citation Nos. 8329773 and 8329782.

L. Zane Gill
Administrative Law Judge

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