FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 7, 2014

KNIFE RIVER CONSTRUCTION, Contestant	CONTEST PROCEEDINGS
v.	Docket No. WEST 2013-0827-RM Order No. 8699159; 05/01/2013
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket No. WEST 2013-0828-RM Citation No. 8699160; 05/01/2013 Docket No. WEST 2013-0829-RM Citation No. 8699161; 05/01/2013 Knife River Vernalis Plant Mine Id. 04-05459
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-1009-M A.C. No. 04-05459-327568
v.	Knife River Vernalis Plant
KNIFE RIVER CONSTRUCTION, Respondent	

DECISION

Appearances: Courtney Przybylski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Nicholas Scala, Esq., Law Office of Adele L. Abrams PC, Beltsville, Maryland, for Respondent.

Before: Judge Manning

These cases are before me upon notices of contest by Knife River Construction and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Knife River Construction, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Sacramento, California and filed post-hearing briefs. One section 107(a) order and two section 104(a) citations were adjudicated at the hearing. The mine is an aggregate operation in San Joaquin County, California.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 8699159 and Citation No. 8699160

On May 1, 2013, MSHA Inspector Brian Chaix issued Order No. 8699159 under section 107(a) of the Mine Act and Citation No. 8699160 under section 104(a). Order No. 8699159 is an imminent danger order and Citation No. 8699160 alleges a violation of section 56.14101(a)(1) of the Secretary's safety standards. (Exs. G-1,3). Both the order and citation state that "scraper #1690402/LD9W95 did not stop on a grade when tested. The equipment was in service at the time of inspection, handling both raw feed and waste. The grade on which it was tested measured approximately 12-14%" *Id.* The order also states that "[a] verbal imminent danger order was issued to the site Foreman and regional Safety Director at approximately 0935, requiring that the scraper be removed from service until the brakes had been repaired and confirmed." (Ex. G-1).

Citation No. 8699160 also states that "[m]iners operating equipment which are not capable of stopping as required by the standard risk grave injury." (Ex. G-3). With regard to the citation, Inspector Chaix determined that an injury was highly 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 moderate, and that one person would be affected. Section 56.14101(a)(1) of the Secretary's safety standards requires, in pertinent part "[s]elf-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." 30 C.F.R. § 56.14101(a)(1). The Secretary proposed a penalty of $1,140.00 for this citation.

For the reasons set forth below, I affirm Order No. 8699159 and modify Citation No. 8699160 to be non S&S.

Discussion and Analysis - Order No. 8699159

Inspector Chaix issued an oral imminent danger order immediately upon witnessing a scraper with defective brakes and then reduced that oral order into writing shortly thereafter in Order No. 8561259.

Section 3(j) of the Mine Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). The Commission has held:

> Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Act or the Secretary's regulations. This is an extraordinary power

> that is available only when the "seriousness of the situation demands such immediate action."

Utah Power & Light Co., 13 FMSHRC 1617, 1622 (Oct. 1991) (quoting the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the 1977 Act).

An imminent danger exists "when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989). While the concept of imminent danger is not limited to hazards that pose an immediate danger, "an inspector must 'find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.' " *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006). Inspectors must determine whether a hazard presents an imminent danger without delay, and an imminent danger determination must be supported "unless there is evidence that [the inspector] had abused his discretion or authority." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2164.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. Under the circumstances, an inspector must make a reasonable investigation of the facts and must make his determination upon the basis of the facts known or reasonably available to him. As the Commission explained in *Island Creek Coal Co.*:

> While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving his case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing.

15 FMSHRC 339, 346-47 (Mar. 1993). An inspector "abuses his discretion...when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners." *Utah, Power & Light Co.*, 13 FMSHRC at 1622-23.

I find that Inspector Chaix did not abuse his discretion when he issued Order No. 8699159; his belief that the defective brakes could lead to a serious injury of the operator of the equipment or the inspection party was reasonable. The inspector saw a large piece of equipment carrying a heavy load upon a steep grade. The brakes of that equipment did not function

properly and could not stop the vehicle upon the grade. Although the cited brakes were not completely incapacitated, defective brakes have caused numerous injuries and fatalities in mines. Defective brakes could reasonably cause a serious injury to miners and therefore constitute an imminent threat to miners. Considering the facts, Inspector Chaix's decision to issue an oral imminent danger order was reasonable. Order No. 8699159 is **AFFIRMED**.[1]

Discussion and Analysis - Citation No. 8699160

Respondent does not contest the fact of violation for Citation No. 8699160, but disputes the penalty as well as the S&S,[2] highly likely, and fatal designations.

I find that the Secretary did not fulfill his burden to establish that Citation No. 8699160 was S&S because the Secretary failed to show that the violation was reasonably likely to contribute to an injury. Although the brakes on the cited scraper were defective, they did not render the equipment uncontrollable. The brakes failed to stop the equipment on the grade, but stopped the equipment quickly at the bottom of the grade. (Tr. 113). At all times, the scraper moved at a slow velocity, traveling only two to three miles per hour when descending the grade. (Tr. 155). It was uncommon for the scrapers to travel this grade at the mine and the scraper had not done so for more than a month. (Tr. 141). I credit Kevin Farwell, the operator of the scraper at the time, that he would usually not use the brakes on the grade and would have stopped operating the vehicle when he thought it posed a danger. (Tr. 161, 170). He testified that he would rely on the engine retarder to "hold the rig back." (Tr. 161). Furthermore, there was no equipment working in the area and no pedestrian traffic. The inspection party was present, but at

[1] I reject Respondent's argument that if a citation issued in conjunction with an 107(a) order that addresses the same condition as the 107(a) order is not S&S then the 107(a) order must be vacated. A judge considers all evidence that the parties present de novo when reviewing an S&S designation. When reviewing a 107(a) imminent danger order, the judge reviews the order to determine if the inspector, who must make a quick decision at the time of issuance, "abuses his discretion[.]" *Utah, Power & Light Co.*, 13 FMSHRC at 1622-23. The difference between the review processes, although the underlying events are the same, means that a 107(a) order can be upheld without an underlying S&S violation. The Commission, furthermore, has held that the condition underlying an imminent danger order does not necessarily have to violate the Act, which suggests that no S&S violation is required to uphold a 107(a) order. *Id.*

[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). 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 Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Musser Eng'g, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

the top of the hill rather than downgrade from the scraper. The cited area was a cut grade, which means it was surrounded by walls that contained the scraper. (Tr. 77).

The Secretary relies upon the size of the equipment and steepness of the grade to support his S&S designation, arguing that each contributed to the likelihood of an injury as a result of an overtravel hazard. Both the mass of the equipment and the grade it travels upon may contribute to the likelihood of an injury by making the vehicle more difficult to stop. Although the operator of the scraper could be hurt in a sudden stop or collision with the wall, considering continued normal mining operations, the speed of the scraper, and the condition of the brakes, I find it was unlikely that the operator would be injured as a result of the cited condition. I credit the testimony of Farwell that, at a speed of three miles per hour, the engine retarder would keep the scraper under control. I agree with the Secretary that, as a general matter, operating heavy equipment on a grade without functioning service brakes creates a potential S&S violation, but under the facts here it was unlikely that Farwell would have lost control of the equipment. It was also unlikely that, in the event of an emergency, the malfunctioning service brakes would have contributed to an accident in which there was an injury. The Secretary did not present evidence to show that the cited condition was reasonably likely to contribute to a serious injury under continued normal mining operations and therefore the violation was not S&S.

Although the cited condition was unlikely to lead to an injury, if an injury occurred as a result of the condition it was reasonably likely that injury would be serious. As there were no miners working in the area, the operator was the most likely person to be injured. In the event of a rollover of the vehicle, the operator could suffer permanently disabling injuries. Due to the low speed of the vehicle, however, a rollover was unlikely. The most likely injury would be a lost workdays restricted duty type of injury. The gravity of this violation was serious.

I find that the violation was the result of Respondent's moderate negligence. The service brakes failed to hold when Farwell operated the scraper upon the grade, but performed well upon flat surfaces, which made it difficult for the operator to know that the brakes were defective. Farwell tested the brakes on the level route he expected to travel at the start of his shift and the brakes functioned properly. (Tr. 150). A berm blocked the area of the mine with the grade at the beginning of the shift and the operator only entered the area after production shut down and the berm was removed. Farwell did not expect to operate the vehicle on the grade the day of the inspection and had not traveled down the grade before the inspector witnessed it. That trip was Farwell's first opportunity to test the brakes on the grade. (Tr. 151). Farwell credibly testified that, under normal circumstances, he would have tested the brakes on this first run down the grade and, if the brakes failed to stop the scraper on the grade, he would have taken the scraper out of service to have the brakes checked and repaired as needed. (Tr. 163-65). After the brakes failed to hold the scraper on the grade in the presence of the inspector, however, Farwell should have stopped the equipment to take it out of service rather than driving back around the other side to return to the inspection party.

I hereby **AFFIRM** Order No. 8699159 and **MODIFY** Citation No. 8699160. With regard to Citation No. 8699160, I find that the cited condition was unlikely to contribute to an injury and therefore is non-S&S; a penalty of $900.00 is appropriate for this violation.

B. Citation No. 8699161

On May 1, 2013, Inspector Chaix issued Citation No. 8699161 under section 104(a) of the Mine Act, alleging a violation of section 56.14107 of the Secretary's safety standards. (Ex. G-10). The citation states, in part, that "[t]wo vehicles were observed unattended on a grade on the mine haul road, while neither ribbed, banked, nor chocked. Neither vehicle was carrying chocks, but a bank was available." *Id.* Inspector Chaix determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the operator's negligence was moderate, and that one person would be affected. Section 56.14207 of the Secretary's safety standards requires "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.F.R. § 56.14207. The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8699161.

Discussion and Analysis

I find that the cited conditions violated section 56.14107 because the two vehicles cited were parked on a grade, but the wheels were not chocked or turned into a bank. Section 56.14207 can be broken down into four requirements for parked mobile equipment: (1) an unattended vehicle (2) must be placed in park (3) with the parking brake set and (4) tires must be choked or turned into a bank if a vehicle is on a grade. The cited vehicles were unattended, parked with parking brakes set on a grade, but the tires were neither choked nor turned into a bank.

I find that the vehicles were unattended because no operator was in a position to immediately control the vehicles. Although Respondent argues that the vehicles were not unattended because the operators were not far from the vehicles, Respondent's witnesses agree with Inspector Chaix that they exited their vehicles. (Tr. 57-58, 121-22, 182). A miner outside of, but close to, a vehicle cannot operate the vehicle and therefore cannot attended the vehicle under the standard. *Nevada Cement Co.*, 18 FMSHRC 1653, 1655 (Sept. 1996) (ALJ). A miner in proximity to an improperly parked vehicle, furthermore, is exposed to an overtravel hazard if the vehicle rolls. A vehicle is unattended, regardless of the proximity of miners to the vehicle, if the operator is not in a position to immediately operate that vehicle.

Respondent argues that the vehicles were not actually "parked" because the drivers were going to immediately return to their vehicles. Section 56.14207, however, focuses upon unattended vehicles. When the standard states "when parked on a grade," the word "parked" is not an additional requirement within the standard. It references the fulfillment of the first three requirements of the standard. A vehicle is parked if it is unattended. If a vehicle is unattended and placed in park with a parking brake set, the vehicle is clearly "parked" under the safety standard and by any definition of the word. It is immaterial if the vehicle is in an area that vehicles are not commonly parked; the point of the standard is to create uniform procedures for operators to follow when exiting and parking vehicles anywhere in the mine.

The vehicles were placed in park with parking brakes set, and all the witnesses agree that the cited vehicles were parked upon a grade or slope. (Tr. 58, 131, 197).[3] The tires were not chocked or turned into a bank. The condition cited in Citation No. 8699161 violates section 56.14207. The gravity of this violation was low.

I find that Respondent's moderate to high negligence caused the conditions cited in Citation No. 8699161. Respondent's witnesses, who parked the cited vehicles improperly, contend that they did not park the vehicles properly because the inspector insisted upon stopping immediately, the tires were turned toward the bank, it was unusual to stop in the area, and that the SUV was new. Both a foreman and the safety supervisor for the region parked vehicles improperly. Both men were responsible for parking properly, regardless of whether the inspector said to stop or they stopped independently.[4] The fact that both men failed to parked in compliance with the standard and produced an array of excuses as to why they did not suggests that employees working at the mine likely ignored proper parking procedures and the two witnesses were simply doing what was routine for them. Regardless of whether that is true, both should have known to comply with section 56.14107(a) and did not do so. A penalty of $200.00 is appropriate for this violation. I increased the penalty from that proposed by the Secretary taking into consideration that the negligence actions were committed by two management employees.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-14). The Secretary's records show that Respondent had only one violation in the previous 24 months and the violation was not S&S. Based on the penalty points assigned by the Secretary in Exhibit A to the petition for penalty, Respondent is a medium to small-sized operator. *Id.* The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Knife River Construction to continue in business. The gravity and negligence findings are set forth above.

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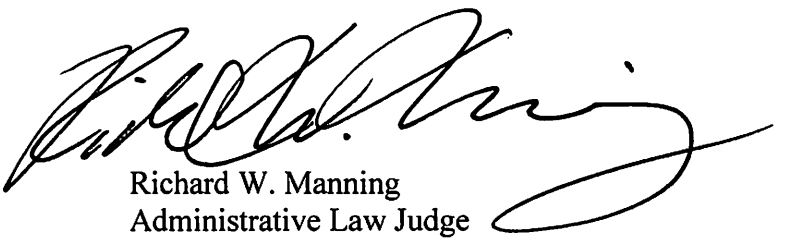
[3] Respondent argues that the cited vehicles passed a roll test and therefore did not violate the standard. Kevin Smudrick, the Northern California Safety manager and operator of one of the vehicles, performed the roll test, however, after moving the vehicle, which did not show that the location where the vehicles were cited did not have a grade. All three witnesses agree that the vehicles were originally parked on a grade.

[4] I find no merit in Respondent's argument that the inspector "set up" Respondent when he asked to stop. Even if this contention is true, furthermore, it is not grounds to vacate a citation. MSHA inspectors must cite any violations they find. 30 U.S.C. § 814(a). The inspector did not cause this violation by asking to stop; the operators had the opportunity to properly park the vehicles before exiting.

III. ORDER

For the reasons set forth above, I **AFFIRM** Order No. 8699159 and Citation No. 8699161 and **MODIFY** Citation No. 8699160. Knife River Construction is **ORDERED TO PAY** the Secretary of Labor the sum of $1,100.00 within 30 days of the date of this decision.[5] The three contest proceedings are hereby **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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[5] 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.