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June 3, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-908-M A.C. No. 04-02964-323504
v.	
TAFT PRODUCTION COMPANY, Respondent	Taft Production Company & Mines

DECISION AND ORDER

Appearances: Daniel Brechbuhl, Esq., Department of Labor, Denver, Colorado, for Petitioner;
Larry R. Evans, Corporate Health & Safety Manager, Oil-Dri Corporation of America, Ochlocknee, Georgia, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Taft Production Company, 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 Los Angeles, California and filed post-hearing briefs. A total of four section 104(a) citations were adjudicated at the hearing.[1] Taft Production mines and produces clay for use in kitty litter and other products.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8697954

On April 23, 2013, MSHA Inspector Eric Wiedeman issued Citation No. 8697954 under section 104(a) of the Mine Act, alleging a violation of section 56.20003(a) of the Secretary's safety standards. (Ex. G-3). The citation states that there was a pile of material at the entrance to the 101 conveyor tunnel. The material was approximately 2 feet by 2 feet and ranged from 6 inches deep to 1 1/2 feet deep. The material consisted of small granules and dust. The citation alleges that miners are in the area to inspect and clean. Inspector Wiedeman determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost

[1] This proceeding was originally designated for simplified proceedings under 29 C.F.R. § 2700.102(a). By order dated November 26, 2013, I removed the case from simplified proceedings and it was tried under the Commission's conventional rules.

workdays or restricted duty. He determined that the operator's negligence was moderate, and that one person would be affected. Section 56.20003(a) of the Secretary's safety standards requires "workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly[.]" 30 C.F.R. § 56.20003(a). The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I modify Citation No. 8697954 to be the result of Respondent's low negligence.

Discussion and Analysis

I find that Respondent violated section 56.20003(a) because it failed to keep a passageway clean. Both Inspector Wiedeman and Nick Kingston, a miner representative for Respondent, agreed that a pile of material existed at the 101 conveyor tunnel. (Tr. 13, 73; Ex. R-1). Respondent argues that the cited area was not a workplace or passageway because no miners would work there before the area was cleaned.[2] I find, however, that the area was intended for use by miners for walking. Miners accessed the cited area to grease conveyor lines on a weekly basis. (Tr. 20, 79). Inspector Wiedeman testified that the cited area was the only route to access the grease lines. (Tr. 14). I reject Respondent's argument that weekly use of the area is not frequent enough to constitute a passageway; the cited area was not accessed while the condition existed but the area was a passageway. Based upon the consistent testimony from both the inspector and Kingston, I find that the area was a passageway or work area; miners accessed the area to grease lines or passed through the area in order to access the lines. The area was not clean. (Ex. R-1). A trip or fall leading to a sprain was unlikely, but possible. Respondent violated section 56.20003(a).[3]

I find that the violation was the result of Respondent's low negligence. The inspector testified that the condition existed for two days. (Tr. 15). Miners accessed the area to grease lines, but not while the conveyor operated and only on a weekly basis. (Tr. 79-80). The condition posed little danger and it is likely that no miners knew about the condition. (Tr. 20). Citation No. 8697954 was the result of Respondent's low negligence. I **MODIFY** Citation No. 8697954 to reduce the negligence. A penalty of $400.00 is appropriate for this violation.

B. Citation No. 8697955

On April 23, 2013, Inspector Wiedeman issued Citation No. 8697955 under section 104(a) of the Mine Act, alleging a violation of section 56.20003(a) of the Secretary's safety

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[2] Respondent cites *Alan Lee Good* to show that an area accessed only for maintenance is not a passageway. 23 FMSHRC 995, 1000 (Sept. 2001). Respondent, however, misconstrues the holding in that case. The Commission found that the cited area was not accessed or used to walk upon during maintenance, not that miners walking in the area for maintenance did not make an area a passageway.

[3] My interpretation of workplaces and passageways under section 56.20003(a) is consistent with the decision of Judge James Gilbert on this same issue. *Taft Production Co.*, 23 FMSHRC 522, 526 (Feb. 2014).

standards. (Ex. G-5). The citation states that there was a pile of material upon the section 4 pad that covered a 5 foot by 5 foot area. The depth of the pile varied between 4 inches and 3 feet and there were footprints in the pile. The citation states that miners entered the area to grease the bearings of the chain conveyor. Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. 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. The Secretary proposed a penalty of $176.00 for this citation.

For the reasons set forth below, I modify Citation No. 8697955 to be non-S&S.

Discussion and Analysis

I find that the condition cited in Citation No. 8697955 is a violation of section 56.20003(a) for the same reasons I found that Citation No. 8697954, above, violated the safety standard. Respondent does not contest that it violated section 56.20003(a) with respect to this citation, but argues that the cited conditions were not S&S.

I find that the Secretary did not fulfill his burden to prove that Citation No. 8697955 was reasonably likely to contribute to an injury and Citation No. 8697955 is therefore not S&S.[4] The Secretary argues that a serious injury was reasonably likely to occur because miners were exposed to the conditions, evidenced by footprints in the accumulations. (Tr. 39; Ex. G-6). Miners walked through the cited area on a daily basis to grease conveyor bearings. (Tr. 40, 91). I find, however, that the cited condition was unlikely to cause an injury. Kingston testified that the accumulated material was dust and the photographs corroborate his testimony. (Tr. 91; Ex. G-6). Walking through a small amount of dust is unlikely to trip a miner. The area where the largest and deepest accumulations occurred was directly under the conveyor, which was too low to the ground to walk under. (Ex. R-4). The Secretary presented no evidence asserting that the dust was slippery. As a consequence, the dust would be unlikely to obstruct the path of and trip a pedestrian miner. Although the Secretary showed that the condition existed and miners accessed the area, he did not show that the cited condition was likely to cause injury. Access to a condition does not establish that the condition is likely to injure a miner. The Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury. The citation is therefore not S&S.

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[4] 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).

I find that the violation was the result of Respondent's moderate negligence. I credit Kingston's testimony that Respondent noticed the condition a few hours before the inspection and planned to remove it; a miner should not have walked through the cited area before it was cleaned. Citation No. 8697954 was the result of Respondent's moderate negligence. I hereby **MODIFY** Citation No. 8697955 to be non-S&S; a penalty of $500.00 is appropriate for this violation.

C. Citation No. 8697956

On April 23, 2013, MSHA Inspector Eric Wiedeman issued Citation No. 8697956 under section 104(a) of the Mine Act, alleging a violation of section 56.14107(a) of the Secretary's safety standards. (Ex. G-7). The citation states that the shafts of the squaring plate shuttle on the 104 pelletizer were not guarded. The guard was removed and was near the cited shafts. (Tr. 51-52; Ex. G-8). The shafts move approximately 3 inches and were located 2-3 inches above the deck. The citation states that miners enter the area to inspect and clean. Inspector Wiedeman 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 56.14107(a) of the Secretary's safety standards requires "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8697956.

Discussion and Analysis

I find that the conditions cited in Citation No. 8697956 violated section 56.14107(a). The Commission has held that a violation of the guarding standard requires a "reasonable possibility of contact and injury" that includes "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). To determine whether a reasonable possibility exists, the Commission stated that all "relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct" must be considered. *Id.* The parties agree that the cited squaring plate shaft was unguarded. Although the equipment was not under repair and operated the previous night, Respondent's policy requires miners to lock out the cited equipment before entering the area. (Tr. 95). Policy, however, cannot account for "the vagaries of human conduct" that may lead a miner to enter the area without locking out the equipment. It would be reasonably possible for a miner to contact the cylinders in the unguarded area, doing so with a foot since the area was 2-3 inches above the deck. (Tr. 52). The focus of the analysis in this guarding standard is the reasonable possibility of contact, not whether the machine was operating and the parts were physically moving at the time of the inspection.[5] The cited condition presented a reasonable possibility of injuring a miner and Respondent therefore violated section 56.14107(a).

[5] I reject Respondent's argument that Citation No. 8697956 should be vacated because the unguarded moving parts were not actively moving at the time of inspection. Respondent

Although the violation was not S&S the gravity was serious. Respondent knew or should have known of the condition cited in Citation No. 8697956. The condition was obvious and the result of Respondent's moderate negligence. I **AFFIRM** Citation No. 8697956 and find that penalty of $600.00 is appropriate for this violation.

D. Citation No. 8697960

On May 1, 2013, Inspector Wiedeman issued Citation No. 8697960 under section 104(a) of the Mine Act, alleging a violation of section 56.14130(g) of the Secretary's safety standards. (Ex. G-9). A miner noticed upon inspection that the seat belt of Respondent's #3 Mack water truck was broken but he operated the vehicle without using the seat belt. *Id.* Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was low, and that one person would be affected. Section 56.14130(g) requires that "[s]eat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt." 30 C.F.R. § 56.14130(g). The Secretary proposed a penalty of $263.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8697960.

Discussion and Analysis

I find that Respondent did not violate section 56.14130(g) because section 56.14130(g) does not apply to the cited piece of equipment. The Secretary does not require all self-propelled vehicles to be equipped with Rollover Protection Systems (ROPS) and seatbelts. Only the vehicles listed in section 56.14130(a) must have ROPS and seatbelts. All vehicles that require seatbelts also require ROPS. The only exception is haulage trucks, which are required to have seatbelts but not ROPS under a different safety standard at section 56.14131(a). When the Secretary promulgated section 56.14131 he chose to only require seatbelts upon haulage trucks rather than on all vehicles used at surface mines that are not protected by ROPS. "Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines," 53 Fed. Reg. 32496. 32512 (August 25, 1988).

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mischaracterized a decision to support its argument, citing *Brubaker Mann* to argue that if the inspector did not see the equipment in use, it did not violate section 56.14107(a). 8 FMSHRC 1487, 1493 (Sept. 1986) (ALJ). *Brubaker Mann*, however, does not reference whether a piece of equipment was actively moving, but whether that equipment was in service. The Commission has addressed guarding standards. *See Thompson Brothers Coal*, 6 FMSHRC at 2097. I find that under Section 56.14107(a), moving parts are machine parts that move as part of their functions; the standard is not limited to parts that actively move during an inspection.

Respondent, furthermore, references MSHA's program policy manual ("PPM") to argue that the standard only applies when no guard exists at conveyor pulleys. (R. Br. at 8-9). Respondent misconstrues the PPM and its argument ignores the plain language of section 56.14107(a) that requires any moving parts, including shafts, to be guarded. I also reject Respondent's arguments that rely upon other standards as they do not apply to the current case.

Subsection (g) of section 56.14130 is only applicable if subsection (a)[6] requires the installation of seatbelts upon the cited equipment. *Ford Construction Co.*, 14 FMSHRC 1975, 1977 (Dec. 1992). The Commission did not require that a piece of equipment be explicitly listed in subsection (a).[7] Instead, the Commission found that the pertinent consideration of whether section 56.14130 applies is the characteristics of the equipment, including "the size of the cited equipment, its function and its ability to articulate[.]" *Id* at 1978.

Based upon Kingston's description of the equipment and the photograph of the equipment submitted by the Secretary, I find that section 56.14130(a) does not apply to the cited piece of equipment. A water truck is not a "wheel tractor," as that term is used in section 56.14130(a)(3), because it does not fit within the definition of a tractor. A "tractor" is a "self-propelled vehicle . . . intended for moving itself *and* other vehicles." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 582 (2d ed. 1997) (emphasis added). The Secretary did not present any evidence that the cab of the water truck was in a tractor that pulled a wheeled water tank. Likewise, the Secretary also did not establish that the water truck was the "tractor portion of semi-mounted . . . water wagon[,]" as that term is used in section 56.14130(a)(4). A water wagon is generally larger than a water truck and cannot operate upon public highways. (Tr. 99). There is also no evidence that any portion of the water truck was "semi-mounted," that the truck had the ability to articulate, or that it included a tractor.

It is clear that section 56.14130(a) primarily addresses large, industrial, tractors that articulate and not trucks like the water truck cited here. I reject the Secretary's argument that the water truck fits within section 56.14130(a) because it had a "semi-tractor *style* cab consistent with the types of equipment listed" in that subsection. (Sec'y Br. at 18 n. 8) (emphasis added). Subsection (a) was not broadly written to include all vehicles with large truck cabs. It is significant that the Secretary did not present evidence that the water truck was equipped with ROPS or that it was cited by the inspector for not being equipped with ROPS. If a seatbelt was required in the water truck, then ROPS was required as well. I find that the cited water truck

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[6] Section 56.14130(a) states:

> Roll-over protective structures (ROPS) and seat belts shall be installed on—
> (1) Crawler tractors and crawler loaders;
> (2) Graders;
> (3) Wheel loaders and wheel tractors;
> (4) The tractor portion of semi-mounted scrapers, dumpers, water wagons, bottom-dump wagons, rear-dump wagons, and towed fifth wheel attachments;
> (5) Skid-steer loaders; and
> (6) Agricultural tractors.

30 C.F.R. § 56.14130(a).

[7] Respondent argues that section 56.14130(g) does not apply to water trucks because water trucks are not specifically listed in section 56.14130(a). The Commission expressly rejected this argument. *Ford Construction Co.*, 14 FMSHRC at 1977.

does not fit any of the equipment listed in section 56.14130(a), which is a prerequisite for the application of section 56.14130(g).

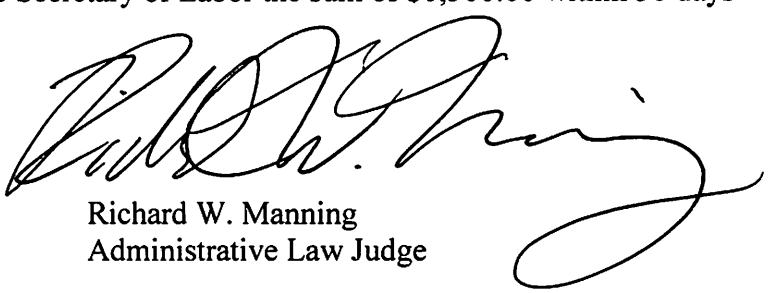
The Secretary also argues that section 56.14100(b) applies to the cited condition. That safety standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary did not allege a violation of that safety standard and Respondent was not given the opportunity to defend against such an allegation. Consequently, I have not considered this argument. Failure to wear a seatbelt creates a hazard. The Secretary's safety standard and its regulatory history, however, compel me to **VACATE** Citation No. 8697960 because section 56.14130(g) does not apply to the cited equipment.[8]

II. APPROPRIATE CIVIL PENALTY

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-13). Respondent was issued 12 citations in the 15 months prior to April 23, 2013. Most were designed as non-S&S when issued. Respondent was a medium-sized mine operator which employed about 73 people in 2013. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Taft Production Company to continue in business. The gravity and negligence findings are set forth above. I find that the penalties proposed by the Secretary were too low taking into consideration the size of the operator, the gravity of the violations, and Respondent's negligence. I increased the penalties based primarily on the size of Respondent.

III. ORDER

For the reasons set forth above, I **MODIFY** Citation Nos. 8697954 and 8697955, I **AFFIRM** Citation No. 8697956, and I **VACATE** Citation No. 8697960. Taft Production Company is **ORDERED TO PAY** the Secretary of Labor the sum of $1,500.00 within 30 days of the date of this decision.[9]



Richard W. Manning
Administrative Law Judge

[8] The Secretary should consider amending its safety standards for metal and nonmetal mines to require the use of seatbelts in all vehicles used upon the surface at such mines.

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

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