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July 10, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2014-52-M A.C. No. 05-02256-333003 P247
v.	
MOLTZ CONSTRUCTION, INC., Respondent	Climax Mine

DECISION

Appearances: Jana Leslie, Conference & Litigation Representative, U.S. Department of Labor, Denver, Colorado, for Petitioner;
William Dominguez, Safety Director, Moltz Construction, Inc., Salida, Colorado, 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 Moltz Construction, Inc., 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 presented testimony, documentary evidence, and closing arguments at a hearing held in Denver, Colorado. Two section 104(a) citations were adjudicated at the hearing and one citation was settled prior to the hearing. Moltz Construction was an independent contractor performing work at the Climax Mine.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8597347

On August 6, 2013, MSHA Inspector David Michael Sinquefield issued Citation No. 8597347 under section 104(a) of the Mine Act, alleging a violation of section 56.14132(a) of the Secretary's safety standards. (Ex. G-2). The citation states that the backup alarm on an Ingersoll Rand compactor did not function when tested. Inspector Sinquefield determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to be fatal. He determined that the operator's negligence was moderate and that one person would be affected. Section 56.14132(a) mandates that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." 30 C.F.R. § 56.14132(a). The Secretary proposed a penalty of $108.00 for this citation.

For the reasons set forth below, I reduce the negligence attributed Respondent.

Discussion and Analysis

I find that the condition cited in Citation No. 8597347 violated section 56.14132(a). Section 56.14132(a) requires that audible warning devices in self-propelled vehicles must be maintained in functional condition. The backup alarm of the cited self-propelled compactor did not function when tested and therefore was not maintained in functional condition, which is a violation of section 56.14132(a).[1] Respondent argues that an operator is not required to maintain equipment that is not in use. (Tr. 76). The Commission, however, rejected this argument and reversed the decision that Respondent relied upon. *Wake Stone Co.*, 35 FMSHRC 825 (Apr. 2014). The backup alarm of the cited compactor did not function when tested, which violates section 56.14132(a).

I find, furthermore, that the fatal designation is appropriate. I credit the inspector's testimony that accidents caused by inoperative backup alarms frequently result in fatalities at mines. (Tr. 27-28). I agree with the inspector that a fatality or other injury was unlikely in this instance, however. The compactor operated in an area without foot traffic and only one other piece of mobile equipment entered the area. (Tr. 26-27). As a consequence, the gravity was low.

I find that Citation No. 8597347 was the result of Respondent's low negligence. I credit the evidence that the alarm worked when the last preshift examination was conducted. The Secretary did not present evidence that suggested that Respondent knew or should have known of the violation. I **MODIFY** Citation No. 8597347 to reduce Respondent's negligence to low and find that penalty of $50.00 is appropriate for this violation.

B. Citation No. 8597348

On August 6, 2013, Inspector Sinquefield issued Citation No. 8597348 under section 104(a) of the Mine Act, alleging a violation of section 56.20003(a) of the Secretary's safety standards. (Ex. G-6). The citation states that a portable travel parts trailer was cluttered and crowded with spare parts, slings, a power saw, storage boxes, power cables and other materials that covered the back of the floor area. The citation alleges that the affected area was not being maintained in a clean and orderly manner. Inspector Sinquefield 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.[2] Section 56.20003(a) of the Secretary's safety standards requires "workplaces,

[1] The Mine Act is a strict liability statute. Violations of the Act, therefore, only require that violations exist because "strict liability means liability without fault." *Sec'y of Labor v. Nat'l Cement of Cal, Inc.*, 573 F. 3d 788, 795 (D.C. Cir. 2009).

[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

passageways, storerooms, and service rooms shall be kept clean and orderly[.]" 30 C.F.R. § 56.20003(a). The Secretary proposed a penalty of $162.00 for this citation.

For the reasons set forth below, I modify Citation No. 8597348 to be non-S&S and Respondent's negligence to be low.

Discussion and Analysis

I find that the condition cited in Citation No. 8597348 violated section 56.20003(a); the cited area was a storeroom and a workplace that was not kept clean and orderly. The cited area had both a table with a vice and a table suitable for office work, which made it a work area. (Tr. 34). The floor at the back of the trailer was completely blocked with tools and other debris for a distance of 4 feet. (Ex. G-8; Tr. 33). The debris blocked the rear entrance to the trailer. (Tr. 67). Respondent argues that no miners were exposed to the cited condition because the trailer was locked and had not been entered since it arrived at the Climax Mine. (Tr. 76-77). A locked door, however, does not constitute a barricade. Assuming continued mining operations, miners could access the cited trailer and it was not kept clean and orderly, which presented a slip, trip, and fall hazard in violation of section 56.20003(a). As stated above, the Mine Act is a strict liability statute.

I find that the Secretary failed to fulfill his burden to show that Citation No. 8597348 was S&S. The cited condition presented a violation of section 56.20003(a) and a slip, trip, and fall hazard because numerous tools and other items covered the floor of the trailer. The conditions could contribute to a serious injury such as a sprain or broken bone, but it was unlikely to do so. Although the cited area qualified as a work area and storeroom under section 56.20003(a), miners had not entered the trailer since it arrived at the mine site two weeks earlier. The trailer was not likely to be used for office work, as there were other locations for such work. (Tr. 68). Access to the trailer was controlled and reduced because the entrance to the trailer was locked and only one person had the key. (Tr. 37, 58). Kenneth Tunstall, a general superintendent with Moltz, testified that Moltz placed the tools and supplies on the floor of the trailer when it was taken to the Climax Mine so that they would not fall from the shelves in the trailer. (Tr. 66). He also stated that Moltz had other trailers at the Climax Mine that also contained tools. *Id.* Tunstall further testified that the trailer had been brought to the Climax Mine from another worksite where Moltz performed concrete work and that it was unlikely that the tools in the cited trailer would be used at Climax. (Tr. 66-67). I find that although it was possible for Respondent's employees to enter the trailer through the back door, such access was not very likely making the cited condition unlikely to contribute to an injury. The Secretary presented little evidence to support his S&S designation and did not present evidence to dispute Tunstall's

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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 Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

testimony. I find that Citation No. 8597348 was unlikely to lead to an injury and therefore I find that Citation No. 8597348 is non-S&S. The gravity was low.

I also find that the violation was the result of Respondent's low negligence. Although Moltz knew that there were tools and supplies on the floor of the cited trailer, there was no proof that anyone would enter the trailer through the back door without first cleaning up this material. Someone could enter the trailer from the front entrance, which was unobstructed, and place the tools and supplies on the shelves before using the trailer for any other purpose. I cannot assume that Moltz would require or need an employee to enter the trailer for the first time in the most hazardous manner. I **MODIFY** Citation No. 8597348 to delete the S&S determination and to reduce Respondent's negligence to low. I find that a penalty of $50.00 is appropriate for this violation.

II. SETTLED CITATION

The parties presented the settlement of Citation No. 8597350 at the hearing. Respondent agreed to pay the $100.00 penalty proposed by the Secretary. (Tr. 9-10).

III. 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-1). Respondent was issued three citations in the 15 months prior to August 6, 2013. Two of these citations were designed as non-S&S. Respondent's operations at the Climax Mine were small. It is a medium-sized company but much of its work is at facilities that are not subject to the Mine Act. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Moltz Construction, Inc., to continue in business. The gravity and negligence findings are set forth above.

IV. ORDER

For the reasons set forth above, I **MODIFY** Citation Nos. 8597347 and 8597348. Moltz Construction, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $200.00 within 30 days of the date of this decision.[3]

Richard W. Manning
Administrative Law Judge

[3] 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.

Distribution:

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