FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 24, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-29-M
Petitioner	:	A. C. No. 03-01640-05511
v.	:	
	:	Docket No. CENT 95-30-M
REB ENTERPRISES, INC.,	:	A. C. No. 03-01640-05512
Respondent	:	
	:	REB Enterprises
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-239-M
Petitioner	:	A. C. No. 03-01640-05517-A
v.	:	
	:	REB Enterprises
HAROLD MILLER, employed by	:	
REB ENTERPRISES, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-240-M
Petitioner	:	A. C. No. 03-01640-05518-A
v.	:	
	:	REB Enterprises
RICHARD E. BERRY, employed by	:	
REB ENTERPRISES, INC.,	:	
Respondent	:	

DECISION ON REMAND

On March 30, 1998, the Commission issued a decision in these civil penalty proceedings vacating my initial findings that violations by REB Enterprises, Inc. (AREB@) of 30 C.F.R. '' 57.14131(a) and 56.14130(g) were not the result of REB=s unwarrantable failure, and remanding the matters to me for further analysis. In addition, the Commission reversed my finding that REB did not violate 30 C.F.R. ' 56.14130(a)(3), and remanded the matter for a determination as to whether the violation was as a result of REB=s unwarrantable failure, and an assessment of an appropriate civil penalty. Lastly, the Commission vacated my dismissal of an

order, amended to cite a violation of section 56.14130(g), supra, and remanded the matter for a determination as to whether the violation was a result of REB=s unwarrantable failure, and an assessment of an appropriate civil penalty.

1. Citation No. 4327776.

The Commission remanded this matter to evaluate the Secretary=s hearsay evidence regarding the issue of REB=s unwarrantable failure, and to determine if it was reliable and entitled to any probative weight.

In essence, the only evidence submitted by the Secretary to support its position that the violation cited was an unwarrantable failure consisted of hearsay testimony proffered by Inspector Enochs. This testimony consisted of second-hand information he had received from another inspector, who did not testify at the hearing, regarding an industrial assistance session at which time hand-outs were passed out, and the importance of the use of seat belts was discussed with REB=s supervisors. Enochs also testified that he had a conversation with Ron Alexander, the operator of the cited vehicle, in which he asked Alexander why he was not wearing his seat belt, and the latter told him that Anobody made a big deal about it@ (Tr. 34).

In weighing this testimony as it relates to the issue of the degree of REB=s negligence, I note that the record does not contain any corroborating evidence relating to facts set forth in the declarants= out of court statements. Also, there is no evidence that REB exercised the right of subpoena to cross-examine these declarants. (See, *Mid-Continent Resources, Inc*. 6 FMSHRC 1132, at 1136-1137.) I thus do not assign Enochs= hearsay testimony any probative value. I place more weight upon the testimony of Richard Berry, REB=s president, whose demeanor I carefully observed. I found his testimony credible that a sign is posted outside the building where employees check in advising them of the need to wear seat belts, and that such a notice was also posted in REB=s office. This testimony was not contradicted or impeached. Within this context I find that the seat belt violation was not the result of REB=s aggravated conduct, and hence can not be characterized to have been an unwarrantable failure.

2. Order No. 4327622

The Commission vacated my initial finding that REB=s violation of section 56.14130(g) supra, was not as a result of its unwarrantable failure, and remanded the matter to evaluate the reliability and probative value of the Secretary=s hearsay testimony. The evidence tending to establish REB=s unwarrantable failure consists of the inspector=s testimony that the operator of the cited vehicle told him that sometimes he wears a seat belt, and sometimes he does not. In contemporaneous notes taken by Enochs he indicated that Bill Jacobs, the operator of the cited vehicle, stated that no one makes a big deal about wearing a seat belt. Jacobs did not testify. Also, Enochs testified that he was told by another inspector, who did not testify, that in an industrial assistance session he had warned REB=s supervisory personnel, including REB=s foreman Raymond King, of the importance of seat belt use.

Dale St. Laurent, who previously had served as an MSHA special investigator, testified

that Jacobs has told him that REB did not have a seat belt policy, and that no one ever made him wear a seat belt. He also testified that he was told by a REB serviceman, a Mr. Yates, that in the year prior to the inspection, he never saw either of the two bulldozer operators wearing a seat belt, and nobody made him wear seat belts. Additionally, St. Laurent testified that Yates had told him that there was no company policy regarding seat belts, that he did not recall anyone at REB telling anyone else to wear a seat belt, and that Jacobs told him (Yates) that neither Harold Miller, the lead-man at the site, nor Berry ever told him (Jacobs) to wear a seat belt.

On the other hand, I observed the demeanor of Miller, and found his testimony credible that, on the date cited, he had only been at the site for approximately 10 minutes prior to the inspector=s issuance of the order at issue, and had not observed that Jacobs was not wearing a seat belt. I note that when Enochs observed Jacobs not wearing a seat belt, he was 10 yards closer to Jacobs than Miller was. There is no evidence that Miller was in any position to have observed that Jacobs was not wearing a seat belt. There is not any direct evidence that King, or Miller had notice or knowledge that Jacobs was not wearing a seat belt. There is no evidence that King, prior to Enochs= issuance of the order at issue, was in any position to have observed that Jacobs was not wearing a seat belt. Also, as discussed above, the credible evidence establishes that REB had posted information in its office regarding the requirement for its employees to wear seat belts while on the job. Although Miller had indicated that prior to the date of the issuance of the order at bar he had not enforced the seat belt rules, there is no evidence that Miller, on the date the order was issued, had any official duties or responsibilities towards enforcing compliance with the mandatory seat belt standard. Thus, considering all of the Secretary=s evidence, including hearsay evidence, I find it insufficient, within the above context, to have established that the violation herein was as a result of REB=s unwarrantable failure.

3. Order No. 4327625.

The Commission vacated the initial determination that the violation of section 56.14130(g), supra, was not an unwarrantable failure, and remanded to evaluate the Secretary=s hearsay evidence to determine whether it was reliable, and entitled to any probative weight. The Secretary=s evidence consisted of Enochs= testimony that the violation was obvious, that it was the fourth citation or order he had issued that day involving the failure to wear seat belts, and that REB had not taken any corrective action. Also, St. Laurent testified to a conversation, concerning the use of seat belts by employees, that he had with an individual who operated equipment for REB. The individual told him that Athe normal posture was . . . that if a guy wanted to wear them fine, and if he didn=t want to wear them then that was okay too@ (Tr. 246). This individual was not called by the Secretary to testify. St. Laurent also testified that Miller had told him that he usually did not wear a seat belt when he operated equipment, and that he usually let employees do what they wanted to do regrading the wearing of a seat belt. Essentially, for the reasons set forth above, (1, 2, supra) I assign less weight to the totality of the Secretary=s evidence as it contains out of court statements, and there is no direct evidence corroborating the facts set forth in the declarants= out of court statements, nor is there evidence that REB exercised its right to subpoena and cross-examine these individuals. I assign more weight to the direct testimony of REB=s witness as set forth above (1, 2 supra). I find that the Secretary=s evidence was insufficient to establish that the violation cited was the result of REB=s

unwarrantable failure.

4. Order No. 4327631.

The Commission vacated the initial finding that it was not established that the violation of 30 C.F.R. ' 56.14107(a) resulted from REB=s unwarrantable failure, and remanded for further analysis of the issue of unwarrantable failure.

The inspector=s conclusion that the violation was as a result of REB=s unwarrantable failure was based, inter alia, upon information provided to him by another inspector, a Mr. Hermstein, who did not testify, who told him that at a meeting King was given a handbook on guarding. In analyzing this hearsay testimony of the inspector, I note that there is no corroborating evidence relating to the activities of Hermstein. In the absence of either Hermstein or King testifying, and being subject to cross-examination, and in the absence of evidence corroborating the facts set forth in the declarants= out of court statements, I find Enochs= hearsay testimony insufficient to positively establish that King had been given a handbook on guarding. Enochs further testified that he concluded that the violation was as a result of REB=s unwarrantable failure because King knew he was creating a violative condition when he removed the guard from the pulley, because of the seriousness of the danger of exposure to a wing type pulley, and because there was a lot of traffic in the area. I find that the probative value of this testimony is diluted by the testimony of Berry, whose demeanor I observed and whom I found to be a credible witness, that, in essence, the only time a miner would have a need to go to the area of the tail pulley in issue was to perform maintenance on the belt, and in that event the belt would not be in operation. For these reasons, I find that the evidence adduced by the Secretary is insufficient to establish that the violation was as a result of REB=s unwarrantable failure.

5. Order No. 4327626.

The Commission vacated the initial decision dismissing the order at issue, and finding that the evidence established that REB did violate 30 C.F.R. ' 56.14130(a)(3), and remanding the matter for determination whether the violation was unwarrantable, and an assessment of an appropriate civil penalty.

In explaining his reasons for concluding REB=s negligence was high, the inspector testified that there were not any mitigating circumstances. He indicated that the cited vehicle A. . . could be seen easily that it was obvious that there was no seat belt on the machine@ (sic.) (Tr. 258). Also, he indicated that he was not sure that a preshift inspection of the equipment had been performed before it was put into use.

REB did not present any testimonial or documentary evidence to contradict the testimony of the inspector. Although the lack of a seat belt was obvious, there is no evidence when, and for what purpose, the seat belt had been removed. Also, there is no direct evidence as to how frequently the cited vehicle is used, and there is no evidence as to the last time it was used before it was cited. I thus find that REB=s negligence was not of such a high level as to have constituted aggravated conduct. I thus conclude that the violation was not unwarrantable.

According to the inspector, the terrain in the plant was mostly level, but that if the operator of the vehicle would be bumped, he could fall off his seat, and suffer a nonfatal injury. I thus find that the level of gravity of the violation was more than moderate. However, for the reasons set forth above, I find that it has not been established that REB=s negligence was more than moderate. I find that a penalty of $700 is appropriate for this violation.

6. Order No. 4327628

The Commission, in its decision, vacated the dismissal of Order No. 4327628, and remanded the matter for determination as to whether the violation was the result of REB=s unwarrantable failure, and an assessment of an appropriate civil penalty.

The inspection opined that REB=s negligence was high because he had yet to find anybody on the property who was wearing a seat belt. He indicated, in essence, that he had nothing to add to his testimony regarding negligence other than what he testified to regarding the other seat belt violations. Hence, my conclusion regarding negligence and unwarrantable failure is the same as set forth above (1, 2, supra). For the same reasons, I find that it has not been established that REB=s negligence was more than moderate. I further find that the driver of the cited vehicle was not wearing a seat belt, and could have been seriously injured should the vehicle have hit another object. I thus find that the violation constituted more than a moderate level of gravity. I find that a penalty of $700 is appropriate for this violation.

ORDER

It is **ORDERED** that Citation No. 4327776, Order Nos. 4327622, 4327625, 4327631, 4327626, and 4327628 were not the result of REB=s unwarrantable failure. It is further **ORDERED** that within 30 days of this decision, REB shall pay a civil penalty of $1,400 for the violations cited in Order Nos. 4327626 and 4327628.

Avram Weisberger
Administrative Law Judge

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