FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 16, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-108-M
Petitioner	:	A.C. No. 23-00252-05517
	:	
v.	:	Docket No. CENT 2002-129-M
	:	A.C. No. 23-00252-05518
	:	
BAILEY QUARRIES INCORPORATED,	:	Chesapeake Quarry
Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Randall D. Bailey, Vice President, Bailey Quarries, Inc., Republic, Missouri, *pro se*, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Bailey Quarries, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege six violations of the Secretary's mandatory health and safety standards and seek penalties of $2,562.00. A hearing was held in Springfield, Missouri. For the reasons set forth below, I affirm the citations and assess penalties of $1,559.00.

Background

The Chesapeake Quarry is one of six limestone quarries operated by Bailey Quarries, Inc., in southwest Missouri. Limestone is removed from the quarry and crushed, broken and sized into several types of stone for sale to the public.

The quarry was inspected by MSHA Inspector Wesley L. Hackworth on July 25 and September 11, 2001. The inspections resulted in the issuance of six citations which were contested by the company at the hearing. In contesting the citations, the operator was more concerned with the amount of the penalties, then the fact of violation. (Tr. 14.)

Findings of Fact and Conclusions of Law

Citation No. 6211041

This citation alleges a violation of section 56.14101(a)(2) of the Secretary's regulations, 30 C.F.R. § 56.14101(a)(2), on July 25, 2001, because:

> The park brake on the Euclid R50 haul truck would not hold when tested. The brake was tested on the inclined road up to the crusher feed hopper. The truck was loaded and would roll backward freely when the brake was independently applied. The truck was being used to haul material from the pit to the plant for crushing. This condition created a hazard of an employee being injured should the truck roll from a parked position.

(Govt. Ex. 4.) Section 56.14101(a)(2) requires that: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

The inspector testified that the haul truck was equipped with parking brakes. He said that the truck was loaded with limestone and that both the service brakes and parking brakes were tested on the road from the pit to the crusher, which was the steepest road it traveled. After the truck was brought to a complete stop on the hill, the driver was instructed to engage the parking brakes and take his foot off of the service brake. When he did that, the truck rolled backwards.

Based on the inspector's testimony I find that the Euclid R50 haul truck was equipped with parking brakes, but that they were not capable of holding the truck with its typical load on the maximum grade it traveled. Therefore, I conclude that the company violated the regulation as alleged.

Citation No. 6211042

This citation charges a violation of section 62.120, 30 C.F.R. § 62.120, on July 25, 2001, in that:

> On July 25, 2001, the plant laborer/ground man performing cleanup around the plant area was exposed to mixed noise levels of 78.04% as measured with a noise dosimeter for a full shift using a lower threshold limit of 80 dBA. The amount exceeded the noise action level of 50% times the instrument error factor (1.32) for dosimeter noise sampling. This is equivalent to an 8-hour exposure at 88.2 dBA. No hearing conservation program had been established meeting the requirements of 30 C.F.R. § 62.150.

(Govt. Ex. 5.)

Section 62.120 requires that: "If during any work shift a miner's noise level exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program that complies with § 62.150 of this part." *Action level* is defined in the regulations as: "An 8-hour time-weighted average sound level (TWA_8) of 85 dBA, or equivalently a dose of 50% integrating all sound levels from 80 dBA to at least 130 dBA." 30 C.F.R. § 62.101. Section 62.150, 30 C.F.R. § 62.150, requires that a hearing conservation program include: (a) a system of monitoring; (b) the provision and use of hearing protectors; (c) audiometric testing; (d) training; and (e) record keeping.

Inspector Hackworth testified that he had Tom McDonald, the ground man, wear a calibrated dosimeter from 10:25 a.m. to 6:00 p.m. At the end of that period, the dosimeter indicated that McDonald had been exposed to a time-weighted average sound level of 88.2 dBA and a noise dose of 78.04 percent. Thus, it is apparent that McDonald's noise level exposure exceeded the action level both as a time-weighted average and as a noise dose.

The inspector testified that the company's hearing conservation program did not meet the requirements of the regulation because it "hadn't notified the miner in writing, had not provided him two types of muffs and earplugs to choose from . . . ." (Tr. 47.) With regard to the hearing protection, the operator had offered the miner two types of earplugs, one of which he was wearing on the day of the inspection, but had not offered him the choice of two types of earmuffs.

There is no specific requirement in section 62.150 that the miner be notified in writing that he is enrolled in a hearing conservation program. There is, however, a requirement in section 62.110(d), 30 C.F.R. § 62.110(d), that if a miner's exposure exceeds the action level, "[t]he mine operator must notify the miner in writing within 15 calendar days of: (1) the exposure determination; and (2) the corrective action being taken." Since section 62.150 refers to section 62.110 concerning a system of monitoring, it is arguable that this written notification is incorporated in section 62.150.

Nonetheless, it is apparent that the operator at least minimally violated the hearing conservation program requirement by only offering the miner the choice between two types of earplugs, rather than two types of earplugs and two types of ear muffs. Consequently, I conclude that the Respondent violated section 62.120 by not having enrolled McDonald in a hearing conservation program that complied with section 62.150.

Citation No. 6211053

This citation is for a September 11, 2002, violation of section 56.12032, 30 C.F.R. § 56.12032, because:

> The cover plate for the motor termination box on the drive motor of the 3/16 conveyor was not secured properly in place. The cover had come loose and was hanging down only being held in place on one corner. The 480 volt wire nut splice connections and insulated inner conductors were exposed. There was no apparent damage to the wiring or connections. This condition created a hazard of the connections being damaged to physical and environmental conditions and causing a shock hazard.

(Govt. Ex. 8.) Section 56.12032 provides that: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Inspector Hackworth testified that during his inspection he observed the cover plate hanging from one corner of the motor termination box. The picture that he took of it clearly shows that the cover plate is normally held on by a screw at each corner of the box, but was attached only by one screw, exposing the inside of the box to the elements. (Govt. Ex. 12.) Accordingly, I conclude that the company violated the regulation as alleged.

Citation No. 6211054

This citation alleges a violation of section 56.14107(a), 30 C.F.R. § 56.14107(a), on September 11, 2001, because:

> The fan and V-belt drive assembly on the engine of the International Harvester haul truck #105 were not guarded to prevent employee contact. The side engine guards/panels were off/missing. The truck was hauling waste from the west pit to the waste stockpile area. This condition created an entanglement hazard to employees.

(Govt. Ex. 9.) Section 56.14107(a) requires that: "Moving 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."

As the picture taken by the inspector plainly demonstrates, there were no coverings on either side of the motor compartment of the haul truck. (Govt. Ex. 12.) There were two bolts located on the side of the engine compartment which indicated that at one time there may have been side covers. However, no one remembered seeing such coverings, nor was anyone able to testify that the truck, which had been owned by the company since 1984, originally came with such coverings.

The evidence adduced at the hearing was that if anyone were working on the motor in the vicinity of the fan and belt assembly the engine would more than likely by off. Furthermore, if work had to be performed on the engine while the engine was on, any side coverings would have

to be removed, thus offering no protection. Therefore, it appears that the only way that a miner could have a hand or arm caught in the belt system would be if the person stumbled when walking by the truck, while the motor was running, and stuck his arm into the motor.

While such an accident would appear to be a highly unlikely occurrence, it is, nevertheless, possible. Consequently, I conclude that the Respondent violated section 56.14107(a) as charged.

Citation No. 6211055

This citation charges a September 11, 2001, violation of section 56.14132(a), 30 C.F.R. § 56.14132(a), because:

> The backup alarm on the Euclid R50 haul truck was not maintained in functional condition. The truck was hauling waste rock from the west pit to the waste rock stockpile area. There was no foot traffic in the area. The alarm would not sound when tested. This condition created a hazard of an employee being injured should they not realize or be warned of the truck backing up.

(Govt. Ex. 10.) Section 56.14132(a) provides that: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

Inspector Hackworth testified that the Euclid truck was equipped with a backup alarm, but that when he had the driver put the truck in reverse and backup, the alarm did not sound. Therefore, I conclude that the operator violated this regulation.

Citation No. 6211056

This citation also alleges a September 11, 2001, violation of section 56.14132(a) because:

> The backup alarm on the Fiat Allis FR130.2 front end loader, serial #54226, would not function when tested. The loader was operating in the stockpile yard area loading customer trucks. This condition created a hazard of an employee or customer truck driver being backed over due to not being warned of the loader backing up.

(Govt. Ex. 11.)

Inspector Hackworth testified that the front end loader was equipped with a backup alarm, but that when he had the driver put the loader in reverse and backup, the alarm did not sound. Accordingly, I conclude that the company violated section 56.14132(a).

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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." 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). 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 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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*, 6 FMSHRC at 3-4.

Considering the criteria in order, I have already concluded that (1) there was a violation of a safety standard. I also find (2) that the violation created a distinct safety hazard, backing over employees or truck drivers walking in the vicinity of the loader. With regard to (3), the company argues that there were signs admonishing truck drivers not to get out of their trucks, so that it was not reasonably likely that they would be on the ground around the loader. However, this argument does not take into account the operator's employees working in the area as well as presuming that truckers are not going to get out of their trucks because a sign tells them not to. I find that there was a reasonable likelihood of injury in this instance and that (4) any injury would be reasonably serious.

Accordingly, I conclude that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed penalties of $2,562.00 for these violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated, and I so find, that Bailey Quarries is a small operator and that it demonstrated good faith in abating the violations. (Jt. Ex. 1.) No evidence was presented at the hearing to indicate that payment of the proposed penalties would adversely affect the company's ability to remain in business, so I find that they will not affect the company to such an extent.

The evidence is that the company has a poor history of previous violations, indeed so poor that it comes within MSHA's excessive history provisions for assessing penalties. 30 C.F.R. §§ 100.4(a)(2) and 100.4(b); (Govt. Exs. 1, 2, 13 & 14.) It appears, however, that this history arose from one inspection in September 2000, which resulted in 36 citations, a number, by all accounts, surpassing the number of citations received by the company for previous and subsequent inspections. Thus, while I find that the company has a poor history of previous violations, it does not appear that it is a habitual violator.

Turning now to the specific citations and penalties, I find, as did the inspector, that Citation No. 6201141 was not of serious gravity and that the Respondent's negligence was "low." The Secretary has proposed a penalty of $317.00 for the violation and I find that appropriate.

The Secretary has proposed a penalty of $399.00 for Citation No. 6211042. I agree with the inspector that the gravity of the violation was not serious, but disagree with his finding of negligence. While the company had not complied with all of the requirements of enrolling the employee in a hearing conservation program, it was attempting to do so, and had, in fact, accomplished the most important parts, having the employee's hearing tested and furnishing him hearing protection. Not having notified the employee in writing that he was enrolled in a program or offering him four choices of hearing protection is not that significant in this case. Accordingly, I find that the company's negligence was "low" and assess a penalty of $100.00.

While the gravity of the violation in Citation No. 6211053 was not serious, the operator was "moderately" negligent in allowing the cover plate to be in such a condition. As the company's witness admitted, an onshift inspector "should notice something like this." (Tr. 146.) However, I find that the Secretary's proposed penalty of $655.00, $600.00 more than it would be if the excessive history provisions were not in effect and $180.00 more than the penalty proposed for the only S&S violation in these cases, is too high. Consequently, I assess a penalty of $300.00

I find the guarding violation on the motor of the haul truck in Citation No. 6211054 to be the least serious one in these cases. The possibility of injury from this violation is extremely remote. While the evidence suggests that the truck has been like this since the company acquired it in 1984, there is no evidence that it has been cited for this violation before. Therefore, I find that the operator's negligence with regard to this violation was very "low" and assess a penalty of $50.00 instead of the $399.00 proposed by the Secretary.

Finally, for the two backup alarm violations in Citation Nos. 6211055 and 6211056 the Secretary has proposed penalties of $317.00 and $475.00, respectively. I concur with the inspector's finding that the Respondent's negligence in both cases was "low," as well as his characterizations of gravity as being fairly serious for Citation No. 6211056 and not so serious for Citation No. 6211055. Accordingly, I find that the penalties proposed by the Secretary are appropriate.

Order

In accordance with the above findings, Citation No. 6211042, in Docket No. CENT 2002-108-M, is **MODIFIED** by reducing the level of negligence from "moderate" to "low" and is **AFFIRMED** as modified and Citation No. 6211041 in that docket is **AFFIRMED**; Citation No. 6211054, in Docket No. CENT 2002-129-M, is **MODIFIED** by reducing the level of negligence from "moderate" to "low" and is **AFFIRMED** as modified and Citation Nos. 6211053, 6211055 and 6211056 in that docket are **AFFIRMED**. Bailey Quarries, Inc., is **ORDERED TO PAY** a civil penalty of **$1,559.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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