FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

July 5, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2007-17-M
Petitioner	:	A. C. No. 41-04184-96923
v.	:	
	:	
CSA MATERIALS, INC.,	:	Eagle #2
Respondent	:	

DECISION

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Tony Vinson, Safety Director, CSA Materials, Inc., San Angelo, Texas, *Pro Se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against CSA Materials, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $494.00. A hearing was held in San Angelo, Texas. For the reasons set forth below, I modify one citation, vacate the other, and assess a penalty of $60.00.

Background

CSA Materials operates the Eagle #2 mine near Del Rio, Texas. The company mines crushed limestone which is sold for road construction or as aggregate for asphalt plants. The mine employed an average of ten employees in 2005.

MSHA Inspector Emilio Perales conducted a regular, semi-annual inspection of the mine beginning on June 20, 2006. He concluded the inspection the next day. During the inspection, he issued two citations, Nos. 6263615 and 6263616, under section 104(a) of the Act, 30 U.S.C. § 814(a), which were contested at trial.

Findings of Fact and Conclusions of Law

Citation No. 6263615

This citation alleges a violation of section 56.14211(b) of the Secretary's regulations, 30 C.F.R. § 56.14211(b), because:

> A service man was observed standing under the boom of the 980G Caterpillar Front-End Loader[,] Serial # 2KR01365[,] while servicing the loader. The boom was in the raised position and was not blocked or secured from accidental lowering. The bucket was at full tilt with the teeth on the ground. The service man is exposed to accidental lowering of the boom. Also, the loader was not blocked or secured to prevent [it] from rolling.

(Pet. Ex. 1.) Section 56.14211(b) provides that: "Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering. The equipment must also be blocked or secured to prevent rolling."

Inspector Perales testified that he observed a miner working under the boom of the front-end loader, the arms of which were raised with the bucket resting on its teeth on the ground, and that there was nothing blocking or mechanically securing the boom to prevent it from accidentally lowering on the miner. (Tr. 24.) A picture that the inspector took of the situation corroborates his testimony. (Pet. Ex. 3.) The loader was on a level, paved surface. (Tr. 53.) Inspector Perales stated that "a failure of the hydraulic system could cause the boom to lower." (Tr. 25-26.) The violation was terminated by lowering the bucket and the boom to the ground. (Tr. 29.) The Secretary did not present any evidence as to whether the loader was blocked or secured to prevent rolling.

It is undisputed that the boom arms were not blocked or mechanically secured. Nonetheless, the Operator argued that because the loader was on level ground, with the motor off and the bucket resting on the ground, the bucket arms were mechanically secured against accidental lowering by the bucket. (Tr. 150-52.) Inspector Perales testified, however, that with the type of front-end loader in use, the bucket resting on the ground would not prevent the arms from accidentally lowering. (Tr. 79-80.) Accordingly, I conclude that the Respondent violated the regulation as alleged, except for the words: "Also, the loader was not blocked or secured to prevent rolling."

Significant and Substantial

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 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated 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 (Dec. 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 S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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. In this case, a violation of a safety standard has already been established. With regard to the second factor, Inspector Perales testified that the accidental lowering of the boom could result in a fatal injury. (Tr. 25.) Consequently, I conclude that the first two criteria have been established.

As is frequently the case in determining whether a violation is S&S, it is the third criterion which is at issue. In a prior Commission case, *Holt Company of Texas*, 22 FMSHRC 196 (Feb. 2000) (ALJ), a miner died "when the bucket of a Caterpillar 990 front end loader collapsed pinning him between the lift arms and the main body of the loader." In that case, the miner "had been working on the main hydraulic valve assembly of the loader but failed to block the lift arms prior to disengaging the hydraulic lines." *Id.* Thus, it is clear that a failure of the hydraulic system could result in a fatal injury.

In this case, the miner under the boom was "either changing or adding oil to the front differential." (Tr. 25.) He was not working on the hydraulic system or on anything that might affect the hydraulic system. It further appears, that absent a failure of the hydraulic system, lowering of the boom was prevented by the way the bucket was resting on the ground. I find that, in these circumstances, the chance of a spontaneous failure of the hydraulic system was unlikely and, therefore, that there was not a reasonable likelihood that the hazard contributed to would result in an injury. Accordingly, I conclude that the violation was not "significant and substantial" and the citation will be so modified .

Citation No. 6263616

This citation charges a violation of section 56.12001, 30 C.F.R. § 56.12001, in that:

> The disconnect box for the #11 conveyor belt (2704) had a fuse that did not have the correct capacity. The box powers a 15 HP motor which should have 40 amp fuses and instead it had two (2) 50 amp fuses and one (1) 40 amp fuse. This condition exposes a person to possible electrical hazard.

(Pet. Ex. 2.) Section 56.12001 provides that: "Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity."

Inspector Perales testified that he observed some fuses next to the disconnect box for the number 11 conveyor belt, so he asked that the box be opened. (Tr. 31.) He saw three fuses in use in the box, two 50 amp fuses and one 40 amp fuse. (Tr. 32.) A 15 horsepower motor operated the conveyor belt. (Tr. 34.) The inspector said that in determining whether a violation existed, he called "our electrical supervisor or electrical inspector for the San Antonio field office and . . . discussed it with him." (Tr. 36.) He related that:

> In conferring with our electrical inspector and using the 19.2 amperage reading off of the actual motor itself . . . times 125 percent of the NEC percentage that is used, it comes up with 24 volts. And in looking at any charts for this particular motor and at those amps, it is a 30 amp fuse that is used for that particular motor. And then if you take into account the full load capacity of 19.2 amperage, times 175 percent, which is your full load, it comes up to 33.6 amps. And that is the determination of the 40 amp fuse.

(Tr. 37.) He stated that: "The 125 percent represents the full load of the circuit, and the 175 percent represents the full current of the circuit." (Tr. 40.) Also introduced into evidence was a "Motor Circuit Protection" chart which indicates that the National Electrical Code (NEC) recommends a 40 amp fuse as the maximum for general application involving a 15 horsepower motor. (Pet. Ex. 6.) The inspector testified that he also used this chart in concluding that 40 amp fuses should have been in use in the disconnect box. (Tr. 41-42.)

Inspector Perales further testified that the 50 amp fuses were not appropriate because they would not "allow the system to ground itself or kick itself out due to the higher amp or fuse rating. Which . . . could lead to excessive heat in the wiring system. It could lead to a fire hazard, arching hazard. Or because of the deterioration of the insulation to the wire, it could lead to shock hazard also." (Tr. 43.) Finally, the inspector related that the citation was terminated the next day when the company's electrical contractor came to the mine, reviewed the situation,

determined that 40 amp fuses were the correct type for the disconnect box, and installed them. (Tr. 44.)

Robert W. White testified for the Respondent. He was an MSHA Inspector and was Supervisory Inspector in the San Antonio, Texas, office at the time of his retirement in 1998. (Tr. 94.) He now operates Safety Assessment Services which works "with the mining community on training, electrical ground testing, first aid, CPR, safety audits." (Tr. 94.) He stated that Jim Smiser, an MSHA certified electrical inspector, works part-time for his company. (Tr. 100.) He acknowledged that he did not know how to calculate the correct fuse size, but stated that he relied on Mr. Smiser's calculations. (Tr. 126-28.)

Some pages from the "DeWalt Electrical Professional Reference" were introduced into evidence, which Mr. White testified indicated that a 52 amp fuse was the proper size fuse for the disconnect box. (Resp. Ex. 2 at 2; Tr. 112.) He did not know why there was a difference between the NEC chart and the DeWalt chart as to fuse size. (Tr. 132.)

To sum up the evidence on this citation, almost of all of it is hearsay. Inspector Perales issued the citation based on his discussions with the MSHA electrical inspector and testified based on what the electrical inspector told him. He seemed to have little electrical knowledge himself. For instance, he could not explain the difference between "general application" and "heavy start" on the Motor Circuit Protection chart he testified concerning. (Tr. 80, Pet. Ex. 6.) The MSHA electrical inspector did not testify. Similarly, Mr. White relied on Mr. Smiser, his electrical expert, but Mr. Smiser did not testify. Finally, the inspector testified that the operator's electrical contractor determined that 40 amp fuses were the appropriate size for the disconnect box, but the contractor did not testify.

This citation demanded expert testimony. None was offered.[1] The gravamen of this violation is protecting the circuit against *excessive* overload. No evidence was presented on what constituted an excessive overload. No evidence was presented whether a 10 amp difference between a 40 amp fuse and a 50 amp fuse permitted an excessive overload on the circuit. Indeed, the chart relied on by the Secretary indicated that a 45 amp fuse was appropriate for "heavy start," so the difference may only be five amps. (Pet. Ex. 6.) On the other hand, the Respondent's evidence seemed to show that there was no overload at all. Unfortunately, no one could explain the difference between the charts, whether both were correct, neither was correct, or one was more reliable than the other.

[1] Prior to his testifying, the Respondent offered Mr. White as an expert witness on this citation and I overruled the Secretary's objection to him so testifying. (Tr. 95, 101.) However, after reviewing his testimony, it is obvious that he is not an expert. Therefore, I reconsider my previous ruling and hold that he was not testifying as an electrical expert. Clearly, Inspector Perales was not an expert either.

As always, the burden was on the Secretary to prove this violation by a preponderance of the evidence. She has failed to do so. Accordingly, the citation will be vacated.

Civil Penalty Assessment

The Secretary has proposed a penalty of $247.00 for Citation No. 6263615. 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 (Apr. 1996).

In connection with the penalty criteria, the parties stipulated that in 2005 the Operator employed an average of ten miners, who worked 34,246 hours and that the assessment of civil penalties would not affect the company's ability to remain in business. (Jt. Ex. 1 at 2.) From this, I conclude that CSA Materials is a relatively small operation and that any penalty assessed will not adversely affect its ability to continue operating. From its "Assessed Violation History Report," I find that the operator has a better than average history of previous violations. (Pet. Ex. 7.) I further find that the company demonstrated good faith in rapidly abating the violations after being notified of them.

With regard to the violation's gravity, I find that while it could have resulted in a fatality, the chances of that happening in this case were unlikely, so the violation was not as serious as it could have been. Finally, I agree with the inspector that the negligence of the operator in committing this violation was "low." (Pet. Ex. 1.)

Taking all of these factors into consideration, I conclude that a penalty of $60.00 is appropriate for the violation.

Order

In view of the above, Citation No. 6263615 is **MODIFIED** by changing the likelihood of injury from "Reasonably Likely" to "Unlikely" and the "Significant and Substantial" designation from "Yes" to "No" and is **AFFIRMED** as modified. Citation No. 6263616 is **VACATED**.

CSA Materials, Inc., is **ORDERED TO PAY** a civil penalty of **$60.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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