FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 25, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-125-M
Petitioner	:	A. C. No. 41-03590-05523
v.	:	
	:	Rosser Pit & Plant
PAPPY=S SAND & GRAVEL ,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-179-M
Petitioner	:	A. C. No. 41-03590-05524A
v.	:	
	:	Rosser Pit & Plant
JOHN P. REEDER,	:	
Respondent	:	

DECISION

Appearances: Thomas Paige, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Secretary;
Timothy A. Duffy, Esq., Burleson, Pate & Gibson, L.L.P., Dallas, Texas, for Respondents.

Before: Judge Weisberger

In these consolidated cases the Secretary of Labor (Secretary) seeks a civil penalty from Pappy=s Sand & Gravel (APappy@) for allegedly violating 30 C.F.R. '' 56.14131(a) and 56.9300(a). The Secretary also seeks a civil penalty from John P. Reeder, under section 110(c) of the Federal Mine Safety and Health Act of 1977 (The Act), in connection with the violation of section 56.9300(a), supra. Pursuant to notice, a hearing on these matters was held in Ft. Worth, Texas, on April 7, 1998. Petitioner filed proposed findings of fact and a brief on May 18, 1998. No brief was filed by Respondents.

Findings of Fact and Discussion

I. Background

Pappy operates a 150 acre pit in Kaufman County, Texas, where it mines, processes, and sells concrete sand and rock. As part of its operation, mined material is washed by water that is then pumped to the processing plant from a pond that is approximately 1,000 feet long and 200 feet wide. A levee that runs 1,000 feet along the side of the pond, holds the water in the pond and prevents it from flooding a road located on the other side of the levee. When Pappy commenced operations at the site in 1990, trees completely covered the top of the levee preventing any travel on it. In late 1995, Pappy decided to raise the level of the levee in order for the pond to be able to hold more water. The first step was to clear all the trees from the top of the levee, and to fill holes on the levee. After this was done, work commenced on the levee to widen it from less than 10 feet to 35 feet, and raise it 1 foot so that it could be 6 feet above the pond. A berm was placed on the levee to prevent the trucks traveling on the levee from sliding off.

In the beginning of October 1996, it was decided to again raise the levee. The berm was removed because, according to John Ples Reeder, Pappy=s president, it ". . . would channel the water into areas which would ruin the levee" (Tr. 78).

Around the beginning of November 1996, work commenced on raising the levee an additional foot. Dump trucks traveled on top of the levee to place soil in a pile that ran along the middle of the levee for the entire length of the levee.[1]

On November 4, 1996, Ronnie Howard, who had been hired the previous month, was driving along the levee in a Mack dump truck loaded with soil. The truck slid off the top of the levee into the pond and overturned, causing Howard to suffer a cracked rib and a collapsed lung.

On November 12, 1996, subsequent to an investigation, MSHA Inspector Omar Dale Williams, issued Pappy a section 104(d)(1) citation alleging a violation of 30 C.F.R. ' 56.14131(a) which provides as follows: "[s]eat belts shall be provided and worn in haulage trucks." Williams also issued a section 104(d)(1) order alleging a violation of 30 C.F.R.

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[1]/ It was contemplated that after all the soil was piled on the levee, graders were to be used to level the soil over the surface of the top of the levee, and raise it 1 foot. According to Reeder, the same amount of soil would have been required to build a berm for the length of the levee. Upon completion of the raising of the height of the levee, Pappy intended to seed the top of the levee, and trucks would no longer travel there.

' 56.9300(a) which provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn . . . . "

MSHA also seeks a penalty from Reeder under section 110(c)[2] of the Act, in connection with the alleged violation of section 56.9300(a), *supra*.

II. Violation of Section 56.14131(a), supra.

According to Williams= investigation, Howard was not wearing a seat belt at the time of the accident on November 4. Pappy did not present any evidence to contradict or impeach the Secretary=s evidence. Hence, I find that it has been established that Howard was not wearing a seat belt and that accordingly, Pappy did violate Section 56.14131(a), supra.

A. Significant and Substantial

According to Williams, the violation was significant and substantial.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act 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." 30 U.S.C. ' 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor 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

[2]/ Section 110(c), supra, provides, as pertinent, that A. . . [w]henever a corporate operator violates a mandatory . . . safety standard . . . any . . . officer . . . of such corporation who knowingly authorized, ordered, or carried out such violation, . . . shall be subject to the same penalties . . . that may be imposed upon a person under subsections (a) and (b).@

violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

The record establishes that Pappy did violate a mandatory standard. It is also clear that this violation contributed to the occurrence of an injury to the truck operator. Further, the roadway on which the dump truck at issue traveled did not have a berm, and was elevated approximately 6 feet above a pond. Also, an accident did occur resulting in serious injuries. I find that within this context, the third and fourth elements set forth in *Mathies*, supra, have been met. I thus find that it has been established that the violation was significant and substantial.

B. Unwarrantable Failure

According to Reeder, it is Pappy=s policy for employees to wear seat belts. He said that in safety meetings employees are told to wear seat belts. Reeder said that if he would be informed that someone is not wearing a seat belt, he would reprimand him. He said that he was not aware that Howard had not been wearing his seat belt, and that he (Reeder) did not arrive on the site on November 4, until after the accident had occurred.

Williams testified that in three or four prior visits to the site, he spoke to various employees, and was satisfied that they had been told to wear seat belts. He also observed employees with their seat belts on.

On the other hand, Pappy had previously been cited on December 28, 1995, by MSHA Inspector Robert LeMasters, for violating section 56.14131(a), when LeMasters observed an employee operating a Mack haul truck on the site without a seat belt. Also, records of safety meetings do not indicate that Howard was present at any meeting when safety belts were discussed. Also, Reeder conceded on cross-examination that although all employees were instructed to wear seat belts, some were "hard-headed" (Tr. 69), and received an abusive reprimand. Howard was reprimanded by Reeder on two occasions for driving too fast, but had not been reprimanded for not wearing a seat belt. Within the context of this evidence, I find that it has been established that Pappy=s conduct rose to the level of aggravated conduct, and hence, I find that the violation resulted from its unwarrantable failure (*See Emery Mining Corp.*, 9 FMSHRC 1997 (1987)).

C. Penalty

As discussed above, I find that the level of Pappy=s negligence to have been more than moderate. I also find that the violation, having in resulted in an accident that caused serious injuries to Howard, was of a high level of gravity. I find that a violation of $5,000.00 is appropriate for this violation.

III. Violation of Section 56.9300(a), supra.

The evidence is undisputed that, when cited, the 1,000 foot long levee did not have a berm. In essence, it is Pappy=s position that the levee was not a roadway and hence, was not required by section 56.9300(a), supra, to have a berm. Pappy argues that the levee was initially covered with trees, and was never used by vehicles to pass from one place to another. Pappy refers to the fact that, when cited, the trucks on the levee were delivering dirt to the site to be spread on top of the levee to increase its height, and that upon completion of this task, grass would be grown on the levee, and it would not be open to vehicular traffic.

In essence, section 56.9300(a), supra, requires berms on "roadways." That term is not defined in Title 30, supra. *Webster=s Third New International Dictionary* (1986 Edition) ("*Webster=s*") defines Aroadway@ as pertinent, as follows: " . . . **b:**ROAD; *specif.***:** the part of a road over which the vehicular traffic travels." *Webster=s* defines Aroad,@ as pertinent, as follows: "3(c)**:** the part of a thoroughfare over which vehicular traffic moves . . . . " *Webster=s* defines Athoroughfare,@as pertinent, as follows: "1**:** a way or place through which there is passing . . . ."

Since, when cited, bulldozers and dump trucks traveled over the levee while dumping dirt, I find that the levee was indeed used as a roadway. Hence, it fell within the scope of section 56.9300(a), and a berm was required. Since the levee did not have a berm, section 56.9300(a), supra, was violated.

A. Significant and Substantial

Vehicles traveled the entire length of the top of the levee, approximately 1,000 feet. The levee was 6 feet above a pond, but no berm was provided along the levee. At least one driver did not wear a seat belt. I find, within this context, that it has been established that the violation was significant and substantial. (*See Mathies*, supra.)

B. Unwarrantable Failure and Reeder=s Violation of Section 110(c)

In October 1996, Pappy intentionally removed the berm that had been in place on the levee. Trucks then began to travel on the top of the levee to dump soil. As set forth above, (III, supra), a violation of section 56.9300, supra, resulted. Since the violation was caused by Pappy=s intentional act, I find that the violation resulted from its unwarrantable failure. (*See Emery*, supra). For the same reasons, I find that Pappy=s President, Reeder, who directed that the berm be removed, violated section 110(c), supra, in that he authorized such a violation.

C. Penalty

For the reasons set forth above, I find that the level of Pappy=s negligence was more than moderate. Also, since the lack of a berm contributed to the accident wherein Howard suffered serous injuries, I find that the gravity of the violation was relatively high. I find that a penalty of $8,000.00 is appropriate. In assessing a penalty against Reeder, I make the same findings regarding gravity and negligence (*See Sunny Ridge Mining Company, Inc.*, 19 FMSHRC 254, 272 (Feb. 1997). *Sunny Ridge*, supra, further provides that in assessing a penalty against an individual under section 110(c) of the Act, the individual=s income and family support obligations, the appropriateness of the penalty in light of the individual=s job responsibilities, and the individual=s ability to pay. These facts appear to be within the control of Reeder. However, he did not adduce any evidence regarding them. I find that he has not come forward with any evidence to mitigate a penalty based upon his ability to pay. Taking into account the factors set forth above, I find that a penalty of $600.00, is appropriate.

ORDER

It is **ORDERED** that, within 30 days of this decision, Pappy pay a total civil penalty of $13,000.00, and that John P. Reeder, pay a civil penalty of $600.00.

Avram Weisberger
Administrative Law Judge

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