FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 4, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ODELL GEER CONSTRUCTION, COMPANY, INCORPORATED, Respondent	: : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. CENT 98-131-M A. C. No. 41-03878-05506 Gibbs Pit
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. WILLIAM A. HOOTEN, JR. Employed by ODELL GEER CONSTRUCTION, COMPANY, INCORPORATED, Respondent	: : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. CENT 99-124-M A. C. No. 41-03878-05507 Gibbs Pit

DECISION

Appearances: Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Rodney P. Geer, Esq., Odell Geer Construction Company, Inc., Belton, Texas, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Odell Geer Construction Company, Inc., and William A. Hooten, Jr., respectively, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege five violations of the Secretary's mandatory health and safety standards and seek a penalty of $25,000.00 against the company and a penalty of $2,500.00 against Hooten. A hearing was held in Austin, Texas. For the reasons set forth below, I affirm the citation and orders and assess penalties of $15,000.00 and $500.00, respectively.

Background

Odell Geer Construction operates the Gibbs Pit mine in Youngsport, Texas. The mine consists of a crusher and wash plant. The wash plant was set up in May or June of 1997. On October 20, 1997, MSHA Inspector Robert D. Seelke conducted a regular inspection of the Gibbs Pit. During the inspection he observed five conveyor belts in the wash plant which did not have catwalks, hand rails or any other apparent means of safely accessing the head pulleys, which were at least 12 feet off of the ground.

After talking with miners working around the belts, Seelke determined that the head pulleys were being maintained by a miner walking up the inclined conveyor belt. As a result, he issued one citation and four orders under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging violations of section 56.11001 of the Secretary's regulations, 30 C.F.R. § 56.11001. Citation No. 7860014 alleged that:

> A safe means of access was not being provided to the head pulley of the over the screen belt at the wash plant. Employees had to walk the inclined conveyor to the head pulley which was approximately 20 foot [*sic*] above ground level. Hand rails were not provided. Employees stated that they must grease the head pulley at least every other day. This condition has existed for approximately 6 weeks. It was determined that the superintendent was aware of the hazard and had made no apparent effort to correct it. This is an unwarrantable failure.

(Govt. Ex. 6.)

Order Nos. 7860015, 7860016, 7860017 and 7860018 were worded identically, except for the name of the conveyor belt involved. They stated:

> A safe means of access was not being provided to the head pulley of the "D" belt ["B" belt, "F" belt, screen belt] at the wash plant. Employees had to walk the inclined conveyor to the head pulley which was approximately 12 to 15 feet above ground level to perform maintenance work. Hand rails were not provided. Employees stated that they must grease the head pulley at least every other day. This condition has existed for approximately 6 weeks. The superintendent Jr. Hooten engaged in aggravated conduct constituting more than ordinary negligence in the fact that he knew employees were accessing the head pulley and had made not apparent effort to correct it. This is an unwarrantable failure.

(Govt. Ex. 6.)

After the citation and orders were issued, a 110(c), 30 U.S.C. § 820(c), special investigation was conducted to determine if any of Odell Geer's agents should be held personally

liable for the violations. As a consequence of this investigation, the Secretary filed a Petition for Assessment of Penalty against William A. Hooten, Jr., commonly referred to as Junior Hooten.

Findings of Fact and Conclusions of Law

Section 56.11001 requires that: "Safe means of access shall be provided and maintained to all working places." The company concedes that it violated the regulation, but contests the "significant and substantial," "unwarrantable failure" and 110(c) allegations. (Tr. 311-12, 317.) I find, however, that the violations occurred as alleged by Inspector Seelke.

Significant and Substantial

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." 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 explained:

> 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 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.

See also Buck Creek Coal, Inc. v. MSHA, 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).

In *United States Steel Mining Co., 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).

This evaluation 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 1007 (December 1987).

As usual, it is the third criterion -- whether the violation is reasonably likely to result in an injury -- which is in question. There is no doubt that the violations occurred. Nor is there any claim that the violations would not contribute to a safety hazard. No evidence was presented that any injury was ever suffered by anyone walking up the belts, or at least none was ever reported.[1] However, Steven Gore, the employee responsible for greasing the head pulleys a minimum of every other day, testified that the belts consisted of: "Slick black rubber. It had just a minute amount of material on it. It was pretty slick, especially if it had some of the smallest rock that's made, F rock. If it had a little bit on there you'd have to hold onto the belt to walk up there." (Tr. 25.) He said that he had "fallen lots of times." (*Id.*)

Since the only way to access the head pulleys was to walk up the belts and since the belts were slick and did not provide a uniform, firm surface, I conclude that the lack of hand rails or other safe means to grease the head pulleys contributed to a reasonable likelihood that someone would be injured by slipping and falling off of the belts.[2] In view of the height of the belts at their head pulleys, it is apparent that a fall off of the belt would result in a reasonably serious injury involving broken bones at a minimum. Accordingly, I conclude that the violations were "significant and substantial."

Unwarrantable Failure

The term "unwarrantable failure" is also found in section 104(d)(1) of the Act, which establishes more severe sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987).

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[1] Steven Gore testified that he had a "few slippages and falling down once in awhile. I didn't claim it on L&I and it was never talked about." (Tr. 30.)

[2] In reaching this conclusion, I reject the company's argument that a crane, which was located on the property, or a man-lift could have been used to work on the head pulleys. No one, from the safety director on down, testified that it had occurred to them to use the crane for such tasks or that they had suggested to Horace Kelley, the foreman, or Gore that the crane be used. Furthermore, the company did not even own a man-lift, but would have had to rent one every time work on the head pulleys was required.

"Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The Commission has established the following factors as being indicative of whether a violation is unwarrantable:

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998).

In this case, it is undisputed that five of the six conveyor belts in the wash plant violated the regulation; thus, the violation clearly was extensive. It is also undisputed that the violations had existed since the conveyor belts were erected in July 1997 until the citation and orders were issued in October 1997, a considerable length of time. In addition, the violations were obvious. Inspector Seelke testified that: "Not seeing any catwalks, handrails, manlifts on site, that question came into my mind. And I asked the question, how do you maintain your head pulleys [?]" (Tr. 119-20.) John L. Rovetto, company safety director, testified on this issue as follows:

> JUDGE: Mr. Rovetto, when you were accompanying the inspector on the inspection, you said that when he looked up at the head pulley you knew what he was going to ask?
>
> A. Yes, sir.
>
> JUDGE: How did you know what he was going to ask you?

A. I could see the grease hoses weren't there, sir.[3]

JUDGE: So it was readily apparent then?

A. If you were standing under the head pulley, yes, sir.

(Tr. 286-87.) On the other hand, the violations do not appear to have posed a high degree of danger, nor had the operator been placed on notice that greater efforts were necessary for compliance.

It is apparent that the operator was aware of the existence of these dangerous condition from the time the conveyor belts were constructed. Rovetto testified that he had an "on-the-ground conference" with Ed Zvolanek, the superintendent prior to Hooten, Hooten and Kelley in June before the conveyors were erected and told them that the easiest way to put catwalks and railings on the conveyors would be to put them on while the conveyors were on the ground, before they were raised. (Tr. 253.) He further testified that in mid-July Kelley came to him and told him that the conveyors were being put up without the catwalks. He said that after he checked into the matter, he informed Kelley that grease hoses were going to be installed. Rovetto and Hooten both testified that they assumed that Kelley had had the grease hoses installed, although neither bothered to check.

Kelley testified that he was given grease hoses to install at the crusher, but not on the head pulleys. He claimed that he talked to Rovetto and Hooten on several occasions about the unsafe means of accessing the head pulleys to grease them. Gore testified that he also complained to Hooten about having to climb up the belt to grease the head pulley. Hooten denied that anyone ever told him that the head pulleys were being accessed by walking up the belt.

The company implies that Kelley deliberately failed to install the grease hoses, after being told to do so, because he was miffed at Hooten having been selected as superintendent rather than he. This argument, although plausible, provides no defense to the unwarrantable failure allegation. In the first place, I find Kelley's testimony to be credible and Hooten's not to be. In the second place, even if Hooten's testimony were believable, it would not provide any support to the company's position that it did not act unwarrantably.

Hooten testified that he and Kelley did not always see "eye-to-eye," that Kelley did not always do what he was told and that, as a result, he checked up on most, if not all, of the things he directed Kelley to carry out. (Tr. 227-29.) Hooten also admitted stressing to Gore the importance of regularly greasing the head pulleys. Yet, he claimed he never checked to see if the grease hoses had been installed. If true, this indicates extraordinary indifference in direct contrast to his assertion that he had to follow-up on everything that Kelley did.

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[3] Hooten and Rovetto testified that catwalks and railings were not necessary because they had intended to install grease hoses on the head pulleys so that the pulleys could be greased from the ground.

Finally, if Kelley did intentionally not install the grease hoses, the company is still not absolved. As foreman, Kelley was an agent of the operator. Therefore, his actions are attributable to the operator and clearly demonstrate an unwarrantable failure.

While testifying on this issue, Rovetto said: "After hearing testimony today, I have to believe that someone knew the hoses weren't put on there." (Tr. 270.) I reach the same conclusion, and find that Rovetto, Hooten and Kelly all knew, or should have known, that the conveyors did not have a safe means of access, and that Hooten and Kelley knew, or should have known, that they were being accessed unsafely.

In conclusion, the violations in this case were extensive, involving five of the six conveyor belts at the wash plant, they had been in existence for at least three months, they were obvious and the operator was aware of their existence. All of this demonstrates an indifference to the problem and a serious lack of reasonable care on the part of the Respondent. Accordingly, I hold that the violations in this case were the result of the company's unwarrantable failure to comply with the regulation.

Hooten's 110(c) Liability

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

The evidence in this case that Hooten acted knowingly is overwhelming. I find the testimony of Gore and Kelley that they specifically told him that something needed to be done because the head pulleys were being accessed by climbing up the belt to be credible. Further, I find Hooten's claim that he did not know how the belt was being accessed to be incredible. By his own testimony he spent 70 percent of his time at the Gibbs Pit. According to him, much of that time was spent checking up on Kelley. It is impossible to believe that he spent that much time on the ground yet never noticed anyone walking up the conveyor belt or that the grease hoses had not been installed.

Moreover, his asserted lack of knowledge is contradicted by his response to the inspector when asked how the head pulleys were accessed. He said: "I don't know. I guess they must be using the conveyor." (Tr. 252.) He later told James Thomas, the special investigator, the same thing, that "he assumed the way they were going up there was by walking up the conveyor." (Tr.

169.) To neither inspector did he express any shock or dismay that the grease hoses had not been installed, or attempt to explain that he had directed their installation.[4]

Consequently, I find that Hooten was in a position to affect safety and that he failed to act even though he had knowledge that the conveyor belts had no safe means of access. Therefore, I conclude that he acted knowingly and is liable under section 110(c) of the Act.

Civil Penalty Assessments

The Secretary has proposed penalties of $5,000.00 for each of the five violations by the company and $500.00 for each of the five violations by Hooten. 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).

The Company's Penalty

In connection with the penalty criteria concerning the company, the parties have agreed that: (1) the operator demonstrated good faith in abating the violations; (2) Odell Geer Construction worked 58,736 man hours in 1997, of which 34,449 were worked at the Gibbs Pit; and (3) Odell Geer Construction Company's ability to remain in business would not be adversely affected by the payment of a $25,000.00 penalty. (Tr. 291-94.) From this I find that the company demonstrated good faith in abating the violations; that both the mine and its controlling entity are small operations; and that Odell Geer's ability to remain in business will not be affected by a penalty imposed in this case.

Based on the company's Assessed Violation History Report, (Govt. Ex. 1), I find that the company has a very low history of prior violations. Because these violations could have resulted in a serious injury, I find that the gravity of the violations was serious. Further, in accordance with the finding that these violations resulted from an unwarrantable failure, I find that the operator's negligence was "high."

Taking all of the penalty criteria into consideration, I conclude that a penalty of $3,000.00 is appropriate for each violation.

Penalty for William A. Hooten, Jr.

Because no evidence was presented at the hearing concerning the penalty criteria and Hooten, I asked the parties to stipulate "how the penalty criteria would affect Mr. Hooten" and to submit it in writing as Joint Exhibit 1. (Tr. 297-98.) Joint Exhibit 1 was filed on August 4,

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[4] In fact, the only disagreement anyone from the company raised concerning these violations, when they were issued, was to request that they be included in a "single citation." (Tr. 287-88.)

1999. However, it only consists of an affidavit by Mr. Hooten setting out his income and expenses. According to that, he has annual expenses of $26,047.44 and an annual "take home" income of $26,613.69.

In connection with the penalty criteria, as applied to individuals, I find that the gravity of these violations was serious, that Hooten's negligence was "high," that he has no previous history of 110(c) violations and that he is the mine superintendent. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997).

Since the affidavit submitted does not state whether Hooten is married, I cannot perform a two step analysis of his financial position because I cannot determine either his household financial condition or his share of the household's net worth, income and expenses. *Wayne R. Steen*, 20 FMSHRC 381, 385 (April 1998). Thus, there is no evidence as to his "size" or "ability to continue in business." *Id.*

The remedy for this circumstance, however, is not to further delay this case by requesting additional information, but to find that, by failing to submit the information when given the opportunity to do so, his "ability to continue in business" will not be affected by the imposition of an authorized penalty in this case. The Commission has previously held with respect to operators that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984); *accord Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (April 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). There does not appear to be any reason that the same presumption should not also apply to 110(c) respondents.

Taking all of the penalty criteria into consideration, I conclude that a penalty of $100.00 for each violation is appropriate.

Order

Citation No. 7860014 and Order Nos. 7860015, 7860016, 7860017 and 7860018 in Docket No. CENT 98-131-M and the civil penalty petition in Docket No. CENT 99-124-M, alleging that William A. Hooten, Jr., knowingly authorized the violations in the citation and orders, are **AFFIRMED.** Accordingly, Odell Geer Construction Company, Inc., is **ORDERED TO PAY** a civil penalty of **$15,000.00** and William A. Hooten, Jr., is **ORDERED TO PAY** a civil penalty of **$500.00**, within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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