FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 19, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-159-M
Petitioner	:	A. C. No. 23-00746-05530
v.	:	
	:	Docket No. CENT 98-207-M
K.R. WILSON CONTRACTING, INC.,	:	A.C. No. 23-00746-05531
Respondent	:	
	:	Sullivan Plant

DECISION

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Michael O. McKown, Esq., Ziercher & Hocker, P.C., St. Louis, Missouri, for Respondent.

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 K.R. Wilson Contracting, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege five violations of the Secretary's mandatory health and safety standards and seek penalties of $100,860.00. A hearing was held in St. Louis, Missouri. For the reasons set forth below, I vacate one citation, affirm four and assess penalties of $40,688.00.

Settled Citations

At the beginning of the hearing, counsel for the Secretary advised that the parties had agreed to settle the two citations in Docket No. CENT 98-207-M. The agreement provides that the penalty will be reduced from $860.00 to $688.00. Based on the representations of the parties, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and approved the agreement. (Tr. 16-18.) The provisions of the agreement will be carried out in the order at the end of this decision.

Background

The Respondent operates a small limestone quarry in Sullivan, Missouri, known as the "Sullivan Plant." At about 12:30 p.m., on June 20, 1997, Larry Bouse, the plant foreman, began replacing a brake expander tube on the left rear wheel of a 1966 Caterpillar, Model 988A, front-end loader. This required him to elevate and block the loader on stands. Since it was necessary to remove the wheel, one end of the fender over the wheel was disconnected and the fender, which weighed 425 pounds, was raised to an almost upright position by the boom hoist on a hoist truck. The fender was then secured by connecting a portable ratchet hoist, commonly called a "come-along,"[1] to the top step[2] on the fender and to an "eye piece" on the top of the roll-over protective structure of the loader.

By 4:30 p.m., Bouse had completed the brake repairs and was attempting to get the wheel back onto the loader. Ronald Haanpaa and Vernon Abney, who had completed work for the day, offered to assist Bouse in completing his work. Haanpaa got into the hoist truck to lift the wheel back into position with the boom hoist. Abney got in the wheel well to guide the wheel back onto the axle and Bouse got on the hood of the loader to communicate between Haanpaa and Abney. When they still could not get the wheel on, Abney suggested that they completely remove the fender. He was coming out of the wheel well when the "come-along" failed, releasing the fender. The fender struck Abney in the forehead near the hair line and pushed his head back into the frame of the loader. Abney, who was not wearing a hard hat at the time, suffered massive head injuries and died as a result.

MSHA began its investigation of the accident the next day. On July 21, 1997, three citations were issued to the operator as a result of the accident. Citation No. 7856213 alleges a violation of section 56.14211(b) of the regulations, 30 C.F.R. § 56.14211(b), because: "On June 20, 1997 an employee was fatally injured when a raised fender of a 988A Caterpillar front end loader fell striking him. The portable hoist, which was used to secure the hinged 425 pound

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[1] A "come-along" is "a little drum that a cable wraps around." The drum is in a frame which has a ratcheting device operated by a handle. As the handle is ratcheted in one direction, it rotates the drum, causing the cable to wrap around it. As it is ratcheted in the other direction, the cable is played out. The frame has a hook on one end and the cable extends out from the frame and has a pulley with a hook attached to it. (Tr. 283-84.)

[2] The fender had steps on it to be used in climbing up on the loader.

fender, failed. (Govt. Ex. 1.) Citation No. 7856214 charges a violation of section 56.15002, 30 C.F.R. § 56.15002, in that: "When [the employee] left his truck to assist with the loader repairs, he did not put on a hard hat where there was a danger of falling objects." (Govt. Ex. 1.) Finally, Citation No. 7856515 asserts a violation of section 56.14100(b), 30 C.F.R. § 56.14100(b), since:

> The portable hoist, which was used to secure the hinged 425 pound fender failed when the cable compression clamp broke. Additionally, it had loose bolts, the pulley bearing would not roll and the 3/16-inch cable was attached with a bolt marked "CAT." The cable had broken wires and the rating information was missing. The handle did contain a warning against unauthorized alteration. The foreman was directing a wheel assembly installation on the loader and allowed the defective equipment, which had been altered and not maintained, to be used. This constitutes more than ordinary negligence and is an unwarrantable failure to comply with the Standard.[3]

(Govt. Ex. 1.)

The "come-along" failed because a compression thimble, or aluminum swedge sleeve, catastrophically collapsed. "This thimble is a soft aluminum sleeve that slides over the doubled cable and is compressed by a special swedging tool to form a permanent loop in the end of the cable." (Resp. Ex. 2 at 2.) This allowed the pulley hook to become unattached from the cable, releasing the hook and the fender. The catastrophic failure was caused by an outside event, probably the tire on the hoist cable, or the hoist cable itself, striking the fender.

Findings of Fact and Conclusions of Law

Citation No. 7856213

This citation alleges a violation of section 56.14211(b) which 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." Section 56.14211(d), 30 C.F.R. § 56.14211(d), states that "a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent."

The regulation is clear and unambiguous that the raised component can either be "blocked" *or* "mechanically secured." The MSHA inspectors who testified were all of the opinion that the fender should have been blocked. Consequently, it is the Secretary's position that since

[3] This citation originally alleged a violation of section 56.14100(c). The citation was modified on November 13, 1997, to substitute the "Condition or Practice " set out above, to change the standard alleged to be violated and to charge that the violation was an "unwarrantable failure."

the fender was not blocked, the standard was violated. Inasmuch as that position ignores the clear language of the rule, I find that argument without merit. On the other hand, the Respondent contends that the raised fender was mechanically secured by the "come-along." The evidence, however, demonstrates that the fender was not mechanically secured.

As section 56.14211(d) plainly states, if a functional load-locking device or a device which prevents free and uncontrolled descent is used the regulation is satisfied. In this case, such a device was not used. The "come-along" did not prevent free and uncontrolled descent of the fender when it struck Abney in the head. Since it failed, the "come-along" was obviously not functional. *Cf. Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998 (June 1997) (requirement that conveyor belt be equipped with slippage and sequence switches means *functional* switches); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (requirement that self-propelled mobile equipment be equipped with a service brake system means *functioning* system); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991) ("switches to be used to lock out electrical equipment must be equipped with *functioning* lockout devices") (emphasis added). Therefore, I conclude that the operator violated the regulation.

I reach this conclusion even though I accept the testimony of H. Boulter Kelsey, Wilson's mechanical engineering expert, that the "come-along" failed because of the unforseen, catastrophic collapse of a thimble on the cable. The Act imposes strict liability on mine operators for violation of the mandatory standards regardless of fault. *Western Fuels-Utah v. Fed. Mine Safety & Health*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Rock of Ages Corp.*, 20 FMSHRC 106, 114 (February 1998); *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (January 1994). As the Commission has stated, "the principle of liability without fault requires a finding of liability even in instances where the violation resulted from unpreventable employee misconduct." *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1998). Likewise, the principle of liability without fault requires a finding of liability in this case even though the failure of the "come-along" was unforeseeable.

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 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 1007 (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.

In view of Abney's fatal injuries, there can be little doubt that this violation satisfies the *Mathies* criteria. "Clearly, it was a significant contributing cause to the fatal accident." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (January 1997). Consequently, I conclude that the violation was "significant and substantial."

Citation No. 7856214

Section 56.15002, which this citation alleges to have been violated, requires that: "All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard." The evidence is undisputed, and, indeed, the Respondent concedes, that Abney was not wearing his hard hat when he was struck by the fender. It is also undisputed that this was an area where hard hats were supposed to be worn. Accordingly, I conclude that the company violated this regulation.

Significant and Substantial

This violation is alleged to be "significant and substantial." The operator argues that Abney would have been killed even if he had been wearing a hard hat. The evidence to support this claim is the speculation of Mr. Kelsey based on his calculation of the force of the blow suffered by Abney. Mr. Kelsey, however, did not see the accident, or pictures of the accident, nor did he see the type of hard hat Abney was not wearing or even know what brand it was.

On the other hand, Abney was not wearing a hard hat and he was killed by a blow to the head. There is no way to know what would have happened to him if he had been wearing a hard hat. Under those circumstances, I conclude that his failure to wear a hard hat reasonably contributed to his death and that the violation was, therefore, "significant and substantial."

Citation No. 7856215

This citation alleges a violation of section 56.14100(b), which states: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The citation lists the following defects in the "come-along": (1) loose bolts; (2) pulley bearing would not roll; (3) the cable was attached with a bolt labeled "cat"; and (4) the cable had broken wires. As it turns out, none of these defects caused the accident. Despite that, if the defects affected safety, the standard was violated. In this case, the Secretary has not proved that the defects affected safety.

The Commission has stated that: "The phrase 'affecting safety' . . . has a wide reach and the 'safety effect on an uncorrected equipment defect need not be major or immediate to come within that reach.'" *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (citations omitted). While the Secretary's witnesses characterized the "come-along" as a "piece of junk" and reported that Bouse and Mr. Wilson had similarly described it, the Secretary has failed to demonstrate how the defects affected safety.

Conversely, the Respondent has rebutted any inferences to be derived from the descriptions of the "come-along" with the testimony of Mr. Kelsey. He stated that the "Cat" bolt "enhanced the capacity" of the "come-along. (Tr. 296.) With regard to the broken wires, he said: "I looked at the frame at the cable and about three or four strands were broken. It had nothing to do with the failure in this circumstance. . . . You can break probably half of the wires in this cable and still have it lift the 4,000 [pound] capacity." (Tr. 296-97.) In reply to a question about the pulley not rolling, he testified:

> It has no effect because the pulley was standing still for four and a half hours. This come-along was in a static loaded condition. There is no movement of the fender. There is no rolling back and forth. There is nobody cranking the handle. It is holding the fender in a locked, secured position for the time period prior to the catastrophic failure. There is no influence whatsoever by the pulley under those circumstances.

(Tr. 297-98.) Finally, in answer to whether the "come-along" was a "piece of junk," he responded:

> Yeah, it's a piece of junk but it's usable junk. It's usable junk like this that we have around in virtually every kind of shop in this country that people use all the time. *It is not unsafe*. It is not something that when you pick it up and look at it and say ["]oh, this thing could fail any minute["] because that just isn't the case. It is a piece of pretty well worn equipment. A lot of folks consider it junk but it's still usable.

(Tr. 318-19.) (Emphasis added.)

Clearly, the only defect affecting safety was the defect in the thimble. However, that defect was not visible. As Mr. Kelsey stated:

> The normal visualization of the surface would show some s[cr]atching on the surface but nothing to indicate that a catastrophic failure was imminent by just looking at it. There is no evidence of that. Even after the fact the only way we can tell it's a catastrophic failure is by looking at it under a microscope. You still can't tell with just the naked eye.

(Tr. 306-07.) Since the defect was not apparent, the company cannot be faulted for not correcting it.

The Secretary did not present any evidence on how the defects affected safety. At best, the testimony of the MSHA inspectors created an inference that the defects affected safety. The Respondent, however, has effectively rebutted this inference with the expert opinion of Mr. Kelsey. Because of his expertise, Mr. Kelsey's testimony is entitled to much greater weight than the opinions of the inspectors. Accordingly, I conclude that the company did not violate section 56.14100(b) and will vacate the citation.

Civil Penalty Assessment

The Secretary has proposed penalties of $40,000.00 for the violation of section 56.14211(b) and $25,000.00 for the violation of section 56.15002. 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. *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 stipulated that K.R. Wilson was a small company and that the operator demonstrated good faith in abating the violations. (Tr. 14-15.) The company's Assessed Violation History Report shows that it was only assessed four $50.00 violations during the two years preceding the violations in this case. Based on this, I find that the operator has a good history of violations. Finally, since the violations in this case resulted in a death, I find that both violations are of high gravity.

In an attempt to show that its ability to remain in business will be adversely affected by the proposed penalties, the company has put into evidence an Accountants Review Report with attached financial statements. (Resp. Ex. 3.) The cover letter contains the following disclaimer:

> All information included in these financial statements is the representation of the management of **K.R. Wilson Contracting, Inc.**
>
> A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

(*Id.* at 1.) This disclaimer is precisely the reason that unaudited financial statements are not sufficient to carry the operator's burden of establishing that a penalty will adversely affect the company's ability to remain in business. *See Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994). Consequently, I conclude that the penalties in this case will not have a detrimental effect on K.R. Wilson's ability to remain in business.

The last penalty criterion is negligence. The Secretary has alleged a "high" level of negligence with regard to Citation No. 7856213. This is presumably based on the defects found in the "come-along." However, in view of the fact that the apparent defects did not affect safety and that the defect which caused the accident was neither discernible nor foreseeable, I conclude that the level of negligence should be "low."

The Secretary has asserted that the violation in Citation No. 7856214 resulted from "moderate" negligence. The evidence in this case indicates that Larry Bouse, the foreman in charge of the repairs to the loader, did not "like" hard hats and was "occasionally" lax in demanding that employees wear them. (Tr. 143, 371.) Therefore, I conclude that this violation was caused by "high" negligence.

Taking all of the penalty criteria into consideration, I assess a penalty of $15,000.00 for Citation No. 7856213 and $25,000.00 for Citation No. 7856214.

Order

Accordingly, Citation Nos. 7856213 and 7856214 are modified with regard to the level of negligence as set out above, and are **AFFIRMED** as modified, and Citation No. 7856215 is **VACATED** in Docket No. CENT 98-159-M. Citation Nos. 7855877 and 7855909 are **AFFIRMED** in Docket No. CENT 98-207-M.

K.R. Wilson Contracting, Inc., is **ORDERED TO PAY** civil penalties of **$40,688.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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