FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-167
Petitioner	:	A. C. No. 34-01062-03509
v.	:	
	:	Joshua Strip
JOSHUA COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ned Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Alan Churchill, Proprietor, d/b/a Joshua Coal Company, Henryetta, Oklahoma, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. ' 820(a). The petition seeks to impose a total civil penalty of $200.00 for four alleged non-significant and substantial (non-S&S) violations of the mandatory safety standards in 30 C.F.R. Parts 48 and 77 of the regulations.[1] These matters were heard on January 5, 1999, in Tulsa, Oklahoma. The Respondent, Joshua Coal Company, is a sole proprietorship operated by Alan Churchill. Alan Churchill represented himself in this matter.

The parties stipulated that Churchill is a small mine operator who is subject to the jurisdiction of the Mine Act. The evidence further reflects that Churchill has no history of prior violations during the two years preceding the issuance of the citations in issue, that Churchill

[1] A violation of a mandatory safety standard is properly characterized as non-S&S if it is not reasonably likely that the hazard contributed to by the violation will result in an event, *i.e.*, an accident, resulting in serious injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

abated the cited conditions in a timely manner, and, that the $200.00 civil penalties proposed by the Secretary will not effect Churchill=s ability to continue his business.

At the hearing, the parties were advised that I would defer my ruling on the four citations pending post-hearing briefs, or, issue a bench decision if the parties waived their rights to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 85-6). Accordingly, this written decision formalizes the bench decision issued with respect to each of the contested citations. The bench decision vacated two citations and affirmed the remaining two citations. A total civil penalty of $50.00 was imposed for the two affirmed citations. The bench decisions herein are edited versions of the bench decisions issued at trial with added references to pertinent case law.

I. Findings and Conclusions

Churchill operates two surface coal mines located in Okmulgee County, Oklahoma. The Joshua Strip, the subject of this proceeding, is located near Coleton, Oklahoma. The other, newer mine is located near Morris, Oklahoma. Although Churchill has employed as many as three individuals in the past, the only individuals currently working at these mines are Alan Churchill and his son Craig Churchill.

The coal seams at Churchill=s mines are approximately 15 to 50 feet under the surface. Coal is extracted by using dozers, scrapers and front-end loaders to uncover and remove the coal. The coal is then taken to the crusher by pit trucks where it is processed and loaded into haulage trucks.

A. Citation No. 4366187

Mine Safety and Health Administration (MSHA) Inspector Lester Coleman conducted a regular Triple-A inspection of the Joshua Mine, I.D. No. 3401062, in February and March of 1998. A Triple-A inspection is a regular bi-annual inspection of a surface coal mine that is mandated by section 103(a) of the Mine Act, 30 U.S.C. ' 813(a). Coleman was accompanied by Alan and/or Craig Churchill during most of his inspection.

During the course of his inspection, Coleman observed the drive belt and pulleys on a ten inch Gorman Rump pump driven by a 471 Detroit diesel engine that was located in the 001-0 pit. The pump had a radiator fan driven by one or more belts and pulleys. At the hearing Coleman recalled seeing an eight inch opening located on the left side , when looking from the rear of the engine, where a person could catch a finger, a shirt sleeve or a glove between the belt and the pulley. The operating controls were on the right side of the pump. Coleman concluded the drive belt and pulley Awas not guarded to prevent a person from contacting the exposed moving parts@ and issued Citation No. 4366187 citing an alleged violation of the mandatory safety standard in section 77.400(a), 30 C.F.R. ' 77.400(a), pertaining to guarding of mechanical equipment. (Gov. Ex. 1).

At the hearing Churchill presented a video of the subject pump.[2] The video revealed the

[2] Churchill presented a multi-volume video of the alleged violative conditions at the hearing. At the trial, the record was left open, and leave was granted, for Churchill to edit the

cited Aunguarded@ pinch point area was 13 inches from the outer perimeter end of the fan shroud and 16 inches from the top of the pump. There was no exposure from the top because there are two bars that run along the top of the pump. The width of the alleged unguarded opening was demonstrated on the video to be approximately the width of a hand and wrist (approximately 4 to 5 inches).

After viewing the video, Coleman conceded there was, at most, a remote likelihood that someone could inadvertently stumble and come into contact with the belt pulley given the location of the belt, the narrow width of the opening, and the fact there were two bars on top of the pump. (Tr. 78-9). In fact the video evidence demonstrated that, short of intentionally placing one=s hand through this narrow opening, 13 inches into the inner workings of the pump, there was no means of inadvertent contact.

In view of the evidence presented, I issued the following bench decision with respect to Citation No. 4366187:

> While the Secretary is normally entitled to deference when interpreting her own mandatory safety standards, deference cannot be accorded to the Secretary=s interpretation if it is plainly wrong and inconsistent with the purpose of the cited regulation. *Dolese Brothers Co.*, 16 FMSHRC 689, 693 (April 1994) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).
>
> Turning to the purpose of the regulation, the Commission addressed the purpose of the mandatory standard in section 77.400(a) in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984). The Commission stated:
>
> > We find the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention or ordinary carelessness. Applying this test requires taking into consideration all relevant exposure and injury variables. For example, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis.
> > 6 FMSHRC at 2097.

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video for the purpose of deleting the video references to citations that were not in issue in this proceeding. (Tr. 183). The edited video was filed on January 12, 1999, and has been admitted as Resp. Ex. 4.

> Thus, stumbling and inadvertent contact is the concern the standard addresses. The standard is not intended to require moving parts to be guarded in order to prevent intentional contact. The Secretary has the burden of proving the occurrence of a violation. Although I am sensitive to inspector Coleman=s concerns about inadvertent stumbling or other inadvertent contact, the video evidence fails to demonstrate a reasonable possibility of such unintentional contact. Accordingly, Citation No. 4366187 **SHALL BE VACATED**. (Tr. 87-91).

B. Citation No. 4367403

Coleman observed a tan mechanic=s truck in the 001 pit that was not equipped with an audible back-up alarm when the truck was put in reverse. Consequently, Coleman issued Citation No. 4367403 alleging a violation of section 77.410(a)(1), 30 C.F.R. ' 77.410(a)(1) that requires, in pertinent part, that trucks, except pick-up trucks with an unobstructed rear view, shall be equipped with an audible warning back-up device.

Churchill admits the cited truck did not have a back-up alarm. However, he maintains the driver=s rear view was not obstructed. Churchill presented a video of the subject vehicle that demonstrated that, although there was a clear line of vision out the rear window through the center of the truck bed, the driver=s view was obstructed by equipment located on the truck bed directly behind the driver and directly behind the front passenger. Although the rear view was partially rather than totally obstructed, common sense dictates that the cited mandatory standard is triggered if there is any obstructed view. For it is little comfort to a victim struck by a vehicle in reverse that he would not have been struck if he had been standing or kneeling in an area that was not obstructed from view.

Accordingly, at trial, I issued the following bench decision concerning on Citation No. 4367403:

> The mandatory standard in section 77.410(1)(a) is clear. It requires an audible back-up alarm with the exception of a pick-up truck with an unobstructed rear view. The rear view does not have to be totally obstructed, as the respondent suggests, for a violation to occur. A rear view is either unobstructed or obstructed. A partially obstructed view constitutes an obstructed view under section 77.410(1)(a).
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> Although I have no doubt that the rear view of the operator of the cited truck depicted in the video evidence was adequate to safely change from the left lane to the right lane on a highway, normal driving hazards are not the hazards addressed in section 77.410(1)(a). Rather, the standard is meant to protect an individual working in close proximity to the rear of the truck. Such a person, at any moment, can bend down behind the truck, for any number of reasons, and be obscured from the view of the truck operator. In such an instance, the truck would only have to

travel several feet for tragedy to occur.

Accordingly, the partial obstruction of view observed and cited by Coleman constitutes a violation of the cited mandatory standard. Consequently, Citation No. 4367403 **SHALL BE AFFIRMED**. I view the placement of the equipment on the truck bed, which left an open area to preserve rear view as a mitigating circumstance that reduces the respondent=s degree of negligence to low. Consequently, a civil penalty of $25.00 will be imposed. (Tr. 107-112).

C. Citation No. 4366193

Section 48.31(a) of the Secretary=s training regulations, 30 C.F.R. ' 48.31(a), requires yearly hazard training to be provided to all Aminers@ as that term is defined in section 48.22(a)(2), 30 C.F.R. ' 48.22(a)(2). The section 48.22(a)(2) definition of Aminer@ includes any Adelivery. . . worker contracted by the operator.@ Coleman testified hazard training for fuel delivery truck drivers had been approved by the MSHA district manager. Although Coleman did not testify about the specific terms of the respondent=s approved hazard training requirements, Coleman speculated the approved hazard training would include such subjects as elevated road hazards as well as the proper way to mount and dismount the fuel storage tank.

Fuel deliveries occur at the mine site on an irregular basis, usually less frequently than once per month. Coleman asked Alan and Craig Churchill if the last fuel truck driver to make a delivery had received hazard training. Coleman testified that the Churchills indicated he had not received such training. At trial, Churchill argued hazard training was not required. Nevertheless, Churchill also maintained that his and his son=s negative response to Coleman=s question was intended to convey that the fuel driver had not signed a hazard training certificate although he had, in fact, received the required hazard training.

As a result of the information given to Churchill, Coleman issued Citation No. 4366193 charging, A[t]he operator did not provide the last fuel truck delivery person with any hazard recognition training,@ as required by section 48.31(a)(1). Apparently, in view of Churchill=s insistence that training had been provided although no training certificate had been signed by the driver, Citation No. 4366193 was subsequently modified to reflect a violation of section 48.31(d) that requires operators to maintain, and make available for inspection, signed training certificates.

In view of the above, I issued the following bench decision on Citation No. 4366193:

While I have my doubts that hazard training was provided in view of Alan Churchill=s insistence in this proceeding that hazard training of delivery drivers is not required, I will give Churchill the benefit of the doubt that training was provided. Moreover, this conclusion is consistent with MSHA=s modification that removed the assertion that hazard training was not given. However, modified Citation No. 4366193 cites a violation of section 48.31(d) for Churchill=s admitted failure to maintain a signed training certificate. Consequently, Citation

No. 4366193 **SHALL BE AFFIRMED**. However, I consider the fact that fuel deliveries for this 1,000 gallon fuel tank are made on an irregular basis, sometimes as infrequently as once every few months, as a mitigating circumstance that warrants a finding of very low negligence. Accordingly, a civil penalty of $25.00 is assessed for Citation No. 4366193. (Tr. 144-49).

D. Citation No. 7599404

Coleman inspected the 1,000 gallon fuel storage tank located on a mound. The video of the tank reveals it to be a circular tank with steel framing around the upper circumference of the tank, approximately 36 inches below the top of the tank. There is a locked fuel filler cap on the top of the tank. The tank has a permanent, heavy duty, vertical steel ladder that is welded or bolted to the tank and steel frame. The person filling the tank normally climbs the ladder and stands on the surrounding steel frame while leaning forward against the tank and holding on to the tank=s top.

From Coleman=s vantage point at the bottom of the mound where the tank was located, Coleman initially thought the ladder was considerably taller than its approximate seven feet height. Thus, Coleman thought the ladder may be in violation of the provisions of section 77.206(c), 30 C.F.R. ' 77.206(c), that require installation of backguards on vertically anchored ladders extending from a point not more than seven feet from the bottom of the ladder to the top of the ladder. A backguard is a tubular device installed on a ladder to prevent a person from falling backwards. However, since the distance from the top of the steel frame to the ground was determined to be seven feet, two inches, Coleman told Churchill that A[he] wasn=t going to issue a citation or anything until I did some more research and looked into it and did some measuring and so on.@ (Tr. 151-52).

Upon further reflection, Coleman assumed the person filling the fuel tank would have to climb this seven foot height by climbing the ladder to the top of the steel frame while holding a fuel hose in his hand. Coleman considered this condition to be an unsafe means of access. Therefore, Coleman ultimately issued Citation No. 7599404 citing an alleged violation of the safe access provisions of section 77.205(a), 30 C.F.R. ' 77205(a). Although the citation was initially issued as an S&S violation, it was later modified by MSHA to reflect a non-S&S condition. Citation No. 7599404 stated:

> A safe means of access was not provided to and at the work place on the 1,000 gallon fuel storage installation. The person fueling the storage tank was required to climb up the ladder with a heavy fuel hose in one hand and try to hold on with the other hand. Once the person reached the work place, he was required to lean against the fuel tank with his lower legs while standing on a piece of angle iron that is about two inches wide. No hand holds were provided. The distance from the ground to the filler hole (work place) was about 12 feet. (Gov. Ex. 4).

Craig Churchill testified that the fuel filler cap at the top of the tank is locked by key. He stated that, normally, he climbs the ladder and stands on the surrounding steel frame while leaning forward against the tank and holding on to the tank=s top. He then removes the locked

filler cap while the fuel driver removes the hose from the truck. The driver then hands him the hose while the driver returns to the truck to open the valve. Thus, Craig Churchill opined that he did not believe this method of filling the tank was unsafe.

After viewing the video tape and considering the testimony, I issued the following bench decision with respect to Citation No. 7599404:

> The cited mandatory standard requires that a safe means of access shall be provided and maintained to all working places. A means of access is unsafe when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts particular to the mining industry, would recognize a hazard warranting corrective action. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). So the question is whether a reasonably prudent person familiar with the fuel delivery business would believe the cited condition was unsafe.
>
> In resolving this issue of safety in the context of the Secretary=s burden of proof, it is significant that Coleman did not observe anyone accessing the fuel tank at the time of his inspection. While it is true that inspectors need not observe a violation to conclude that a violation has occurred [*Emerald Mines Co.*, 9 FMSHRC 1590 (September 1987), *aff=d, Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 59 (D.C. Cir. 1988); *see also Nacco Mining Co.*, 9 FMSHRC 1541 (September 1987)], in this case, the citation is based on Coleman=s speculation concerning how the individual would access the tank. Although climbing a ladder with, rather than without, the fuel hose may be ill advised, a citation is not supportable solely because an alternative conceivable method of access may be unsafe. *See, e.g., The Hanna Mining Company*, 3 FMSHRC 2045, 2046 (September 1981) (an operator does not have to assure that every conceivable route to a working place is safe). Put another way, equipment is not inherently unsafe simply because it is misused.
>
> Turning to the condition as described in Citation No. 7599404, I believe Coleman=s description accurately describes the condition. However, evaluating the nature and extent of the alleged hazard can only be accomplished by viewing the video. While standing erectly, without hand holds, on a two or three inch supporting frame, may sound precarious, the video reflects there is no danger of slipping between the frame or losing one=s balance because the individual is leaning forward about 30 degrees while holding on to the top of the tank. Thus, there is little danger of falling forward or backward.
>
> Churchill concedes the hand holds installed on the ladder, and the platform constructed by the metal frame to abate the citation, improve safety. However, because the means of access is now safer, does not, alone, warrant the conclusion that the cited condition was unsafe. Significantly, while a backguard is required by the regulations if a vertical ladder exceeds a certain length, hand holds are not

explicitly required. Moreover, Coleman admits he initially was uncertain if a violation existed and that he issued the citation upon further reflection.

Thus, on balance, I conclude that the Secretary has failed to establish, by a preponderance of the evidence, that the cited condition was unsafe. Accordingly, Citation No. 7599404 **SHALL BE VACATED**. (Tr. 175-81).

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 4366187 and 7599404 **ARE VACATED**.

IT IS FURTHER ORDERED that the respondent shall pay, within 30 days of the date of this decision, a total civil penalty of $50.00 in satisfaction of Citation Nos. 4367403 and 4366193. Upon timely receipt of payment, Docket No. CENT 98-167 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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