

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

March 3, 1999

MIDWEST MINERALS, INC., : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. CENT 98-231-RM  
: Citation No. 7925924; 9/6/98  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Portable Plant #2 Mine  
ADMINISTRATION (MSHA), : Mine ID 14-01463  
Respondent :

**DECISION**

Appearances: Katherine Shand Larkin, Esq., and Karen L. Johnston, Esq., Jackson & Kelly, PLLC, Denver, Colorado, for Contestant;  
Mark W. Nelson, Esq., Office of the Solicitor, Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a Notice of Contest filed by the Respondent, Midwest Minerals, Inc., against the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The company contests the issuance to it of Citation No. 7925924 on June 26, 1998. A hearing was held in Pittsburg, Kansas. For the reasons set forth below, I affirm the citation, as modified.

**Factual Setting**

Portable Plant No. 2 is a crushing plant owned and operated by Midwest Minerals. On June 22, 1998, it was being operated at a limestone quarry, owned by Midwest, which was located about eight miles southwest of Chetopa, Labette County, Kansas. William F. Feathers, 67, was plant superintendent.

On that date, Feathers suffered injuries in an accident involving a 1955 Caterpillar D-7 bulldozer. On July 20, 1998, Feathers died as a result of his injuries.

No one saw the accident. The parties are in agreement, however, that the accident probably occurred as described by Midwest in its Report of Accident Investigation submitted to MSHA on August 10, 1998. It states:

Based on our investigation, we believe the following events occurred: On the afternoon of June 22, 1998, Bud Mayberry assisted Bill Feathers in tightening the tracks on the D-7 dozer, Equipment #872, which was parked on the north side of the chips pile at the Chetopa Quarry. Mayberry and Feathers finished the tightening job and collected the tools used to tighten the tracks and put the tools away. Mayberry left the scene shortly thereafter in the water truck to continue watering rounds.

Although there were no eyewitnesses to the accident, based on the injuries suffered by Feathers, we believe that Feathers was kneeling on the tracks of the dozer, attempting to start the pony motor.<sup>1</sup> It appears that the dozer was in gear at this time and once the pony motor started, the diesel started and the dozer began running in reverse gear. We believe that Feathers was pulled between the service platform and the tracks of the dozer before being deposited on the ground. Bill Feathers passed away at 8:30 p.m. on Monday, July 20, 1998.

The only conclusion that can be drawn from the facts as we know them is that Feathers failed to make sure that the dozer was out of gear before attempting to start it. Prior to the accident, Feathers was the only person who operated the dozer. Thus, to the extent the dozer was left in gear, Feathers was the only individual who could have done so. An inspection of the dozer following the accident showed no evidence of any mechanical problems that could have caused the accident.

(Govt. Ex. 7.)

When the accident was discovered, Feathers reportedly stated to those who found him: "Someone must have put it in reverse." (Govt. Ex. 9, p. 4.) There is no evidence that Feathers ever said anything again about the accident.

---

<sup>1</sup> The pony motor is a starting engine that must be operating in order to start the bulldozer's diesel engine. (Govt. Ex. 10, pp. 25-28.)

MSHA Inspector David Moehle investigated the accident on June 23, 1998. On June 26, 1998, he issued Citation No. 7925924, alleging a violation of section 56.14105, 30 C.F.R. ' 56.14105, of the regulations.<sup>2</sup> On August 6, 1998, after apparently being convinced by Midwest that maintenance on the bulldozer had been completed, Wayne J. Wasson, Supervisory Mine Safety and Health Inspector in the Topeka, Kansas, Field Office, issued a modification to the citation charging a violation of section 56.9101, 30 C.F.R. ' 56.9101. The modification alleged:

The plant superintendent was seriously injured at this mine on June 22, 1998 and later died of his injuries on July 20, 1998, when he failed to maintain control of the Caterpillar D-7B tractor, in that he started the main diesel by engaging the pony (starting) motor with the transmission in reverse gear. The main engine started and the tractor moved backwards. He was standing or kneeling on the track and was drawn between the track and the operator's platform/framework. The superintendent's actions constituted more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard.

(Govt. Ex. 3.)

On receiving this modification, the company filed its Notice of Contest.

### **Findings of Fact and Conclusions of Law**

---

<sup>2</sup> Section 56.14105 provides that:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

The Secretary has alleged that this violation was significant and substantial and resulted from an unwarrantable failure on the part of the operator. As discussed below, I find that the violation occurred as asserted and was significant and substantial, but did not take place because of an unwarrantable failure by the company.

Section 56.9101 requires, as pertinent to this case, that: Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Midwest argues that this regulation does not apply to the facts in this case because the words maintain control presume that the operator had control of the mobile equipment initially. Resp. Br. at 6. The company further points out that it is apparent that Feathers never had control of the bulldozer and that he was not in a position to maintain control. While I agree that once the pony motor started and the bulldozer began moving in reverse Feathers probably neither had control of the vehicle nor was in a position to maintain control, I do not conclude that such a scenario removes the case from the scope of the regulation.

The only Commission decision construing this, or a similar, regulation is *Daanen & Janssen, Inc.*, 20 FMSHRC 189 (March 1998). In that case, the vehicle apparently was moving under control before the driver lost control of it. There is nothing in the decision, however, that states, or even implies, that if a vehicle operator loses control of his vehicle immediately on starting it he could not violate this standard. Furthermore, I find such an interpretation to be unreasonably narrow.

The dictionary contains several definitions of maintain, but the only one that is germane to this case is **3** : to persevere in : carry on : keep up : CONTINUE. Webster's Third New International Dictionary (Unabridged) 1362 (1986). Feathers had control of the bulldozer when he started the starting engine. He evidently lost control of it immediately upon its beginning to move. Thus, he failed to keep up or continue in control while the vehicle was moving. The fact that he was never in a position to regain control is insignificant. As the Commission stated in *Daanen & Janssen*, [t]he reasons for a loss of control are irrelevant to consideration or whether control over moving equipment was maintained. *Id.* at 196.

I find that the facts of this case bring it within the meaning of section 56.9101. While I find that Feathers actions, or lack of actions, come within the plain meaning of the standard, I am also mindful of the Commission's long-held principle that the Mine Act and its regulations must be broadly construed to further the Act's remedial goals. *Cyprus Emerald Resources Corporation*, 20 FMSHRC 790, 797 (August 1998). Accordingly, I conclude that Midwest Minerals violated section 56.9101.

### 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), 30 U.S.C. § 814(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); *Youghiogeny & 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 Feathers=fatal injuries, there can be little doubt that this violation satisfies the *Mathies* criteria. AClearly, 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 Asignificant and substantial.@

### Unwarrantable Failure

The citation alleges that this violation resulted from an Unwarrantable failure@to comply with the regulation. 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); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). 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). See also *Buck Creek* at 136 (approving Commission=s unwarrantable failure test).

The problem in this case, is that there is almost no evidence on which to determine the level of Feathers=negligence. Mayberry left Feathers after completing tightening the bulldozer=s tracks. Witnesses next observed the bulldozer going backwards, apparently unattended. Feathers=said, when he was found, Asomeone must have put it in reverse.@ It is impossible from

this to determine exactly what happened, let alone the degree of negligence. Indeed, when the company first reported the accident to MSHA, the report stated that Feathers had been run over by the bulldozer.

The Secretary, relying on *Lafarge Construction Materials*, 20 FMSHRC 1140 (October 1998) and *Midwest Material Co.*, 19 FMSHRC 30 (January 1997), argues that as a supervisor Feathers should be held to a high standard of care, that there was a high degree of danger involved, and that, therefore, there was an unwarrantable failure. The difference between this case and the ones cited by the Secretary, however, is that in those cases we know what the supervisor did, or did not do. Here we do not.

While it can be inferred from what is known that this was not an act of God, but involved negligence of some degree, the level of negligence cannot be inferred. It is just as likely that Feathers was merely inadvertent, as concluded by Inspector Moehle in his testimony, (Tr. 128-29, 138), and his accident investigation reports, (Cont. Exs. C and D), as that his negligence was aggravated. In fact, based on the evidence that Feathers had been operating the bulldozer for three years, had never started it in gear before, had instructed other miners in starting and operating the bulldozer and was viewed by superiors and subordinates as being safety conscious, it is more likely that he was unthinking, rather than indifferent.

The Secretary has the burden of proving that this violation resulted from an **Unwarrantable failure.** To establish this the Secretary has relied on inferences. However, due to the lack of evidence, there is no **rational** connection between the evidentiary facts and the ultimate fact inferred. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (November 1989). Consequently, I conclude that the negligence in this case does not rise to the level of an **Unwarrantable failure.**

In conclusion, I find that the Secretary has established a violation of section 56.9101 of the regulations and that the violation was **significant and substantial.** However, I do not find that the violation resulted from an **Unwarrantable failure** on the part of the operator. I will modify the citation accordingly.<sup>3</sup>

### **Order**

It is **ORDERED** that Citation No. 7925924 is **MODIFIED** from a 104(d)(1) citation, 30 U.S.C. ' 814(d)(1), to a 104(a) citation, 30 U.S.C. ' 814(a), by deleting the **Unwarrantable failure** designation and that the citation is **AFFIRMED** as modified.

---

<sup>3</sup> Both parties discussed in their briefs whether the level of negligence in this case, whatever it is, can be imputed to the operator. Since the level of negligence is relevant only in arriving at an appropriate civil penalty, a matter that is not before me, I have not discussed or decided that issue.

T. Todd Hodgdon  
Administrative Law Judge

Distribution:

Katherine Shand Larkin Esq., Karen L. Johnston, Esq., Jackson & Kelly, 1660 Lincoln,  
Suite 2710, Denver, CO 80264 (Certified Mail)

Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway,  
Suite 1600, Denver, CO 80202-5716 (Certified Mail)

/fb