

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

May 10, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-240-M
Petitioner	:	A. C. No. 03-01783-05502
v.	:	
	:	Docket No. CENT 98-276-M
SPA CITY GRAVEL,	:	A. C. No. 03-01783-05503
Respondent	:	
	:	Spa City Gravel Mine

**DECISION**

Appearances: Stephen E. Irving, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas, on behalf of the Petitioner;  
Pamela D. Walker, Esq., Little Rock, Arkansas, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon Petitions for Civil Penalty filed by the Secretary of Labor against Spa City Gravel (Spa City) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging fourteen violations of mandatory standards and seeking civil penalties of \$2,479.00 for those violations. The general issue before me is whether Spa City committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

At hearing the Secretary, exercising her unilateral authority, vacated Citation Nos. 7865443, 7865449 and 7865457. The parties also agreed to a settlement of Citation Nos. 7865444, 7865448, 7865450, 7865451, 7865453, 7865454, 7865455, 7865456 and 7865458, proposing a reduction in total penalties for these violations to \$1,176.00. The proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act and an order directing payment of that amount will be incorporated in this decision.

Two citations remain at issue. Citation No. 7865445 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14105 and charges in relevant part as follows:

The Cat 950 front-end loader (serial #73J10976) was observed parked at the plant (truck loading area) with the engine running, no operator inside, loader bucket approximately 18 inches off the ground, park brake not set, wheels not

blocked, and the mechanic had his right arm inserted into the oscillating section of the loader up to his shoulder trying to repair the provided back-up alarm while customer trucks were being loaded with the Cat 977 crawler loader. The customer trucks and Cat 977 crawler were both in the same area as the stopped Cat 950 front-end loader. Not having the park brake set, wheels blocked or the power off allows for movement of the Cat 950 loader (from being bumped by other mobile equipment or just rolling) which could result in serious injury to the mechanic's arm or him being run-over . . . .

The cited standard, 30 C.F.R. 56.14105, provides as follows:

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.

Donald Ratliff, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) testified without contradiction that the subject Cat 950 front-end loader was parked at the truck loading area with its engine running, with no operator inside, with the loader bucket raised and with its wheels not blocked. In addition, the mechanic had his arm inserted up to his shoulder into the oscillating section of the loader trying to repair its backup alarm. Inspector Ratliff's testimony that customer trucks were passing behind the loader only 10 to 12 feet away is also undisputed.

The subject mechanic did not testify. However, Spa City owner George Clark testified that he believed the parking brake on the loader must have been engaged because after the citation was issued he saw the front-end loader being moved and concluded that you have to release the parking brake to move the loader. Clark also testified, in essence, that it would be too time consuming to block all eight wheels on the loader before working on it.

Inspector Ratliff credibly testified however that Clark was not present when he cited the loader and that he, Ratliff, observed the mechanic engage the parking brake only after the loader was cited. Ratliff testified that after the loader was cited he proceeded to the mine office where Clark was located and told Clark of the violation. It therefore appears that Clark's belief that the brake had been engaged before it was cited was based only upon observations made at a later time, i.e., subsequent to the issuance of the citation after the mechanic was told to engage the brake and had thereupon actually engaged the brake. I therefore find that, indeed, the parking brake on the cited loader had not been engaged as alleged in the citation.

Under the circumstances the violation is proven as charged. In reaching this conclusion I have not disregarded Mr. Clark's testimony that it would have been too time consuming to block all the wheels of the loader. While this concern is no defense to the violation I note in any event

that Inspector Ratliff testified that only one wheel need be blocked to meet the requirements of the cited standard.

The violation is also “significant and substantial.” A violation is “significant and substantial” if, based on 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 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 Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991). In this regard I accept Inspector Ratliff’s undisputed testimony that the actions of the mechanic, in placing his arm into the oscillating section of the cited loader under the noted conditions were so serious as to constitute an imminent danger. Since mine owner George Clark himself effectively acknowledged that at least the parking brake should have been engaged on the subject loader while the mechanic was performing work in the area of the oscillating section, I find that the violation was also the result of operator negligence. However, considering the minimal history of only one prior violation at this mine and the small size of the operator (only two workers) I find that a civil penalty of \$300.00, is appropriate.

Citation No. 7865452 alleges a violation of the standard at 30 C.F.R. § 56.15001 and charges as follows:

No stretcher or adequate first aid supplies were being provided at the mine site. Some Band-Aids, cold pack, and other small idem [*sic*] were in a first aid box but nothing was provided to stop or restrict blood flow in the event of a serious cut to an employee. A stretcher is necessary in the event an injured person is required to be moved to prevent the employee from receiving more injuries.

Failure to properly treat injured employees could result in a minor injury becoming worse.

The cited standard, 30 C.F.R. § 56.15001 provides in relevant part that “[a]dequate first-aid materials, including stretchers . . . shall be provided at places convenient to all working areas.”

It is undisputed that no stretcher was provided at the mine site as alleged. It is also undisputed, however, that during an earlier inspection at the mine, another MSHA inspector had informed Mr. Clark that, in light of the fact that his mine was near an ambulance facility and that it was essentially only a two-man operation, there was no need for Clark to provide a stretcher. I do not therefore find the operator chargeable with negligence. I note that the Secretary also acknowledges that the violation was of low gravity in that she represents that an injury was unlikely. I further note that although a “Section 104(b)” order was issued for the alleged failure of the operator to timely abate the violation, it is undisputed that when that order was issued, nearly a month after the related citation, Clark had already placed an order for a stretcher and was awaiting delivery. Thus, although the order itself is not at issue, for purposes of assessing a civil penalty I credit the operator with a good faith effort to abate the violation. I again note the minimal history of violations and small size of the operator in concluding that a penalty of \$25.00 is appropriate.

### **ORDER**

Citation Nos. 7865443, 7865449 and 7865457 have been vacated by unilateral decision of the Secretary. Charging document Nos. 7865444, 7865448, 7865450, 7865451, 7865452, 7865453, 7865454, 7865455, 7865456, 7865458 and 7865445 are hereby affirmed and Spa City Gravel is hereby directed to pay civil penalties of \$1,501.00, for the violations therein within 40 days of the date of this decision.

Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution:

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