FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 30, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-30-M
Petitioner	:	A. C. No. 41-03941-05501
v.	:	
	:	Longview Sand & Excavating Company
LONGVIEW SAND & EXCAVATING	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Stephen Irving, Esq., Margaret Cranford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Terry Bailey, Esq., Bailey & Bailey, Carthage, Texas, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalties 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 Act), 30 U.S.C. ' 820(a). The petition seeks to impose a total civil penalty of $439.00 for two alleged violations of the Secretary=s mandatory safety standards in 30 C.F.R. Part 56 of the regulations that govern surface non-metal mines. The alleged violations concern a damaged windshield on a front-end loader and the respondent=s failure to use a life jacket when accessing a sand dredge.

These matters were heard on May 28, 1998, in Longview, Texas. The parties stipulated that Longview Sand & Excavating Company is a mine operator subject to the jurisdiction of the Act. (Tr. 10).

At the hearing, the parties were advised that I would defer my ruling on these 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. 110-11). Accordingly, this decision formalizes the bench decision issued with respect to the two citations. The bench decision vacated the citation concerning the damaged windshield, and affirmed the significant and substantial (S&S) citation concerning the failure to wear a life-jacket. A $150.00 civil penalty was assessed for the affirmed citation.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission=s standards with respect to what constitutes an S&S violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In determining if it is reasonably likely that a cited condition will result in serious injury, it is not necessary to show that miners were exposed directly to the resultant hazard at the time of the inspection. Rather, the Commission has stated:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood of injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. ' 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

> the Commission shall consider the operator=s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator=s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

II. Findings of Fact

Jon Jacks is the sole proprietor of Longview Sand & Excavating Company located in Longview, Texas. Jacks has no employees. Jacks testified that he dredges sand from a small pond several times each month. The pond is approximately seven to eight feet deep and the pond=s dimensions were estimated to be 40 feet by 40 feet. The dredge is approximately 17 feet long. The frequency of Jacks= dredging varies depending on his customers= need for sand. The dredge can be accessed by row boat. However, at the time of the inspection, the row boat was partially submerged because of a storm. There is a rope that extends from the dredge to the shore that also serves as a means of access by pulling the dredge to shore. The sand is stockpiled on shore and loaded into customer trucks with a Komatsu W90-3 front-end loader.

MSHA Inspector Robert R. Lemasters conducted an initial inspection of Jacks= sand dredging facility on April 30, 1997. Lemasters issued a citation for Jacks= failure to obtain a mine I.D. number because Jacks had failed to notify MSHA of his mining activities. The citation issued for Jacks= failure to register as a mine operator is not in issue in this proceeding.

a. Citation No. 7853165

During the course of his inspection, Lemasters inspected the Komatsu front-end loader. The front-end loader travels short distances from the stockpile to customer trucks at an average speed of approximately five miles per hour. (Tr. 80). The loader=s steering wheel is located in the center of the dashboard. Lemasters observed the windshield had a star-burst type radiating crack approximately 12 inches in length located to the left of the steering wheel. He observed the damaged windshield from the ground and he also observed the crack from the cab of the vehicle when he climbed aboard to check for seatbelts.

On cross examination Lemasters stated he did not take photographs of the cracked windshield. In describing his recollection, he stated AI believe it was to the lower left, if my memory serves me.@ (Tr. 37-8).

Jacks testified that the windshield was damaged when it was struck by a hose that broke loose from the front of the loader. Jacks testified that the crack was in the lower left of the windshield and that it did nor obstruct his vision when he operated the loader from the normal operator=s position in the center of the operator=s compartment.

As a result of Lemasters observations, Lemasters issued Citation No. 7853165 citing an alleged non-S&S violation of the mandatory safety standard in section 56.14103(b), 30 C.F.R. ' 56.14103(b). Lemasters considered the violation to be non-S&S because the front-end loader was operated at a slow speed. Lemasters established May 2, 1997, as the date for abating the citation. Section 56.14103(b) states:

> If damaged windows **obscure visibility necessary for safe operation**, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the

equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment. (Emphasis added).

b. Citation No. 7853166

Jacks was not dredging at the time of Lemasters= April 30, 1997, inspection. Lemasters noted that although dredging operations were conducted on a regular basis, there was no evidence that life jackets had ever been used. Consequently Lemasters issued Citation No. 7853166 for an alleged violation of the mandatory safety standard in section 56.15020, 30 C.F.R. ' 56.15020. Section 56.15020 provides, A[l]ife jackets or belts shall be worn where there is danger from falling into water.@

To abate the citation Lemasters informed Jacks that he would have to keep a life jacket on the premises. Lemasters set May 1, 1997, as the abatement date. Lemasters testified that Jacks responded that he had a life jacket at home that he used for fishing, and that he would bring it out to the pond.

Jacks, on the other hand, testified that he brought a life jacket from home to work whenever he used the dredge. However, Jacks admitted that he never told Lemasters at the time of the inspection that he used a life jacket while on the dredge. Jacks testified he failed to inform Lemasters that he used a life jacket because Lemasters never specifically asked him if he used one.

Lemasters returned to the facility on June 10, 1997, to ensure that the citations were abated. However, the cracked windshield was not replaced, and Jacks still did not have a life jacket on the premises. As a consequence of Jacks= inaction, on June 10, 1997, Lemasters issued 104(b) Order Nos. 4453237 and 4453238 for Jacks= failure to timely abate the citations previously issued on April 30, 1997.[1] Order No. 4453237 was terminated after Jacks removed the windshield with a sledge hammer. To terminate Order No. 4453238, Lemasters remained on the premises until Jacks returned from a local store where he had purchased a life jacket.

III. Bench Decision

a. Citation No. 7853165

[1] When a violative condition is not corrected timely, Section 104(b) of the Act, 30 U.S.C. ' 814(b), authorizes the Secretary to issue an order requiring the withdrawal of all mine personnel until appropriate remedial measures are taken.

As a threshold matter, the Secretary has the burden of proving that a violation of a mandatory safety standard has occurred. *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (November 1992) (citations omitted). Citation No. 7853165 cites an alleged violation of section 56.14103(b). This regulatory provision is violated only if damaged windshields Aobscure visibility for safe operation.@ Thus, a damaged windshield, in and of itself, is not a violation of the standard. It is only a violation if the damage obscures the visibility needed for safe operation.

The issue of safe operation must be viewed in the context of the nature of the vehicle in question. While a damaged windshield on a haulage truck used to drive on elevated winding roads in a quarry may constitute a violation of section 56.14103(b), the same damage on the windshield of a front-end loader driven over short distances at speeds of approximately five miles per hour may not interfere with safe operation of the loader. Thus, the issue is, did the damage to the windshield obscure vision to the extent that the front-end loader could not be operated safely?

As noted, the Secretary bears the burden of proof. There are no photographs of the cracked windshield. Inspector Lemasters candidly testified that his description of the size and location of the crack in the windshield was accurate Aif his memory served him right.@ His observations occurred more than one year ago.

Jon Jacks testified that the crack was smaller than the crack recalled by Lemasters, and that it was located lower in the windshield than the location described by Lemasters. Jon Jacks= testimony with respect to the size and location of the damage was corroborated by his father, J. R. Jacks, Jr., who was sequestered during this proceeding.

In weighing the evidence, I must consider the disputed testimony, the lack of photographic evidence, the nature of the operation of the subject vehicle over short distances at very slow speeds, and, the fact that even Lemasters did not consider the hazard caused by the damaged windshield to be S&S in nature. Consequently, I conclude the Secretary has not shown, by a preponderance of the evidence, that the damaged windshield sufficiently obscured vision so as to interfere with the safe operation of the front-end loader. Accordingly,
Citation No. 7853165 and related 104(b) Order No. 4453237 shall be vacated.

b. Citation No. 7853166

While it is true, as argued by the respondent, that Section 56.15020 does not explicitly require an operator to keep life jackets on mine property, this mandatory standard does require life jackets to be worn when there is a danger of falling in water. An operator=s failure to keep life jackets readily available for use by personnel who are exposed to the hazard of drowning creates a rebuttable presumption that life jackets are not worn when required.

It is well settled that a citation may be issued for violations detected by an MSHA inspector even after the violations have ceased to exist. *See, e.g., Emerald Mines Corp.*, 9 FMSHRC 1590 (September 1987), aff=d., 863 F.2d 51 (D.C. Cir. 1988). Thus, contrary to the arguments advanced by the respondent, Lemasters did not have to observe Jacks in the act of dredging without wearing a life jacket in order to properly cite Jacks for a violation of section 56.15020.

Here, Lemasters concluded, in essence, that Jacks= failure to have a life jacket available for use was circumstantial evidence that Jacks did not wear a life jacket when accessing the dredge. In view of this circumstantial evidence, the burden of proof shifts to Jacks to demonstrate that he had, in fact, worn a life jacket while dredging.

Significantly, even Jacks admits that, during Lemasters= April 30, 1997, inspection, he never contended that he had worn a life jacket while dredging. Jacks= only reference to a life jacket concerned the one he purportedly had at home that he used for fishing. Jacks= explanation at the hearing that he did not inform Lemasters that he routinely wore a life jacket on the dredge because Lemasters never asked him is not credible. Moreover, Jacks assertion that he had in the past brought his life jacket from home to the dredge is belied by the fact that he did not have a life jacket on the premises during Lemasters= June 10, 1997, abatement inspection. His purchase of a life jacket at a local Wal-Mart to abate the citation is further evidence of his lack of credibility concerning his alleged routine use of a life jacket.

In the final analysis, Jacks= assertion that he should escape liability because he left his life jacket home on April 30, 1997, and again on June 10, 1997, is nothing more than the time worn AI left my homework home@ excuse. It doesn=t work. Accordingly, the Secretary has shown, by a preponderance of the evidence, that Jacks did not wear a life jacket while dredging in violation of the mandatory safety standard in section 56.15020.

A violation is properly designated as S&S if there is a reasonable likelihood that the hazard contributed to by the violation will result in an event in which there is a serious injury or death. It is the contribution of the violation to the cause and effect of the hazard, i.e., drowning, that must be significant and substantial. *Secretary of Labor v. Jim Walters Resources, Inc.*, 111 F.3d 913, 917-18 (D.C. Cir. 1997). Lemasters testified that the dredge had no railings and that there was debris and grease on the deck of the dredge. Thus, the Secretary has shown that

Jacks= failure to wear a life jacket, given continued dredging operations, significantly and substantially increased his exposure to the hazard of drowning. Consequently, the violation of section 56.15020 was appropriately characterized as S&S.

The Secretary has proposed a civil penalty of $292.00 for this violation. Applying the penalty criteria in section 110(i) of the Act, I note the violation was serious in gravity and attributable to a moderate degree of negligence on the part of Jacks. However, the evidence reflects a mitigating factor in that the respondent is a very small operator that conducts his business as a sole proprietorship with no employees. Although there is no history of violations because the subject citations were issued during the initial MSHA inspection, the fact that only one S&S violation was observed is also a mitigating factor. Although Jacks did not rapidly abate the cited violations, his failure to do so is attributable to his lack of familiarity with MSHA=s abatement procedures given the fact that this was his first MSHA inspection. Affording Jacks the benefit of the doubt that he will be more cooperative in abating any future safety violations that may be detected, I am assessing a civil penalty of $150.00 for Citation No. 7853166 and related 104(b) Order No. 4453238. A civil penalty of $150.00 will not effect Jacks= ability to remain in business.

ORDER

ACCORDINGLY, Citation No. 7853165 and related 104(b) Order No. 4453237 **IS VACATED**. **IT IS ORDERED** that the respondent **SHALL PAY** a civil penalty of $150.00 in satisfaction of Citation No. 7853166 and related 104(b) Order No. 4453238. Payment of the civil penalty shall be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment this docket proceeding **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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