

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 29, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-42-M
Petitioner	:	A. C. No. 39-00226-05512
	:	
v.	:	
	:	
SWEETMAN CONSTRUCTION CO.,	:	Summit Pit
Respondent	:	

DECISION

Appearances: Mark Nelson, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Robert Portice,
Sioux Falls, South Dakota,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.* The Mine Act. The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Sweetman Construction Company with violating five mandatory safety standards set forth in 30 C.F.R. Part 56 concerning sand and gravel mining operations. At the hearing, two of the citations were accepted by Respondent, three citations were fully contested and, after presentation of documentary and testimonial evidence by both parties, were submitted for decision.

STIPULATIONS

A. Sweetman Construction Co. is engaged in mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.

B. Sweetman Construction Company is the owner and operator of the Summit Pit, MSHA I.D. No. 39-00226.

C. Sweetman Construction Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.* (Athe Act@).

D. The Administrative Law Judge has jurisdiction in this matter.

E. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

F. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

G. The proposed penalties will not affect respondent=s ability to continue in business.

H. Respondent demonstrated good faith in abating the violations.

I. Sweetman Construction Co., is a mine operator with a total of 155,789 total hours worked in 1997 with 18,251 hours worked at the Summit Pit.

J. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

The Inspection

Mine Inspector Larry Larson inspected Respondent=s Summit Plant on October 15, 1997. The plant had one shift with eight men working ten-hour days, five days a week. Inspector Larson stated he was there to make a Aregular@inspection with special emphasis on power haulage equipment. The power haulage equipment consisted of two trucks that were inside the yard and two front-end loaders that were running when he arrived at the plant at 8 a.m. He completed his inspection by 1 p.m. and issued five citations for violations he observed at the plant.

Citation Nos. 7915818 (headlights) and 7915819 (windshield wipers)

Both citations allege defects Inspector Larson found on a certain white construction yard truck company #404. Both citations charge the Respondent with a violation of the provisions of 30 C.F.R. ' 56.14100(b) which reads as follows:

(B) 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.

Citation No. 7915818 charges nonfunctional headlights on the white yard truck and reads as follows:

The White constructor yard truck company #404 did not have the head lights being maintained in a functional condition. This truck is used on a daily basis when the plant is running, to empty material from the bunkers. Safety items must be maintained or repaired in a timely manner.

Citation No. 7915819 charges a violation of the same safety standard for defects on the same white yard truck consisting of nonfunctioning windshield wipers. The citation states:

The White constructor yard truck company #404 did not have the wind shield wipers being maintained in a functional condition. This truck is used on a daily basis when the plant is running, to empty material from the bunkers. Safety items must be maintained and or repaired in a timely manner.

I credit the testimony of Federal Mine Inspector Larson. About three hours after commencing his inspection, Inspector Larson checked out the White truck #404 which he observed under a hopper with the gate open and material running into the truck. Mr. Lien, the driver of the truck, told the inspector that he made a preshift inspection of the truck that morning and checked everything out. Mr. Lien did not indicate there was anything wrong with the truck.

It is undisputed that, upon checking the truck, the inspector found that the headlights and the windshield wipers were not functional. The inspector determined that both of these defects affect safety and were not corrected in a timely manner. The operator had trouble trying to get the windshield wipers working. A can of WD 40 was used to spray the windshield wipers in an attempt to make them functional. After starting up the truck, a big air leak was discovered in the air- pressure system that activates the windshield wipers. The truck had to be taken to the plant's garage where the necessary repair and maintenance work was done to abate the citation.

On being asked how the nonfunctional headlights and windshield wipers affected safety, the inspector replied in pertinent part as follows:

... in South Dakota we all know that the storms blow in in the summertime very quickly. I have seen storms in South Dakota here where they will come in, and it gets black and day C black as night and the headlights and everything come on C or the street lights will come on it's so dark. And these deluges, they might last 15, 20

minutes and put a lot of rain down. So I feel that this plant is not going to shut down for a 15 minute rainstorm, and that the windshield wipers would be very handy to have during a rain storm, and the lights for the visibility of the truck out in the yard.

Clearly, the maintenance and the timely repair of headlights and windshield wipers on a haulage yard truck is an important step in avoiding a hazard not only to the drivers but also to persons that are in and around the mine property. Defects which make the headlights and/or windshield wipers of a yard haulage truck nonfunctional affect safety and timely correction is required by the cited safety standard. The evidence established that this was not done. I find these were two separate violations of 30 C.F.R. ' 56.14100(b). Both citations are affirmed.

Citation No. 7915820 - (Berms at elevated dump site)

This citation charges the operator with an S&S violation of 30 C.F.R. ' 56.9301 which provides as follows:

Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.

The citation alleges a violation of the cited standard as follows:

There were no berms, bumper blocks or similar restraints on the elevated mason sand stockpile, to keep equipment from backing or driving over the edge of the dump site and overturning. This elevated stockpile is of sufficient height that the operator of the piece of equipment could get seriously injured if a roll over should occur. Persons in mobile equipment are in and around this elevated stockpile on a daily basis when the plant is running.

Inspector Larson testified that there were no berms, bumper blocks or similar restraints on the elevated mason sand stockpile dump site to keep mobile equipment from backing or driving over the edge of the dump site and overturning. The inspector observed that there was no berm of any kind at the dump site at the end of the mason sand stockpile ramp and only a 10- inch berm of mason sand along the side of the ramp. To comply with the regulations, a berm must be axle height of the mobile equipment that traveled up the ramp to the elevated dump site. To meet this requirement in this case, the height of the berm would have to be at least **22** feet high. Inspector Larson also rebutted testimony by Respondent that wind may have blown away the mason sand berm. Inspector Larson was of the opinion that winds of up to 37 miles per hour would not cause more than a slight deterioration of the berm.

The evidence clearly established a violation of 30 C.F.R. ' 56.9301.

Significant and Substantial Violations

Inspector Larson testified the dump site was close to 15 feet high and stated that the elevated dump site was of sufficient height that the driver of mobile equipment could get seriously injured if a roll-over should occur. Persons in mobile equipment are in and around this elevated stockpile on a daily basis when the plant is running.

I agree with Inspector Larson's opinion that if the dump site was left unbermed, it was reasonably likely that an accident of a serious nature would occur. I find that the lack of adequate berms on the elevated stockpile dump site was a significant and substantial violation of the cited safety standard. 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. 30 U.S.C.

' 814(d)(1). A violation is properly designated as 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 further 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 C that is, a measure of danger to safety C 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.

Id. At 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (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).

I credit Inspector Larson's testimony and find that the evidence presented by Petitioner established each of the elements required to show that this was an S&S violation of 30 C.F.R. ' 56.9301.

Citation Nos. 7915816 and 7915817 Were Accepted

Both citations were issued under section 104(a) of the Act alleging non-significant and substantial violations. MSHA proposed a civil penalty of \$50.00 for each of the citations. At the hearing, the operator accepted both violations along with MSHA proposed penalties in full, totaling \$100.00. I find the proposed penalties for these two violations are appropriate under the criteria set forth in section 110(c) of the Act. The proposed penalties are approved.

Assessment of Civil Penalties

In assessing a civil penalty under section 110(i) of the Act, the judge is required to give consideration to the appropriateness of the penalty to the size of the operator's business, the probable effect on the operator's ability to continue in business, the operator's history of previous violations, the operator's negligence, the gravity of the violations and the operator's good faith abatement.

I have considered the statutory criteria in my *de nova* review and determination of the appropriate penalties and I find the MSHA proposed penalties are the appropriate penalties for each of the violations.

ORDER

Based on the statutory criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i) I assess the following penalties:

<u>Citation No.</u>	<u>30 CFR '</u>	<u>Penalty</u>
7915016	56.4101	\$ 50.00
7915017	56.12030	50.00
7915818	56.14100(b)	50.00
7915819	56.14100(b)	<u>157.00</u>
	TOTAL	\$357.00

Accordingly, each of the five citations is **AFFIRMED** and Respondent, Sweetman Construction Co., is **ORDERED TO PAY** the Secretary of Labor the sum of \$357.00 within 40 days of the date of this decision. Upon receipt of timely payment, this case is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

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