FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 9, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-184-M
Petitioner	:	A. C. No. 41-00906-05503 CX2
v.	:	
	:	
HOLT COMPANY OF TEXAS,	:	
Respondent	:	Sherwin Plant

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas, on behalf of Petitioner;
William M. Knolle, Esq., Knolle, Livingston & Holcomb, Austin, Texas, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging the Holt Company of Texas (Holt) with two violations of mandatory standards and proposing civil penalties of $50,000.00 for those violations. The general issue before me is whether Holt violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

On August 1, 1998, Holt mechanic Benny Duncan suffered fatal injuries when the bucket of a Caterpillar 990 front end loader collapsed pinning him between the lift arms and the main body of the loader. Duncan had been working on the main hydraulic valve assembly of the loader but failed to block the lift arms prior to disengaging the hydraulic lines. Reynolds Metal Company (Reynolds) operated the subject mine and had engaged independent contractor Holt to repair and maintain the loader and other equipment at its mine.

Citation No. 7852384

This citation, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14211(c) and charges as follows:[1]

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[1] Section 104(d)(1) of the Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the

A fatal accident occurred at this operation on August 1, 1998, when a mechanic was crushed between the bucket assembly and the frame of the loader. The bucket lift arms had not been blocked or supported to prevent accidental lowering of the component. The employer received supplemental information from the manufacturer that detailed safe work procedures which included the necessity to block or support the bucket lift arms whenever these types of repairs are made. The employer, however, did not pass the information on to the field technicians. Management engaged in aggravated conduct constituting more than ordinary negligence in that they had received information on safe work procedures that could have prevented this accident and did not distribute the information to the persons responsible for carrying out the tasks.

The cited standard, 30 C.F.R. § 56.14211(c), provides that "[a] raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component."

Since it is undisputed that Holt employee Benny Duncan failed to secure the bucket on the 990 front end loader while exposed to the hazard of the accidental lowering of the bucket, the violation is proven as charged. The violation herein was also "significant and substantial."

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 explained:

Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

> 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).

Since there is no dispute that the violation caused Duncan's death I find that the violation was clearly "significant and substantial."

The Secretary also maintains that the violation was the result of high negligence and "unwarrantable failure." In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

The instant case is similar to the case of *Secretary v. Whayne Supply Company*, 19 FMSHRC 447 (March 1997). The victim in that case was, as was the deceased in this case, performing only the routine duties of a rank-and-file field mechanic. The Commission held that the deceased mechanic therein was not therefore an agent of the operator whose negligent conduct could be imputed to the operator. As in the *Whayne* case, Duncan's conduct in this case similarly cannot be imputed to Holt on the basis of an agency theory. The Commission also noted in *Whayne* however that although an operator is not liable for aggravated conduct based on the actions of a rank-and-file miner it may nevertheless be held responsible for an unwarrantable failure based on its own conduct. It therefore held that in the context of evaluating operator

conduct for purposes of both civil penalty assessment and unwarrantable failure determinations that "where a rank-and-file employee has violated the Act, the operator's supervision, training and discipline of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Whayne Supply Company* at pages 452 and 453.

In this regard the Secretary argues in her post-hearing brief that Holt provided no supervision of its employees at the subject plant. In support of her claim the Secretary cites the testimony of Holt heavy equipment operator Domingo Flores, who stated that his supervisor, Charlie Burnham, had never inspected his work or supervised him at the Sherwin Plant. Burnham was also a supervisor for the deceased, Benny Duncan. While one cannot clearly infer from Flores' testimony that Benny Duncan himself had not been properly supervised, the testimony nevertheless suggests some absence of direct on-site supervision over field service technicians. However, the Commission intimidated in the Whayne case that supervision of field technicians may occur in ways other than direct review of the employee's work, such as evaluation based on feedback from customers and coworkers, See *Whayne Supply Company*, fn.7 at page 452. As Respondent observes in its brief there is ample record evidence that Holt received nothing but positive reports from its customers, including Reynolds, and other employees about Duncan's competence and safety consciousness.

Moreover, in contradiction of the observations of Domingo Flores, Richard Barton, former shop supervisor and field service dispatcher for Holt, testified that he frequently visited the field technicians including those at the Reynolds Plant to consult and assist them. In addition, technical service manager Bill Kammer, testified that he had occasionally acted as a supervisor and observed the work of Benny Duncan in the field. Kammer further explained that when a person advances to the level of a field service technician he has already had years of supervision and has demonstrated he is qualified to make decisions on his own. Kammer indicated it was the accepted industry practice for field technicians to work without supervision in the field. The Secretary herself apparently recognizes this reality in that she did not, as a condition of abatement, require any closer supervision of Holt's field technicians.

Under the circumstances and within the framework of the *Whayne* case, I do not find that the lack of day-to-day direct supervision of field technicians such as Benny Duncan, constituted, in itself, such aggravated conduct as demonstrating high negligence or unwarrantable failure.

The Secretary next contends as grounds for high negligence and unwarrantability, that Benny Duncan failed to receive adequate training on blocking the 990 loader and, specifically, that he did not receive information necessary for him to safely to remove the main control valve on that loader. In this regard it appears to be undisputed that Duncan had never received any formal training in blocking procedures specifically for the Caterpillar 990 loader. There is credible record evidence however, that Duncan had received general classroom training in blocking procedures and had in fact properly utilized blocking procedures while working on the hydraulics of Z-bar linkage loaders similar to the Caterpillar 990 loader. Robert Yell and other coworkers had observed Duncan demonstrate proper blocking techniques. Richard Barton

recalled specifically that Duncan had, only shortly before the fatal accident, properly blocked a Caterpillar 950 loader while working on the main control valve. According to Barton, the Caterpillar 950 loader has the same Z-bar linkage as the Caterpillar 990 loader. Holt field technician Domingo Flores, had also seen Duncan working on a properly blocked Caterpillar 992 loader shortly before the accident at issue.

Thus, even assuming, *arguendo*, that Duncan had no formal training on blocking the 990 loader, the fact that he had been observed shortly before the accident at issue properly utilizing blocking procedures on similar equipment, attenuates any causal link between the absence of such training and the incident herein. In reaching this conclusion I have not disregarded the hearsay testimony of MSHA inspector Mike Davis that he was told by Reynolds maintenance supervisor Guy Asher, that a month prior to the fatality he saw Duncan attempting to work under the loader without properly blocking it and that Asher purportedly sent Duncan off the Reynolds property to obtain proper stands to block the loader. While hearsay testimony is admissible in Commission proceedings I find that the testimony proffered herein, not subject to the scrutiny of cross examination, can be given but little weight.

In a related argument the Secretary appears to contend that Holt did not supply Duncan with the blocking instructions contained in the Caterpillar 990 Assembly and Disassembly Manual. Indeed, according to the charging document, this claim was the basis for the Secretary's unwarrantability finding. However, Richard Barton, a technical communicator who assisted the field technicians with information obtained from Caterpillar's computerized Service Information System (SIS), credibly testified that he commonly conferred with Duncan regarding particular problems and furnished Duncan data from the SIS. According to Barton, approximately one week before Duncan's accident, Duncan consulted him about continuing problems on the Reynolds' Caterpillar 990 loader. In response, Barton, had printed-out and provided Duncan the pages from the Caterpillar 990 manual regarding work on the 990 main control valve including blocking instructions. Under the circumstances it is clear that, contrary to the Secretary's allegations, Duncan did have in his possession only a week before the accident herein the most up-to-date information for blocking the Caterpillar 990 loader.

Under all the circumstances I cannot find Holt chargeable with significant negligence. Accordingly, I find that the violation was not the result of Holt's unwarrantable failure.

Citation No. 7852386

This citation alleges a "significant and substantial" violation of the training standard at 30 C.F.R. § 48.26 and charges as follows:

> A fatal accident occurred at this operation on August 1, 1998, when a mechanic was crushed between the bucket assembly and the frame of a front end loader. The employee had not received comprehensive training in accordance with 30 C.F.R. Part 48.26. The Federal Mine Safety and Health Act of 1977 declares an untrained miner is a hazard to himself and others. The contractor was aware of these training requirements.

The Secretary alleges that Holt failed to provide training to Duncan under 30 C.F.R. § 48.26. There is no dispute that Holt did not provide this training. The violation is accordingly proven as charged. Holt argues however that the Secretary has not established that Section 48.26 training would have required any specific training for blocking the Caterpillar 990 loader or that the failure to provide Section 48.26 training contributed to the accident. Indeed, the Secretary has not established that the Section 48.26 training would have included training specific to blocking the Caterpillar 990 loader. Moreover, in light of the credible evidence that Duncan knew that blocking was required and knew how to block a 990 loader, the failure to have provided Section 48.26 training would not appear to have been a causative factor in the accident herein. The Secretary has offered no rationale nor cited any evidence in her brief to support her gravity and "significant and substantial" findings. Under the circumstances I find that the Secretary has failed to establish that this violation was "significant and substantial" or of significant gravity.

In assessing a civil penalty herein I have also considered the evidence that Holt was of modest size, has a minimal history of violations, that it abated the violations in good faith and that the proposed penalties herein would not effect its ability to stay in business.

ORDER

Citation No. 7852384 is hereby modified as a "significant and substantial" citation issued under "Section 104(a)" of the Act. Citation No. 7852386 is modified to delete the "significant and substantial" findings. Holt Company of Texas is further directed to pay civil penalties of $2,000.00 and $300.00 respectively for the violations charged in the above citations within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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