FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 26, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-38-M
Petitioner	:	A.C. No. 03-00681-05508
v.	:	
	:	Blocker Lean No. 4
RON COLEMAN MINING, INC.,	:	
Respondent	:	

DECISION

Appearances: David Q. Jones, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Secretary;
Kevin Coleman, Vice President, Ron Coleman Mining, Inc., Hot Springs, Arkansas, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Penalty filed by the Secretary of Labor ("Secretary") alleging that Ron Coleman Mining, Inc. ("Coleman") violated 30 C.F.R. §§ 56.14130(i) and 56.14130(g). Pursuant to notice, the matter has heard in Malvern, Arkansas, on July 27, 1999.

Finding of Facts and Discussion

I. Citation No. 7865573 (violation of 30 C.FR. § 56.14130(i)).

On July 22, 1998, Donald Ratliff, an MSHA inspector, inspected Coleman's Blocker Lead No. 4 Mine, a surface quartz mine. He inspected a Caterpillar D5 Dozer that was not in operation. He observed that the seatbelt, which was under the seat and bolted to the floor, had saturated oil on it, and that the fabric of the belt was covered with mud or dirt. He stated that ". . . from the way the mud had set up, it was apparent to me that they hadn't been used in some time (Tr. 23). He stated that ". . . Caterpillar stipulates in the maintenance of their seatbelts is that they not become soiled because of the fabric nature . . . [i]f they get grease, oil, hydraulic fluid or anything of the nature on the webbing, it will break down the webbing of the seatbelts . . . ." (sic) (Tr. 27). He opined that because the belt buckle was "imbedded" with dirt it had become inoperable (Tr.27). Ratliff stated that the female end of the belt had been impacted

with dirt which he described as consisting of hard crusty material. He did not recall if he had touched it. According to Ratliff, a miner who accompanied him, Henry Rogers, told him that the bulldozer in question was used to push material over an embankment that was composed of material that was not compacted, at a 35 degree angle, and approximately 200 feet high. Ratliff opined that since the bulldozer was being used to push material over the embankment, and since the embankment was comprised of material that was not compacted and at a steep angle, there existed the possibly that the bulldozer could travel over the embankment and possibly turn over. He issued a Citation alleging a violation of 30 C.F.R. § 56.14130(i), supra, which in essence provides as follows: "[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance."

In general, Ratliff described the violation as significant and substantial, and indicated that Kevin Coleman, the vice president and safety coordinator of Coleman, had driven the bulldozer the day before, and should have noted the condition of the belt, and should have been aware that it was not being maintained properly. In this connection, Ratliff testified that it was "very apparent" when he walked up to the bulldozer that the seatbelt was not maintained (Tr. 43).

Coleman does not dispute the condition of the belt as testified to by Ratliff. However, the issue for resolution is whether Coleman's failure to have remedied the belt's condition as testified to by Ratliff made the belt inoperable, or any way interfered with its use. It is signifi-cant that Ratliff did not attempt to attach the end of the belt and so determine whether there was any impairment in its operation or use. As explained by Coleman, and not contradicted or rebutted by the Secretary, one end of the belt had a hook- like device, which is inserted into a hole at the end of the other piece of the belt, and is then secured. There is no evidence in the record that attaching the end of the belt in this fashion was not possible, or in any way made difficult to do as a consequence of the conditions observed by Ratliff.

I do not assign much probative weight to Ratliff's testimony that Caterpillar "stipulates" that a seatbelt should not become soiled, and that if it gets oil on it, it will break down. Ratliff did not identify the source of this stipulation. The Secretary did not proffer any written statement by Caterpillar to prove the terms of what it stipulates. Nor did the Secretary proffer the testimony of any Caterpillar agent having personal knowledge of this stipulation. Thus, Ratliff's testimony, by itself, under these circumstances is not sufficiently reliable to be accorded any significant probative value.

Accordingly, since it has not been established that the materials on the belt would have in anyway impeded the use of the belt and its effective functioning as a safety seatbelt, I conclude that the Secretary has not met its burden of establishing a violation under section 14130(i), supra. Accordingly, Citation No. 7865573 shall be dismissed.

II. Citation No. 7865574 (a violation of 30 C.F.R. § 56.14130(g), supra

According to Ratliff, Coleman informed him that when he had operated the bulldozer on July 21, 1998, he had not been wearing the seatbelt. Ratliff issued a section 104(d)(1) order alleging a violation of section 56.14130(g), supra, which in essence, requires the wearing of a seatbelt when operating certain equipment, which includes the bulldozer in question. Coleman does not dispute this violation, and according I find that Coleman did violate section 56.14130(g), supra.

A. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine 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)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

The record establishes the first two elements set forth in *Mathies*, supra, in that Coleman does not dispute that it violated a mandatory standard, i.e., section 56.14130(g), supra. Also, Ratliff's uncontradicted testimony establishes that the failure to wear a seatbelt would have contributed to the hazard of the operator becoming injured if the bulldozer would have over-turned. According to Ratliff, MSHA studies have concluded that the wearing of a seatbelt is a top priority to prevent serious injuries in haulage situations. In essence, he opined, that based on MSHA's studies and his personal experience, a serious injury was highly likely to have occurred, because the bull-dozer was being operated in a manner that rendered an injury occurring event, i.e., the bulldozer overturning, to have been highly likely to have occurred, since the bulldozer was being used to push material over a steep embankment that was 200 feet high, and made out of material that was not compacted. On the other hand, Coleman testified that the bulldozer at issue had never been used at the mine site until July 21, and that he used it on that date because the customary equipment, a front-end loader, was broken. He indicated that he used bulldozer for about 30 to 45 minutes, and that there was a mound of dirt between him and the edge of the highwall.

It appears from photographs of the site, (Respondent's Exhibits 1 and 2), that the area in which Coleman operated the bulldozer was flat. However, since the bulldozer was located at the site at issue, it was available for use in the manner described by Ratliff. Hence, given continued mining operations, and the bulldozer operator not wearing a seatbelt, I find that within the framework of the above evidence, the third and forth elements of *Mathies*, supra, have been met, and that the violation was significant and substantial.

B. Unwarrantable Failure

According to Ratliff, he considered the violation to have been an unwarrantable failure in that, Ron Coleman, who is the safety coordinator, and is responsible for providing safety training, should have noted, in an examination of the bulldozer prior to its operation, that it was provided with a seatbelt, and should have worn the seatbelt. Ratliff asserted that Coleman, as safety coordinator, should set a good example for other miners. Also, Ratliff indicated that the seatbelt was visible, and that it was not necessary to remove the seat of the bulldozer in order to see it.

I accept Coleman's testimony inasmuch as it was not contradicted or impeached, that he always instructs his miners to wear their seatbelts, always wears a seatbelt when operating a vehicle that he knows to be equipped with a seatbelt, and that when he operated the bulldozer on the date in question, he could not have been seen by the other miners on the site due to the spatial difference between their locations. In addition, Coleman, asserts that he did an examination of the bulldozer before he operated it, and no seatbelt was visible, and hence he did not wear one. Although Coleman may not have observed the seatbelt, I find that he reasonablely should have seen the belt, as Ratliff's testimony that the seatbelt was visible and he did not have to remove the seat in order to see it, was not contradicted or impeached . Moreover, since Coleman was a safety coordinator and responsible for safety training, and since a seatbelt was visible to Ratliff, he (Coleman) should have looked for and been able to have seen the seatbelt, and thus should

have worn it. In these circumstances, I find that failure to do so, constituted more than ordinary negligence and reached the level of aggravated conducted, and thus was an unwarrantable failure. (See, *Emery Mining Corporation* 9 FMSHRC 1997 (1987)).

C. Penalty

According to Ratliff's uncontradicted testimony, a serious injury or fatality could have resulted from the violation herein, i.e., failure to wear a seatbelt, should the bulldozer have turned over. Thus, I find that the level of gravity of the violation was high. I also find, as set forth above, that the level of Coleman's negligence was high, in that Coleman should have observed the presence of a seatbelt, and should have worn it. On the other hand, I find that the penalty to be assessed herein should be mitigated by the fact that Coleman is not a large operation, having produced only 24 tons of mined material in 3,384 man-hours in 1998, had demonstrated good faith in abating the violations within a reasonable period of time after notification of the violations, and, importantly, had no assessed violations in the past 24 months. Also, Coleman's tax returns for the year 1997, the most recent year available, indicated a loss of $74,121.00 which tends to indicate that a penalty may have a negative impact upon its ability to continue in business. Therefore, for all these reasons, I find that Coleman shall be assessed the penalty of $1,000.00.

ORDER

It is **ORDERED** that Citation No. 7865573 be **DISMISSED**. It is further **ORDERED** that Order No. 7865574 be **AMENDED** to a section 104(d)(1) Citation,[1] and that Coleman pay a total civil penalty of $1,000.00 within 30 days of this Decision.

Avram Weisberger
Administrative Law Judge

[1]/ Since Citation No. 7865573 which was issued as a section 104(d)(1) Citation is dismissed, and there is no evidence of the issuance of any other section 104(d)(1) Citation within the previous 90 days prior to the issuance of Order No. 7865574, the latter must be reduced to a section 104(d)(1) Citation.

Distribution:

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