FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

September 7, 1995

WHAYNE SUPPLY COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 94-518-R Order No. 4011758; 1/25/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Docket No. KENT 94-519-R Citation No. 4011760; 1/25/94 Mine: Job No. 17A ID No. 15-17434-A25
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-556 A.C. No. 15-17434-03501 A25 Job No. 17A
v.		
WHAYNE SUPPLY COMPANY, Respondent	:	

DECISION

Appearances: Joseph A. Worthington, Esq., Smith & Smith, Louisville, Kentucky, for Contestant; Brian W. Dougherty, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Amchan

Background and Issues Presented

On January 20, 1994, James Paul Blanton, a field service technician employed by Whayne Supply Company (Whayne Supply), was killed when struck by the belly pan of a bulldozer. At the time of the accident, Blanton was underneath the bulldozer

at a surface coal mine operated by Addington Mining Company (Addington) in Pike County, Kentucky. The Mine Safety and Health Administration (MSHA) conducted an investigation of this accident and issued the two contested citations at issue in this matter.[1]

Citation No. 4011760 alleges a violation of section 104(d)(1) of the Act and 30 C.F.R.' 77.405(b). This regulation provides that, "[n]o work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position." Subsequent to the hearing in this matter a $50,000 civil penalty was proposed for this alleged violation.

Citation No. 4011758 alleges a violation of 30 C.F.R. '77.1713(a). This regulation requires that at least once each shift, or more often if necessary, each active working area or active surface installation be inspected by a certified person for hazardous conditions. This citation alleges that Mr. Blanton's foreman, Charles Crisp, did not inspect Blanton's work area or arrange for Addington to make such an inspection. A $204 civil penalty has been proposed for this alleged violation.

For the reasons stated below, I conclude that Whayne Supply violated '77.405(b) as alleged, but that such violation did not result from Whayne Supply's "unwarrantable failure" to comply with the standard. I therefore affirm the violation as a significant and substantial section 104(a) citation and assess a $1,500 civil penalty. Citation No. 4011758 is vacated.

The events leading up to the accident

Several days prior to January 20, 1994, a D10 Caterpillar bulldozer owned and used by Addington at a surface coal mine in Pike County, Kentucky, broke down (Tr. 19-20). The dozer was moved out of the way of mining operations into a flat open field (Tr. 42-43, 84). Once Addington's mechanics determined that they could not fix this bulldozer, Addington called Whayne Supply to send a field service technician to their mine to repair the bulldozer.

[1]Identical citations were issued to Addington, which were contested and then settled prior to a hearing.

Whayne Supply sells and services Caterpillar machinery and equipment in Kentucky and Indiana. It regularly services such equipment on Addington mine sites. On the afternoon of January 19, 1994, James Paul Blanton, a field service technician working out of the Ashland, Kentucky branch office, was called by his supervisor, Charles Crisp, and assigned to the Addington mine site the next morning (Tr. 245).

On January 20, Blanton drove his service truck from his home to Addington's No. 17A Mine in Pike County. Upon his arrival, he met with Addington's foreman, Ronnie Keaton. Keaton sent Blanton to repair the disabled D10 bulldozer. Later in the morning Keaton drove to the bulldozer to oversee the digging of a shallow trench (Tr. 134). The bulldozer was then pushed over the trench so that Blanton could lower the belly pan and gain access to the vehicle's defective torque converter[2].

Prior to beginning work on the bulldozer, Blanton repositioned his service truck so that the right rear of the vehicle was close to the bulldozer (Exhibit G-8, photo 2). Blanton's truck was equipped with a small crane located on its right rear. This crane is normally used to support a chain which is run under the belly pan and attached to the opposite track to prevent the pan from falling abruptly when the bolts are loosened (Exh. C-3, Tr. 216, 408-09).

[2]The D10 bulldozer has three belly pans, which are removable sections on the bottom of the vehicle, designed to allow access to components located directly above (Tr. 152-53). To gain access to the torque converter, Blanton had to loosen the bolts of the middle belly pan, allowing it to swing down on hinges on one side of the pan (Tr. 117-122, Exh. G-8, photo Nos. 10-13).

Blanton spoke briefly to Keaton, Addington's superintendent David Maynard, Addington's maintenance foreman James Cox and the D10's operator, Tony Boggs[3]. He was then left alone to repair the D10's torque converter. Shortly before noon he was found dead or dying, pinned by the belly pan underneath the bulldozer. He was found in a sitting or kneeling position. The belly pan, which weighed approximately 500 pounds, had swung down on its hinges and was laying against his neck and back. The bolts holding up the pan had been removed with an air wrench. The belly pan had not been secured by a chain or other device before the bolts had been loosened.

Terry Crawford, a Whayne Supply technician who was at the Addington mine to repair another vehicle, arrived at the accident site shortly after Blanton was discovered. Crawford climbed on the back of Blanton's service truck and hit the top button of the control panel for the crane boom (Tr. 229). The crane boom did not move. Crawford then told Addington's maintenance supervisor, James Cox, that the boom did not work (Tr. 230). On the next day Crawford told MSHA investigators that he tried to move the boom and that it did not work (Tr. 231).

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[3]At the hearing on May 2, 1995, Boggs testified that Blanton told him that the crane boom would not work when he tried to warm
fn. 3 (continued)
up his truck at 1:00 a.m., on January 20, 1994, and that he had trouble with the air compressor as well (Tr. 58). I am unable to credit this testimony in view of the fact that when interviewed by MSHA on January 21, 1994, Boggs did not mention that Blanton had said the boom was not working (Tr. 90-93). At the earlier interview Boggs told MSHA that Blanton said he had trouble starting his truck early in the night but that he was able to start it later (Tr. 90). This is consistent with foreman Crisp's account of his conversations with Blanton prior to the accident (Tr. 245-48).

I conclude that the Secretary has not established that the boom did not work on the morning of January 20, 1994. I credit Crawford's testimony that he was unfamiliar with the controls on Blanton's truck and hit the wrong button to move the crane (Tr. 332-36, Exh. C-6). I also credit the testimony of Service Manager Jeffrey Suttle that since Blanton's air compressor worked just prior to the accident, the boom would also have worked (Tr. 379). Finally, the boom did work when Foreman Crisp activated it on January 25, 1994, albeit at a much higher ambient temperature (Tr. 128, 154, 239, 363-67).

Moreover, even if the boom had not worked, Blanton had the means to safely secure the belly pan before loosening its bolts. His truck was equipped with a cable come-along which he could have used to do this task safely without the boom (Tr. 368, Exh. G-4).

Contestant violated 30 C.F.R. ' 77.405(b)

Whayne Supply does not contend that Blanton removed the belly pan in a safe manner. It questions the applicability of the cited standard and the degree to which MSHA holds it responsible for Blanton's negligence. The Secretary takes the position that when the bulldozer was pushed over the trench dug by Addington, it became "raised" within the meaning of section 77.405(b) (Tr. 300). I concur with this interpretation of the regulation and find that Whayne Supply violated this standard as alleged, because Blanton's conduct is imputed to Whayne Supply for liability purposes, A. H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983). The regulation prohibits work under machinery or equipment that has been raised until it has been "securely blocked."

I interpret "securely blocked" to have the same meaning as the phrase "blocked or mechanically secured to prevent accidental lowering," in the corresponding metal/non-metal safety standard at 30 C.F.R. ' 56.14211(b) (see Midwest Material Corporation, 16 FMSHRC 636, 638 n. 1 (ALJ April 1995-review granted June 5, 1995). Thus, when the bolts were loosened on the belly pan, working under the belly pan violated the standard unless the pan was blocked or secured with a device such as a metal chain hooked to a crane or come-along.

Is Blanton's Negligence Imputed to Respondent for Purposes of determining whether the violation was due to an "unwarrantable failure" and assessing a penalty[4]?

The negligence of a rank-and-file miner ordinarily cannot be imputed to an operator for penalty purposes. However, the operator's supervision, training and disciplining 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, Southern Ohio Coal Co., 4 FMSHRC 1459, 1464-5 (August 1982).

[4]Civil penalties were proposed in this matter after the May 2-3, 1995 hearing. The contest cases were stayed pending issuance of the proposed penalties from May 18, 1994, to February 24, 1995, when I set them for hearing. In my notice of hearing, I invited the parties to seek consolidation of civil penalty proceedings or to present evidence regarding the section 110(i) penalty criteria, depending on whether or not civil penalties were proposed by MSHA prior to hearing. At the hearing on May 2, 1995, the Secretary's counsel advised me that the Assistant Secretary had decided to wait to propose civil penalties (Tr. 8-9).

Although I am unaware that the Commission has so held directly, it follows that the same rule applies to the imputation of a rank-and-file miner's conduct for purposes of determining whether an operator's violation was due to an "unwarrantable failure[5]." Mr. Blanton was not a supervisory employee. However, I impute his negligence to Respondent, because the record does not establish that Whayne Supply took such reasonable steps in training and supervising Blanton, that it should be completely absolved of responsibility for his violative conduct for negligence and penalty purposes.

There is no indication that Blanton received any formal training regarding safe procedures for removing a belly pan in the field (Tr. 216-220, 255-56). Whayne Supply service technicians are trained to avoid or minimize time spent under a suspended load (Tr. 255-56, 405). It is not clear how a technician would understand the application of this rule to belly pan removal. There is no evidence that Mr. Blanton was ever instructed by Whayne Supply that if he had to get under the belly pan, he had to have it secured before he started loosening the bolts. There is also no evidence that Blanton had been instructed or trained to remove the bolts in a manner whereby only one arm would be under the belly pan, as described by Mr. Crawford (Tr. 346-7).

Whayne Supply hires experienced mechanics and relies heavily on on-the-job training for its field technicians (Tr. 208-09, 219, 372). Blanton received no supervision in the performance of his tasks. His foreman, Charles Crisp, never reviewed his performance and relied on reports from other Whayne Supply employees and possibly customers (Tr. 254).

Mr. Blanton's reputation was that of a very competent and safe mechanic (Tr. 144-45, 165, 172-73, 244). Indeed, Addington maintenance supervisor James Cox sometimes specifically asked Whayne Supply to dispatch Blanton (Tr. 173). By all accounts, Blanton's failure to use a cable to support the belly pan was very unusual (Tr. 159, 229, 368).

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[5]In Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 196-7 (February 1991), the conduct of a rank-and-file miner was imputed to the operator in finding unwarrantable failure because the miner was acting as the agent of the operator in conducting workplace examinations. I do not find that decision applicable to the instant case. Although there may be situations in which an employee working alone should be deemed the agent of the operator for civil penalty/unwarrantable failure purposes, I do not think that is so in all cases.

Nevertheless, I cannot conclude that in the absence of specific training as to proper procedures for securing a belly pan in the field, that Blanton's violative act was so unforeseeable that Whayne Supply should be totally absolved from any responsibility for it. The removal of the belly pan is apparently a common task for Whayne Supply's field technicians. In the absence of training in the proper procedure, the failure of a technician to secure the belly pan was not completely beyond Whayne Supply's control.

Blanton's negligence and therefore Whayne's negligence was not sufficiently "inexcusable or aggravated" to constitute an "unwarrantable failure" to comply with the Act

In retrospect, Mr. Blanton's conduct on January 20, 1995, was very unwise. One nevertheless has to assume that he greatly underestimated the likelihood that the belly pan could swing down on him. Otherwise, he would not have placed himself under the belly pan after he had loosened the bolts[6].

Conduct rising to the level of "unwarrantable failure" has been characterized by the Commission as "inexcusable or aggravated" as to opposed to "thoughtless" or "inattentive." Emery Mining Corp., 9 FMSHRC 1991, 2001 (December 1987). Particularly in light of the fact that Mr. Blanton's actions did not compromise the safety of others, I would characterize his behavior as "thoughtless," rather than "inexcusable or aggravated." I find his negligence to fall short of that needed to establish an "unwarrantable failure," and therefore affirm the citation issued to Whayne Supply as a "significant and substantial" violation of section 104(a) of the Act.

Finally, in assessing Whayne Supply's responsibility for the violation, it is necessary to consider the Secretary's contention that Contestant's procedure for removing belly pans did not comply with the standard (Secretary's brief at pp. 25-28, Tr. 274, 286-7, 297-8). MSHA argues that even if Blanton had followed this procedure, there would have been a violation of '77.405(b). It contends that to comply with the standard either cribbing must be placed underneath the belly pan before the bolts are loosened or two chains must be secured under it.

MSHA's concession that two chains would satisfy the standard (Tr. 286-7) establishes that the Agency does not interpret its regulation to only allow cribbing as means of "securely blocking"

[6]To some extent Blanton's conduct simply defies explanation. He apparently was in good spirits on the morning of January 20 (Tr. 90) and was familiar with the proper procedure for removing belly pans (Tr. 145).

raised equipment. Furthermore, the MSHA program policy manual states that cribbing is not the only method of compliance with section 77.405. It provides as follows:

> 77.405 Performing Work From a Raised Position; Safeguards. Mechanical means that are manufactured as an internal part of the machine for the purpose of securing a portion of the machine in a raised position are acceptable as meeting the requirements of this section.

Although this manual does not have the force of law, it may provide assistance in interpreting an MSHA regulation, King Knob Coal, Co., 3 FMSHRC 1417, 1420 (June 1981). Given the Agency's recognition that means other than cribbing fulfill the requirements of the standard, it must do more than show that cribbing was not used to establish a violation.

To conclude that use of one chain violates the standard, the record would have to show that a reasonably prudent employer familiar with the mining industry and the protective purposes of the standard would have recognized that relying on one chain was a violation, Ideal Cement Company, 12 FMSHRC 2409 (November 1990). This has not been established. To the contrary, the record indicates that Whayne Supply's procedure is the accepted practice in its industry (Tr. 160, 182-83, 200-01, 283, 322).

Furthermore, the record does not indicate that this practice is not a prudent one (Tr. 431-34). Indeed, the use of cribbing or a jack in the field when lowering the belly pan may be more dangerous than securing the belly pan with a single chain suspended from the boom of the Autocrane (Whayne Supply's brief at pp. 23-26)[7]. I regard this as an additional reason to interpret the standard in a manner that allows this procedure.

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[7]The most convincing argument that Whayne Supply makes in this regard involves the exposure of the technician when lowering the belly pan and then when bolting it back in place after repairing the torque converter. It appears to be very difficult to move the bulldozer once the belly pan is secured with a chain (Tr. 397-98, 403). Unless the bulldozer is moved, the technician must get under the raised pan to remove the blocking material in order to lower the pan sufficiently to get at the torque converter. The miner would also have to tighten the pan's bolts prior to reinstalling the cribbing material, or work under the unblocked belly pan while reinstalling these blocks (or jack) for longer than it takes to simply tighten the bolts.

Thus, in assessing Contestant's negligence in this matter, I reject the contention that Whayne Supply's customary procedure for lowering belly pans violated section 77.405(b).

Assessment of a Civil Penalty

The Secretary has proposed a $50,000 penalty for Citation No. 4011760. I conclude a penalty of such magnitude is not consistent with the criteria set forth in section 110(i) of the Act. Of these factors, the most important is the degree of Whayne Supply's negligence. The Secretary, in its narrative findings for a special assessment, characterizes Whayne Supply's negligence as "high." I would characterize it as "moderate." This assessment considers both the "thoughtlessness" of Mr. Blanton and the lack of formal training provided by Whayne Supply regarding belly pan removal. While I conclude that Whayne Supply may have relied too much on Mr. Blanton's prior experience, it certainly was not a ridiculous assumption that he knew not to place himself under a belly pan after the bolts had been loosened.

The gravity of the violation is obviously quite high as established by Mr. Blanton's tragic death[8]. These two factors lead me to conclude that a $1,500 penalty is appropriate under section 110. Such a penalty is also consistent with Whayne Supply's size, previous violation history and good faith in abating the violation. Such a penalty clearly would not jeopardize Whayne Supply's ability to stay in business.

I regard Whayne Supply's responsibility for the violation herein as comparable to that of the operator in Midwest Material Corporation, supra. The only distinctions I see between the two cases are that one of the employees involved in the fatal accident in Midwest was a supervisor, while Mr. Blanton was not. On the other hand, Blanton had worked for Whayne Supply for considerably longer than those miners had worked for Midwest Material. On this basis, I would find Whayne Supply somewhat more responsible than Midwest for not adequately training or supervising its employees.

Whayne Supply did not violate 30 C.F.R. '77.1713(a) in

[8]I conclude that the violation herein clearly meets the criteria for "significant and substantial" in Mathies Coal Co., 6 FMSHRC 1 (January 1984).

failing to perform or arrange for an on-shift examination of Mr. Blanton's work area.

Section 77.1713(a) requires an examination of each active working area and each active surface installation by a certified person at least once each shift. An active working is defined in section 77.2 as any place in a coal mine where miners are normally required to work or travel.

The theory of the citation is that Mr. Blanton's foreman, Charles Crisp, failed to make such an examination or arrange to have such an examination made by Addington. However, I conclude that examinations of the active working that satisfy the standard were made by Addington's foreman, Ronald Keaton, and superintendent David Maynard (Tr. 42-43). Both were certified to make such inspections (Tr. 42, 147).

After sending Blanton to the open field where the D10 bulldozer was located, Keaton drove to that location. He had his equipment operators dig a trench for Blanton to accommodate the belly pan (Tr. 133-35). Keaton asked Blanton if he wanted the bulldozer moved again and Blanton said no. I conclude that Keaton made a sufficient examination of the work area to assure that the work site presented no hazards to Mr. Blanton. A sufficient examination of an open flat field removed from mining operations may differ from what satisfies the requirements of '77.1713(a) in an area in which, for example, blasting is going to take place.

The fairly cursory look at Blanton's work area by Keaton and Maynard fulfilled the obligations of Addington and Whayne Supply under the cited standard (See e.g., testimony of MSHA Inspector Stewart at Tr. 291). The hazard that killed Mr. Blanton had nothing to do with the condition of his work area. The cited standard placed no obligation on Addington to supervise the manner in which Blanton performed his tasks or inspect his truck[9]. Similarly, the standard and the Mine Act do not require Whayne Supply to provide one-on-one supervision of a miner at all times. Having found that a workplace examination satisfying the requirements of '77.1713(a) was performed, I vacate Order No. 4011758.

[9]The Secretary argues that Whayne Supply violated section 77.1713(a) because Addington supervisory personnel did not inspect Blanton's service truck or the bulldozer for hazards (Secretary's brief at pp. 30-31). In the instant case, Addington fulfilled its obligations by merely observing the area in which Blanton was to perform his work.

ORDER

Citation No. 4011760 is affirmed as a significant and substantial violation of section 104(a) of the Act. A civil penalty in the amount of $1,500 is assessed.

Citation No. 4011758 is **VACATED**.

The assessed penalty shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Joseph A. Worthington, Esq., Smith & Smith,
400 North First Trust Centre, 200 South Fifth St.,
Louisville, KY 40202-3238 (Certified Mail)

Brian W. Dougherty, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Rd.,
Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

/lh