FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 21, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-994
	:	A.C. No. 15-05423-03501 Q7G
v.	:	
	:	Manalapan No. 1 Mine
B & S TRUCKING COMPANY, Respondent	:	

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Susan C. Lawson, Esq., Harlan, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of 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. Section 801, et. seq., the "Act," charging B & S Trucking Company (B & S) with one violation of the mandatory standard at 30 C.F.R. ' 77.405(b) and seeking a civil penalty of $1,800 for that violation. The issue before me is whether B & S violated the cited standard as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under section 110(i) of the Act. Additional specific issues are addressed as noted.

The citation at issue, No. 4242292, alleges a "significant and substantial" violation of 30 C.F.R. ' 77.405(b) and charges as relevant herein that "the operator of the No. 11 Mack Truck was observed working under the unsupported raised bed of this coal truck." The cited standard 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."

Jim Langley, a coal mine inspector and accident investigator for the Mine Safety and Health Administration (MSHA) testified

that he was conducting an inspection at the Manalapan Mining Company (Manalapan) No. 1 Mine on October 17, 1993, when he observed from the mine office about 110 feet away, a truck driver pass beneath the raised bed of a coal truck in the process of fueling that truck. It was a 20 to 30 ton 10 wheel Mack diesel and its bed was raised fully extended to four to eight feet. The truck driver was working for B & S, which hauls coal for Manalapan.

Langley maintains that he was only 100 feet away from the truck at the time of this observation and had an unobstructed view. He first observed the driver fueling the left side tank then pass beneath the raised truck bed to fuel the other side. Langley noted that the driver first passed the fuel hose across then walked beneath the unsecured bed. According to Langley either a bed pin or crib blocks could have been used to secure the raised bed safely and within compliance of the cited standard but neither was used. Within the framework of this credible testimony by the experienced and disinterested witness, Inspector Langley, I conclude that the violation existed as charged.

Inspector Langley also maintains that the violation was "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 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (1984), the Commission explained:

> In order to establish that a violation of a mandatory 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.
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> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (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 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991).

Based on his knowledge of prior fatalities resulting from falling unsupported truck beds, Langley concluded that it was highly likely for such a fatality to occur in this case. According to Langley there was no way to determine from an external examination of the hydraulic system whether the safety check valve was indeed functioning or was about to fail and apparently no mechanical examination was performed on the truck at issue in this case to determine whether or not the safety check valve was functioning. Within the above framework of credible evidence I agree that indeed the violation was "significant and substantial." In this regard it is noted that Manalapan Mining Company Safety Director Darrell Cohelia agreed that if the violation had happened as alleged then it was indeed a "significant and substantial" violation.

The Secretary also maintains that the violation was the result of high operator negligence. His analysis in this regard was set forth in his post-hearing brief as follows:

> The operator had to have known, and ignored the fact, that the design of the gas pumps at the No. 1 mine encouraged drivers to engage in the violative practice committed by Mr. Brock. The pumps were designed in a manner which prevented the drivers from conveniently and expeditiously refueling the tanks on each side of the truck. Specifically, the pumps were situated so that a driver had to pull alongside the pumps to refuel his truck. However, with the truck in that position, the hose was not long enough to reach the tanks on both sides of the truck. Accordingly, in order to fuel the second tank, the driver was required to turn the truck around. However, as a more expedient alternative, the driver could raise the bed of the truck, throw the hose across the frame, and then either step over the frame under the raised bed or walk around the truck. Human nature being what it is, the operator must have realized that its drivers, like Mr. Brock, were stepping or leaning across the frame of the truck under the raised bed. This would not pose any danger so long as the driver used the bed pins to block the raised bed into position. Here, however, power lines above the pumps prevented the drivers from fully extending the bed of the truck and, thus, the driver could not use the bed pins to block the raised bed into position.

That the operator recognized the hazards posed by this situation is suggested by the fact that the pumps at the other mine sites were designed differently. Specifically, they were designed so that the driver could pull nose first up to the tanks. When designed in this manner, the gas hose was long enough to reach the gas tanks on both sides of the truck without having to move the truck or raise the bed.

There are three major problems with the Secretary's argument. First, there is insufficient evidence to establish that the independent haulage contractor B&S had any authority regarding the location and arrangement of the fuel pumps at issue. The pumps were apparently under the control of a separate corporate entity, Manalapan Mining Company. Second, even if B&S had authorized the location of the pumps it is undisputed that the haulage truck drivers could nevertheless have fueled both their tanks from that configuration in compliance with the law. Third, finding negligence retroactively by reliance upon subsequent remedial measures i.e. by realigning the fuel pumps into a position facilitating the safe fueling of haulage trucks, is contrary to public policy and the objectives of the Act to encourage mine operators to optimize safety. See also Rule 407, Federal Rules of Evidence.

There is, moreover, no evidence of any prior violations or similar practices at this or any other mine location and indeed it is the undisputed testimony that the regular truck drivers customarily filled the driver's side fuel tanks on one pass and, upon returning, filled the other side tank -- a non-violative practice. I have also considered the evidence that B & S employees had been provided required safety training, including specific warnings against working under unsecured raised truck beds. Even the truck driver at issue in this case, Charles Brock, acknowledged having such training and admitted that he knew working beneath raised unsecured truck beds was improper. Under the circumstances, I find B & S chargeable with but little negligence.

In reaching my conclusions in this case, I have not disregarded the testimony of truck driver Charles Brock that he worked beneath the raised truck bed only while passing the hose across the truck frame and that he did not actually climb across the truck frame itself. I nevertheless find the disinterested and credible testimony of Inspector Langley that he actually observed Brock crossing the truck frame beneath its raised bed, to be entitled the greater weight. Langley had an unobstructed view of Brock from a distance of only about 100 feet. I also note Brock's self-interest in avoiding possible discipline from

his employer for having violated known rules of safe conduct.

Under all the circumstances and considering the relevant criteria under section 110(i) of the Act, I find that a civil penalty of $400 is appropriate for the violation herein.

ORDER

Citation No. 4242292 is **AFFIRMED** as a "significant and substantial" citation and B & S Trucking Company is hereby

directed to pay a civil penalty of $400 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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