FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 24, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-187
Petitioner	:	A. C. No. 15-11506-03543
v.	:	
	:	
R B COAL COMPANY, INC.,	:	
Respondent	:	Verda Tipple

DECISION

Appearance: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of Petitioner; Richard D. Cohelia, Manalapan Mining Company, Inc., Brookside, Kentucky, on behalf Respondent.

Before: Judge Melick

This case is before me upon a Petition for a 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 R B Coal Company Inc. (RB) with three violations of mandatory standards and proposing civil penalties of $2,400.00, for those violations. The general issue before me is whether RB 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. Additional specific issues are addressed as noted.

Respondent has agreed to pay the proposed penalties for Citations No. 7495831 and 7495832, in full, and the Secretary has agreed to accept this amount in settlement of the citations. I have considered the representations and documentation submitted with respect to those citations and I conclude that the proferred settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amounts will be accordingly incorporated in this decision. Citation No. 7495833 remains at issue.

Citation No. 7495833 alleges a "significant and substantial" violation of the standard at 30

C.F.R. § 48.31.[1] Following the Secretary's latest amendment the citation now charges that "[h]azard training has not been given to any of the approximately 30 customers hauling coal from the tipple site."

The cited standard, 30 C.F.R. § 48.31, provides as relevant hereto that:

> (a) Operators shall provide to those miners, as defined in § 48.22(a) (2) (Definition of miner) of this subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:
>
> (1) Hazard recognition and avoidance;
> (2) Emergency and evacuation procedures;
> (3) Health and safety standards, safety rules and safe working procedures;
> (4) Self-rescue and respiratory devices; and,
> (5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

There is no dispute that RB did not provide the hazard training set forth in the cited standard. It argues that, pursuant to the Secretary's Program Policy Manual (Volume III, Part 48, pgs. 26-27), hazard training is not required if there is no exposure of customers to mine hazards. It has indeed been stipulated that the hazard training regulations at 30 C.F.R. § 48.31 are applicable to customer truck drivers only if they are exposed to mine hazards. The issue before me then is whether the cited customers were in fact exposed to mine hazards.

According to Respondent the customer trucks (18 wheel tractor-trailers) enter mine property along a gravel road to a scale house where they are weighed. They then proceed 100 to 200 yards to the stockyard and park while waiting to be loaded. The drivers at this time exit the trucks to untarp the truck beds and sometimes stretch their legs while waiting. They then pull up to be loaded by an RB employee and return to the scale house for re-weighing. The drivers then exit their trucks and enter the scalehouse to pick up their weigh tickets and pay for the coal. They also retarp their trucks at this time.

Inspector Alex Sorke, Jr., of the Department of Labor's Mine Safety and Health Administration (MSHA), testified that he was at the subject mine on February 23, 2000, when he observed customer trucks on mine property. He credibly described a number of hazards he perceived by the presence of the untrained drivers, including traffic hazards presented to other trucks and to pedestrians, objects falling from conveyors, potential ignition of diesel fuel by

---

[1] The citation was twice amended at hearings and, following hearings, was again twice amended - - the last time after Respondent's brief had been filed. While in technical compliance with the procedural rules, this clearly is no way to prosecute a case. In light of these amendments, the issues to be briefed as described at hearings are no longer relevant.

smokers near the diesel fuel tanks and exposure to electrocution from contact with low hanging overhead power lines.

I find within the framework of this credible testimony that the customer truck drivers were indeed exposed to hazards at the cited tipple and that, accordingly, such customer truck drivers were required to have hazard training under Part 48 of the Secretary's regulations. Since the drivers did not have such training the violation is accordingly proven as charged. While Respondent suggests that these alleged hazards were remote, based primarily on a lack of a history of accidents and citations, I disagree and find, in particular, based on the undisputed evidence a high likelihood of serious or fatal injuries from electrocution.

The Secretary 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 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission 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 -- 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 Powder 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).

The credible evidence clearly supports a finding that the violation was "significant and substantial" even considering only the electrocution hazard. It is undisputed that various overhead power lines carried electrical charges sufficient to cause electrocution. Moreover, at the scale house, the wires were, according to the credible evidence, hanging as low as fifteen feet above ground level. According to Inspector Sorke, the truck drivers would manually elevate metallic arms, some as much as twenty feet above ground, when covering their loads with tarps in the vicinity of the scale house near the Number 3 power line. I agree that it was reasonably likely

for such metallic arms to contact the power lines and for drivers standing on the ground in contact with these metallic arms to thereby suffer electrocution. The violation herein was accordingly "significant and substantial" and of high gravity.

I disagree however with the Secretary's conclusion that the violation was the result of high operator negligence. Mine foreman Gregory McKnight testified that he had been the scale house person for nine years at the Verda Tipple. McKnight testified without contradiction that the tipple had been the subject of up to five inspections per year and had never been cited for the failure to provide hazard training. He noted that, on average, about thirty customer trucks arrive at the tipple each day. McKnight was unaware of the requirement to provide hazard training for his customers. It is also noted that the regulation at 30 C.F.R. § 48.22(a)(2) which the Secretary cites as the basis for the requirement that customers are required to have hazard training does not specifically mention the word "customers." Under the circumstances, I find that McKnight could reasonably and in good faith have believed that customers were not required to have hazard training within the meaning of Part 48. The violation herein was accordingly the result of moderate to low negligence.

Civil Penalty

Under Section 110(i) of the Act, the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The record discloses that the operator had a history of 27 violations during the period February 23, 1998 through February 22, 2000. This is a moderate history of violations. The parties have stipulated that the operator's size was 2,097,447, "total annual production tons or hours per year" in the 12 months preceding the violation. The operator is therefore relatively large. There is no evidence that the operator did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation. The operator has the burden of proving that a particular civil penalty would effect its ability to remain in business. *Broken Hill Mining Company*, 19 FMSHRC 673 (April 1997). In the absence of specific proof that the penalties herein would effect the operator's ability to continue in business it is presumed that there would be no such adverse effect. *See Sellersburg Stone Company*, 5 FMSHRC, 287 (March 1983), *aff'd* 736 Fd.2 1147 (7th Cir. 1984). Negligence and gravity have previously been discussed with respect to the violation. Under the circumstances I find that a civil penalty of $1,000.00, is appropriate.

ORDER

Citations No. 7495831, 7495832, 7495833, are hereby affirmed and RB Coal Company Inc., is directed to pay civil penalties of $317.00, $655.00 and $1,000.00, respectively, for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

Richard D. Cohelia, Safety Director, Manalapan Mining Co., Inc., P.O. Box 311, Brookside, KY 40801-0311 (Certified Mail)

\mca