FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 21, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2003-103
Petitioner	:	A.C. No. 15-18317-03508
	:	
v.	:	
	:	
CARBON RIVER COAL CORPORATION,	:	Mine No. 8
Respondent	:	

DECISION

Appearances: Brian Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner;
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Carbon River Coal Corporation ("Carbon River"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a single violation of a regulation requiring that operators of mobile equipment wear seatbelts, 30 C.F.R. § 77.403a(g). A civil penalty of $20,000.00 is proposed for the violation, which resulted in fatal injuries to a miner. For the reasons set forth below, I find that Carbon River violated the regulation, and impose a civil penalty of $5,000.00.

Findings of Fact - Conclusions of Law

The facts are largely undisputed. Carbon River's No. 8 Mine is a surface coal mine located near Carrie, Kentucky. On December 17, 2001, a miner was operating a small bulldozer clearing and leveling rocky ground for the placement of a dewatering pump. About 11:50 a.m., a coworker discovered that the bulldozer was lying on its side. The operator was pinned beneath the dozer's rollover protection device ("ROPS"), and exhibited no vital signs. It was later determined that the dozer had most likely encountered a large rock that caused it to overturn onto its side. The dozer was equipped with a functioning seat belt. However, the operator was not wearing the seatbelt and, as a result, was thrown from the seat and pinned beneath the ROPS when the dozer overturned.

Following an investigation by the Secretary's Mine Safety and Health Administration ("MSHA"), Lester Cox, Jr., an MSHA inspector with over 12 years of experience and over 17 years of previous mining experience, issued Citation No. 7530842, charging Respondent with a violation of 30 C.F.R. § 77.403a(g), which requires that: "Seat belts . . . shall be worn by the operator of mobile equipment required to be equipped with ROPS." The violation was designated significant and substantial, and the gravity was assessed as very serious because the violation resulted in a fatality. The operator's negligence was rated as "High." The Secretary proposed a specially assessed civil penalty of $20,000.00.

Respondent does not dispute that the regulation was violated, or that the violation was significant and substantial.[1] It contends that its negligence was no more than low, and that the civil penalty proposed by the Secretary is excessive.

<u>Negligence</u>

The parties agree that the operator of the bulldozer was highly negligent in failing to wear the seatbelt. However, the negligence of a rank-and-file miner cannot be imputed to the operator for purposes of penalty assessment. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982). "[W]here a rank-and-file employee has violated the Act, *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."[2] *Id.*

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[1] A violation is properly designated significant and substantial "if, based upon 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

[2] The Secretary's regulations describing criteria for the assessment of proposed civil penalties define negligence, and assign penalty points for various levels of operator negligence. The pertinent regulation, 30 C.F.R. § 100.3(d), provides, in part:

> The negligence criterion gives appropriate consideration to the factors relating to an operator's failure to exercise a high degree of care to protect miners from safety or health hazards. When applying this criterion, MSHA considers actions taken by the operator to prevent or correct conditions or practices which caused or allowed the violation to exist. In determining the operator's diligence in protecting miners in any given hazard situation, due recognition is given to mitigating circumstances which explain the operator's conduct in minimizing or eliminating a hazardous condition. Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards. . . .

The dozer operator was considered to be an experienced and careful equipment operator, and there is no evidence that he had failed to wear his seat belt on prior occasions. Tr. 60. Carbon River had a written policy requiring the use of seat belts, a copy of which had been given to the dozer operator. Tr. 24, 71, 80; ex. R-2. The topic of seat belt use was covered in annual refresher training, which included the use of two MSHA-produced video presentations on the subject. Tr. 64-5. That training also included coverage of MSHA-issued "fatalgrams," bulletins on fatal accidents, copies of which were distributed at the training, and occasionally posted on bulletin boards. Tr. 77. The dozer operator had undergone annual refresher training less than three months before the accident. Tr. 67; ex R-1. There were no conspicuously posted signs reminding miners of the seat belt policy. Tr. 22, 82. However, equipment operators were verbally instructed to wear seat belts. Tr. 28. Carbon River did not hold periodic formal safety meetings. Safety issues peculiar to the day's work were addressed as work assignments were made at the start of a shift.[3] Tr. 69, 78. Although there was no formal program of supervision to check whether seat belts were actually being used by equipment operators, supervisors would occasionally "walk up" on them and check whether they were wearing seat belts.[4] Tr. 75. If an equipment operator was found not using his seat belt, he was verbally directed to use it. Tr. 72, 82. Equipment operators have not been formally disciplined for failing to wear seat belts. Tr. 72. However, that option existed, depending upon the seriousness of the violation. Tr. 84. Carbon River had not previously been cited for a violation of the regulation requiring use of seat belts. Tr. 32.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

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[3] Cox was critical of the lack of weekly safety meetings, although they are not required by regulation. Tr. 25, 42, 46-7. He was aware of underground mines that conduct weekly safety meetings, but was unable to identify a surface mine that did so. Argus Brock, another MSHA inspector, testified that he knew of surface coal mining companies that hold monthly, not weekly, safety meetings. He also stated that five to ten minute daily sessions where supervisors discussed the upcoming day's work, pointing out safety considerations, could be called safety meetings. Tr. 100.

[4] Most of the mobile equipment used at Carbon River had an enclosed cab for the operator, such that seat belt use could not be easily determined. Tr. 74.

The Secretary argues that Carbon River's negligence was high because it failed to adequately communicate, supervise and enforce its seat belt policy.[5] Carbon River contends that it took significant steps to prevent the dozer operator from operating the equipment without using a seat belt, including installing and maintaining a fully functional seat belt on the dozer, distribution of a written policy requiring the use of seat belts, verbal reminders to use seat belts and highlighting of mandatory use of seat belts in annual refresher training that was given to the dozer operator less than three months before the accident.

While the posting of signs and periodic verbal reminders may have enhanced communication of the seat belt policy, the absence of such measures does not establish that Carbon River's seat belt policy was not effectively communicated to its employees. The miners interviewed by Cox uniformly were aware of the policy and had been told to wear seat belts. The topic was highlighted during annual refresher training and would have been emphasized in the posting of any fatalgram involving use of a seat belt. Significantly, on the facts of this case, the dozer operator was given his annual refresher training, which included emphasis on use of seat belts, less than three months prior to the accident that generated the citation. I find that Carbon River's seat belt policy was effectively communicated to its employees, in particular, the fatally injured dozer operator.

Cox concluded that the seat belt policy was not being properly enforced based upon statements of three miners and a foreman, to the effect that employees did not always wear seat belts. Tr. 43-44. His interpretation of those interview statements, however, is open to question. As to the foreman, it was based only on his agreement that the dozer operator had not been wearing his seat belt at the time of the accident. Tr. 40. The specific content of the other statements was not disclosed. Michael Fields, one of Carbon River's foremen, testified that equipment operators had, on occasion, been found not to be wearing seat belts. They were verbally instructed to do so, but were not formally disciplined. Tr. 72.

An on-the-spot verbal instruction or reprimand appears consistent with a reasonable progressive discipline system, in which more formal disciplinary action is reserved for repeat offenders or egregious violations. The Secretary contends, with some justification, that Carbon River had an unreasonably high threshold for formal discipline, i.e. "a knowing[] commit[ment] of an unwarranted failure to comply" with a safety rule. Ex. R-2. However, in the absence of evidence of violations of the company seat belt policy warranting more than a verbal directive, the fact that there had been no formal disciplinary actions for non-use of seat belts does not establish that Carbon River's enforcement of its policy was seriously deficient.[6] As noted above,

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[5] Cox's determination that Carbon River's negligence was high was based, primarily, on his conclusion that the seat belt policy was not being properly enforced and that regular safety meetings were not being held. Tr. 46-7.

[6] Fields testified that formal disciplinary actions might result in the loss of skilled operators, who were in short supply. Tr. 84. Such considerations would provide no justification

Respondent had not been cited for a violation of the seat belt regulation in previous MSHA inspections.

The essence of the Secretary's argument, and Cox's assessment, is that Carbon River's seat belt policy was frequently or regularly ignored by miners and supervisors, resulting in the fatal accident.[7] The evidence does not support such a finding. Considering all of the above factors, I find that Respondent's negligence was low.

The Appropriate Civil Penalty

The parties stipulated that the Respondent is a medium-sized coal mine with a small controlling entity. It received 19 citations and orders over the course of 108 inspection days in 2001. Imposition of the proposed penalties would not threaten Respondent's ability to remain in business. Respondent demonstrated good faith in promptly abating the violation. The gravity and negligence assessments with respect to the violation are discussed above.

Citation No. 7530842 is affirmed as a significant and substantial violation. However, the operator's negligence was low. The Secretary proposed a civil penalty of $20,000.00 based upon a special assessment. Upon consideration of the factors itemized in section 110(I) of the Act, I impose a penalty of $5,000.00.

ORDER

Citation No. 7530842 is **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of $5,000.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

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for pervasive ignorance of the seat belt policy by employees or supervisors.

[7] Cox testified that the sign-in sheet at the training session held to abate the violation stated that use of seat belts would "now" be company policy. Tr. 26-7. The Secretary argues that this statement indicates that Carbon River's written policy had not been adequately communicated, exercised or enforced prior to the accident. As noted above, however, the miners interviewed by Cox were aware of the policy and had been told to wear seat belts. I find that the language used on the sign-in sheet indicated a new emphasis on the seat belt policy.

Distribution: (Certified Mail)

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