

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 12, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 96-137-M
Petitioner : A.C. No. 33-00043-05505
v. :
: Christman Quarry
CHRISTMAN QUARRY, :
Respondent :

DECISION

Appearances: Thomas J. Pavlet, Conference and Litigation Representative, Duluth, Minnesota and Patrick Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio on behalf of Petitioner; Mark Morrison, Esq., Woodsfield, Ohio on behalf of Respondent.

Before: Judge Melick

This case is before me upon the petition for 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 Christman Quarry with one violation of the mandatory standard at 30 C.F.R. § 56.14207 and proposing a civil penalty of \$500 for that violation. The general issue before me is whether Christman Quarry committed the violation as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 4416121, as modified, alleges a "significant and substantial" violation of the noted standard and charges as follows:

On December 14, 1995 a dozer operator was fatally injured when he attempted to either exit or enter the operators [sic] cab of his machine while the engine was running. The parking brake mechanism had not been set. It is believed the operator accidentally bumped a lever causing the dozer to move in a forward motion. The victim either fell or was standing on the dozer track. This action caused his

body to go beneath the track where he was crushed by the dozer's weight. Citation issuance was delayed due to full review of the accident information.

The cited standard provides, as relevant hereto, that "mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set."

There is no dispute that on December 14, 1995, at approximately 12:30 p.m. Darrin Clift was run over and killed by the bulldozer he had been operating. There were no eyewitnesses and the underlying cause of the incident is unknown. Clift had reported for work at 7:30 that morning. A short meeting was held in the garage area to discuss the day's work with the foreman Darren Dimmerling. After Clift and Dimmerling inspected the dozer, Clift went to work at the lower level of the pit. Later that morning it was decided that top soil on the upper working level bench needed to be removed before drilling could begin. Around 12:10 p.m., Clift parked the dozer in front of the upper face of strip material and shut down the engine, reportedly to eat lunch.

Around 12:30 p.m., employees in the shop area heard the dozer start up. One or two minutes later, Dimmerling and mechanic Fred Ulrich saw the dozer pass through the 20-inch pile of top soil and down the pushed-off material with the dozer blade in the raised position. Suspecting that something was wrong they drove the pick-up truck to where the dozer came to rest. The dozer transmission lever was found in first gear forward and, it was running at three quarters to full throttle. Clift's coat, lunch box, a crate and a grease gun were found in the dozer cab.

Not finding Clift, they returned to the area where he had been working. His body was found severed in the track left by the dozer. No autopsy was performed and no investigation was made of the deceased's prior health condition. The county coroner nevertheless opined that death was due to a severed aorta and spine from the bulldozer accident.

Quarry owner Gerald Christman had been operating this mine for 21 years. The deceased was one of his safest and best bulldozer operators. Christman observed that the deceased never left the dozer without putting the blade down and engaging the brake. He speculated that the deceased could have started the dozer while standing on the dozer track but it would then have been in neutral. He agrees that you could reach the throttle lever from the track but noted that if you grabbed the gear lever from the track you would likely put the dozer in reverse.

The Secretary speculates in his accident investigation report (Government Exhibit No. 5) that the deceased accidentally engaged the throttle lever while he was entering or exiting the bulldozer cab, thereby causing it to move forward. He further speculates that the deceased was pulled to the front of the dozer by its track and run over. The Secretary theorizes therefore that the transmission was in gear, rather than in neutral, and the shift lever should have been locked-out. The dozer would thus have been prevented from moving while unattended, regardless of the throttle setting.

The Act is a "strict liability" statute so that a mine operator is liable without fault for violations committed by its employees, i.e. no fault or negligence is required to establish a violation. *Western Fuels-Utah, Inc., v. FMSHRC, et al.*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-894 (5th Cir. 1982); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (September 1991). In this case it is not known how the subject bulldozer came to be unattended. Indeed it could very well have resulted from the deceased suffering a heart attack. What is clear however is that once the deceased had departed from the bulldozer for whatever reason, it was left unattended. It is also clear that the bulldozer controls were not in the park position and the parking brake was not set. There was clearly therefore a violation of the cited standard and, under the concept of strict liability, the operator is responsible for the violation.

The Secretary also claims 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 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 injury in question will be of a reasonably serious nature.

See also *Austin Power Co. 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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *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).

In this case the precise cause and the particular circumstances surrounding the violation are admittedly unknown. It is therefore impossible to properly assess this case under the stated criteria. Accordingly there is insufficient proof that the violation was significant and substantial or of high gravity. In addition, under the unique circumstance of this case, there is no basis to find operator negligence. Accordingly and considering all of the criteria under Section 110(i) of the Act I find that only a nominal penalty of \$1 is appropriate.

ORDER

Christman Quarry is hereby directed to pay a penalty of \$1 within 30 days of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

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