FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 4, 1999

MATERIAL SERVICE CORP.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. LAKE 97-22-RM
	:	Citation No. 4416777; 11/13/96
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Algonquin Sand & Gravel
ADMINISTRATION (MSHA),	:	Mine ID No. 11-01117
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-31-M
Petitioner	:	A. C. No. 11-01117-05515
v.	:	
	:	Algonquin Sand & Gravel
MATERIAL SERVICE CORP.,	:	
Respondent	:	

DECISION

Appearances: Richard R. Elledge, Esq., Gould & Ratner, Chicago, Illinois, for Contestant\Respondent;
Ruben R. Chapa, Esq., Office of the Solicitor, Department of Labor, Chicago, Illinois, for Respondent\Petitioner.

Before: Judge Hodgdon

These consolidated cases are before me on a Notice of Contest and a Petition for Assessment of Civil Penalty filed by Material Service Corporation against the Secretary of Labor, and by the Secretary, acting through her Mine Safety and Health Administration (MSHA), against Material Service, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The Company contests the issuance to it of Citation No. 4416777 alleging a violation of the Secretary=s mandatory health and safety standards. The petition seeks a penalty of $60,050.00 for the contested and two other citations. A hearing was held in Chicago, Illinois. For the reasons set forth below, I vacate two of the citations and assess a penalty of $30,000.00.

Background

The Algonquin Sand and Gravel mine, also known as AYard 46,@ is one of several sand and gravel operations owned by Material Service Corporation, a subsidy of General Dynamics Corporation. It is located in McHenry County, Illinois. The mine is large in area and supplies as many as 13 different grades of sand and gravel to its customers. Trucks owned by Material Service, and operated by employees known as Astockpilers,@ are loaded with product at the Wash plant and haul it to various stockpiles located throughout the yard. Customer trucks come onto the property and park next to the stockpile of the type of sand or gravel to be picked up and are loaded by a front-end loader. Customer trucks and operator trucks all drive on the same roadways in the yard.

On June 19, 1996, Eugene McPheron was driving a semi-dump truck for Sunrise Cartage. Although he had only worked for Sunrise for 35 days, he had been a truck driver hauling materials for about 30 years. He returned to Yard 46 for his third haul at about 10:00 a.m. and stopped at the binder[1] pile just north of the Wash Plant to be loaded. After observing several other trucks that had come in after him being loaded, McPheron decided that he might be in the wrong place. He got out of his truck and went back to ask the driver of the truck who had pulled in behind him if he was in the right place. As McPheron walked toward the other truck, the driver of that truck, Raymond Remillard, got out of his truck, which was parked next to the Wash Plant, and walked toward McPheron. They met between the trucks.

As the two men talked, they were facing northeast towards McPheron=s truck and the binder pile. While they were talking, they were run over from the rear by an R-35 Euclid 35 ton Rear Dump truck driven by Robert Bauman, a Material Service stockpiler. Bauman was returning to the Wash Plant to pick up another load when he felt a bump while passing between the two parked trucks. He looked in his mirror and saw two bodies lying on the ground. He got out of his truck and went to see what had happened. On observing the bodies, he signaled the loader operator to call for help.

The first person from management to arrive at the scene was Frank Anderson, Production Foreman. He got there a few minutes after the accident. He went to the bodies on the ground, told one employee who had come to the accident to go to the front gate to direct the emergency vehicles when they arrived, told Bauman to move his truck and tried to see if there was anything he could do for McPheron and Remillard. Shortly thereafter, ambulances, police cars and fire trucks began arriving.

Remillard=s injuries were fatal. McPheron suffered a concussion, two herniated disks, two fractured ribs and numerous bruises and scrapes. As of the date of the hearing, he had not been released by his doctor to return to truck driving.

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[1] ABinder@ is a Asubstance used to produce cohesion in loose aggregate, as the crushed stones in a macadam road.@ American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 50 (2d ed. 1997).

MSHA Inspector Jerry L. Spruell arrived to investigate the accident on June 20, 1996. Based on his investigation, he issued two citations to the company on June 25, 1996. The first, Citation No. 4416239, alleged that the company had violated section 50.12 of the regulations, 30 C.F.R. ' 50.12, because the Amine operator allowed an accident site to be altered without approval of the District Manager or MSHA representative@ by moving the Euclid truck from where it had first stopped. (Govt. Ex. 12.)

The second, Citation No. 4416240, alleged a violation of section 56.9100(b), 30 C.F.R. ' 56.9100(b), because:

> Signs or signals to warn of hazardous conditions were not placed at appropriate locations on the property. There was nothing posted on the mine site to alert customer drivers to stay in their vehicles or that mine equipment have [*sic*] the right-of-way during load-out procedures. On 6-19-96 two customer truck drivers were injured, one fatally, when they were struck by a Euclid R-35 truck (Co # 54-6502) as it was in the process of turning into the mill area. These drivers could not be seen by the haul truck driver prior to the accident. In the area where the accident occurred there was no warnings of truck travel or to remain in your vehicle.

(Govt. Ex. 10.)

On November 13, 1996, the inspector issued a third citation to the company. Citation No. 4416777 asserts a violation of section 56.9100(a), 30 C.F.R. ' 56.9100(a), in that:

> Rules governing right-of-way were not established and followed on this property. . . . The mine operator failed to establish traffic rules to control right-of-way, a safe traffic pattern and reduce traffic congestion where the Euclid truck normally traveled. They mixed off-road and over-the-road truck vehicles without adequate allowance for the difference in vehicle size. The company allowed a vehicle to be parked in an area that prevented their haul unit driver from seeing the men on the ground before he struck them.

(Govt. Ex. 11.)

Findings of Fact and Conclusions of Law

Citation No. 4416239

This citation alleges a violation of section 50.12, which requires that:

> Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an

> accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

There is no dispute that the accident site was altered when the Euclid truck was moved 30 feet from where it stopped after the accident. Unless moving it comes within one of the exceptions set out in the regulation, the section was violated. I find that the truck was moved to permit emergency vehicles to recover the victims and to eliminate a possible imminent danger and, therefore, the section was not violated.

Anderson testified that he told Bauman to move the truck A[b]ecause, in my opinion, he was much too close to the immediate scene of the accident and it was impeding the emergency people from getting to the two injured gentlemen.@ (Tr. 181.) He further testified on cross examination:

> Q. You did not have the Euclid truck moved to prevent imminent danger?
>
> A. I didn=t know the condition of the truck. I didn=t know if the brake was set, and I could not determine if there might not possibly by an imminent danger of the truck rolling back toward me and everybody else on the ground.

(Tr. 248-49.) While this indicates that Anderson was concerned with a possible imminent danger, the evidence is much stronger that he mainly was concerned with access for emergency vehicles.

Other than stating his opinion that the truck did not have to be moved to permit access to the victims, the inspector, who did not view the scene until the day after the accident, provided no reasons or rationale for his conclusion. He also testified as follows:

> Q. How many rescue vehicles responded to the emergency, do you know?
>
> A. I have no idea.
>
> Q. Did you inquire?
>
> A. Did I inquire?
>
> Q. As to how many vehicles ---?
>
> A. If I did, I don=t remember.
>
> Q. Okay. Thank you. Now, you spoke in terms of your training in fatality investigations. Have you had any personal experience in actual mine rescue that injured victims were present?

A. No, I have not.

Q. Have you had any personal experience in responding to an automobile or truck or equipment accident other than a mine accident where there were injured parties?

A. No, I have not.

(Tr. 137-38.) Thus, the inspector=s opinion appears to be based entirely on the fact that the truck was moved, and not on any investigation to determine whether the movement was necessary to permit access by emergency vehicles.

Essentially, to find a violation in this case, it is necessary to second-guess Anderson=s judgment. As he stated:

> In hindsight, the ambulance could have accessed the victims without my moving the truck. However, at the time, in the heat of the moment, I felt very definitely, and I do feel today, that it was necessary to move the truck. That was a reaction pursuant to my training to clear the area and secure the area for the ambulance.

(Tr. 244.) I find that his decision at the time was reasonable under the circumstances. It unquestionably was made for the reasons stated and was not a surreptitious attempt to undermine the investigation.[2] Finally, as the inspector admitted, the fact that the truck had been moved Adid not impede my investigation.@ (Tr. 135.)

Since moving the truck, although it altered the scene of the accident, was for reasons permitted by the regulation, was not an attempt to subvert the investigation and did not hinder the investigation, I find that it did not violate section 50.12. Consequently, I will vacate the citation.

Citation No. 4416240

This citation alleges a violation of section 56.9100(b) which requires that A[s]igns or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine.@ The inspector found that the company violated this section because there were no signs warning customer drivers to stay in their trucks or that mine vehicles had the right-of-way at the mine. I agree.

[2] There is no evidence that the operator attempted to hide the fact that the truck was moved from the inspector. Further, the operator=s employees showed the inspector where the truck stopped.

Material Services admits that there were no signs anywhere in the yard advising drivers to stay in their trucks, but contends that all of the drivers knew that they were not supposed to get out of their trucks, so the lack of signs was not a violation of the regulation. However, this was clearly not the case. The only customer truck driver who testified at the hearing, McPheron, said

that it was common for drivers to get out of their trucks on mine property in the loading area. He related that:

> Well, everybody has to, you know, use the bathroom, jump out, and that=s the only time you really got to clean your windshield off before you go back out on the highway. And then some guys are sweeping their truck out and then you check your tires to see if you=ve got a flat tire before you go back out. As soon as they get stopped in line or whatever, they=re always jumping out, doing something, you know.

(Tr. 42.) He further testified that Material Services did not give him any warnings or safety precautions to be followed at the yard, nor did anyone advise him about direction of movement or who had the right-of-way. His testimony was unchallenged.

The company makes no claim that drivers getting out of their trucks, at other than designated places, was not a hazardous condition. Obviously, if McPheron and Remillard had not gotten out of their trucks this accident would not have happened. Since their were no signs anywhere directing drivers not to get out of their trucks, I conclude that the company violated section 9100(b). *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997).

Significant and Substantial

The Inspector found this violation to be Asignificant and substantial.@ A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In view of the death of Remillard and the serious injuries of McPheron, there can be little doubt that this violation satisfies the *Mathies* criteria. Therefore, I conclude that the violation was Asignificant and substantial.@

Negligence

The inspector assessed Material Service=s negligence in not complying with the regulation as Amoderate@ because he believed there were few mitigating circumstances involved. I find this to be an accurate assessment.

Citation No. 4416777

This citation alleges a violation of section 56.9100(a) which requires that A[r]ules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine.@ The Secretary has failed to prove this violation.

The inspector testified that this citation was issued because A[t]here were no rules governing the -- who had the particular right-of-way in the area where a fatal accident had occurred the previous June.@ (Tr. 97.) He further stated that Arules had not been established dictating a safe movement of vehicles in the area where an accident had occurred.@ (*Id.*) The inspector maintained that he made this determination by talking to people at the scene of the accident.

On the other hand, Jeff Brasuell, the plant superintendent, testified that in the spring of 1991, after he became superintendent he made some changes in the traffic pattern at the yard because Athere was some congestion coming off the roadways and the flow wasn=t quite as precise or as clear as I thought it could be by implementing some of these changes, and so we looked to make it better.@ (Tr. 262.) He related that a roadway Awas added so that all the traffic moved from east and south and then exited the yard basically on the west side of the yard . . . so that everybody would travel --- everything would travel in a clockwise pattern.@ (Tr. 263.) Specifically, with respect to the Euclid truck, he stated that it was Aa long-standing rule at the plant that the trucks would yield the right-of-way to the Euclid truck.@ (Tr. 285.)

In support of its claim to have rules governing speed, right-of-way and direction of movement, Material Service offered into evidence a map showing the direction of traffic and the location of traffic signs, which existed prior to the accident, to carry out its plan. (Resp. Ex. E.) It also presented pictures of the signs, which included Astop@ signs, Aspeed limit@ signs, Astop ahead@ signs, ADo Not Enter@ signs, ANo Right Turn@ signs, ACaution steep grade@ signs, ACaution. Speed limit 10 mph@ signs, AKeep Right@ signs, AWrong way@ signs, ASlow@ signs, and AYield@ signs. (Resp. Ex. C.)

That the company=s plan was effective is evidenced by the testimony of McPheron. In testifying concerning the area where the accident happened, he stated, AI=m sure it=s one-way, but I=m not sure if it was posted there. It=s just a given that everybody knew which way, you know, to go in and go out.@ (Tr. 31.) With regard to the Euclid truck, he testified: AI don=t think it=s

posted anywhere, but everybody knows, you stay out of his way and leave room for him and you don=t block any roads, you know where he=s going, let him do his job, you know.@ (Tr. 38.)

Finally, to abate this violation, MSHA did not require Material Services to change the rules concerning right-of-way and traffic already in effect, but only to put up a few more signs reinforcing the rules previously established. Randall Mucha, Director of Safety for Material Services, testified that after receiving the citation:

> We looked at traffic patterns again at Yard 46. We even looked at traffic patterns to maybe reverse the flow of traffic at [this] location and every alteration that we were to try --- that we looked at making, we always ended up going back to the original study that was done and original traffic pattern that was completed in 1991.

(Tr. 329.) Off-road and over-the-road trucks are still operating on the same roadways and nothing was apparently done to prohibit trucks from parking were the trucks were parked at the time of the accident, even though those two items were the specific deficiencies set out in the citation as demonstrating that the company had not implemented traffic rules.

The regulation requires that the company have rules, and in this case there is no doubt that the company did have rules. There has been no showing that those rules were in any way deficient.[3] Moreover, there is nothing to indicate that the accident resulted from a failure of the company=s rules of the road. The accident occurred because truck drivers got out of their trucks when they should not have, not because there was confusion as to rights-of-way or who had to yield to whom. The signs that were put up to abate the violation did not change Material Service=s traffic pattern or rules of the road and would not have prevented the accident.

Accordingly, I conclude that the Secretary has failed to establish that the operator violated section 56.9100(a). Consequently, I will vacate the citation.

Civil Penalty Assessment

[3] The only evidence on this citation presented by the inspector was that he had talked to people during his investigation about road rules. He did not state to whom he had talked, nor did he relate what they said. Since this citation was issued some five months after the accident, at the direction of the inspector=s superiors, and over his reservations, which appear to have been well-founded, it is questionable whether the investigation turned up any evidence to support this citation. It it did, the Secretary did not present it.

The Secretary has proposed a penalty of $40,000.00 for the violation of section 56.9100(b). However, it is the judge=s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

With respect to the penalty criteria, the parties have stipulated that Yard 46 worked 50,906 man hours during 1996 and that all Material Service operations worked 798,297 man hours during 1996; that for the two years prior to the violations in this case Material Service had 169 violations for 13 mine facilities, of which 10 were issued to Yard 46; and that the company=s ability to remain in business will not be affected by payment of the proposed penalty for all three citations of $60,050.00. (Jt. Ex. 1.) From this, I find that Yard 46 is a medium size mine and Material Service is a medium size company; that the mine=s history of previous violations is average and that the operator=s ability to remain in business will not be adversely affected by a penalty in this case.

I have already found that Material Service=s negligence in this case was moderate. I further find that the gravity of the violation was extremely serious since a fatality occurred, as well as serious injuries to McPheron. The Secretary has not presented any evidence that the company did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation. In fact, based on the available evidence, it appears that Material Service did act in good faith in trying to rapidly abate the violation and I so find.

Taking all of the criteria into consideration, I conclude that a penalty of $30,000.00 is appropriate in this case.

ORDER

Accordingly, Citation Nos. 4416239 and 4416777 are **VACATED**; Docket No. LAKE 97-22-RM is **DISMISSED**; and Citation No. 4416240 is **AFFIRMED**. Material Service Corporation is **ORDERED TO PAY** to pay a civil penalty of **$30,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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