

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 19, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2000-43-M
Petitioner	:	A.C. No. 36-07953-05503
v.	:	
	:	Docket No. PENN 2000-94-M
ROBERT FIELDS,	:	A.C. No. 36-07953-05504
	:	
Respondent	:	Robert Fields Quarry

DECISION

Appearances: John Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Arthur D. Agnellino, Esq., Abrams & Agnellino, Athens, Philadelphia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging violations by Robert Fields (Fields) of 30 C.F.R. §§56.15001, 56.18010.

On April 14, 1999 Richard J. Schilling, an MSHA surface specialist inspected the Robert Fields Quarry, a flagstone operation. William Kithcart, who was on the site, identified himself as the foreman. Schilling asked Kithcart "... about the first aid materials" (Tr. 21.), and the latter told him that they recently opened up and that the kit that they had was stolen sometime during the time that they were not in operation. A stretcher was available and convenient to the working areas.

Schilling issued a Citation alleging a violation of 30 C.F.R. §56.15001 which provides, as pertinent, as follows: "[a]dequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas."

Alfred Kithcart, the father of William Kithcart, indicated that he took over the quarry in 1999, and that prior to that time he and his son worked the quarry with his uncle. He said that he obtained full control of the operation in the Spring of 1999. According to Kithcart, on April 14, when Schilling inquired of him regarding blankets, he told Schilling that there were blankets on the site, but they were not in plastic bags. Further, according to Alfred Kithcart, the blankets were located in a sleeper attached to a tractor, and in automobiles on the site. Also, according to Alfred Kithcart, an unlocked camper owned by his uncle and located on a hill on the site, contained his uncle's blanket, stretcher, and kit.

Schilling was not shown any first-aid materials when he made an inquiry of William Kithcart who identified himself as the foreman. Nor was William Kithcart aware, at the time cited, that there were any first-aid materials on the site. Also, although Alfred Kithcart testified, in essence, that there were first-aid materials in an unlocked camper on the site, it appears that these materials did not belong to the operator. Moreover, Alfred Kithcart, aside from merely asserting that first-aid materials were in a camper, did not indicate the last time, prior to April 14, that he had actually observed the first-aid kit. Nor did he testify regarding the specific contents of the kit, or the condition and quantity of the items therein.

Within this context, I find that although there were blankets and a stretcher convenient to working areas, there were no "adequate first-aid materials". I thus find that Fields violated section 56.15001 supra.

According to Schilling, the violation was significant and substantial. He indicated that without a first-aid kit, should a miner suffer a broken bone on the site, the failure to immediately immobilize the broken bone with a splint and bandages could lead to a compound fracture. Also, the lack of a first-aid kit containing compresses and bandages could result in significant loss of blood should a miner get seriously cut. In this connection, he noted the presence of injury-causing hazards such as the moving parts of mobile equipment, and the possibility of a miner being caught between items of mobile equipment. He also noted that particles that fly off stone when cut as part of the normal operation, could cause injuries. According to Schilling, an amputation of a limb could result due to exposure to the blade of the saw used in normal operations. In addition, when stone is split by hand as part of the normal operations, small particles fly off which could hit a person. Schilling indicated that the area was wet creating a hazard of a person falling. Additionally, Schilling opined that the heavy material being mined could fall when a person is moving it, or "[W]ith the skid - steer - loaders, you could get caught between, or back into, or even the materials being shift off the forks" (sic) (Tr. 29).

A "significant and substantial" violation is described in section 104(d)(1) of the Mine 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." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor 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.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Based on the testimony of Schilling, I find that it has been established that there was a violation of a mandatory standard, and that the lack of a first-aid kit contributed to the hazard of worsening the effect of an injury by not being able to provide some type of first-aid as quickly as possible. Regarding the third and fourth elements set forth in *Mathies supra*, I note Schilling's testimony as set forth above, and his further testimony that no one currently trained in first-aid was available at the site. However, he not describe in detail the specific nature of all steps of Fields' operation. Nor did he describe with any specificity the teeth of the saws used in this operation.

On the other hand, a telephone was located 150 yards from the pit working area, and 400 yards from the re-cut building where some stone is cut. An ambulance service was located only a few minutes drive from the site. William Kithcart had received first-aid training when he served in the military in 1993, and Alfred Kithcart, had also received first-aid training while in the military, and received weekly first-aid training while working as a mechanic.

I give more weight to the testimony of Alfred Kithcart regarding the condition of the

equipment at the site due to the specifics in his testimony. I also note that this testimony was not contradicted or impeached.

Further, the “highwall” at the site was only 5 feet high and, according to Alfred Kithcart’s testimony, that was not contradicted or impeached, all work on the flagstone was performed on a flat surface. Also, according to his uncontradicted and unimpeached testimony, the saws used at the site to cut the flagstone did not have any teeth but contained diamond chips which cut the flagstone material by means of abrasion and water, rather than by cutting. There is no evidence of any injuries at the site that required treatment by a physician.

Within the above context, I find that the third and fourth elements set forth in Mathies, supra, have not been established. Thus I conclude that it has not been established the violation was significant and substantial.

Considering the testimony of Alfred Kithcart, that he and his son were the only permanent workers at the site, that the mine was a seasonal operation, that the three other persons who worked at the site on occasion were his children, I find that the size of the operation was small. Also, I note that only three citations had been previously issued regarding the operation of the site, and none were issued subsequent to the time that William and Alfred Kithcart took over the operation in 1999. Also, considering the factors that an ambulance service was nearby, that there is no history of serious injuries at the site, that the likelihood of a serious injury was not too great considering the fact that the highwall at the site was only 5 feet high, that the saws used at the site did not have any teeth, and that the material worked on was on a flat surface, I find that the level of gravity of the violation was relatively low. Further, inasmuch as the mine was not in operation, that its first-aid materials had been stolen over the previous winter when the mine was not in operation, that one of the two permanent workers at the site, Alfred Kithcart, believed that first-aid materials owned by his uncle were located on the site, that both the permanent workers on the site had some degree of first-aid training, I find that the level of Fields’ negligence was relatively low. Further, considering Alfred Kithcart’s testimony, that was not contradicted or impeached, that after the Citation had been issued, blankets on the site were put in plastic bags, and that upon receipt of the Citation at issue, a first-aid kit was purchased containing ace bandages, gauze, band-aids, sterile packs, and tape, I find that Fields acted in good faith in abating the Citation at issue. Taking into account all the above factors, I conclude that a penalty of twenty-five dollars (\$25.00) is appropriate for this violation.

Schilling also cited Fields for violating 30 C.F.R. §56.18010, which requires that an individual capable of providing first-aid shall be available on all shifts, and shall be currently trained. Fields conceded that when cited, there was no one available on the site who was currently trained in first-aid. I thus find that Fields did violate Section 56.18010 supra.

According to Schilling, the factors that he set forth in his testimony regarding the first Citation that he issued, relating to his conclusion that it was significant and substantial, apply

equally to the instant Citation. Thus, essentially for the reasons set forth above, I find that, within the context of that evidence, the violation was not significant and substantial.

Essentially for the reasons set forth above, I find that the level of gravity of the violation as well as the negligence of Fields to have been low. Taking this into account, as well as considering the remaining factors set forth in Section 110i of the Federal Mine Safety and Health Act of 1977, I find that a penalty of twenty-five dollars (\$25.00) is appropriate for this violation.

ORDER

It is ordered that, within 30 days of this Decision, Fields shall pay a total civil penalty of fifty dollars (\$50.00).

Avram Weisberger
Administrative Law Judge
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Distribution: (Certified Mail)

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