

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2007-163
Petitioner	:	A.C. 36-01818-110700-02
	:	
v.	:	
	:	
R S & W COAL COMPANY, INC.,	:	R S & W Drift
Respondent	:	

DECISION

Appearances: Patrick M. Boylan, Conference and Litigation Representative, Mine Safety and Health Administration, Department of Labor, Wilkes-Barre, Pennsylvania, and John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Randy Rothemel, R S & W Coal Company, Schuylkill, Pennsylvania, *Pro Se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against R S & W Coal Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges a single violation of the Secretary’s mandatory health and safety standards and seeks a penalty of \$76.00. For the reasons set forth below, I modify the citation and assess a penalty of \$35.00.

Background

_____The R S & W Drift Mine is owned and operated by R S & W Coal Company, Inc. The company mines anthracite coal at this Schuylkill, Pennsylvania location. The mine employed an average of 6 employees for the first three quarters of 2007. There has been no production at the mine since the beginning of September 2007.

Ronald G. Pinchorski, Coal Mine Safety and Health Inspector, conducted a mandatory inspection at the R S & W Drift Mine on October 17, 2006. During the inspection, he issued Citation No. 7009043, under section 104(a) of the Act, 30 U.S.C. § 814(a), which was contested at trial.

Findings of Fact and Conclusions of Law

The citation alleges a violation of section 77.1605 of the Secretary's regulations, 30 C.F.R. § 77.1605, because: "The left side door window on the Caterpillar Model 966C, rubber tired front-end loader (Sn#76J940) was not maintained in good condition, in that the window was broken (Section Missing). This condition caused the possibility of injuries to occur due to sharp edges." (Govt Ex. 1.) Section 77.1605(a), 30 C.F.R. §77.1605(a), provides that: "Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

Inspector Pinchorski testified that the window was located on the left side door. (Tr. 13.) This is the side of the Caterpillar that the operator would mount and dismount. (Tr. 13.) Inspector Pinchorski believed that the broken Plexiglas window contained sharp edges. (Tr. 13.) According to him, the handle of the door was located several inches away from the broken part of the window. (Tr. 39.) Timely abatement of the citation occurred when the window was removed. (Tr. 15.)

Randy Rothermel, owner of the company, testified that the window, which he brought with him to the trial, was broken about an inch from the top. (Resp. Ex. A, Tr. 52.) He said that he did not believe it was a violation because "it's impossible to get hurt the way that window was installed in the loader." (Tr. 43.) He estimated that the window had been in the same condition between three and five years. (Tr. 43.)

It is undisputed that the window was broken. However, based on an examination of the window, I conclude that it was broken about an inch from the top and not a third of the way up as the inspector recollected. Regardless, since the window was broken, it was not in good condition and I conclude that the operator violated section 77.1605(a) as alleged.

Significant and Substantial

The inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated 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 (Dec. 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 S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

The inspector testified that since the loader was mounted and dismounted numerous times a day, he felt as if an injury was reasonably likely. (Tr. 14.) He further testified that possible injuries included slipping or falling into the broken part of the window and lacerating a wrist, hand, or arm. (Tr. 15.) On the other hand, Rothermel did not believe it was possible to cut one's self on the broken part of the window. (Tr. 44.)

While it appears unlikely that the broken window would cause a laceration, it makes little difference because it is even more unlikely that someone could inadvertently come in contact with the break. The door is opened before the operator climbs up to enter the cab. (Tr. 38.) The handle used to climb up into the cab is about a third of the way up the window and some 20 inches below the break. If someone slipped while entering the cab, they would fall into the open cab. If they grabbed for the handle and missed, they would either hit the window well below the break or stick their hand in the open cab. If the door were shut and they slipped and grabbed for the handle they would still be well below the break.

I find that the third *Mathies* criterion has not been met. There is no reasonable likelihood that the broken window would result in an injury. Accordingly, I conclude that the violation was not "significant and substantial" and will modify the citation accordingly.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$76.00 for this violation. 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 (Apr. 1996).

In connection with these criteria, the parties have stipulated that the Respondent demonstrated good faith in attempting to achieve compliance after notification of the violation. (Tr. 7.) In addition, the evidence shows that this is a small mine and that the operator has a good history of previous violations. (Govt. Exs. 5, 6 and 7.) Further, the operator has not demonstrated that the payment of the assessed penalty will adversely affect his ability to remain in business.

With regard to gravity, I find that this was a non-serious, technical violation of the rule in that the broken part of the window was so high up that it posed little hazard. I further find that, for this reason, the operator's negligence concerning this violation was "low." The citation will be modified accordingly.

Taking all of these factors into consideration, I conclude that a penalty of \$35.00 is

appropriate for this violation.

Order

In view of the above, Citation No. 7009043 is **MODIFIED** by changing the likelihood of injury from “Reasonably Likely” to “Unlikely,” the “Significant and Substantial” designation from “Yes” to “No” and the level of negligence from “moderate” to “low” and is **AFFIRMED** as modified. R S & W Coal, Inc., is **ORDERED TO PAY** a civil penalty of **\$35.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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