# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 11, 1997

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. SE 96-352-M |
| Petitioner | : | A. C. No. 31-01633-05552 |
| v. | : | |
| | : | |
| EAST COAST LIMESTONE, INC., | : | |
| Respondent | : | Maple Hill Mine |

## DECISION

Appearances: Frances B. Schleicher, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Connie M. Goodson, Vice President, East Coast Limestone, Inc., for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a). The petition seeks to impose a total civil penalty of $1,386.00 for nine alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the regulations. This matter was heard on March 11, 1997, in Wilmington, North Carolina. Connie M. Goodson, Vice President of East Coast Limestone, Inc. (ECL), appeared on behalf of the respondent Corporation. Bobby Goodson, Mrs. Goodson=s husband, is the corporate President. The parties stipulated the respondent is a mine operator subject to the jurisdiction of the Act.

At the hearing, the respondent withdrew its contest of the $50.00 proposed civil penalty for Citation No. 4550963. At the conclusion of the hearing, the parties were advised that I would defer my ruling in this case pending post-hearing briefs, or, issue a bench decision if the parties waived their rights to file post-hearing briefs. The parties declined to file briefs. (Tr. 171-72). Accordingly, this decision formalizes the bench decision issued at the end of trial. (Tr. 175-97). The bench decision affirmed five citations, modified two citations by deleting the significant and substantial (S&S) designations, and vacated one citation. The total civil penalty assessed in these matters for the eight citations, including the citation for which the contest was withdrawn, is $785.00.

### I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission=s standards with respect to what constitutes an S&S violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

*See also Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. ' 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assesing civil penalties:

> the Commission shall consider the operator=s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator=s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

For penalty assessment purposes, the evidence reflects mitigating factors in that the respondent is a small to moderately sized operator that does not have a significant history of violations. (Gov. Exh. 11). The proposed civil penalties will not effect the respondent=s ability to remain in business, and the respondent rapidly abated the cited violations.

II. Findings and Conclusions

ECL operates a limestone quarry in Maple Hill, North Carolina. At this facility ECL extracts limestone through a drilling and blasting process. The limestone is hauled from the pit by truck where it is dumped at conveyors. The limestone is placed on conveyors by front-end loaders for transport to the crushing plant where it is crushed, cleaned, sized and stockpiled for distribution. Kelly Fultz, A Mine Safety and Health (MSHA) Inspector assigned to the Columbia, South Carolina Field Office, conducted a routine safety inspection of the Maple Hill plant on June

18 and June 19, 1996. During the course of his inspection, Fultz was accompanied by Craig Dixon or Buck Pierce. Dixon and Pierce are ECL foremen.

A. Citation No. 4550657

Fultz, accompanied by Dixon, entered the respondent=s shop and observed oil located on the floor around barrels and a large tank that had a capacity of approximately 500 to 1,000 gallons. The tank and barrels were connected to electric pumps that were used to fill smaller, hand-held cans with hydraulic fluids and oil to service and maintain equipment. Consequently, Fultz issued Citation No. 4550657 citing a non-S&S violation of the mandatory safety standard in section 56.20003, 30 C.F.R. ' 56.20003, that requires that Athe floor of every workplace shall be maintained in a clean and, as far as possible, dry condition (emphasis added).@

Goodson stated the floor around the drums and tank was constantly being cleaned because of spills that invariably occurred from drips or overflows during the can filling process. Consistent with Goodson=s testimony, Fultz explained that he designated the violation as non-S&S because the spills were confined to an area that was Anot in a regular traveled workway@ in that the cited area was not Awhere you do your normal walking through the shop.@ (Tr. 26-27). The Secretary proposed a civil penalty of $50.00.

The undisputed condition cited by Fultz constitutes a violation of section 56.20003. Although men may have been cleaning up the oil at the time of Fultz=s inspection as asserted by Goodson, there is a reasonable inference to be drawn that the cleanup was motivated by Fultz=s presence in the shop. Significantly, Dixon did not inform Fultz that the spills in question were very recent, or, that they were in the process of being cleaned. Therefore, Citation No. 4550657 is affirmed. Although I recognize the slip and fall hazard associated with stepping in oil, given the viscosity of oil, the inherent drips and spills that will occur during the can filling process, and the confined affected area, the negligence attributable to the respondent is reduced from moderate to low. Accordingly, a slightly reduced civil penalty of $35.00 shall be assessed for Citation No. 4550657.

B. Citation No. 4550658

As Fultz was leaving the shop area, he observed a haulage truck being driven from the direction of the plant to the pit with the driver=s door open. Fultz looked up through the open door and observed the seatbelt hanging from the seat. Fultz stopped the truck and talked to the driver. The driver, Rodney James, informed Fultz that he had just gotten back in the truck after checking something outside, and that he had forgotten, or not had a chance, to buckle his seatbelt. Consequently, Fultz issued Citation No. 4550658 for an alleged S&S violation of the mandatory safety standard in section 56.14131(a), 30 C.F.R. ' 56.14131(a), that requires that Aseatbelts shall be provided and worn in haulage trucks.@ The Secretary seeks to impose a civil penalty of $362.00 for this violation.

The evidence clearly establishes a violation of the cited mandatory standard. However, the issue of whether the violation was properly designated as S&S is not so clear. With the exception of respirable dust violations, that are presumed to be S&S because of the cumulative effects of respirable dust inhalation, issues concerning S&S must be decided based Aon the particular facts surrounding the violation....@[1] *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *See Consolidation Coal Co.*, 8 FMSHRC 890, 898 (June 1986), *aff=d* 824 F.2d 1071 (D.C. Cir. 1987). Thus, there is no legal authority for the MSHA policy, as enunciated by Fultz, that all seatbelt violations must be presumed to be S&S in nature.

In this case, Fultz testified that the respondent has a very strict policy that requires all drivers to wear seatbelts. The spontaneous exculpatory statement by James, that he had just gotten back in his truck moments before, supported by his open driver door, is credible and of significant evidentiary value. Whether a violation is properly characterized as S&S must be viewed in the context of continued mining operations. *Halfway Incorporated*, 4 FMSHRC 8, 12-13 (January 1986). Here the testimony supports the respondent=s contention that James=s failure to buckle up was a momentary lapse of memory that was contrary to company policy. The Commission has stated that an S&S designation Arequires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is [a serious] injury.@ *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). The Secretary has not demonstrated, or even asserted, that James=s failure to secure his seatbelt was more than an isolated event. Thus, there is an inadequate basis for concluding that there was a reasonable likelihood of an injury causing event. Accordingly, the S&S designation for Citation No. 4550658 shall be deleted. Balancing the reduction in gravity in view of the S&S deletion, with the importance of wearing seatbelts at all times, a civil penalty of $125.00 is assessed for this citation.

C. Citation No. 4550659

During his inspection, Fultz, in the presence of Dixon, examined John Deere haulage truck No. 578. Fultz determined the service brakes, park brakes, service horn and windshield wipers were in proper working order. Fultz requested Dixon to put the truck in reverse. Fultz stood by

[1] There is also case law suggesting that violations of the mandatory safety standard in section 75.360(a), 30 C.F.R. ' 75.360(a), concerning preshift examination requirements are presumptively S&S Abecause of the inherent potential hazards existing in underground mining.@ *Manalapan Mining Company, Incorporated*, 18 FMSHRC 1375, 1395 (August 1996) (concurring opinion).

the side, rear of the truck and noted that although he could hear the backup alarm with the truck idling, he could not hear the backup alarm when Dixon revved the engine up. (Tr. 61). Consequently, Fultz issued Citation No. 4550659 for an alleged violation of section 56.14132(b)(2), 30 C.F.R. ' 56.14132(b)(2), that requires alarms to be audible above surrounding noise levels. Fultz concluded the violation was non-S&S because he did not observe any foot traffic in the loading or unloading areas.

The evidence reflects the backup alarm was operational. However, depending upon how forcefully the engine was revved, there became a point when the alarm could not be heard. Fultz conceded that it is difficult to keep a haulage truck backup alarm in optimum operating condition because it frequently gets clogged with mud. (Tr. 63-64). Given the operational condition of the alarm, and the mitigating testimony by Fultz concerning the difficulty of maintaining the cited alarm, the degree of the respondent=s negligence is reduced from moderate to low. Therefore, a corresponding reduction in the proposed penalty from $50.00 to $25.00 shall be assessed.

D. Citation No. 4550660

Fultz issued Citation No. 4550660 for a violation of the mandatory standard in section 56.14132(a), 30 C.F.R. ' 56.14132(a), because he determined the respondent=s Kobelko LK 300A front-end loader=s service horn was not operational. The respondent has stipulated that the horn was not working. Although the service horn malfunction had been noted in the preshift examination book, there was no explanation noted for why it had not been repaired. Fultz designated the violation as non-S&S because he did not observe any foot traffic in the area. He also determined the cited loader=s service brakes were in good operating condition, and he concluded the brakes could be relied upon to stop the loader thus minimizing the need for using the horn. (Tr. 73). The Secretary proposes a civil penalty of $50.00 for this violation.

As noted, the respondent admits the fact of the violation. With respect to the appropriate penalty to be assessed, the administrative law judge is not bound by the civil penalty proposed by the Secretary. Rather, as the trier of fact, I must consider the statutory penalty criteria and the deterrent purposes underlying the Act=s penalty assessment provisions. *See Sunny Ridge Mining Company, Inc., et al*, 19 FMSHRC 254, 263 (February 1997) *citing Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), aff=d 736 F.2d 1147 (7th Cir. 1984). Here, the respondent failed to take any action to repair a malfunctioning horn noted in the preshift examination book. Ignoring a condition noted during a preshift examination negates the purpose of the examination. Such conduct must not be condoned and warrants a finding of an increase in the degree of the respondent=s negligence. Consequently, an increased civil penalty of $100.00 shall be assessed.

E. Citation No. 4550961

Fultz inspected the respondent=s Terex 90B front-end loader. Fultz observed a cut in the operator=s seatbelt, which he estimated was Amore than half way through@ the width of the belt,

in the area where the seatbelt extends up from the vehicle floor. As a result, Fultz issued Citation No. 4550961 citing an alleged S&S violation of section 56.14130(i), 30 C.F.R. ' 56.14130(i). This mandatory safety standard requires seatbelts to be Amaintained in functional condition, and replaced when necessary to assure proper performance.@ The Secretary proposes a civil penalty of $362.00 for this citation.

With respect to the fact of occurrence of the cited violation, the respondent does not deny that there was a cut in the subject seatbelt. In fact, the respondent has provided a photograph of the cut in question. (*See* Resp. Exh. 6). Based upon the condition of the seatbelt depicted in Resp. Exh. 6, there was a reasonable basis for Fultz=s conclusion that this seatbelt should be replaced Ato assure proper performance.@ Accordingly, the evidence establishes the fact of the violation.

Turning to the issue of S&S, once again we are confronted with the propriety of MSHA=s policy that all seatbelt violations are deemed to be significant and substantial in nature. However, as discussed above, S&S questions must be resolved on a case-by-case basis based on the totality of circumstances surrounding the violation. It is well settled that the Secretary has the burden of proving a violation is S&S. *See Peabody Coal Co.*, 17 FMSHRC 26, 28 (January 1995) *citing Union Oil of Cal.*, 11 FMSHRC 289, 298-99 (March 1989). Thus, it is incumbent on the Secretary to demonstrate that there is a reasonable likelihood, based on the facts in this case, that the condition of the seatbelt (the hazard) will result in a serious injury causing event (the failure of the seatbelt).

At the outset, while Fultz characterized the cut in the belt as Amore than half way through,@ there is no evidence of actual measurements of the cut and belt width. Examination of the photograph on Resp. Exh. 6 reveals the cut to have been approximately one-third through the belt. (Tr. 93). In any event, I credit Fultz=s testimony that the seatbelt was Aprobably compromised 40 to 50 percent.@ (Tr. 87). While such a cut on a seatbelt in a haulage truck may be properly designated as S&S, this citation concerns a front-end loader. Fultz testified operation of this loader was confined to the crusher area where it was maneuvered to pick up dumped material and load it into the crusher hopper. (Tr. 101). Although this area was on an incline, Fultz conceded the maximum speed attained by this front-end loader was between 5 and 10 miles per hour. (Tr. 102). While I recognize Fultz=s concern about the potential for the loader to turn over, such an event still requires a reasonable likelihood of seatbelt failure in order for the Secretary to prevail on the S&S issue.

In the final analysis, if a seatbelt is intended to hold drivers securely in place at highway speeds, is the same seatbelt, approximately 40 percent compromised, reasonably likely to fail at speeds of 5 to 10 miles per hour? I don=t think so. Accordingly, Citation No. 4550961 is modified to delete the significant and substantial designation.

Although the S&S designation has been deleted, thus reducing the gravity of the violation, I concur with the Secretary that a defective seatbelt is a serious violation attributable to a

moderate degree of negligence on the part of the respondent. Consequently, a civil penalty of $150.00 shall be imposed.

F. Citation No. 4550962

Fultz determined the parking brake on the respondent=s John Deere No. 406 haulage truck would not hold the loaded truck when tested on a slight incline. Fultz issued Citation No. 4550962, citing a violation of section 56.14101(a)(2), 30 C.F.R. ' 56.14101(a)(2). This mandatory standard requires parking brakes to be Acapable of holding [mobile] equipment with its typical load on the maximum grade it travels.@ The Secretary seeks to impose a $50.00 civil penalty for this violation which the Secretary has designated as non-S&S.

The respondent does not deny the inadequacy of the parking brake. Rather, the respondent asserts there is no violation because its haulage trucks are routinely parked on level ground. The respondent misses the point. Parking brakes are commonly known as Aemergency brakes.@ When the service brakes malfunction or become inoperable, such as in instances where a haulage truck stalls, the emergency brake may be the last resort for controlling the vehicle. Parking brake malfunctions can contribute to fatal accidents. *See*, *e.g.*, *Fluor Daniel Incorporated*, 16 FMSHRC 2049 (October 1994), *rev=d on other grounds* ,18 FMSHRC 1143 (July 1996). While I disagree with the Secretary=s under-zealous characterization of the cited violation as non-S&S, the *sua sponte* authority of an administrative law judge to modify a citation to add an S&S designation under section 105(d) of the Act, 30 U.S.C. ' 815(d), is unclear. See *Mechanicsville Concrete, Inc., t/a Materials Delivery*, 18 FMSHRC 877, 880 (June 1996). While I will affirm the citation as issued, the serious gravity and degree of negligence associated with the continued operation of a multi-ton haulage truck without adequate parking brakes, at the very least, warrants a doubling of the initial penalty proposed by the Secretary. Accordingly, a civil penalty of $100.00 shall be assessed for Citation No. 4550962.

G. Citation No. 4550963

At the hearing, the respondent withdrew its contest of Citation No. 4550963. (Tr. 117). This citation concerned the malfunction of the service horn on the respondent=s John Deere 844 front-end loader in violation of 56.14132(a), 30 C.F.R. ' 56.14132(a). The violation was designated as non-S&S, and the Secretary proposes a civil penalty of $50.00. Consequently, Citation No. 4550963 is affirmed, and the respondent shall pay the proposed $50.00 civil penalty.

H. Citation No. 4550964

Fultz issued Citation No. 4550964 for a violation of section 56.9300, 30 C.F.R. ' 56.9300, on the basis of his observation that berms and guardrails were not provided on the outer bank of the roadway going to the filler plant hopper feeder. This roadway is traversed by the John Deere 844 front-end loader. Fultz designated the violation as S&S because of the exposure of the loader to unprotected sides of the roadway. Fultz opined that given the absence of a berm, under conditions where the loader is frequently unbalanced because of a full raised bucket, it was reasonably likely that the loader will fall off the side of the roadway causing serious injuries to the loader operator. Fultz testified the roadway was approximately 14 feet wide, and that the height of the inclined roadway to the ground below, from the beginning to the end of the roadway=s 40 feet length, increased from zero feet to a maximum of 6 to 10 feet. (Tr. 136-37). Fultz testified there was evidence that berms were once there, although they apparently had been washed away.

At the hearing, the respondent essentially conceded the absence of the berms. However, the respondent relied on a building, located approximately 5 feet from the side of the roadway, to prevent the loader from overturning as an alternative to berm protection.

I credit Fultz=s testimony concerning the respondent=s failure to maintain berms on the cited roadway. A building, located near the side of a roadway, does not satisfy the mandatory safety standard section 56.9300 that requires berms on elevated roadways. Accordingly, the evidence supports the fact of the cited violation. Fultz=s testimony regarding the likelihood of the loader falling off the side of this unprotected roadway was credible. Consequently, the S&S designation in Citation No. 4550964 is also affirmed. Given the conflicting testimony concerning whether the maximum height of the roadway was 6 feet as alleged by the respondent, or 10 feet as asserted by Fultz, which impacts on the gravity and degree of negligence penalty criteria, the $362.00 civil penalty proposed by the Secretary shall be reduced to $200.00.

I. Citation No. 4550965

Based on Fultz=s inspection findings of defective mobile equipment, such as malfunctioning front-end loader service horns, an inadequate back-up alarm, a defective seatbelt, and defective parking brakes, Fultz concluded the respondent was failing to inspect its mobile equipment before each shift as required by section 56.14100, 30 C.F.R. ' 56.14100. Consequently, Fultz issued Citation No. 4550965 citing a non-S&S violation of this mandatory standard. The Secretary proposes a $50.00 civil penalty for this citation.

Fultz admitted that his basis for issuing this citation was his assumption that no preshift inspections had been performed. Fultz admitted he did not ask any employees if they had preshifted the vehicles. He also acknowledged that he did not ask to examine preshift records or otherwise seek to determine if preshift inspection reports were kept by the respondent. At the hearing the respondent presented preshift inspection reports. (Tr. 158-60).

I am unpersuaded by the Secretary=s position that an operator is presumed to have failed to perform preshift inspections of mobile equipment simply because defects in the equipment are revealed during the course of an MSHA inspection. In the absence of specific evidence constituting inadequate preshift inspection procedures, mere speculation that the respondent failed to perform preshift examinations because of defects detected by an MSHA inspector does not provide an adequate basis for establishing that the failure to preshift in fact occurred. Accordingly, Citation No. 4550965 shall be vacated.

## ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 4550658 and 4550961 are modified to delete the significant and substantial designations. **IT IS FURTHER ORDERED** that Citation No. 4550965 **IS VACATED**. The respondent shall pay a total civil penalty of $785.00 within 30 days of the date of this decision in satisfaction of the citations in issue in this matter. Upon timely receipt of payment, this docket proceeding **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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