FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

October 15, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-26-M
Petitioner	:	A. C. No. 22-00679-05503
v.	:	
	:	Scott Pit
COUSINS' AGGREGATE SALES &	:	
HAULING, INC.,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Secretary;
Ronald W. Fisk, Vice President, Cousins' Aggregate Sales & Hauling, Inc., New Orleans, Louisiana, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Penalty filed by the Secretary of Labor ("Secretary"), alleging that Cousins' Aggregate Sales & Hauling, Inc., ("Cousins") violated various mandatory safety standards set forth in Title 30 Code of Federal Regulations. Pursuant to notice, the case was hearing in Convington, Louisiana, on September 14, 1999. The Parties waived the filing of a post hearing brief.

I. Introduction

On September 10, 1996, Joseph Boudreaux an employee of Cousins walked on top of a pipeline, located over a body of water, in order to access a dredge that was approximately 80 feet from the shore. Boudreaux fell from the pipeline into the water and drowned. Subsequent to an investigation, MSHA Inspector Benny W. Lara, issued a citation alleging a violation of 30 C.F.R. § 50.10 and two orders issued pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977 ("the Act") alleging violations of 30 C.F.R. §§ 56.15020 and 56.14100(b), respectively.

II. Citation No. 4446089 (violation of section 103(j) of the Act, and 30 C.F.R. § 50.10)

A. Violation

Section 103(j) of the Act provides that in the event of an accident occurring in a mine " . . . the operator shall notify the Secretary thereof . . . ." Section 50.10, supra, as pertinent, provides that "[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." (Emphasis added.)

None of Cousins agents or officers took the initiative in notifying MSHA of the accident at issue on September 10, 1996. Indeed, Cousins conceded at the hearing that it did violate section 50.10, supra. Accordingly, I find that Cousins did violate section 50.10, supra.

B. Penalty

There is no evidence that this violation would have resulted in an injury to any miner. I thus find that the gravity of this violation was low. At the date of the accident, Cousins had only three employees, and thus is considered a small operation. Also, prior to the issuance of the orders and citations at issue, MSHA had not issued Cousins any other citations or orders. Thus, Cousins does not have any history of violations. The Parties stipulated that the violations were abated in a timely manner, and in good faith.

In essence, Lara opined that the level of Cousins' negligence was high. In support of this opinion Lara cited that fact that Cousins had been in operation for 10 years, had been subject to MSHA's jurisdiction at other sites for this period of time, and therefore should have known of its reporting responsibilities pursuant to section 103(j), supra, and section 50.10, supra. On the other hand, John Caldwell, who was Cousins' superintendent at the site in question on September 10, testified he did not call MSHA after the accident because he thought that the site was not subject to MSHA jurisdiction as it was not in operation. In this connection, he stated that although approximately 20 tons of material had been produced and piled up, no material had been sold. Don Fisk, Cousins' President, also was of the opinion that the site was not subject to MSHA jurisdiction, as equipment on the site was still being rebuilt. Also, Fisk indicated that after he was informed of the occurrence of the fatality shortly after 9:30 a.m., he was excited and that it did not occur to him to call anyone except Ron Fisk, Cousins' Vice President. For these reasons, I conclude that the level of Cousins' negligence to have been less than moderate.

At the present time, Cousins has been dissolved as a corporation, and is no longer in operation. Further, Cousins' lease of the site was not renewed by the lessor. I thus find that imposition of a penalty would have a negative effect on Cousins' ability to remain in business.

Based upon all the above, I conclude that a penalty of $50.00 is appropriate for this violation.

III. Order No. 4446094 (violation of 30 C.F.R. § 56.15020)

A. Violation

Section 56.15020, supra, provides as follows: "[l]ife jackets or belts shall be worn where there is a danger from falling into water."

According to Lara, his investigation revealed that the decedent had not been wearing a life jacket.[1] Also, Lara's investigation revealed that the decedent, immediately prior to his drowning, was walking a pipeline located over water. Cousins has not disputed this testimony. I thus find that the decedent was not wearing either a life jacket or belt when he walked on the pipeline located over water. I find that this situation presented a danger of falling into water. I thus find that Cousins did violate section 56.15020, supra.

B. Significant and Substantial

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)(l). 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.

---

[1]/ When the decedent's body was retrieved from the water, he was not wearing a life jacket.

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).

The pipeline at issue was approximately 10 inches in diameter and, as observed by Lara, had some sand on its surface. It was located over water that was approximately 15 feet deep, and extended approximately 85 feet from the shore to a dredge. Given these circumstances, and the fact that a fatality did occur, I find that it was reasonably likely that the hazard contributed to by the violative condition of not wearing either a life jacket or a belt while traversing the pipeline at issue, i.e., falling into the water below the pipeline, would have resulted in an injury of a reasonable serious nature, i.e., striking one's head against the pipe or falling into the water and drowning. I thus conclude that the violation was significant and substantial within the framework of the Commission's decision in *Secretary* v. *Mathies*, supra.

B. Unwarrantable Failure

According to Caldwell, on several occasions he had told Alex Parker, the dredge operator, to wear a life jacket. Caldwell stated that he had told Boudreaux, the other employee on the site, more than once to wear his life jacket. Caldwell indicated that the day prior to the accident, he had told Boudreaux not to walk the pipeline. Caldwell indicated that, within 30 days of the accident, he (Caldwell) always wore his life jacket.

Fisk testified that on July 1, he had purchased an additional four life jackets,[2] and had the name of each employee placed on a life jacket. Approximately a week after the four life jackets were purchased, Fisk had the dredge moved from its location close to shore to a point approximately 70 feet from the shore, and told Caldwell, Parker, and Boudreaux to no longer walk on the pipeline, and to have their life jackets whenever they are around water.

On the other hand, Caldwell testified that he was not told by anyone that it was unsafe to walk the pipeline, that he saw both Ron Fisk and Don Fisk, Cousins' Vice President, walk the pipeline, that although he had told Parker and Boudreaux not to walk the pipeline they continued to do so, that he did not discipline them, that Cousins did not have any safety rules or

---

[2]/ Prior to July 1, there were three life jackets at the site for the three employees.

disciplinary program, and that he did not always wear his life jacket while in the rowboat[3] that was used to access the dredge. Fisk stated that after July 1, he observed Boudreaux walking the pipeline without his jacket and that he told him not to do it.[4] Importantly, Fisk, who was the company's president, and should have set a good safety example, conceded when the dredge had been located only 20 feet from the shore, he had walked on the pipeline without a life jacket. Although the water under the pipe was 5 feet deep, and the pipe extended only 20 feet, a life jacket should have been worn as there clearly existed some degree of danger of falling into the water.

Within the context of the above evidence, I find that the violation herein occurred as the result of Cousins' negligence, and that the level of this negligence reached the point of aggravated conduct, and thus constituted an unwarrantable failure (see, *Emery Mining Corp.*, 9 FMSHRC 1997 (1987)).

C. Penalty

I find that the gravity of this violation was relatively high, and that the level of Cousins' negligence was relatively high as set forth above. Considering the remaining factors set forth in section 110(i) of the Act, as discussed above, (II B.). I find that a penalty of $2,000.00 is appropriate for this violation.

IV. Order No. 4446095 (violation of C.F.R. § 56.14100(b)

A. Violation

Section 56.14100(b), supra, provides, as pertinent, that ". . . [d]efects on any equipment, . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

The usual means to provide access to the off shore dredge, in order to repair or service it, was by rowing an aluminum rowboat that was located on the shore.

According to Lara, when he inspected the subject site on September 12, 1996, he rowed to the dredge in the rowboat along with Caldwell. According to Lara, on the way back to the shore, after the boat had been in the water for approximately 20 minutes, he observed approximately 2 inches of water on the bottom of the boat. He indicated that there were three holes on the bottom of the boat, and the diameter of one hole was approximately the size of an eraser on a pencil. According to Lara, to the best of his recollection, when he entered the boat

---

3/ The rowboat was referred to by the witnesses as a "jon boat."

4/ Fisk indicated that he did not fire Boudreaux because he felt that Boudreaux, whom he described as a hard worker, needed the job.

prior to rowing to the dredge, it did not have any water in it.

Caldwell indicated that he had repaired the boat by caulking it on September 9, 1996, but did not test it after he made the repairs. Importantly, Caldwell did not contradict Lara's testimony regarding the depth of the water on the bottom of the boat as observed by him, and the fact that there was no water in the boat prior to its being launched. I thus conclude that, when observed by Lara, the boat did leak. Further, according to the uncontradicted testimony of Lara, the leaks, as observed by him, could only get worse, and, if not corrected, would affect safety, and could cause the boat to sink, thus creating a hazard to any persons in the boat. I thus find that the rowboat did have a defect affecting safety.

Caldwell testified that after he observed the boat leaking on September 9, 1996, he caulked it, and that he had also previously patched leaks around rivets. Fisk testified that he had put silicone around the rivets "off and on." However, since the boat was leaking on September 12, as observed by Lara, I conclude that, in spite of previous patching, all the leaks had not been corrected. Thus, I find that it has been established that Cousins did violate section 56.14100(b), supra.

B. Significant and Substantial

Caldwell opined that the leaks in the boat were "not serious." Fisk testified that he never saw any hole as large as a quarter inch in diameter as testified to by Lara. He opined that the boat was "not leaking badly." However, considering the fact that the boat provides the normal way for employees to travel to the dredge, the distance the boat travels from the shore to the dredge, the fact that, as testified to by Lara and not contradicted, 2 inches of water accumulated in the bottom of the boat after it had been in the water for 20 minutes, and considering the depth of the water in the pond, I conclude that, within this context, the violation was significant and substantial (see, *Mathies*, supra).

C. Unwarrantable Failure

Caldwell testified that in the month prior to the date of the accident after he had informed Don Fisk and Ron Fisk, the two principal officers of Cousins, regarding the leaks in the boat, and they had refused to fix the boat. However, later on in his testimony he indicated that although neither Don Fisk nor Ron Fisk told him to fix the boat, when he had reported the leaks to Don Fisk the first time the latter did not respond, and Caldwell could not recall his response the second time. Caldwell did not set forth with any specificity any words spoken to him by Ron Fisk from which he concluded that the latter had refused to fix the boat. In contrast, I observed the demeanor of Ron Fisk, and found his testimony credible that he had not refused to fix the boat, and that "off and on" he had repaired leaks around the rivets with silicone. Futher, Caldwell had attempted to patch the leaks with caulking on September 9, and also a few weeks prior to that date. Within this context, I find that Cousins had not neglected the leaks, and had made attempts to repair them. Accordingly, its conduct cannot be found to have been aggravated conduct. Thus, I conclude that the violation herein was not the result of Cousins' unwarrantable

failure (see *Emery*, supra).

C. Penalty

Since the violative conditions could have resulted in the boat's capsizing, and thus causing injuries to employees, I find that the gravity of the violation was relatively high. For the reasons set forth above (IV. C.), I find that Cousins was aware of the leaking condition of the boat, but that it did make an attempt to repair the leaks. Thus, I conclude that the level of its negligence was moderate. Taking into account the remaining factors set forth in section 110(i) of the Act, as discussed above (II. B.), I conclude that a penalty of $200.00 is appropriate for this violation.

ORDER

It is **ORDERED** that Order No. 4446095 be amended to a section 104(a) citation that was significant and substantial. It is further **ORDERED** that within 30 days of this Decision, Cousins shall pay a total civil penalty of $2,250.00.

Avram Weisberger
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Chambers Building, Suite 150, Highpoint Office Center, 100 Centerview Drive, Birmingham, AL 35216 (Certified Mail)

Ronald W. Fisk, Vice President, Cousins' Aggregate Sales & Hauling, Inc., 1661 Canal Street, Suite 1000, New Orleans, LA 70112 (Certified Mail)

dcp