

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

July 20, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-49-M
Petitioner	:	A. C. No. 40-00053-05515
v.	:	
	:	
HOOVER INCORPORATED,	:	Murfreesboro Quarry & Mill
Respondent	:	

**DECISION**

Appearance: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of Petitioner;  
Granville S. R. Bouldin, Jr., Esq., Bouldin & Bouldin, Murfreesboro, Tennessee, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against Hoover, Incorporated (Hoover) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801(e) *et. seq.*, the "Act," seeking a civil penalty of \$252.00, for one violation of the mandatory standard at 30 C.F.R. ' 56.7012.

The citation at bar, Citation No. 4898682, alleges a "significant and substantial" violation of the cited standard and charges as follows:

The Ingersoll Rand DM25 SP Drill, company #509009 was left unattended while it was in operation. The drill operator was measuring the depth of holes previously drilled and away from the drill cab. There was a front-end loader and operator working below the bench where the drill was operating approximately 38 feet below. In [*sic*] event that the drill were to unexpectedly malfunction, and since it was close to the edge of the bench, it could topple over and land where the loader was operating resulting in possibly a fatality. While in operation, drills shall be attended at all times.

The cited standard, 30 C.F.R. ' 56.7012, requires that "[w]hile in operation, drills shall be attended at all times."

The subject mine is a surface limestone extraction and crushing operation. The limestone

is drilled and blasted. It is then loaded onto trucks and taken to the crusher. Mining is performed by creating benches. According to Inspector E. G. Duarte, of the Department of Labor's Mine Safety and Health Administration (MSHA), the subject drill was operating on a bench in the quarry area and the closest person to the drill was its operator who was measuring drill holes on the bench 150 to 180 feet away. According to Duarte, the drill at this time was drilling the hole closest to the edge of the 38 foot highwall and a front end loader was operating below the bench. Duarte approached the drill operator and asked if anyone was at the drill. The drill operator responded in the negative. Duarte did not observe anyone else on the bench at the time.

It is undisputed that photographs (Gov. Exhs. 3A through 3G) accurately depict the drill at issue but in no way represent the location or conditions present at the time of the citation. According to Duarte, the drill's operating controls are located inside its enclosed cab. In order to reach the controls the operator in this case therefore would have had to walk or run 150 to 180 feet, open the cab door and climb into the cab. Within this framework of evidence I have no difficulty in concluding that the cited drill was in operation while not attended within the meaning of the cited standard.

Respondent appears to claim that the cited standard is unconstitutionally vague in that a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, would not recognize a hazard warranting corrective action within the purview of the regulation at issue. *Alabama By-Products Corporation*, 4 FMSHRC 2128, 2129-2130 (December 1982). However, even Respondent's superintendent, Kenneth Vanderpool, acknowledged, in reference to attending the drill, that the drill operator "wouldn't have no business" going as far as even 75 feet from an operating drill. Thus, even if there could be some ambiguity in the application of this standard to other factual situations, there is no ambiguity in its application to this Respondent on the fact of this case where the credible evidence shows that the drill operator was 150 to 180 feet from the drill.

In reaching this conclusion, I have not disregarded the testimony of drill operator Nathan Nickens that he was standing next to the dust collector within eight to ten feet of the drill when inspector Duarte "appeared." This apparent conflict with Inspector Duarte's testimony may be explained by the likelihood that Duarte observed Nickens before Nickens was aware of Duarte's presence. In any event, I find the inspector's testimony to be the more credible in this regard. I note on the face of the citation, which would have been prepared contemporaneously with his observation of the violation, the inspector reported that the drill operator was in fact measuring the holes previously drilled away from the cab. This is consistent with his testimony at hearing. While it would have been more helpful if the inspector had reported the 150 to 180 foot distance in his contemporaneous notes and had produced those notes at hearing I nevertheless attribute greater weight to the inspector's observations corroborated to some extent by his contemporaneous citation.

The Secretary also maintains that the violation was "significant and substantial." A

violation is properly designated as "significant and substantial" if, based on 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 explained:

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

*See also Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

On the facts of this case I do not find the Secretary has met the third element of the *Mathies* formula. Duarte testified that he was concerned about the hazards of the drill toppling over the edge of the 38 foot highwall onto the front end loader working below. According to Duarte, there were two ways this could happen. First, he maintained that if the drill steel hangs in the hole, the drill "might possibly" jerk from the vibration and rotate over the edge of the highwall. However, Duarte had no specific anecdotal evidence of such an event and the Secretary failed to establish that he had the necessary qualifications to calculate the forces necessary to move this multi-ton drill sufficient to rotate it over the edge of the highwall. Clearly such a conclusion could only be reached based upon sophisticated computations and an understanding of the principles of physics. Duarte's qualifications in this regard were not established. Without having either specific anecdotal evidence or the expertise necessary for making the requisite computations, I can give but little weight to the inspector's testimony. In addition, Hoover safety director, Jerry Rogers, testified that even if the drill steel would hang up, it would not produce sufficient force to rotate a several-ton drill.

The second hazard Duarte described related to an incident wherein the ground on the

bench gave way and the drill operator, who was in the cab of the drill, was killed when the drill toppled over the highwall. The Secretary's position in this regard is irrational, however, since non-compliance with her reading of the standard would place the drill operator in a safer position outside of the cab. In the case of the illustrated fatality, compliance with the standard would likely place the drill operator in a hazardous position inside the cab.

The Secretary also cites testimony of Respondent's witnesses to establish the gravity of the violation. In particular, she cites the testimony of Respondent's witnesses that an unattended drill can blow a hydraulic hose causing failure of the hydraulic system or causing the drill motor to burn out. However, the Secretary failed to note that the same witness doubted "very seriously" that a fire would result if the motor became overheated because there were "gauges on there that would cause it to shut down." Considering the absence of credible evidence to support her findings I must conclude that the Secretary has failed to sustain her burden of proving that the violation was "significant and substantial" or of significant gravity.

The Secretary has failed to present evidence or argument regarding negligence and the size of the operator, two other criteria under section 110(i) of the Act. Examination of the operator's prior history of violations (Gov. Exh. No. 2) does not show a serious pattern or any prior violation of the standard at issue herein. The violation was abated, according to the citation, when the drill operator returned to the drill cab. Under the circumstances, I find that a civil penalty of \$25.00, is appropriate for the violation at issue.

### **ORDER**

Citation No. 4898682 is AFFIRMED and Hoover Incorporated is directed to pay a civil penalty of \$25.00, within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge

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