FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

March 4, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 1999-8-M
Petitioner	:	A.C. No. 44-06803-05508
v.	:	
	:	
	:	
VIRGINIA SLATE COMPANY,	:	
Respondent.	:	Adco Land Corp. No. 1

DECISION ON REMAND[1]

Appearances: M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; V. Cassel Adamson, Jr., Esq., Adamson and Adamson, Richmond, Virginia, for the Respondent.

Before: Judge Weisberger

This civil penalty case is before me based upon a decision of the Commission, 24 FMSHRC 507 (2002), which vacated and remanded the unwarrantable failure determinations and penalty assessments set forth in my prior decision in this matter, 23 FMSHRC 867 (2001).

I. Unwarrantable Failure Determinations

A. Order No. 7711667

In the order at issue, Virginia Slate was charged with failing to provide berms, bumper-blocks, safety hooks, or similar impeding devices for the front-end loader that loaded the hopper of the crusher. In essence, in its decision vacating my determination that the violation was not a result of Virginia Slate's unwarrantable failure, the Commission instructed me to consider all the unwarrantable failure factors in conjunction with the specific facts of the violation. The Commission in this regard indicated that in addition to the length of time the front-end loader was used, there are additional factors that must be examined in determining whether conduct is aggravated, including the following: "... the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the

[1]The Decision on Remand issued on March 4, 2003, contained clerical errors. These errors were corrected in an order issued on March 28, 2003. The instant published Decision on Remand has eliminated the clerical errors and is in conformity with the order issued on March 28, 2003.

operator's efforts in abating the violative condition, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation". 24 FMSHRC at 512. Specifically, in this regard, the Commission mandated that an analysis should be made of whether the violation posed a high degree of danger particularly in light of the finding I made that as a result of the violation there was a danger of a loader overturning. The Commission also required that "... when discussing whether the operator had knowledge of the violation, the Judge should explain his finding through reference to specific record evidence." 24 FMSHRC, *supra*, at 5113. The Commission further provided that on remand it should also be determined the extent of the operator's knowledge of the violation specifically addressing the testimony of Adamson, Jr. (Tr. Vol. II, 155-71). Lastly, the Commission required that if it be found that Adamson, Jr. knew or had reason to know that impeding devises had not been provided around the front-end loader then I should consider whether or not Adamson, Jr. was a supervisor and, if he was, whether he violated the standard of care required of supervisory personnel by failing to stop a known violation. 24 FMSHRC *supra* at 513.

b. High Degree of Danger

According to the inspector, the violative condition herein presented a risk of the front-end loader falling onto the hopper. He explained that if the front-end loader would over-travel a disabling injury could result by virtue of the front-end loader overturning by running into the hopper. Also, the loader could go over either side of the hopper, fall down to the ground and collide against rocks located on the ground The inspector opined that such a accident was reasonably likely to occur in continued operations.

The high degree of danger in using the front-end loader to dump at the hopper without a berm or stop-block or impeding device was also recognized by Adamson, Jr. who indicated, in essence, that he was uncomfortable using the front-end loader at the hopper because it has "tremendous power and breakout force", (Tr. Vol. II, 165); that the loader operator could knock down any berm that could be constructed; and that although he was satisfied that for a "momentary test" it would "be all right", he didn't want somebody sitting "on a machine for eight hours, driving up and dumping in, ... and make a mistake, the consequences". (*Id.*) (*sic.*) He indicated that it was possible for the operator to become injured. Also, Adamson, Jr. testified that when he gave the instruction to use the front-end loader for a few minutes, he told the operator to be "super careful ..., be real cautious about this ... we don't want anybody hurt". (Tr. Vol. II, 166)

However, the inference of the presence of a high degree of danger is mitigated by the fact that the Commission in it's decision, 24 FMSHRC *supra*, did not reverse my credibility finding, in the previous decision, 23 FMSHRC 867 (2001), accepting the testimony of Adamson, Jr. over Williams' testimony, and finding that from March, 1997 when operations commenced until June 1, 1998, the excavator was normally used to load the hopper, and that on June 1, the front-end loader was used to load the hopper for about ten minutes. In this connection I note that the inspector conceded on cross-examination that if an excavator feeds the hopper, blocks are not

necessary. Further, I accept Adamson's testimony, based upon his demeanor that I found trustworthy, that it was the intention of the operator to use the excavator to load the hopper once everything returned to normal. Based on my observations of Adamson's demeanor I accord more weight to his in-court sworn testimony, than to the uncorroborated hearsay testimony of the inspector that, "[t]heir [Virginia Slate's] intentions were to use the front-end loader, because the excavator was down in the pit area." *(sic.)* (Tr. Vol. II, 141) (Emphasis added.) Not much weight was accorded this statement as the inspector did not provide the basis for this conclusion, nor did he explain the source of this information. Further mitigating the level of the operator's negligence is the testimony of Adamson, Jr. that on two prior occasions "... this had been -- this aspect of doing it", had been inspected and no fault was found by the previous inspectors. (Tr. Vol. II, 162) I accept this testimony inasmuch as it was not impeached or contradicted.

c. Was Adamson Jr. a Supervisor

According to the inspector he referred to Adamson III as the foreman, and the latter told him that he was responsible for making examinations of the work areas. However, the Secretary did not call Adamson, III to testify nor did the Secretary offer any explanations for its failure to do so. Regarding Adamson Jr., it appears, as president of the company, that he had some supervisory responsibilities. In this connection, I note that on cross-examination, he was asked, in essence, whether he was on the site two hours a day four days a week. He answered as follows: "but at different times, with no precise schedule." (Tr. Vol II, 167) Further, Adamson testified, in essence, that on June 1 the loader operator had asked his permission to use the front-end loader to feed the crusher instead of the excavator, and he reluctantly agreed and allowed it. However, any of his negligence as a supervisor, imputed to the company, is mitigated by the fact that the front-end loader was used for only 10 minutes on June 1.

d. Obviousness of the Violation

The violative condition was observed by the inspector. Also, in response to a leading question on direct examination, the inspector agreed that it was his understanding that a stopping block had been missing for at least a week. Although the inspector did not provide the source for this information, it is significant that this testimony was not impeached or contradicted by the operator.

e. Abatement efforts

As abatement of the violative condition, a stop block was provided at the hopper, and the violation was terminated on June 4, three days after the citation had been issued.

f. Discussion

Weighting all the above factors, I find that the use of a front-end loader without a berm or

stop block or any other impeding device at the dump hopper presented a high degree of danger; the danger was recognized by Adamson Jr.; the violative condition was obvious; and that it did not take a significantly long time to abate the violation. However, I find the existence of significant mitigating factors. In this connection I note that according to the inspector, the use of an excavator to load the hopper would not have violated the regulation cited; that from the time the operation at the subject site commenced until June 1, the front-end loader had been used for only 10 minutes; that it was not intended to use the front-end loader again once everything returned to normal at the hopper; and that no fault had been found by previous inspectors on two prior occasions. Within this context I find that the Secretary has failed to establish by a preponderance of the evidence that the operators negligence reached the level of aggravated conduct. Thus, I find that it has not been established that the violation herein was as a result of the operator's unwarrantable failure.

B. Order No. 7711681

a. Extent and Duration of Failure to Perform Adequate Pre-Shift Examinations

Consistent with my initial decision 22 FMSHRC 378, 390, *supra*, I reiterate my finding that because the record establishes the existence of defects on mobile equipment e.g., inoperable horns and lack of seatbelts, that it was more probable than not that a pre-shift examination had not been performed. Thus the operator was in violation of 30 C.F.R. § 56.14100. Further, the Commission, in the instant remand, 24 FMSHRC *supra*, took cognizance of my acceptance of the testimony of Roy Lee Green, regarding the missing portion of a seatbelt on mobile equipment, and that he had driven the truck for three weeks without a seatbelt.

Adamson testified that the pre-shift reports of the truck indicated that it was satisfactory. However the reports themselves constitute the best evidence of their contents. Since they were not proffered in evidence by the operator, I place more weight on the testimony of Green. I find Green's testimony that he had driven the truck for three weeks without a seatbelt to be credible, based upon observation of his demeanor. Thus based on this credible testimony, I conclude that it is more probable than not that the operator had failed to perform pre-shift examination of mobile equipment for at least three weeks.

b. Knowledge that the Operator was not Adequately Carrying out Examinations

Adamson testified that he had told Terry to check the truck before it was put into service; that a couple of days later he asked Green, who was driving it how it was and he (Green) said it was ok; that Adams' son drove it and said it was ok; and that the pre-shift reports of the truck indicated that it was satisfactory. Thus, it is reasonable to conclude that Adamson himself neither knew nor reasonable should have known that inspections had not been performed adequately on the mobile equipment. However, it is significant to note that the inspector's

testimony that Roy Terry, the foreman, informed him that after the truck was delivered three weeks prior to June 2, he (Terry) did not check it for safety defects. This testimony was not rebutted or impeached by the operator. Hence, the knowledge of Terry, a foreman, is imputed to the operator. Accordingly, I find that the operator did have knowledge that it was not adequately carrying out the required pre-shift examinations related to mobile equipment.

c. Obviousness Posed by the Underlying Violations

Green was the only person who testified and had personal knowledge of the lack of a seatbelt in the truck. Green indicated that in the three weeks that he drove the truck it did not have a seatbelt. Also, importantly, he testified that he had reported the lack of a seatbelt to Terry, and the latter did not do anything about it. This testimony has not been rebutted or impeached by the operator. I find it indicative of the fact that it was obvious that a pre-shift examination of the mobile equipment had not been performed in a satisfactory manner. Green and Horn, the only persons to testify who had personal knowledge of the condition, both noted that the seatbelt had just one side. I thus conclude that it can be found that it was more probable than not that it was obvious that proper pre-shift examinations had not been performed, and that the defective seatbelt was obvious.

Within this context I find that the level of the operator's negligence reached the level of aggravated conduct. Hence I find that the Secretary has established that the violation herein was as a result of the operator's unwarrantable failure.

II Penalties

A. Order No. 7711661

1. Gravity

Since the violative condition could have resulted in an injury to a miner, I find that the level of gravity was relatively high.

2. History of Violations

I have reviewed the history of violations, (Gx. 33) which is a two year history of violations, and indicates a total number of 33 violations but only nine of which were S&S. There is an absence of guidelines or framework provided by the Secretary to evaluate this history of violations i.e., no evidence was presented as to how this history of violations compared to other two year periods at this operation, or two year periods of history of violations at comparable operations of comparable size. Hence, I conclude that the history of violations has a neutral affect on the analysis of the penalty to be imposed.

3. Good Faith Abatement

I reiterate my earlier findings that violative condition was abated in a timely fashion. 20 FMSHRC *supra*, at 70.

4. The Operator's Size

I take cognizance of the Commission's finding, which becomes the law of the case, that based upon the production tons or hours of the operation, Virginia Slate is a small operator. 24 FMSHRC *supra*, at 516. Thus this is a factor mitigating the amount of the penalty.

5. Ability to Continue in Business

There is an absence of evidence that the proposed penalty would effect Virginia Slate's ability to continue in business. I take cognizance of the Commission's finding, which becomes the law of the case, that in such an event, it is assumed that no such adverse affect would occur (*Id.*).

6. Negligence

I reiterate my initial finding, for the reasons stated therein, 20 FMSHRC *supra*, at 870, that the level of Virginia's negligence was moderate.

7. Discussion

I note that the Secretary, in it's Petition, requested a penalty of $700.00 for this violation. However, in evaluating the above statutory criteria, especially taking into account that the Secretary had characterized the Operator's negligence as high, whereas in contrast, I found the level of negligence was only moderate, and considering the mitigating factors of the small size of the operation and the good faith abatement, I find that a penalty $300.00 is appropriate.

B. Citation No. 7711663

The 110(i) factors relating to history of violation, size, and the effect of the penalty on the operator's ability to continue business, are set forth relating to Order No. 7711661, *infra*, are common to all the citations at issue and are incorporated herein by reference.

1. Good Faith Abatement

I find that violative condition was abated in a timely fashion.

2. Gravity

I find that although an injury of a reasonably serious nature was not reasonably likely to

have occurred, should an injury have occurred it could have been permanently disabling. I thus find that the level of gravity was moderately high.

3. Negligence

According to the inspector, Terry and two other crusher operators told him that the crusher, and apparently the pulleys, had been in operation in an unguarded condition for two weeks prior to his inspection. The Secretary did not call Terry to testify, nor did the Secretary indicate why Terry was not called. Hence, an inference might be drawn that Terry's testimony would not have been helpful to the Secretary's case. Further, the only crusher operator to testify, Leroy Williams, indicated that there was no guard at the tail pulley "at the time leading up to the inspection" (Tr. Vol. 1, 148), but he did not testify that it had been run without a guard. There is no evidence that a guard was not in place prior to the time the crusher and the operation of the entire plant including the belts at issue had been shut down approximately two weeks prior to June 2. I reiterate my initial findings, 20 FMSHRC *supra*, at 381-382. Specifically, I find, based on my observations of Adamson's demeanor, that his testimony was credible. I, accordingly, give more weight to Adamson's in-court testimony than Horn's hearsay testimony, that from May 10, 1998, through June 1, 1998, the plant was not in operation and no belts were in operation, because the conveyor was being worked on. I also reiterate my initial finding, 20 FMSHRC *supra*, at 383, that based on Adamson's testimony that I find credible, the guard at issue had been removed to clean the area. For these reasons, I find that the level of negligence of the operator to have been only moderate.

Within the context of the above evaluation, and considering the fact that the Secretary's Petition requesting a penalty of $500.00 was based on, *inter alia,* a finding that the operator's negligence was high, whereas I have found that Secretary has failed to establish that the level of negligence was more than moderate, I find that a penalty of $300.00 is appropriate.

C. Citation No. 7711665

As set forth above, for the reasons explained above, I find that the size of the operator's operation is small, and its history of violations has a neutral effect on the setting of the penalty. I reiterate the finding that I made in the initial decision, 22 FMSHRC *supra*, at 384, for the reasons set forth therein, that the level of gravity was relatively high. I also reiterate my earlier finding therein that the level of negligence was no more than moderate, and I reiterate the other findings that I made in the second decision, 23 FMSHRC *supra*, pertaining to abatement and effect of a penalty on the operator's ability to continue in business, as neither of these findings have been reversed or remanded. I find that a penalty of $300.00 is appropriate for this violation.

D. Order No. 7711667

On remand, the Commission ordered me to fully consider the size of the operator's operation, and its history of violations. These factors have been set forth above, and are

incorporated herein by reference, *i.e.,* that the size of the operation was small and the history of violations has a neutral effect on the penalty. I therefore reiterate the finding of a penalty of $200.00 that was previously set forth in prior decisions, 23 FMSHRC *supra*, at 870 and 22 FMSHRC *supra*, at 385.

E. Order No. 7711681

In this remand, pursuant to the Commission's directive, I adopt and reiterate the findings and rationale set forth in the initial decision, 22 FMSHRC *supra*, at 390, that the gravity of the violation was high. The criteria of the size of the operation, history of violations, and effect of a penalty on the ability to remain in business are the same as set forth above relating to Order No. 7711661, *infra*, and are adopted herein. I reiterate my finding previously made that the violative condition was abated in a timely fashion, 23 FMSHRC *supra*, at 87, as it was not reversed or remanded by the Commission. I also reiterate the finding made above, I(B)(c), infra, that the level of negligence reached the level of aggravated conduct, i.e., high negligence. Weighing all the above factors set forth in 110(i) of the Act, I finding that a penalty of $750.00 is appropriate.

ORDER

It is **Ordered** , pursuant to the Commission's remand, 24 FMSHRC, supra, that Virginia Slate pay a total penalty of $1,850.00 for the violative conditions cited in the following Order/Citation Numbers: 7711661, 7711663, 7711665, 7711667, and 7711681.

Avram Weisberger
Administrative Law Judge

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