FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

August 6, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-6-M
Petitioner	:	A. C. No. 44-00061-05533
v.	:	
	:	
LESUEUR-RICHMOND SLATE CORP.,	:	
Respondent	:	Richmond-Arvonia Quarry & Mill

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, United States Department of Labor, Arlington, Virginia, on behalf of the Petitioner;
Harlan L. Horton, Esq., Farmville, Virginia, 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 the Le Sueur-Richmond Slate Corporation (Le Sueur), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, *et. seq.*, the "Act," alleging two violations of mandatory standards and seeking a civil penalty of $1,299.00, for those violations. The general issue before me is whether Le Sueur committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 4433235 alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 56.14107(a) and charges as follows:

> The 10-inch Sears electric bench saw being used at the roofing plant to cut wedges, was not provided with a guard to protect employees from blade. The saw was used on a weekly basis. Employee has to get hand within 4-inches of blade.

The cited standard, 30 C.F.R. ' 56.14107(a), provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Respondent first claims that saw blades are not sufficiently like other "similar moving parts that can cause injury" to come within the meaning of the cited standard. Under the rule of statutory construction, ejusdem generis, where general words are followed by specific examples in

a statutory or regulatory provision, the general words are construed to embrace only objects similar in nature to the specific examples. 2A Sutherland Stat. Constr. 47.17 (5th Ed.) Garden Creek Pocahontas Company, 11 FMSHRC 2148 (November 1989). Therefore, the question is whether the general words of this regulation ("similar moving parts that can cause injury") can fairly be read to include the saw blade at issue in this case given the nature of the specific examples cited in the regulation. I conclude that saw blades come within the scope of the items such as "fan blades" specifically enumerated in the regulation. Saw blades are similar moving parts that clearly can cause injury. Respondent=s argument in this regard is accordingly rejected.

The Secretary=s evidence in support of the violation comes primarily through the testimony of Inspector Joseph Bosley. Bosley has been an inspector with the Mine Safety and Health Administration for 14 years. He also has 15 years underground mining experience. Bosley testified that he, accompanied by another MSHA employee, Sam Bond, conducted an inspection of the subject surface slate mine on October 7, 1997. In its roofing plant he observed a 10-inch Sears electric table saw without a blade guard. The saw was used on a weekly basis to cut wedges for packing roof shingles. The saw blade was 10-inches in diameter, protruded about 2-inches above the surface of the bench and had no guard affixed to it. Bosley opined that the saw had been used recently because of the presence of fresh sawdust and statements by its operator that he used the saw on a weekly basis.

A guide had been provided for more safely moving wood through the channels on the bench, but the guide was found underneath the saw covered with sawdust. Bosley therefore concluded that the guide had not been recently used. The saw operator also admitted to Bosley that he used the saw without any guard over the blade. Significantly, plant foreman Burley Hudgin acknowledged to Bosley that the saw never did have a guard over the blade. This essentially undisputed evidence is clearly sufficient to sustain the violation.

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 safety 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 Inc. 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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *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).

In this regard, Bosley testified that it was reasonably likely for the saw operator to place his hand in the rotating saw blade resulting in the loss of fingers or a hand. The situation was aggravated, according to Bosley, by the fact that the guide itself was not used and that, during ordinary operation, the saw operator=s hand would be within 4-inches of the blade.

Within the above framework of credible and essentially undisputed evidence, I conclude that the violation was indeed "significant and substantial." In reaching this conclusion I have not disregarded the testimony of Respondent=s maintenance supervisor, Keith Cheadham. However, his testimony does not contradict that of Inspector Bosley=s in regard to the above issues. Rather, Cheadham=s testimony goes to the issue of negligence. According to Cheadham, the saw had previously been inspected by MSHA and he was unaware of any citations having previously been issued for the lack of a guard. Cheadham maintains that after a guard was ordered from Sears he had to further modify the saw by obtaining longer mounting bolts. As an aggravating factor however, I note that Cheadham acknowledged that he was aware the saw was being used without a guard. The admission of the maintenance supervisor, an agent of the operator, that he was aware that the saw was being used without a guard also clearly supports a finding of high negligence. The absence of a guard under the circumstances was also obvious and admittedly, the saw never had a guard. Under the circumstances I conclude that the violation was the result of high negligence.

Citation No. 4433236, alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 56.14132(b)(2), and charges as follows:

> The backup alarm of the Cat 966 front end loader was not audible above surrounding noise, could not hear within 2-feet of rear of loader. Observed to [*sic*] people out of there [*sic*] trucks in area. Hazard backing over one of or both of these truck drivers.

The cited standard, 30 C.F.R. ' 56.14132(b)(2), provides that "alarms shall be audible above the surrounding noise level."

Inspector Bosley testified that during the same inspection on October 7, 1997, when approaching the stockpile area, he observed a Caterpillar Model 966 front end loader loading a

truck. According to Bosley, the backup alarm on the loader was not audible above the surrounding noise. He asked the operator to reverse the loader and he was unable to hear the alarm from a distance of five feet due to the surrounding noise. At a measured distance of two feet he was able to hear the alarm. The surrounding noise came from the diesel motors on the loader and two nearby trucks.

Bosley observed that the loader also had an obstructed view to the rear. The eight-foot-high engine compartment and exhaust system created a blind spot behind the loader and pedestrians could not be seen from the operator compartment less than 15 feet behind the loader. Bosley observed that as the loader was operating two truck drivers were walking between the loader and the trucks. Based on this evidence Bosley concluded that the violation was "significant and substantial." He opined that it was reasonably likely that persons walking between the loader and trucks would be run over by the loader and this would be reasonably likely to result in fatal injuries. Within the above framework of undisputed evidence the Secretary has clearly met her burden of proving the violation and that the violation was "significant and substantial" and of high gravity.

In reaching these conclusions I have not disregarded Respondent=s argument that, in essence, the standard is so vague that it leaves mine operators little notice as to their responsibilities. If Respondent is claiming that the cited standard is unconstitutionally vague, the test is whether a reasonable prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition would 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). In this case there is little to contradict the testimony of Inspector Bosley who, it may be inferred, is a reasonably prudent person within the purview of the Alabama By-Products decision. Respondent=s argument in this regard is accordingly rejected.

The Secretary further argues that operator negligence was high, in particular because of three prior violations relating to backup alarms. She refers to Citation Nos. 4440485, 4441557 and 7703296 (See Exh. P-9). These prior violations do not however concern the same factual circumstances as the instant citation. This case involves a unique situation where the alarm was actually functioning but was not, in the inspector=s opinion, sufficiently loud. Because the ascertainment of loudness in this case was subjective and not based on a measured standard I am hesitant to find high operator negligence. The point at which alarms are not sufficiently loud is largely a judgment call and depends on the ambient noise such as the number of diesel vehicles present at any one time.

In assessing civil penalties in this case I have also considered the record evidence concerning the remaining criteria under section 110(i) of the Act.

ORDER

Citation Nos. 4433235 and 4433236, are AFFIRMED and Le Sueur-Richmond Slate Corporation is directed to pay civil penalties of $800.00 and $100.00, respectively for the violations charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

Harlan L. Horton, Esq., 200 North Main Street, Farmville, VA 23901 (Certified Mail)

\mca