FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 17, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 99-19-M
Petitioner	:	A.C. No. 44-05172-05531
v.	:	
	:	Lynnwood Farm Plant - VA
WEST SAND & GRAVEL CO., INC.,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barrish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Jerry W. Kilgore, Esq., Sands, Anderson, Marks & Miller, PC, Richmond, Virginia, for Respondent.

Before: Judge Bulluck

This proceeding is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against West Sand & Gravel Company ("WS&G"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("the Act").

A hearing was held in Harrisonburg, Virginia. The post-hearing briefs are of record. For the reasons set forth below, the citation shall be **AFFIRMED**.

I. Stipulations

The parties stipulated to the following facts:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977.

2. West Sand & Gravel Company, Incorporated, is the owner and operator of the Lynwood Farm Plant, Virginia.

3. Operations of the Lynwood Farm Plant, Virginia, are subject to the jurisdiction of the Act.

4. The maximum penalty which could be assessed for this violation, pursuant to 30 U.S.C. § 820(a), will not affect the ability of West Sand & Gravel Company, Incorporated, to remain in business.

5. MSHA Inspector Joseph Beasley was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 7712465.

6. A true copy of Citation No. 7712465, along with all appropriate continuation forms and modifications, was served on West Sand & Gravel Company, Incorporated, or its agent, as required by the Act.

7. Citation No. 7712465 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

8. Citation No. 7712465 has not been the subject of previous review proceedings.

9. West Sand & Gravel violated § 56.14100(b), although West Sand & Gravel challenges the gravity of Citation No. 7712465 and the "unwarrantable" classification by MSHA.

II. Factual Background

On June 30, 1998, while conducting a Triple A inspection of WS&G's Lynwood Farm Plant, MSHA Inspector Joseph Bosley observed the Chevrolet Scotesdale Unit 326 welding truck being driven around front-end loaders and pedestrians, with the left front (driver's side) tire leaning in toward the engine compartment (Tr. 17-21, 27, 43; Exs. P-1A, P-1C). Inspector Bosley took tape measurements of both front tires, from the inside fender well to the outside top of each tire, finding the distance on the left to be 3.5 inches greater than on the right, and also observed that the left front tire had been rubbing the inside of the fender well (Tr. 20-26; Exs. P-1B, P-2). The inspector also raised the hood of the truck and, upon examination from above, observed that the left side upper control arm bolts, connecting the control arm hinge pin to the frame, were loose and backing away from the frame (Tr. 30, 32-34, 73-74; Ex. P-2).

As a result of his observations, Inspector Bosley had a conversation with the primary driver of the truck, welder Charles Holloway, who told Bosley that he had been reporting the condition of the tire in daily pre-shift examination records since mid-May (Tr. 27-28, 253; Ex. P-2, P-13). While still on site, Inspector Bosley also had a telephone discussion with the foreman, Aggie Selmon, who admitted having known of the truck's condition for six weeks (Tr. 32, 40, 212, 222-23, 239-40; Ex. P-2). Furthermore, according to his field notes, the inspector was told

that the welding truck also had bad springs and shocks, although he was unable to recall the source of that information when he testified (Tr. 32-33, 41-42; Ex. P-2). Consequently, Inspector Bosley issued 104(d)(1) Citation No. 7712465, charging a violation of 30 C.F.R. §56.14100(b), describing the violation as follows:

> The Chevrolet Scotesdale welding truck Unit 326 Serial #1GBHC34J5DV105564 the left front wheel was leaning in rubbing the inside of the fender well. This condition could result in loss of steering if not corrected. When checked the control arm had the bolts backing out. When the inspector ask [sic] the welder he stated this condition had existed since the middle of May, he was reporting it on his pre-shift inspection. When the foreman Aggie Selmon was asked he stated he knew this had existed for six weeks. This truck is used throughout the plant and mine site around heavy equipment and travels the pit roads. This violation is an unwarrantable failure to comply with a mandatory standard

(Ex. P-4). Later that same day, independent contractor David Weade repaired the welding truck by replacing a broken coil spring, and by replacing existing shims with nuts welded to the bracket (Tr. 63-65, 236; Ex. P-5A).

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F.R. §56.14100(b) provides that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

In discussing the broad applicability of the generally worded predecessor standard,[1] the Commission has emphasized that the standard must be construed in consonance with the fundamental protective ends of the Act, so that the "integrity of a machine is not defined solely by its proper functional performance but must also be related to the protection of miners' health and safety." *Ideal cement Co.,* 12 FMSHRC 2409, 2414-15 (November 1990) (*Ideal I).*

In order to establish a violation of this standard, the Secretary must establish that 1) there was a defect in the Chevrolet Scotesdale Unit 326 welding truck; 2) the defect affected safety; and 3) the defect was not corrected in a timely manner to prevent the creation of a hazard.

Respecting the first element of this analysis, the Commission has previously adhered to the ordinary and mining industry usage of the term "defect" as a "fault, a deficiency, or a condition

[1]30 C.F.R. § 56.9002 (1987) provided that: "Equipment defects affecting safety shall be corrected before the equipment is used."

impairing the usefulness of an object or a part. *Webster's Third New International Dictionary (Unabridged)* 591 (1971); U.S. Department of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 307 (1968)." *Allied Chemical Corporation*, 6 FMSHRC 1854, 1857 (August 1984). Moreover, the Commission has held that a missing, as well as a defective component, may constitute an equipment defect, and the defect or missing component need not affect the operation of the equipment. 12 FMSHRC 2415; 6 FMSHRC 1857.

Respecting the second element, the Commission has repeatedly stated that the "phrase 'affecting safety' in the standard has a wide reach and the 'safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach." *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (*Ideal II), citing Ideal I*, 12 FMSHRC 2415, *citing Allied Chemical Corp.*, 6 FMSHRC 1854, 1858. Recognizing that adequate notice of the conduct prohibited by the standard must be accorded to the operator, the Commission has required that the evidence be evaluated in light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." 12 FMSHRC 2415, 2416, *citing Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614, 1617-18 (September 1987). The Commission has provided further guidance on application of this objective test by recognizing "that the various factors that bear upon what a reasonable person would do include safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine." *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (August 1996), *citing U.S. Steel Corp.*, 5 FMSHRC 3, 5 (January 1983).

It is clear from the evidence that the condition of the welding truck's left front tire constituted a defect that affected safety, and having existed for at least six weeks, a defect that was not corrected in a timely manner. Indeed, WS&G has conceded the violation, but disputes that it was "significant and substantial," or the result of its "unwarrantable failure" to comply with the standard.

B. Significant and Substantial

Section 104(d) of the Act designates a violation "significant and substantial" ("S&S") when it is "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "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 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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 Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 135 (7th Cir. 1995); *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*). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Bosley determined that the violation was S&S. He testified that continued use of the welding truck in its defective condition could result in the tire blowing out or acutely flopping to the outside, either of which condition would result in loss of the driver's ability to steer and stop the vehicle (Tr. 49-56). The driver's loss of control, he opined, was reasonably likely to result in serious injury to himself or others, because the welding truck could be thrown into the path of, and run over by a larger haul truck or loader, or could strike a nearby pedestrian miner (Tr. 43-44, 48, 51-52, 56-60). The inspector acknowledged that he did not test drive the truck, that he was unable to estimate how long it would have taken the tire assembly to completely fail, and that the left front tire was not in bad condition (Tr. 60, 75-76, 196-200).

Ronald Medina, a mechanical engineer in MSHA's Approval and Certification Center, Mine Equipment Branch, appeared as an expert for the Secretary. Medina testified that, in forming his conclusion that operating the truck in its defective condition posed a hazard to safety, he did not inspect the welding truck, but examined the citation, the inspector's field notes and photographs, the shop manual for the truck, and the letter of the mechanic who made the repairs (Tr. 102-03, 181, 271-73). He identified shims missing from the bolts and a broken spring as the cause of the left tire leaning into and rubbing the fender well (Tr. 125-26).[2] This condition, he testified, would tend to pull the truck significantly out of alignment, toward the direction of the lean, and would diminish the tire's traction in bumpy or muddy conditions on the dirt and gravel haul road upon which it traveled, which has the effect of decreasing the driver's steering ability (Tr. 129-130, 134-35, 138-41). Consistent with Inspector Bosley's testimony, Medina opined that continued operation of the truck, as cited, could reasonably be expected to result in tire blow-out, caused by intermittent rubbing between the tire and the fender well or, tire flop-out, should the upper control arm completely detach from the frame -- either of which condition amounts to diminished ability to steer and control the vehicle (Tr. 125-26, 128-32, 145-46, 177-80, 273-80). Medina also asserted that he was unable to estimate how long it would have taken the nuts to work loose from the bolts, thereby freeing the upper control arm from the frame (Tr. 175-76).

Maintenance mechanic Charles Holloway, daily driver of the welding truck, testified that the truck was operated six days a week, that he drove it twice daily on the haul road to the pit, and

[2]A shim is a spacer between two surfaces that is added or subtracted to align a vehicle (Tr. 118).

that he would normally pass two or three larger trucks while enroute (Tr. 264, 267). He maintained that the leaning left tire did not seem to affect steering, although he acknowledged that, when he turned sharply on occasion, or hit a rock or "chuck hole, " the tire would bounce up against the fender (Tr. 251-52, 265).

Foreman Aggie Selmon testified that he usually drove the welding truck once a month, on Holloway's off-duty Saturday, and although he opined that the truck was safe to operate with the leaning tire, he acknowledged that it was driven on bumpy dirt and gravel roads, along with Mack trucks and front-end loaders, that it's condition did "look bad," and that the tire would rub the fender well when the truck was on a slant or hit a pothole (Tr. 207, 210-11, 213, 227-28, 237-38).

The evidence, evaluated in terms of continued mining experience, indicates that the left front tire was in good condition and, therefore, unlikely to blow-out, and that there is no way of pinpointing how long the bolts would continue to hold the hinge pin to the frame. It has also been established that the welding truck was heavily used on uneven, sometimes muddy, dirt and gravel surfaces, and that the tire would bounce up and hit the fender well. WS&G's position that the leaning tire had no effect on the ability to steer and stop the truck is not convincing, in light of all the evidence. Therefore, having found that the welding truck, with diminished steering and braking capacity, operated around much heavier equipment and pedestrians, on uneven and muddy gravel surfaces, I find it reasonably likely that the truck driver could suffer serious injury from being struck by another vehicle, or could hit and seriously injure a pedestrian in his path. Therefore, I find that the violation was S&S.

C. Unwarrantable Failure

"Unwarrantable failure" is aggravated conduct consisting of more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a serious lack of reasonable care. *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

The Commission has provided a practical framework in which to analyze whether a violation resulted from unwarrantable failure. Among the factors to be considered are "the extensiveness of the violation, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test. *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

Charles Holloway testified that he first became aware of the leaning tire in April, during his pre-shift examinations of the truck, and that he continued to examine and report the condition

daily, until the issuance of the citation on June 30th (Tr. 250, 256). The pre-shift examination reports in evidence begin on May 1, 1998 (Ex. P-13). Holloway and Aggie Selmon both testified that they were unaware of the broken coil spring, until the truck was repaired by David Weade on June 30th, although Selmon admitted knowledge that the springs were weak (Tr. 216, 229, 252, 258, 263). Holloway and Selmon also testified, with some variation, that, upon discovery that the upper A-frame bolts had worked loose, they aligned the wheel by adding another shim, re-tightening the bolts, and tack-welding the nuts onto the bolts to keep them in place (Tr. 208, 218-21, 232, 250, 258-59, 263). They conceded that no record was made of such repair, and that WS&G never advised Inspector Bosley or any other MSHA official of such repair (Tr. 213, 221, 225, 238, 254, 266). They also conceded that the repairs to which they attested did not straighten the tire (Tr. 221, 255-58).

Inspector Bosley testified that he had seen no evidence of tack-welding when he inspected under the hood of the welding truck, nor was he ever advised by WS&G of any efforts to repair the defective condition (Tr. 61, 63-69, 74-75, 85-86). Referring to David Weade's July 5, 1998, letter, respecting repair of the left front tire assembly, his report of the truck's pre-repair condition contained no observation of tack-welding, or that nuts had been substituted for shims (Ex. P-5A; See Tr. 232-33). Consequently, I credit Inspector Bosley's testimony, find WS&G's allegation of having made repairs unworthy of credence, and conclude that the operator took no action to repair the leaning tire, at least during the months of May and June. Furthermore, a contrary finding, that efforts to repair the tire were made in April or May, does not advance WS&G's position, since the company concedes that the problem persisted. WS&G should have dissembled the tire, discovered the cause of the lean (missing shims and broken spring), and fixed the problem in a timely fashion. Thus, the same conclusion is reached--that the defective tire assembly was visible to WS&G for two months, that it was not corrected, and that WS&G was aware that greater efforts were necessary for compliance. WS&G argues that it is being penalized for diligently reporting the defect, rather than ignoring it (Resp. Br. at 5). In this case, however, since no correction took place, the value of reporting is minimal. Indeed, the truck was repaired the same evening that the citation was issued. It is my finding, therefore, that WS&G's conduct demonstrated a serious lack of reasonable care that was more than ordinary negligence. Accordingly, I find that the Secretary has proven that the violation was the result of WS&G's unwarrantable failure to comply with the standard.

D. Penalty

While the Secretary has proposed a civil penalty of $2,500.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.,* 5 FMSHRC 287, 291-92 (March 1993), *aff'd,* 763 F. 2d 1147 (7th Cir. 1984).

WS&G is a small operator, with a history of no prior violations of the standard at issue and an overall record that is not an aggravating factor in assessing an appropriate penalty (Exs. P-

11, P-12). As stipulated, the proposed civil penalty will not affect WS&G's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of WS&G in causing it. I find the gravity of the violation to be serious, since diminished control of the welding truck subjected the driver and other miners to a potentially hazardous situation, which could have resulted in very serious injury. Furthermore, consistent with my finding that the violation resulted from WS&G's unwarrantable failure, I ascribe high negligence to the operator. Therefore, having considered WS&G's small size, insignificant history of prior violations, seriousness of violation, high degree of negligence, good faith abatement and no other mitigating factors, I find that the $2,500.00 penalty, as proposed by the Secretary, is appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation No. 7712465 is **AFFIRMED**, and West Sand & Gravel Company is **ORDERED TO PAY** a civil penalty of **$2,500.00** within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203

Jerry W. Kilgore, Esq., Sands Anderson Marks & Miller, PC, P.O. Box 1998, Richmond, VA 23218-1998

/nt