FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 99-8-M
Petitioner	:	A. C. No. 44-06803-05508
v.	:	
	:	
VIRGINIA SLATE COMPANY,	:	
Respondent	:	Adco Land Corp No. 1

DECISION ON REMAND

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

Before: Judge Weisberger

This case is before me based upon a decision by the Commission in this matter, 23 FMSHRC 482 (2001), wherein the Commission granted the Secretary of Labor's petition for discretionary review challenging various determinations made in a decision issued subsequent to an evidentiary hearing in this matter, 22 FMSHRC 378 (March 2000), and inter alia, remanded various unwarrantable failure and penalty assessment issues regarding a number of orders and citations at issue in this case.

A. Unwarrantable failure

1. Order No. 7711661 and Citation No. 7711663.

The Commission vacated my initial finding that the violations cited in Order No. 7711661 and Citation No. 7711663 were not the result of Virginia's unwarrantable failure finding that error was made when I applied my credibility determination concerning Williams' testimony about the belt violation in Citation No. 7711660 to [my] unwarrantability analysis of the belt violations in Order No. 7711661 and Citation No. 7711663, and failed to consider Williams' testimony that the belts involved in Order No. 7711661 and Citation No. 7711663 were run without guards during production. 23 FMSHRC, supra at 486-487. Specifically, the Commission issued a remand "... for the Judge to properly consider testimony that fairly detracts from his decision on that issue." 23 FMSHRC supra at 487.

I take cognizance of Williams' testimony that the belts involved in Order No. 7711661 and Citation No. 7711663 had both been run in an unguarded state during production. In contrast, Adamson testified that from May 10, 1998 through June 1, 1998 the plant was not in operation, was not producing any material and no belts were in operation because the conveyor was being worked on. He also testified that only late in the afternoon on June 1, did the plant operate in order to test the crusher, and only six buckets of material were processed. I carefully observed the demeanor of Adamson and Williams during their testimony, and found Adamson to be more credible than Williams, and accordingly accept Adamson's testimony. I also accept his uncontradicted testimony that Virginia had decided to make sure that all guards be in place prior to the start-up of normal operation, but before this task could be performed, Inspector Horn arrived at the site to commence his inspection.

Within this context I find that Virginia's actions regarding the violative conditions cited in Order No. 7711661 and Citation No. 7711663 did not reach the level of aggravated conduct, and hence did not constitute an unwarrantable failure (see, *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987)).

2. Order No. 7711667.

According to Horn, Adamson, III, told him that he was responsible for checking the area at issue, and that Virginia had started using a front-end loader the week prior to June 2. However, the Secretary did not call Adamson, III, as a witness, nor did it offer any excuse for its failure to do so. Williams testified that since February 9, 1998, a front-end loader had been used to load the hopper. Horn concluded that the violation was as a result of Virginia's unwarrantable failure since Virginia knew of the violative condition and did nothing about it.

On the other hand Adamson testified that from March 19, 1997, when operations commenced, until June 1, 1998, normally the excavator was used to load the hopper, but that on June 1 the front-end loader was used to load the hopper for about 10 minutes. I observed the demeanor of Williams and Adamson and found Adamson to be the more credible witness. Within the context of the above record, I find that the Secretary has failed to adduce sufficient evidence to establish that the violative condition, i.e. that berms, bumper-blocks, safety hooks, or similar impeding devices were not provided at the dumping location at issue, to have been so obvious, that the operator should have had knowledge of these conditions. I thus find that it has not been established that Virginia's negligence reached the level of aggravated conduct. Therefore, I find that it has not been established that the violation was as a result of its unwarrantable failure.

3. Order No. 7711681.

In vacating the initial determination that Order No. 7711681 was not due to unwarrantable failure, and remanding for reconsideration, the Commission concluded that "... the Judge failed to examine such aggravating factors that may have been relevant to his

unwarrantability analysis, such as the extent and duration of the operators failure to carry out preshift examinations or its knowledge that it was not adequately carrying out such examinations. The Judge also failed to consider the underlying violations which went undetected or uncorrected because of the operators inadequate preshift examination and conditions." 23 FMSHRC supra at 492. The Commission further noted that the obviousness posed by safety violations involving inoperable horns and defective seatbelts should have been considered as a relevant factor in the analysis of whether the operator's failure to carry out the examinations was unwarrantable. In its remand the Commission directed as follows: "The Judge must address all the relevant factors relating to the preshift examination violation, including the underlying violations that were not detected or corrected because of the inadequate examinations." Id. at 492.

The underlying violations, for which proper preshift examinations had not been performed, relate to safety defects on mobil equipment such as inoperable horns, and lack of seatbelts. The record does not contain any evidence as to how long these conditions were in existence. The only evidence of record relating to the extent and duration of Virginia's failure to carry out adequate preshift examinations, or its knowledge that it was not adequately carrying such examinations, consists of Horn's testimony that when he previously was at the mine he discussed with Terry and Adamson III, "the importance" of the cited standard. He indicated that his conclusion that the violation was unwarrantable was based upon his opinion that Terry, the foreman, knew of the regulation and failed to make preshift examinations, and that there was no reason that these hazards and safety defects should not have been found and corrected (Tr. 52, Oct. 14, 1999). There is nothing in the record to indicate how long the safety defects had been in existence prior to being cited. Nor is there anything to the record to indicate for how long a period of time Virginia had not been making preshift examinations or had knowledge that it was not carrying out such examinations. Within this context, and for the reasons previously cited in my initial decision, (22 FMSHRC supra, at 390), I find that the Secretary has failed to establish that this violation was as a result of Virginia's unwarrantable failure.

B. Penalty Assessment Issues

1. Citation No. 7711660.

I reiterate my earlier findings that inasmuch as the violative condition could have resulted in a permanently disabling injury or fatality, that the level of gravity of the violation was relatively high. For the reasons set forth in the initial decision, (22 FMSHRC supra, at 381 - 382), I conclude that the level of Virginia's negligence to have been only moderate, and thus less than that asserted by the Secretary. I also find that the violative condition was abated in a timely fashion. There is no evidence in the record that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence to suggest that Virginia's history of violations was either very good or very bad, and hence I consider it to have a neutral effect on the analysis of the penalty to be imposed. Taking all of the factors set forth in Section 110(c) of the Act, into account, especially giving some weight to a reduction in the level of negligence from that asserted by the Secretary, I find that a penalty of $300.00 is appropriate.

2. Order No. 771161.

I find that since the violative condition could have resulted in an injury to a miner, and that the level of gravity was relatively high. The condition was abated in a timely fashion and there is no evidence that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence in the record that any penalty should be mitigated by the size of Virginia's operation. A penalty should not be mitigated or increased as the result of the history of violations.

I find, based upon Adamson's testimony, that I find credible that the guard at issue had been removed to clean the area. Accordingly, Virginia's negligence was no more than moderate. Taking into account all of the above, and especially that the level of Virginia's negligence was less than that asserted by the Secretary, I find that a penalty of $300.00 is appropriate.

3. Citation No. 7711665.

The violative condition was abated in a timely fashion. There is no evidence that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence in the record that any penalty should be mitigated by the size of Virginia's operation. There is no evidence to suggest that Virginia's history of violations was either very good or very bad, and hence I consider it to have a neutral effect on the analysis of the penalty to be imposed..

Taking into account all of the above, and especially that the level of Virginia's negligence was less than that asserted by the Secretary, I find that a penalty of $300.00 is appropriate.

4. Order No. 7711667.

Since, as a consequence of the violative condition there was a danger of over turning I find that the gravity of this violation to have been relatively high. According to Inspector Horn, Adamson, III, told him that he was responsible for checking the area at issue, and that Virginia had started using a front-end loader the week prior to June 2. However, the Secretary did not call Adamson, III, as a witness nor did it offer any excuse for its failure to do so. Williams testified that since February 9, 1998, a front-end loader had been used to load the hopper.

On the other hand Adamson testified that from March 19, 1997, when operations commenced, until June 1, 1998, normally the excavator was used to load the hopper, but that on June 1 the front-end loader was used to load the hopper for about 10 minutes. I observed the demeanor of Williams and Adamson and found Adamson to be the more credible witness. Within the context of the above record, I find that the Secretary has failed to adduce sufficient evidence to establish that the violative condition, i.e. that berms, bumper-blocks, safety hooks, or similar impeding devices were not provided at the dumping location at issue, to have been so obvious, or that the operator had specific knowledge of these conditions, so as to raise the level of Virginia's negligence to more than moderate.

The violative condition was abated in a timely fashion. There is no evidence that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence in the record that any penalty should be mitigated by the size of Virginia's operation. There is no evidence to suggest that Virginia's history of violations was either very good or very bad, and hence I consider it to have a neutral effect on the analyzes of the penalty to be imposed.

Taking into account all of the above, and especially that the level of Virginia's negligence was less than that asserted by the Secretary, I find that a penalty of $200.00 is appropriate.

5. Order No. 7711681.

The violative condition was abated in a timely fashion. There is no evidence that imposition of a penalty would have any adverse effect on Virginia's ability to remain in operation. There is no evidence in the record that any penalty should be mitigated by the size of Virginia's operation. There is no evidence to suggest that Virginia's history of violations was either very good or very bad, and hence I consider it to have a neutral effect on the analysis of the penalty to be imposed.

Taking into account all of the above, and especially that the level of Virginia's negligence was less than that asserted by the Secretary, I find that a penalty of $300.00 is appropriate.

Order

It is **Ordered** that if Virginia has not paid the penalties ordered in the original decision, 22 FMSHRC, supra, then Virginia shall pay a total civil penalty of **$4,400.00** for the violations found in the initial decision, 22 FMSHRC supra.

Avram Weisberger
Administrative Law Judge

Distribution: Certified Mail

M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson

Boulevard, Suite 516, Arlington, VA 22203

V. Cassel Adamson, Jr., Esq., Adamson and Adamson, Crozet House, 100 East Main Street, Richmond, VA 22219-2168

/sct