FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 3, 2000

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.	:	
	:	Adco Land Corp No. 1
VIRGINIA SLATE COMPANY,	:	
Respondent	:	

DECISION

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 Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") alleging that Virginia Slate Company ("Virginia") violated various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, a hearing in this matter was held in Buckingham, Virginia.

Briefs were due to be filed three weeks after receipt of the transcript. The transcript was filed on November 16, 1999. On December 6, 1999 the Secretary filed a motion for extension of time to file its brief. The motion was not opposed. On October 21, 1999 an order was entered allowing the parties until February 15, 2000 to file their briefs. On February 15, 2000 the Secretary filed a Post-Hearing Brief. On February 28, 2000 Respondent filed a Brief and Argument.

Findings of Fact and Discussion

I. Order No. 7711660

A. The Secretary's Evidence

On June 2, 1998, Rickey Joe Horn, an MSHA inspector, inspected Virginia's open pit slate operation. In the course of his examination, he observed that the tail pulley for the No. 1

conveyor belt, located on the crusher, which was not in operation,[1] was not guarded. According to Horn, he asked Roy Terry, the foreman, why the guard was off, and the latter informed him that the guard was off because the crusher motor was being worked on. Horn testified that he also spoke to two crusher operators who informed him that the crusher had been worked on for the past 2 weeks, but that it had been run during this time in the condition observed by him (Horn) and that Terry had told him that the mine had been in production for the past week. In this connection, Leroy Williams, who was a crusher operator in 1998, stated that a stock pile at the site on the day of the inspection contained the quantity of material produced in "a full days run." (Tr. 201).

According to Horn, the pulley was only 2 feet above the ground, and because it was unguarded, there was nothing to prevent a person from walking into it. He described the ground around the pulley as being rocky, and consisting of loose material. According to Horn, if a person would trip on this material and fall into the pulley, a fatality would probably result. According to Horn, V. Cassel Adamson, Jr., Virginia's President, told him he did not know how long the guard had been off.

Horn issued an order alleging a violation of 30 C.F.R. § 56.1417(a), and opined that the violation was significant and substantial inasmuch as two employees work all day in the area of the tail pulley, and that it was reasonably likely that an injury that would be at least permanently disabling, would have resulted upon inadvertent contact with the pulley. He also opined that the violation was as the result of Virginia's unwarrantable failure.

Williams indicated that the cited tail pulley did not have any guard "at the time leading up to when the inspection took place" (Tr. I, 148). He testified that the crusher had guards on it when it was in operation, but the guards were removed a few weeks prior to the inspection. He indicated that when crusher was being repaired, the motor was test-fired, but he did not recall if the guards were in place. Later on in his testimony, he indicated that when the "engine" was tested, the guards were in place.

B. Discussion

1. Violation of 30 C.F.R. § 56.14107(a)

Section 56.14107(a) as pertinent, provides as follow: "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, fly wheels, couplings, shafts, fans blades, and similar moving parts that can cause injury."

According to Horn's testimony the tail pulley at issue when observed by him on June 2, did not have any guard. This testimony was not impeached, nor was it contradicted by Virginia's

[1]/ If the hopper is not in operation, the conveyor belt can be placed in operation as it has a separate power source.

only witness, the V. Cassel Adamson, Jr., its President. Nor did Virginia contradict or impeach Horn's testimony that the tail pulley was located approximately 2 feet above the ground. Accordingly, I accept Horn's testimony that on June 2, the tail pulley was not guarded to prevent persons from contacting it. I also find, based upon Horn's uncontradicted testimony that contact with the moving tail pulley can cause an injury. It appears to be Virginia's argument, in essence, that it was not in violation on June 2, as the tail pulley was not in operation. However, the plain meaning of the wording of section 56.14107(a), supra, does not provide for any exception to the requirements set forth therein if the moving part to be guarded is not in operation. Further, Horn's and Williams' testimony establishes that the tail pulley, which is powered by an electric motor, was capable of being operated at a time when the crusher was inoperable. For all these reasons, I find that Virginia did violate section 56.14107(a), supra.

2. Significant and substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel*

Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

As set forth above, the evidence establishes the first two elements set forth in *Mathies*, supra, i.e., that Virginia violated a mandatory safety standard, and that the violative condition contributed to the hazard of a miner becoming injured upon coming in contact with a moving tail pulley. In analyzing the third element of *Mathies*, supra, i.e., whether there was a reasonable likelihood of an injury producing event, i.e., contact with a moving tail pulley, the continuation of normal mining operations must be taken into an account. In essence, according to Adamson, Jr., in normal operations the tail pulley at issue is guarded, and the guard had been removed because the crusher was inoperable, and was being worked on. I reject this testimony as being too speculative to predicate a finding that, with continued normal mining operations, there would not have been a reasonable likelihood of contact with the tail pulley, as it would have been guarded. Further, taking into account the nature of the ground conditions in the area of the tail pulley, consisting of rocky loose material which would have created a stumbling or tripping hazard, the location of the tail pulley approximately 2 feet above the ground, and the fact, as testified to by Horn, that two crusher operators work in the area, I find that the third element of *Mathies*, supra, has been met. In addition, Virginia did not impeach or contradict Horn's testimony, that should a miner have contacted the unguarded tail pulley, it was reasonably likely that a permanently disabling injury would have resulted. I thus find that it has been established that the violation was significant and substantial.

3. Unwarrantable Failure

According to Horn, in essence, Terry and the two crusher operators has told him that the crusher had been operated for the past 2 weeks in an unguarded condition. 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. Moreover, 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 I, 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 2 weeks prior to June 2. According to Horn's testimony, a stock pile that was in existence June 2, consisted of a quantity of material produced in one full day of operation. It appears to be the Secretary position that the stock pile evidences the fact that the plant was in operation, and the tail pulley at issue was in operation during the 2 weeks period when it was not guarded. I find this argument to be speculative, and not supported by the record. I take cognizance of Horn's testimony that James Carter, a crusher operator, had told him that he (Carter) was told by the foreman to operate the crusher without the guards being in place. However, not much weight was accorded this hearsay testimony, as Horn did not indicate where or when this conversation took place. Nor was it corroborated by Williams, the other crusher operator, who did testify. In contrast, I observed Adamson's demeanor and found his testimony credible that, from May 10, 1998, through June 1, 1998, the plant was not in operation, was not producing any material and that no belts were in operation, because the conveyor was being

worked on. I also find his testimony credible 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. Also, I accept his uncontradicted testimony that Virginia had decided to make sure that all guards be in place prior to the startup of the normal operations, but before this task could be performed, Horn arrived at the site to commence his inspection.

Within the above context, I find that Virginia's actions regarding the violative conditions did not reach the level of aggravated conduct, and hence did not constitute an unwarrantable failure. (c.f., *Emery Mining Corp*., 9 FMSHRC 1997 (1987)).

4. Penalty

Inasmuch as the violative condition could have resulted in a permanently disabling injury or fatality, I find that the level of gravity of the violation was relatively high. For the reasons set forth above, (I.(B.)(3.)), I conclude that the level of Virginia's negligence to have been moderate. 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 affect on Virginia's ability to remain in operation. Also there is no evidence in the record that any penalty herein should be mitigated by the size of Virginia's operation. Taking all these factors into account, as set forth in section 110(i) of the Act, as well as Virginia's history of violations, I find that a penalty of $300.00 is appropriate.

II. Order No. 7711661

In his inspection of June 2, Horn observed that there was no protective device for the V-belt drive, and the pulleys for the feeder. The drive motor was located approximately 3 feet above ground level. Horn issued an order under section 56.14107(a), supra. Virginia did not contradict or impeach Horn's testimony regarding the conditions observed by him, but adduced Adamson's testimony to the effect that normally the belt drive at issue was located above the reach of miners working in the area. I thus find, based upon the Horn's testimony that on June 2, as observed by him, the V-belt drive at issue was not guarded and was within approximately 3 feet above the ground. For the reasons as set forth above, (I.(B.)(2.)), I find that this condition presented a hazard to miners of contacting moving machinery. I thus find that Virginia did violate section 56.14107(a), supra. Also, for the reasons set forth above, (I.(B.)(2.), I.(B.)(3.)), I find that the violation was significant and substantial, but not the result of Virginia's unwarrantable failure. For essentially for the same reasons set forth above, (I.(B.)(4)) I find that a penalty of $300.00 is appropriate.

III. Citation No. 7711663

On June 2, Horn observed that the tail pulley for the No. 2 belt, which was located about 2 ½ feet above the ground level, was not guarded. Virginia did not impeach Horn's testimony regarding his observations, nor did it adduce evidence to contradict or rebut his observations.

Virginia's evidence relating to the existence of the violative condition consisted of Adamson's testimony that the areas at issue had usually been bolted by perforated steel material considered to be an area guard. Since Virginia did not rebut or impeach or contradict Horn's testimony regarding the conditions observed by him on June 2, I find, that Virginia did violate section 56.14107(a), supra.

I accept Horn's testimony, that the violation was not significant and substantial inasmuch as a injury of a reasonably serious nature was not reasonably likely to have occurred. Essentially for the reasons set forth above (I.(B.)(3.)), and based upon Adamson's testimony that I found credible that the guard at issue had been removed to clean the area, I find that the violation was not the result of Virginia's unwarrantable failure (c.f. *Emery*, supra). I find that although a reasonably serious injury was not reasonably likely to have occurred, should an injury have occurred as a result of the violation, it could have been of a serious nature. Thus, I find that the gravity of the violation was relatively high. Considering the additional factors set forth in section 110(i) of the Act, as set forth above, (I.(B.)(4.)), I find that a penalty of $300.00 is appropriate.

IV. Citation No. 7711665

On June 2, 1998, the motor, which ran the crusher, was operated by separate clutch and throttle hand levers. There were no guard rails or catwalks provided to access these levers. The means of accessing these levers, was by walking on an I-beam, approximately 6 inches wide, and located approximately 6 feet above the ground. According to the uncontradicted testimony of Horn, a person walking on the I-beam while operating the motor, could loose his balance and suffer an injury. Horn cited Virginia under 30 C.F.R. § 56.11001 which provides that "[s]afe means of access shall be provided and maintained to all working places."

Virginia did not impeach or contradict Horn's testimony, and I accept it. Accordingly, I find that on June 2, there was no safe means of access provided to a working place, i.e., the location of the levers to operate the crusher. Accordingly, I find that Virginia violated section 56.11001, supra.

According to Williams, he had to access the levers by walking on the I-beam twice a day. Considering this testimony, as well as the width of the I-beam, and its location above a rocky surface, I find, that within this context it has been established that the violation was significant and substantial (See *Mathies*, supra).

According to Horn, it was "plainly visible"(Tr. Vol I, 82) that there were no railings or catwalks providing access to the control levers. However, the only evidence the Secretary adduced regarding the length of time that the violative condition had existed, consisted of Williams' testimony. Williams indicated that when he first started to work at the plant, he asked the foreman, Roy Terry, why there was no hand rail on the crusher, and Terry said that he did not know. Not much weight was accorded this hearsay testimony, as it was not corroborated. Also, the Secretary did not indicate why it had not called Terry to testify.

Williams testified that the means of access to the controls as depicted in government exhibit 20, had been in that condition for 2 months or less prior to the date of the inspection (Tr. Vol. I, 175). However, he also indicated that he thought the access platform was taken down a week or so prior to the inspection, but that he could not remember, and was not sure (Tr. Vol. I, 178). He indicated that the plant was in operation just part of the week prior to June 2 (Tr. Vol. I, 180). I find Williams' testimony unclear, and can not predicate any findings on his testimony regarding the length of time the crusher had operated without safe access.

On the other hand, I observed that the demeanor of Adamson, and found his testimony to be credible that the crusher was not in operation in the period from May 10 through June 1, and that after the new motor in the crusher was tested for 10 minutes on June 1, it was then shut down and instructions were given not to run it again until either the controls were shifted to the side of the crusher that had a catwalk, or additional catwalks were installed. Within this framework, I find that it has not been established that Virginia's actions herein amounted to aggravated conduct, and thus do not constitute an unwarrantable failure (see *Emery*).

I find that the level of gravity of the violation was relatively high, inasmuch as a serious injury could have resulted. For the reasons set forth above, I find that the level of Virginia's negligence to have been no more than moderate. My analysis of the remaining factors set forth in Section 110(i) of the Act is set forth above (I.(B.)(4.)). I find a penalty of $300.00 appropriate for this violation.

V. Order No. 7711666

Horn testified that a berm was missing for 20 feet along the west side of an elevated roadway leading to the dump. He indicated that there was a 15 to 20 foot drop-off. He issued an order alleging a violation of 30 C.F.R. § 56.9300 which provides as follows: "[b]erms or guard rails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons and equipment." Virginia did not impeach, contradict, or rebut Horn's testimony, and accordingly I accept it. Based upon Horn's testimony, I find that, on June 2, 1998, a berm was missing for approximately 20 feet on the bank of the roadway where there existed a drop off of approximately 15 to 20 feet would have endangered persons in a vehicle using the roadway. Accordingly, I find that Virginia did violate section 56.9300(a), supra.

According to Horn, the violation was significant and substantial, because trucks do use the roadway, and if such a vehicle would overturn, fatal injuries could result. The Secretary has not adduced any evidence regarding the slope, physical condition of the surface of the roadway, the width of the roadway, how often it was traversed, whether the roadway was used for two way traffic, and the condition of the trucks traveling the roadway. Within this context, I find that it has not been established that an injury producing effect was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial (see, Mathies, supra).

According to Horn, Adamson III, told him that he was responsible for checking the area at issue, that Virginia had started using a front-end loader the week prior to June 2, and that he did not realize that the drop off was that high. Horn concluded that the violation was as the result of Virginia's unwarrantable failure, since Virginia knew of the violative condition, and did nothing about it. Williams testified that since February 1998, a front-end loader has been used to load the hopper. On the other hand, Adamson testified that from March 1997 when operations commenced, until June 1, 1998, he only saw the excavator feeding the crusher. He indicated that normally the excavator was used to load the hopper, but that on June 1, the front-end loader was used the load the hopper for about 10 minutes.

I find the Secretary's evidence inadequate to specifically establish how long a period of time prior to June 2, the area in question has been used as roadway. More importantly, the Secretary failed to establish for how long a period prior to June 2, there was no berm along the bank for approximately 20 feet. Within this context, I find that it has not been established that Virginia's actions amount to aggravated conduct. Thus I find that it has not been established that the violation was the result of Virginia's unwarrantable failure (see, *Emery*, supra).

I find that should a vehicle have gone off the road due to the lack of a berm a reasonably serious injury could have resulted. Accordingly, I find that the gravity of the violation was relatively high. For the reasons set forth above, I find that it has not be established that Virginia's negligence was more than moderate. I find that the violation was abated in a timely fashion. Additionally, taking into account the remaining factors set forth in section 110(i) of the Act, as discussed above (I.(B.)(4.)). I find that a penalty of $200.00 is appropriate.

VI. Order 7711667

According to Horn, there were no bumper blocks or any other impeding devices to prevent a front-end loader loading the hopper from running into the hopper, hitting a rock, or overturning. He issued a section 104(d)(1) order alleging a violation of 30 C.F.R. § 56.9301 which provides that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning."

Virginia did not impeach or contradict Horn's testimony that there were no bumper blocks or any impeding devices at the hopper dumper location. Nor did it impeach or rebut Horn's testimony that there was a danger of overturning. Accordingly, I find that it has been established that Virginia did violate section 56.9301, supra.

According to Horn, the violation was significant and substantial because it was reasonably likely that if the front-end loader continued to use the dumping point, the vehicle would overturn, hit rocks, or run into the side of the hopper. However, he did not explain the bases for his conclusion. Nor does the record contain any facts to support such a conclusion. Accordingly, I find that it has not been established that the violation was significant and substantial.

The evidence adduced by both Parties regarding the issue of unwarrantable failure was essentially the same as that adduced regarding Order No. 771166. Hence, for the reasons set forth above (V., *infra*), I find that the violation herein was not the result of Virginia's unwarrantable failure.

Essentially, for the reasons set forth above (V., *infra*), I find that a penalty of $200.00 is appropriate.

VII. Order 7711668

According to Horn, on June 2, he asked the operator of the Case 584 fork lift to test the manual horn and the automatic reverse horn, and they did not work. He issued an order alleging a violation of 30 C.F.R. § 14132(a) which provides as follows: "[m]anually-operated horns or other audible devices provided on self-propelled mobile equipment as a safety feature shall be maintained in a functional condition."

Virginia did not impeach Horn's testimony. Adamson testified that the cited vehicle, at the time of the inspection, was not provided with any manual horn. However, he did not present any evidence to contradict Horn's testimony that the automatic reverse horn was not operable. Hence, based upon Horn's testimony, I find that Virginia did violate section 56.14132(a), supra.

Adamson testified that the operator of the fork lift sits high above the ground, has all around visibility, and can see behind him by using a rear mirror. Virginia did not impeach or rebut Horn's testimony that the fork lift was being operated inside a building where there is foot traffic. Within the framework of this evidence, I find it has been established that the violation was significant and substantial (see Mathies, supra).

Adamson testified that the fork lift had not been cited in the two previous inspections, and that he was not aware that the horn was not operational. However, on the other hand, Horn testified that he spoke to the operator of the fork lift who told him that the horn and backup alarm had not worked for several weeks. There is no evidence that the fork lift operator had communicated the existence of this defect to any Virginia's managers. Thus, there is no evidence that Virginia's conduct reached the level of aggravated conduct (see, E*mery*, supra). Within the context, I find that it has not been established that the violation was the result of Virginia's unwarrantable failure.

I find that the level of gravity of this violation was relatively high, inasmuch as a serious injury could have resulted should a person not have been warned of the fork lift backing up, and thus could have sustained a serious injury. For the reasons set forth above, I find that it has not been established that the level of Virginia's negligence was more than moderate. Taking all the remaining factors of section 110(i) of the Act into account, I conclude that a penalty of $300.00 is appropriate.

VIII. Order 7711669

Horn testified that the left section of the two-piece seatbelt in a R-22 Euclid haul truck was missing. Virginia did not impeach Horn's testimony. Horn issued an order alleging a violation of 30 C.F.R. § 56.14131(a).[2]

Adamson testified that when he drove the truck in early May 1998, both halves of the seatbelt were in place. However, Virginia did not adduce any evidence to contradict Horn regarding his observation on June 2. Accordingly, I find that Virginia did violate section 56.14131(a), supra.

Horn testified that truck was driven on a elevated roadway to and from the pit. He opined that an accident would have been reasonably likely to have occurred, should the truck have lost its brakes, or hit something, and that a fatality would have resulted. Accordingly Horn concluded that the violation was significant and substantial. Virginia did not impeach this testimony nor did it offer any evidence to rebut it. Hence, within this frame work I find that the violation was significant and substantial (see, *Mathies*, supra.

According to Horn, Terry had told him that after the truck was delivered 3 weeks prior to June 2, he did not check it for safety defects. Also, Horn testified that Adamson III had told him that he drove it prior to its being put in service. Roy Lee Green, a former truck driver for Virginia, testified that he had driven the truck almost every day prior to the inspection, and that it had just one side of a seatbelt. On cross-examination, he stated that he had driven the truck for 3 weeks without a seatbelt. He indicated that he reported the lack of a full seatbelt to Terry who told him that "he would get it straight. But . . . he didn't do nothing about it" (sic) (Tr. Vol II, 224).

Adamson testified that when he drove the truck in early May 1998, when he had purchased it, both halves of the seatbelt were in place. He also testified that he had told Terry to check it out before it was put in service, that a couple of days later, he asked Green, who was driving it, how it was and he said it was okay, that his (Adamson's) son drove it and said it was okay, and that the preshift reports of the truck indicated that it was satisfactory. I accept Adamson's testimony that he neither knew nor reasonably should have known that the left side of the seatbelt was missing on June 2, and prior thereto. However, Virginia did not rebut or impeach Horn's testimony that Terry had told him that he did not check it. Nor did Virginia impeach or rebut Green's testimony that he had reported the lack of a complete seatbelt to Terry, but that the latter did not do anything about it. Within the context, I find that Virginia's actions constituted aggravated conduct, and hence I find that the violation resulted from its unwarrantable failure (see *Emery*, supra).

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[2]/ Section 56.14131(a) provides that "[seatbelts shall be provided and worn in haulage trucks."

I accept Horn testimony, inasmuch as it was not impeached or rebutted, that if the truck would have rolled over, the operator would have been thrown out of the cab, due to the lack of seatbelt. Accordingly, I find that the gravity of the violation was relatively high. Also, for the reasons set forth above, I find that the level of Virginia's negligence was relatively high. Considering also the remaining factors set forth in section 110(i) of the Act, I find that a penalty of $600.00 is appropriate.

IX. Order No. 7711674

According to Horn, on June 2, he observed two compressed gas cylinders that were standing unsecured in a scale house. He indicated that although they were capped, they could fall over and injure someone. He issued an order alleging a violation of 30 C.F.R. § 56.16005 which requires that compressed gas cylinders be secured in a safe manner.

Virginia did not rebut or impeach Horn's testimony, and accordingly, I accept it. I thus find that Virginia did violate section 56.16005, supra.

According to Horn, Adamson III told him that he had placed the cylinders inside the scale house, and that he knew that instead they should have been placed in a storage area, and that he knew he was at fault. Also, according to Horn's testimony, Virginia had been cited in the past for this same type of violation. Virginia did not rebut or impeach this testimony, and I accept it. Within this framework, I find that the violation was as the result of Virginia's aggravated conduct and thus constituted an unwarrantable failure (see *Emery*, supra).

I find that the gravity of this violation was only moderate, inasmuch as Horn testified that should the cylinders fall over as a consequence of not having been secured, and it could cause an injury that would that would result in restricted duty. For the reasons set forth above, I find that the level of Virginia's negligence to have been relatively high. Considering the remaining factors set forth in section 110(i), supra, I find that a penalty of $300.00 is appropriate.

X. Citation No. 7711685

According to Horn, on June 10, 1998, he provided the driver of the R-22 Euclid haul truck with a calibrated noise dosimeter, and the driver kept it on for 8 hours. Horn testified that the dosimeter indicated, after proper conversion from percentage to decibel, a decibel reading in excess of 90. Horn issued a citation alleging a violation of 30 C.F.R. § 56.05050, which, in essence, provides that exposure for 8 hours to more than 90 decibels is not permissible. Virginia did not rebut or impeach Horn's testimony, and accordingly, I accept it. I find on the basis of this testimony that Virginia did violate section 56.05050, supra.

According to Horn, continued exposure of the truck driver to this level of noise over a long period of time would cause the employee to start to loose his hearing, and that this injury is permanently disabling. Virginia did not rebut or impeach this testimony, and accordingly, I

accept. Within this framework I find that the violation was significant and substantial (see, *Mathies*, supra.

I find that there is not any evidence that Virginia's negligence was more than moderate. Since the violation could have resulted a miner losing his sense of hearing, I find that the level of gravity was relatively high. Considering the remaining factors in section 110(i) of the Act, I find that a penalty of $300.00 is applicable.

XI. Order No. 7711680

Horn testified that in his inspection, he had noted various safety defects that should have been observed in an examination, and corrected. He noted that it was obvious that guards, a berm, and a stopping block were missing. He concluded that proper examinations were not being performed, and issued an order alleging a violation of 30 C.F.R. § 56.18002(a) which, as pertinent, requires that each shift the operator shall examine each working place ". . . for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate actions to correct such conditions."

Inasmuch as I previously found that these violative conditions did exist (I.(B.)(1.), II, III, V, VI, *infra*), I conclude that Virginia did violate section 56.18002, supra. Further, since the failure to conduct proper examinations resulted in not correcting violative conditions that were found to be significant and substantial (I.(B.)(2.), II, *infra*), I find that the violation herein was significant and substantial.

According to Horn, Adamson III told him that ". . . examinations had not been conducted in a while, and that they just let it slide" (Tr. Vol. III, 20-21). Inasmuch as Virginia did not impeach, rebut, or contradict this testimony, I accept it and find that within this framework, Virginia's conduct amounted to an unwarrantable failure (see *Emery*, supra).

Since the violation herein was significant and substantial, I find that the level gravity was relatively high. Also, as discussed above, I find that the level of negligence was relatively high. Taking into the account the remaining factors set forth in section 110(i) of the Act, supra, as discussed above, I conclude that a penalty of $600.00 is appropriate.

XII. Order No. 7711681

Horn testified that because he had observed several safety defects on mobile equipment, in his inspection on June 2, he concluded that if a preshift examination had been done properly, the defects would not have existed. He issued an order alleging a violation 30 C.F.R. § 56.14100 which requires, in essence, the inspection of mobile equipment prior to its being placed in

operation on a shift. As discussed above (VII, VIII, *infra*), the record establishes the existence of the following safety defects on mobile equipment: inoperable horns and lack of seatbelts. Due to the existence of safety violations on various mobile equipment, I conclude that it was more probable than not that a proper preshift examination had not been performed. I thus find that Virginia did violate section 56.14100, supra. Essentially for the reasons stated above (VII, VIII, *infra*), inasmuch as the various safety defects were found to be significant and substantial, I conclude that the violation herein of the failure to inspect, was also significant and substantial.

The record does not contain sufficient facts to predicate a finding that Virginia's conduct rose to the level of aggravated conduct. Horn referred to the fact that Terry and Adamson III were aware of the standard at issue, and had ignored the various defects cited. Since the gravamen of the violation relates to the performance and thoroughness of the inspection, evidence of the failure to correct violative conditions is not relevant regarding the issue of negligence relating to a proper preshift examination. Within this context, I find that it has not been established that Virginia's actions constituted an unwarrantable failure.

I find that the gravity of this violation was high, but that the level of negligence was no more than moderate. Taking into the account the remaining factors set forth in section 110(i) of the Act, I find that a penalty of $300.00 is appropriate.

XIII. Order No. 7711683

According to Horn, on June 4, 1998, a 1978 Ford welding truck was being operated on the subject site by an employee of the mine. Horn indicated that the manually operated horn on this truck was not operable. He issued an order alleging a violation of section 56.14132(a), supra.

According to Adamson, the pickup truck was owned by Terry who used it to commute to the work site. Adamson stated that the truck contained a tool box, torches, and gauges that belonged to him (Terry). Adamson stated that the welder was usually transported with a fork lift, and that the only time it was in Terry's truck was when, on a couple of occasions, Terry borrowed it. Adamson testified that the truck was not considered Virginia's quarry equipment, and was never intended to transport quarry equipment around the site, and that specifically it was never intended for Terry to put the welder or company tools in the truck, or for him to use his truck for other than personal transportation.

However, Adamson indicated that he did not know which set of tools or gauges in the truck were his or Terry's. Also, Virginia did not impeach or rebut Horn's testimony that on June 4, the truck was being operated by an employee of Virginia. Nor did Virginia impeach or contradict Horn's testimony regarding the inoperable condition of horn. Accordingly, I find that it has been established that Virginia did violate section 56.14132(a), supra.

I find that Horn's opinion reasonable that Terry, as foreman, should have known that his

truck was being used on the site. However, although on June 2, Virginia had been cited for a violation of the section 56.14132(a), supra, a different piece of equipment was cited. There is no evidence as to how long a period the horn had been inoperable, and for how long a period Virginia knew or should reasonable have known that it was inoperable. Within this context, I find that it has not been established that Virginia's action herein constituted aggravated conduct, and thus the violation was not as a result of its unwarrantable failure.

There is insufficient evidence in the record regarding the path of travel normally taken by the truck, the traffic pattern in the area, any pedestrian traffic in the area, and the nature of the roadway over which it travels. I thus find that it has not been established that the gravity of the violation was more than low. For the reasons set forth above, I find that Virginia's negligence was no more than moderate. Considering the remaining factors set forth in section 110(i) of the Act, I find that a penalty of $200.00 is appropriate.

XIV. Order No. 7711684

Horn testified that he asked the operator of the 1978 Ford truck to back up a slight incline, and set the parking brake, but that the vehicle rolled. Virginia did not impeach or rebut Horn's testimony. I thus find that it has been established, as alleged by Horn, in the order that he issued, that Virginia did violate section 56.14101(a)(2), *supra*, which, as pertinent, provides that mobile equipment shall be provided with a service brake system ". . . capable of . . . . holding the equipment with its typical load on the maximum grade it travels."

There is no evidence as to how long a period prior to June 4, the parking brake had been defective. Within this context, and for the reasons stated above, *infra*, I find that it has not been established that Virginia's conduct herein amounted to an unwarrantable failure (see *Emery*, supra).

According to the uncontradicted and unimpeached testimony of Horn, as a consequence of the violative condition, the truck could hit a person or roll over a cliff causing an injury resulting in loss of work days or restricted duty. I find that the gravity of this violation was moderate. For the reasons set forth above, I find that it has not been established that Virginia's negligence was more than moderate. Considering the remaining factors set forth in section 110(i) of the Act, I find that a penalty of $200.00 is appropriate.

ORDER

It is **ORDERED** that: (1) The following orders are to be reduced to section 104(a) citations that are significant and substantial: 7711660, 7711661, 7711665, 7711668, and 7711681; (2) the following orders reduced to section 104(a) citations that are not significant and substantial; 7711663, 7711666, 7711667, 7711683, and 7711684; and (3) Respondent shall pay a total penalty of $4,400.00 within 30 days of the date of this Decision.

Avram Weisberger
Administrative Law Judge

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