

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 4, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-11
Petitioner	:	A. C. No. 46-06750-03578
v.	:	
	:	Peats Branch No. 3 Mine
HOBET MINING, INC.,	:	
Respondent	:	

DECISION

Appearances: Pamela Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
William C. Miller II, Esq., Jackson and Kelly, Charleston, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor against Hobet Mining, Inc. (Hobet) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., the Act seeking a civil penalty of \$2,072 for one violation of the mandatory standard at 30 C.F.R. ' 77.409.

The citation at bar, Citation No. 4401472, alleges as follows:

The model 8,200 Marrion [sic] dragline co No. 113417 was being operated in the presence of persons (rock truck drivers) exposed to hazard from its operations in that the boom and bucket of said dragline was being operated, swung, loaded, and empty over top of the trucks and drivers hauling spoil out of No. 1 shovel pit. This citation was issued in conjunction with imminent danger order 4401471 therefore no abatement date or time was set.

The cited standard, 30 C.F.R. ' 77.409(a), provides in relevant part that shovels, draglines, and tractors shall not be operated in the presence of any person exposed to a hazard from its operation . . .@

Experienced Mine Safety and Health Administration (MSHA) Inspector Ernest Thompson was assigned to the subject Peats Branch No. 3 Mine. The operation involves the removal of mountain overburden to reach multiple coal seams. End loaders, shovels, and draglines are

utilized in the process. Inspector Thompson arrived at the mine around 8:00 a.m., on the morning of September 4, 1996. Commencing his inspection he was driving on the haul road toward the pit about 200 to 300 yards behind union representative Danny Spencer and West Virginia State Mine Inspector Randall Bailey. At a point where the haul road narrowed and began a curve and about 50 feet away, Thompson observed the dragline bucket cross over the haul road 30 to 40 feet above. The dragline was digging on the left, turning 180 degrees and dropping spoil material.

The bucket also passed directly over a haulage truck at a time when Thompson was 100 to 150 yards away. State Mine Inspector Bailey agreed with Thompson that the bucket had passed right over the truck. Thompson therefore asked Bailey to bring the pit foreman to the scene. When pit foreman Jay Curry arrived, Thompson told him to have the bucket swing over the curve. Curry made the request by radio but was told by the dragline operator that he had lost power. Curry thereupon drove up to the dragline. Within 15 or 20 minutes Thompson saw the dragline tramping back from the road. Thompson subsequently asked Curry why he did not have the bucket dropped as was requested and Curry responded that he ~~Adidnt~~ didn't want to lose any more time, so he decided to move the dragline (Tr. 32).

According to Thompson, the subject dragline had a 72 cubic yard bucket capable of holding approximately 100 tons of material. Thompson estimated the bucket to be 13 to 14 feet across at the lip, about 15 to 16 feet high and 14 to 15 feet deep. The boom was about 320 feet long.

Thompson opined that the violation was ~~A~~significant and substantial because the bucket was being swung over an occupied haul truck and there was a ~~A~~possibility of a rock dropping on the truck, a piece of the bucket breaking off, the bucket itself falling or the brakes failing. He noted that when the bucket was full loose material would fall off. He had also seen loose rock riding in the rigging of the dragline. He further noted that the buckets get ~~A~~beat up, the teeth get broken and the spreader bar can break. Hoist ropes can also break or unravel with the potential of causing serious injuries to a haul truck driver. Thompson also opined that the dragline operator could accidentally pull the wrong lever and inadvertently drop the boom and/or load onto a haulage truck. Thompson opined that it was reasonably likely for an accident to occur and for the resulting injuries to be fatal. Thompson also concluded that the operator was moderately negligent because the foreman ~~A~~should have known of the violative practice.

Randall Bailey, a surface mine inspector for the West Virginia Office of Miners Health Safety and Training, corroborated the testimony of Thompson in significant respects. He too observed the dragline bucket swing over the haulage road and, more specifically, observed the bucket directly over the haulage truck. Bailey also heard Thompson tell pit foreman Curry to lower the bucket to the road to determine its reach. This was not done and, after Curry left to go to the dragline, Bailey observed that its lights went out. Driving up to the dragline he observed that it had been moved. Bailey cited the operator for this incident for a violation of West Virginia law (Government Exhibit No. 5) and the operator paid the violation without contesting it.

Based on the credible testimony of both the Federal and state mine inspectors, I conclude

that the violation is proven as charged and was significant and substantial. A violation is 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 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 C that is a measure of danger to safety C contributed to by the violations, (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 reasonable serious nature.

See also *Austin Power Co. 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 injury (*U. S. Steel Mining Co.*), 6FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *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 reaching these conclusions I have not disregarded the testimony of pit foreman William Curry that he had earlier had the dragline operator swing the bucket and drop it in the direction of the haulage road. However, he did not have the bucket dropped at the point where the inspectors later requested him to do so. Curry further acknowledged that following Inspector Thompson's specific request to drop the bucket where requested, he decided to move the dragline. His explanation for failing to comply with the request strongly suggests that he knew of the violative practice (Tr. 180-182).

I have also not disregarded the testimony of dragline operator Joseph Dever, that early in the shift he had cast the bucket toward the road but found that it did not reach. I conclude however that he must not have cast the bucket in the direction in which inspectors had observed the bucket swinging over the road. Under all the circumstances I can give Dever's testimony but little weight.

I must also conclude based on the credible observations of the two inspectors that the points at which Hobert's surveyor, Gary Joe Lane, was shown by Foreman Curry to begin his

measurements must not have been the actual location of the dragline at the time of the violation. Accordingly, the testimony of Lane is likewise entitled to but little weight.

I find that the cited condition was obvious and therefore should have been observed by responsible management. I therefore accept the Secretary's contention that the operator is chargeable with moderate negligence. Considering all the criteria under section 110(i) of the Act, I find that a civil penalty of \$2,000 is appropriate for the violation herein.

ORDER

Hobet Mining, Inc. is **DIRECTED** to pay a civil penalty of \$2,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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