

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 29, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-112-M
Petitioner	:	A.C. No. 02-02618-05507
v.	:	
	:	South West Sand & Gravel
SOUTH WEST SAND & GRAVEL, INC.,	:	
Respondent	:	

DECISION

Appearances: Rebecca A. Baird, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Roger A. Van Camp, President, South West Sand & Gravel, Inc., Glendale, Arizona, *pro se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against South West Sand & Gravel, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges nine violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$590.00. A hearing was held in Phoenix, Arizona. For the reasons set forth below, I vacate three citations, affirm the rest and assess a penalty of \$425.00.

Settled Citations

Prior to the hearing the parties filed a Partial Settlement Agreement in which the Secretary moved to vacate Citation Nos. 7945392, 7945394 and 7945395 and the Respondent agreed to pay the proposed penalties for Citation Nos. 7945228, 7945229, 7945393 and 7945400 in full. The parties reaffirmed this agreement at the hearing. (Tr. 6-8.) Accordingly, the provisions of the agreement will be carried out in the order at the conclusion of this decision.

Background

As its name suggests, South West Sand & Gravel is sand and gravel operation in Maricopa County, Arizona. It is a small company consisting of four employees.

On July 6, 2000, MSHA Inspector Keith J. Campbell and MSHA Inspector-trainee Terry L. Ward conducted an inspection of the mine. They issued several citations to the company, two of which were contested at the hearing.

Citation No. 7945397 charges a violation of section 56.14100(d), 30 C.F.R. § 56.14100(d), because:

There was a Ford 8000 truck with a 1000 gallon water tank installed on it taken out of service, allegedly. The tank was secured onto the truck frame with 1 inch cables. One cable was loose and one cable had fallen off. There was no record available as to when this truck was first removed from service. It was parked on the ready line with keys in it and not tagged out.

(Jt. Ex. 2.)

Citation No. 7945398 alleges a violation of section 56.14103(b) of the regulations, 30 C.F.R. § 56.14103(b), because:

The caterpillar 988 B front end loader had 2 broken and cracked front windows. One window had several holes and numerous cracks directly in front of the operators station and the other was to the right of the operators station. This was severely cracked. Both windows made visibility an unsafe condition and the large window created a hazard to the operator.

(Jt. Ex. 1.)

Findings of Fact and Conclusions of Law

Citation No. 7945397

Section 56.14100(d) requires that:

Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

The inspectors observed a water truck during the inspection which appeared to be defective because the straps holding the water tank on the back of the truck were not properly attached. The rear strap had come loose and one end of it was lying on the ground. The front

strap was still around the tank, but was loose. The inspectors were told by Mr. Van Camp that the truck had been taken out of service so that the tank could be safely secured to the back of the truck. Inspector Campbell asked to be shown the records recording the defects and the fact that the truck had been taken out of service. The company could not produce the records.

Based on this, I conclude that the Respondent violated section 56.14100(d) of the regulations as alleged.

Citation No. 7945398

Section 56.14103(b) provides, in pertinent part, that: “If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed.” The Respondent argues that windows were not unsafe. I find that the evidence does not support its position.

Inspector Ward testified that as he and Inspector Campbell approached the front-end loader, he noticed that the front windshield was broken. He stated that he climbed up into the cab to see how badly it was broken and he found that it had multiple cracks in it that “went above my line of vision.” (Tr. 27.) He said that the cracks covered 60 to 70 percent of the windshield from top to bottom and went all the way across the windshield. He related that vision through the windshield was “all distorted.” (*Id.*) He also testified that the left corner glass was “totally spiderwebbed.” (Tr. 28.) Inspector Campbell testified that the windows were “so badly holed and cracked that I don’t know how the driver made it from the pit to where he parked it.” (Tr. 95.)

Mr. Van Camp testified that neither of the inspectors got into the driver’s compartment of the loader. He further stated: “Quite frankly, I can’t tell you how the cracks arranged in the windshield at the time in July 2000. I can testify to you there were no holes in the windshield, and the safety glass was not broken on the inside.” (Tr. 158.) In addition, the company offered into evidence the affidavits of two employees and a former employee which stated that the windshield did not have any holes “in the glass area.” (Resp. Exs. B, C and D.)

I find the inspectors’ testimony convincing. Their descriptions were detailed and leave little doubt as to the condition of the windshield and side glass on the loader. Furthermore, on April 9, 2001, Inspector Ward drew pictures of the two windows from memory which demonstrate that visibility through the windows was obscured so that the loader could not be operated safely.¹ (Govt. Ex. 1.)

On the other hand, the company does not dispute that the windows were cracked, only

¹ The Respondent argues that because the drawings are not the same shape as the windows on the loader, which are triangular, they are somehow not valid. The issue, however, is whether visibility was obscured, not the shape of the windows. The drawings vividly depict obscured windows.

that the windshield did not have holes in it.² I find that the windshield did have holes in it, but even if it did not, the cracks alone were severe enough to obscure the operator's vision.³ Accordingly, I conclude that the Respondent violated section 56.14103(b).

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon 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 set out four criteria that have to be met for a violation to be S&S. *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 Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

The inspectors testified that there are several safety hazards contributed to by the loaders' windows being cracked and having holes in them. The loader is used to dig into a 30 foot high

² I give little weight to the three affidavits for the following reasons: (1) No reason was given why the two employees and former employee were not available to testify at the hearing. (2) The three affidavits are worded almost identically, stating only that the windshield did not have holes in it and providing no other details. (3) One of the employees was not present on the day of the inspection. (4) The employees were not subject to cross-examination by the Secretary and I did not have an opportunity to observe them while they testified.

³ The Respondent correctly argues that a photograph would have greatly aided in the resolution of this citation. However, that argument cuts both ways. There does not appear to be any reason the company could not have taken a photograph of the loader at the time of the inspection to support its position.

bank. When the digging occurs, loose and unconsolidated material, including rocks, falls on the loader. The windshield protects the operator from the falling material. When the windshield is cracked and has holes in it, it may not prevent the falling material from hitting the operator, or the falling material may shatter the windshield onto the operator. Moreover, with the operator's vision obscured, he could run into, or over, other pieces of equipment, he could run off of the road and tip the loader over, or he could run over another employee.

Since the loader spends most of its time digging into the bank, and since the material falling from the bank apparently caused the cracks and holes in the windshield, I find that if the windshield were not replaced that it is reasonably likely that an injury would result from the violative windshield and side window. I further find that the injury would be reasonably serious, ranging from cuts and bruises to the operator to the death of the operator or another employee.

Other than asking Inspector Campbell what data he had concerning injuries resulting from damaged windshields in Arizona (he had none), the Respondent did not present any evidence on the S&S issue. Accordingly, I accept the testimony of the inspectors concerning the hazards resulting from this violation and conclude that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed penalties of \$205.00 for two contested violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

The company has four employees. Therefore, I find that it is a small company. I further find that the company was moderately negligent in committing the contested violations. I find that the gravity of the violation concerning the loader was fairly serious, but that the gravity of the violation concerning the water truck was not serious.

The Respondent did not present any evidence to show that the penalty in this case would adversely affect its ability to continue in business. Accordingly, I find that the penalty will not adversely affect the company's ability to remain in business.

The Secretary did not present any evidence concerning the operator's history of previous violations or whether the company demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. Consequently, I find that the operator has a good history of prior violations and did demonstrate good faith in abating the violations.

Taking all of these factors into consideration, I conclude that the penalties proposed by the Secretary are appropriate. Therefore, I assess the following penalties:

<u>Citation</u>	<u>Penalty</u>
7945228	\$ 55.00
7945229	\$ 55.00
7945393	\$ 55.00
7945397	\$ 55.00
7945398	\$150.00
7945400	<u>\$ 55.00</u>
Total	\$425.00

Order

Citation Nos. 7945392, 7945394 and 7945395 are **VACATED**. Citation Nos. 7945228, 7945229, 7945393, 7945397, 7945398 and 7945400 are **AFFIRMED**. Accordingly, South West Sand & Gravel, Inc., is **ORDERED TO PAY** a civil penalty of **\$425.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Rebecca A. Baird, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105

Roger A. Van Camp, South West Sand & Gravel, Inc., P.O. Box 12455, Glendale, AZ 85318

nt