FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 30, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 94-308-M
	:	A.C. No. 42-01975-05505
v.	:	
	:	Docket No. WEST 94-309-M
LAKEVIEW ROCK PRODUCTS, INC., Respondent	:	A.C. No. 42-01975-05506
	:	
	:	Mine: Lakeview Rock Products, Inc.

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gregory M. Simonsen, Esq., Kirton & McConkie, Salt Lake City, Utah, for Respondent.

Before: Judge Amchan

Factual Background

On November 3, 1993, MSHA representative Richard Nielsen, accompanied by his supervisor William Tanner, conducted an inspection of Respondent's sand and gravel pit in Salt Lake City, Utah (Tr. 21 -23). The penalties for seven citations or orders are at issue before me, the most significant of which involves the safety of a highwall at the pit.

Citation/Order No. 4120702: Loose ground on the highwall

At 1:10 p.m., on November 3, 1993, Inspector Nielsen issued Citation/Order No. 4120702, pursuant to sections 104(a) and 107(a) of the Act. The citation/order states:

> Loose ground was observed on the nearly vertical highwall at the upper bench where the bulldozer was pushing material to feed the crusher. The dozer operator was operating adjacent to the high wall where loose rocks could fall into the cab of the dozer. The loose rocks were large enough to cause fatal injuries. The highwall was about 15 meters (50 ft) high. This was an imminent danger.

(Citation/Order No. 4120702, block 8).

The citation/order alleged a violation of 30 C.F.R. §56.3131, which provides:

> In places where persons work or travel in performing their assigned tasks, loose or

> unconsolidated materials shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall of material hazard to persons shall be corrected.

MSHA proposed a $2,400 penalty for this citation/order[1].

Inspector Tanner observed the cited condition first and called it to Inspector Nielsen's attention (Tr. 61, 90). Although Nielsen issued the citation and testified at hearing regarding the highwall, the record is very unclear as to the degree, if any, of his first-hand knowledge of its condition.

Nielsen testified that he recommended that a special assessment be made for the citation/order for the following reasons:

> ... I didn't feel that due care was taken to control the loose ground or to control where people were working in relation to the loose ground, and it was an obvious thing that could be seen from even the lower levels that there was loose ground on this high wall and that some kind of action should be taken (Tr. 58).

However, he later testified that he did not observe the cited condition and that his opinions were based entirely on photographs taken by Mr. Tanner and his conversations with his supervisor (Tr. 61, 71, 91).

Inspector Nielsen also testified that on the basis of photographs taken by Mr. Tanner that there were loose rocks lying on the edge of the quarry wall that were not stripped back (Tr. 131). However, it appears that this opinion is based solely on Nielsen's interpretation of the photograph, rather than first-hand observation (Tr. 132). When asked how he knew that the rocks in the highwall were not resting at an angle of repose (an angle at which soil or rocks will not slide or fall), Nielsen stated:

> That would be a judgment call from the inspector, but looking at the photos, you can see that there are areas where if jarring or weather or other factors entered into that material, that it could

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[1]Citation/Order No. 4120702, insofar as it is an imminent danger order issued pursuant to section 107(a) of the Act, is unreviewable due to Respondent's failure to contest it within 30 days, Local Union 2333, District 29, United Mine Workers of America (UMWA) v. Ranger Fuel Corporation, 12 FMSHRC 363 (August 1990); ICI Explosives USA, Inc., 16 FMSHRC 1794 (ALJ Merlin August 1994). However, the penalty assessment for the order is reviewable, ICI, supra.

and very likely would fall. (Tr. 138)[2].

In sum, Inspector Nielsen demonstrated no first-hand knowledge regarding this alleged violation and I therefore accord his testimony in this regard no weight. The factual questions regarding this condition require a credibility resolution between the testimony of Inspector Tanner, on the one hand, and Pit Manager Scott Hughes, on the other.

Inspector Tanner testified that material in an area directly above that where Respondent's bulldozer was operating on November 3, 1993, was "really, really loose" (Tr. 166-67, Exh. 5B). He told Nielsen to issue the imminent danger order because some of that material, primarily large boulders, could have fallen "at any minute, at any second" (Tr. 174, 208).

Mr. Tanner did not climb the highwall to examine the area he considered loose out of concern for his safety (Tr. 183). He may never have been closer to the highwall than 150 feet away (Tr. 62). The inspector stated that he could tell from the photographs he took that material on the highwall was cracked and loose (Tr. 183-86). This is not apparent to the undersigned.

As the photographic exhibits do not necessarily corroborate Mr. Tanner's conclusions, it is necessary to examine the basis for his opinions regarding the stability of the materials on the highwall. In this regard, Respondent's counsel him asked the following question:

> Q. ... do you have any specific information that would bear upon - - that would indicate to you that this material was not - - that you have circled in these pictures was not of the type that was embedded into the mountain?
>
> A. The only thing I go by is my experience and my education.
>
> * * * *
>
> A. I did not go up there, no and I'm not about to.

(Tr. 187-88).

Mr. Tanner's training and experience fall short of qualifying him as an expert in matters of soil stability and ground control. He has a Bachelor of Arts degree from Marshall University in Huntington, West Virginia, and has attended four courses of undetermined length and content relating to the issues in this case. These courses covered the subjects of ground control, wall and rock stability and underground ground control. They were conducted at the MSHA

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[2]The undersigned concludes that it is not obvious from the photographic exhibits in the record that any of the material in the highwall was loose, unconsolidated, or in danger of falling.

Academy in Beckley, West Virginia, and in Michigan (Tr. 155-56).

Respondent's pit manager, Scott Hughes, has been mining at the same site since the late 1970's (Tr. 215, 230). He testified that the highwall consisted of conglomerated rock, or "basically a bunch of rocks glued together" (Tr. 231-32). He stated further that he blasted the rock in the area cited by Tanner and then inspected to determine whether there was any loose material (Tr. 236). After blasting, Hughes contends he had a bulldozer attempt to pull out the rocks protruding from the wall and could not even wiggle them (Tr. 236). He therefore concluded that it was safe for the bulldozer to scrape away dirt to lower that section of the highwall (Tr. 237).

Comparing the testimony of the Inspector Tanner and Pit Manager Hughes, I conclude that the Secretary has failed to meet its burden of proving that there was loose or unconsolidated material in the highwall that posed a hazard to Respondent's employees. I therefore vacate the penalty proposed for Citation/Order No. 4120702[3].

Citation No. 4120693: Failure to Wear Seat Belt

On the morning of November 3, 1993, Inspectors Nielsen and Tanner observed the driver of one of Respondent's front-end loaders operate his vehicle without wearing his seat belt (Tr. 42-43, 144-45, 156-57). The driver told Nielsen that he did not always wear his seat belt because it hurt his back (Tr. 43)[4].

Nielsen issued a section 104(d)(1) citation alleging a "significant and substantial" (S & S) violation of 30 C.F.R. § 56.14130(g), due to Respondent's "unwarrantable failure" to comply with the regulation and "high" negligence. A civil penalty of $1,800 was proposed for this citation.

The S & S allegation was based in part on the fact that the front-end loader was operating in areas in which the berm

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[3]Inspector Tanner also stated that as he interprets the cited standard, it prohibits miners from working underneath any overhang where blasting has occurred recently (Tr. 205). Section 56.3131 does not so provide explicitly and the record does not establish that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that working beneath the highwall in this case violated the standard, Ideal Cement Company, 12 FMSHRC 2409 (November 1990).

[4]I find it unnecessary to determine whether Pit Manager Scott Hughes told Nielsen that he left the use of seat belts up to his employees (Tr. 50, 226). I do not find credible Scott Hughes' testimony that the driver had just gotten back into his vehicle and had not had a chance to put on his belt before the citation was issued (Tr. 223-24).

on the side of the road was inadequate and was feeding a crusher in an area where there was no bumper block (Tr. 29-39, 144-46). I conclude that the record establishes an S & S violation of the standard pursuant to the criteria set forth by the Commission in Mathies Coal Co., 6 FMSHRC 1 (January 1984). Specifically, I find that given the area in which the front-end loader was operating, an injury due to the driver's failure to wear a seat belt was reasonably likely. It was also reasonably likely that the injuries sustained would have been of a reasonably serious nature.

On the other hand, I conclude that the Secretary has not established an "unwarrantable failure" to comply with the regulation or "high" negligence. I credit Scott Hughes' testimony that Respondent's policy was that drivers were to wear seat belts and that this policy was verbally communicated to its employees (Tr. 223-24, 226-27).

While employee misconduct or disregard of company safety rules is no defense to an MSHA citation, it may be relevant to the degree of negligence imputed to the operator and the size of the civil penalty assessed, Mar-Land Industrial Contractors, Inc, 14 FMSHRC 754 (May 1992). I affirm this violation as a section 104(a) citation and conclude that it was due to the ordinary negligence of Respondent. Considering the six criteria in section 110(i) of the Act, a civil penalty of $600 is appropriate.

I assess this penalty primarily on the basis of the gravity of the violation, which I regard as quite high, and the negligence of Respondent. Although, as Mr. Hughes contends, it is not reasonable to expect Respondent to fire a competent driver every time one is observed without a seat belt, there are effective means of discipline short of discharge.

A graduated punishment scheme, including verbal and written warnings and monetary penalties, might well achieve nearly universal compliance with company safety rules. Since Scott Hughes was aware that his drivers failed to wear seat belts prior to the issuance of this order (Tr. 222-23), his negligence in not implementing a more effective disciplinary system warrants assessment of a civil penalty of $600.

Order Nos. 4120704 and 4120705: Were records made available to the Secretary?

Inspector Nielsen issued Order Nos. 4120704 and 4120705 pursuant to 30 C.F.R. §56.12028 and §56.18002(b), after asking Respondent for records pertaining to the continuity and resistance of its electrical grounding systems, and workplace examinations. According to Nielsen and Tanner, Respondent initially told them they had to have an appointment to see these records (Tr. 72, 76, 175). Both inspectors also testified that the company records were brought to the closing conference at the end of the inspection on November 4, 1993, but that they were unable to look at the records due to confrontational behavior on the part of Glenn Hughes, Respondent's owner (Tr. 74, 199).

The cited regulations provide that the records shall be made available to the Secretary or his duly authorized representative. They do not require that the records be maintained at the mine site and do not specify how long after a request the records must be produced. Had these records been made available on November 4, at the closing conference, it would be necessary to decide whether the records were made available within a reasonable amount of time following the request. However, since I credit the inspectors' testimony that they were prevented from examining the records, I conclude that Respondent violated the standards.

The Secretary proposed penalties of $700 for each of these two orders. Pursuant to the criteria in section 110(i) of the Act, particularly the good faith factor[5], I assess a civil penalty of $500 for each of these orders. Regardless of its disagreement with the inspectors as to the requirements of the standard, Respondent was obligated to allow MSHA to inspect its continuity and workplace examination records. Its interpretation of the standard's requirements can be appropriately handled through the Act's review procedures. Therefore, its unwillingness to allow for review of the records at the closing conference warrants the characterization of "unwarrantable failure" and the penalties assessed.

Citation No. 4120692: Absence of a bumper block

Inspector Nielsen issued Citation No. 4120692 to Respondent because he observed no bumper block in front of the crusher plant (Tr. 23). Respondent's front-end loaders were travelling up a ramp to the crusher plant with material. Nielsen was concerned that the loaders would hit the feed plant and weaken it (Tr. 24).

The citation was issued pursuant to 30 C.F.R. §56.9301, which requires that berms, bumper blocks or other restraining devices be provided at dumping locations where there is a hazard of overtravel or over-turning. Respondent's defense to this citation is that the plant extended eight to ten feet above the ground level at the crushing plant and that it was so firmly embedded into the embankment that its equipment could not push it over (Tr. 219-20).

I affirm the citation because the standard is intended to prevent not only a single instance of overtravel, but also the potential of repeated bumping of such structures which could ultimately produce injury. Exhibit No. 2-A indicates that the portion of the plant protruding above the embankment was subject to damage from repeated contact with heavy equipment. Such contact could, at some point, cause the structure to break and cause a vehicle to go over the embankment. Therefore, I affirm the citation and assess a civil penalty of $50, which was proposed by the Secretary.

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[5]One of the six statutory criteria is "the good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

Citation No. 4120694: Inadequate berm on side of ramp

Inspector Nielsen observed one area of the ramps travelled by Respondent's equipment where the berm on the side measured 16 to 24 inches in height, and another area in which there was no berm at all (Tr. 29-30). MSHA's regulations at 30 C.F.R. §56.9300 require that berms or guardrails be provided and maintained on roadways with a sufficient drop-off to cause a vehicle to overturn or endanger miners in equipment.

There was a sufficient drop-off in the areas cited that a berm was required (Tr. 33-36, 243, Exh. No. 3-B). When berms are required they must be mid-axle height of the largest vehicles that usually travel the roadway (section 56.9300(b)). The ramps cited by Nielsen were regularly travelled by front-ends loaders with a mid-axle height of 36 inches (Tr. 31-32).

I affirm the citation as an S & S violation of the Act and assess a civil penalty of $100. The frequency with which these ramps were travelled persuades me that it was reasonably likely that an accident could occur due to the absence and/or inadequacy of the berms. The fact that one of the loader operators was not wearing a seat belt persuades me that it was also reasonably likely that injuries that might occur would be of a serious nature (Tr. 36).

Citation No. 4120700: Records regarding defective back-up alarm

At 10:45 a.m. on November 3, 1993, the back-up alarm on one of Respondent's front-end loaders was not working (Tr. 39-41). The vehicle operator told inspector Nielsen that he was not aware that he was required to check the back-up alarm Tr. 39-40).

Nielsen then issued Respondent Citation No. 4120700 alleging a violation of 30 C.F.R. §56.14100(d). That regulation requires that defects on such equipment that are not corrected immediately shall be reported to and recorded by the mine operator.

There is no indication as to how long this back-up alarm was not working. Pit Manager Scott Hughes testified that the alarm was working at the beginning of the workshift on November 3, and that the alarm was repaired that afternoon (Tr. 220-223, 257-58).

While Respondent may have been in violation of §56.14100(a), which requires a pre-shift inspection of its vehicles by the operator, it was cited for not having records of a defective condition. However, records are required under §56.14100(d) only for defects which are not corrected immediately. Since there is no evidence that the defective back-up alarm was not fixed immediately, I vacate Citation No. 4120700 and the $50 penalty proposed therefor.

ORDER

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Citation No. 4120692 is affirmed and a civil penalty of $50 is assessed.

Citation No. 4120694 is affirmed as a S & S violation and a civil penalty of $100 is assessed.

Citation No. 4120700 and the penalty proposed therefor is vacated.

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Citation No. 4120693 is affirmed as a S & S violation of section 104(a) of the Act and a civil penalty of $600 is assessed.

The penalty proposed for Citation/Order No. 4120702 is vacated.

Order No. 4120704 is affirmed and a civil penalty of $500 is assessed.

Order No. 4120705 is affirmed and a civil penalty of $500 is assessed.

Respondent is ordered to pay the assessed civil penalties of $1,750 within 30 days of this decision and order. Upon such payment these cases are dismissed.

Arthur J. Amchan
Administrative Law Judge

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