

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 17, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-139-M
Petitioner	:	A.C. No. 45-03086-05509
	:	
v.	:	Docket No. WEST 98-178-M
	:	A.C. No. 45-03086-05510
GOOD CONSTRUCTION,	:	
Respondent	:	Good Portable Crusher

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
 James A. Nelson, Esq., Toledo, Washington, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against Good Construction, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' ' 815 and 820 (the Mine Act). The petitions allege four violations of the Secretary's safety standards. A hearing was held in Kelso, Washington.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Good Construction operates a portable crusher at its Brown Road Quarry in Lewis County, Washington. The quarry is owned and operated by Allen L. Good. On October 21, 1997, MSHA Inspector Arnold Pederson inspected the quarry. During the inspection, he issued a number of citations including the three citations and one order at issue in these proceedings.

A. Citation No. 7962491

This citation alleges a violation of 30 C.F.R. ' 56.9300(a), as follows:

A berm was not placed on the outer edge of an approximately 150-foot long by 20- to 40-foot wide section of elevated access road to the mine, where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. The

road was widened about two months ago so trucks could exit the scale and make traveling safer for passing. The operator was aware that this condition existed but had not installed the berm.

Inspector Pederson determined that the violation was of a significant and substantial nature (AS&S[®]) and was the result of Good Construction's high negligence. He issued the citation under section 104(d)(1) of the Mine Act and alleged that the violation was the result of Good Construction's unwarrantable failure to comply with the safety standard. Section 56.9300(a) provides that A[b]erms or guardrails 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 in equipment.[®] The citation was terminated the following morning after large rocks were placed along the outer edge of the roadway. The Secretary proposes a penalty of \$600 for this alleged violation.

I find that the Secretary established a violation of the safety standard. There is no dispute that a berm was not present along 150 feet of the roadway. In addition, there is no dispute that a drop-off existed along the outer edge of the roadway. Good Construction argues that the roadway was of sufficient width that a berm was not required. It also argues that the standard is so vague that it fails to give mine operators notice of when a berm is required. I reject these arguments. First, I find that the safety standard is clear with respect to its application in this case. A berm is required whenever there is a sufficient drop-off where a vehicle could overturn if it traveled off the edge of the road. The drop-off on the roadway in this instance was of a sufficient grade to cause a vehicle to overturn. Although there may be a point at which a roadway is so wide that berms are unnecessary, the roadway in this instance was 30 to 40 feet wide at its narrowest point and berms were necessary to protect the safety of truck drivers.

I find that the violation was the result of Good Construction's moderate negligence and that the Secretary did not establish that the violation was the result of Good Construction's unwarrantable failure. In making his unwarrantable failure determination, Inspector Pederson relied heavily on the fact that Mr. Good was candid in stating that he was aware that berms were required on elevated roadways. In this instance, however, there are a number of mitigating circumstances that must be taken into consideration. At the time of the inspection, Good Construction was in the process of relocating and widening the access road. Good Construction started rebuilding the road in the late summer of 1997 and the project took a little over three months to complete. (Tr. 88). Good Construction began putting rock on the surface of the road the first week of October. When Inspector Pederson arrived, trucks had been using the new road for about one week. Good Construction had just completed grading the outer edges of the roadway and was set to install the berm. Good Construction planned to use rocks for the berm because an earthen berm could cause silting of the water runoff. (Tr. 90-91). It had gathered the rocks for this purpose and placed them near the scale house. (Tr. 91, 124, 127).

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987).

Unwarrantable failure is characterized by such conduct as Areckless disregard,@Aintentional misconduct,@Aindifference,@or a Aserious lack of reasonable care.@ *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission stated that several Afactors are relevant in determining whether a violation is the result of an operator=s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator=s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.@ *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

I rely on a number of facts in holding that the violation was not the result of Good Construction=s unwarrantable failure. The access road in question is only about 150 to 200 yards long. The trucks that use this roadway are Ahighway legal,@so they are no more than eight feet wide. County roads in the area are about 24 feet wide while the access road varied between about 42 and 85 feet wide without berms. (Tr. 92, 130). The trucks using the access road traveled at a low rate of speed. (Tr. 15, 44). As a consequence, the violation was not extensive and the risk of injury very low. The violation had only existed for about a week and the operator was getting ready to install rock berms. (Tr. 89-90). Good Construction had not been put on notice that greater efforts were necessary. Although Good Construction should have installed berms before it permitted trucks to use the roadway, its failure in this regard does not constitute Areckless disregard@of the safety of the truckers, Aintentional misconduct,@Aindifference@to safety, or a Aserious lack of reasonable care.@ Good Construction did not believe that it was endangering truck drivers and I find that its conduct constituted no more than ordinary negligence. The citation is modified to a section 104(a) citation.

I also find that the violation was not S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation Aof such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard.@ A violation is properly designated S&S Aif 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. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. One must assume Acontinued normal mining operations@when evaluating whether a violation is S&S. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

In order to establish that a violation is S&S, the Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete 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 in question will be of a reasonably serious nature.

The Secretary established all parts of this test except part three. I find that it has not been established that it was reasonably likely that the hazard contributed to by the violation would

result in an injury. The access road was wide, the vehicles that used the road were no more than 8 feet wide, the speed of vehicles on the road was 15 miles per hour or less, and the unbermed portion of the road was about 150 feet long. The condition had lasted about a week and, assuming continued normal mining operations, the condition would have been corrected within a few days. An accident was not likely.

Although I do not rely on this fact, it is interesting to note that the inspector first testified that it was unlikely that the cited condition would result in an accident because of the low speeds on the road and the courtesy exhibited by truck drivers on the road. (Tr. 15). After he was shown a copy of the citation, he testified that an accident was reasonably likely. (Tr. 15-16). Thus, the inspector implicitly conceded that the S&S issue is close.

B. Order No. 7962495

This order alleges a violation of 30 C.F.R. ' 56.9301, as follows:

Both sides of the approach to the feed hopper were not bermed. The ramp was approximately 30 feet long and gradually elevated to about 12 feet high. The plant was recently moved to its present location, ramp to the feeder installed, but berms [were] not placed to prevent the front-end loader from overtraveling, especially with the loaded bucket raised.

Inspector Pederson determined that the violation was not S&S and was the result of Good Construction's high negligence. He issued the order under section 104(d)(1) of the Mine Act and alleged that the violation was the result of Good Construction's unwarrantable failure to comply with the safety standard. Section 56.9301 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." The citation was terminated ten minutes later after berms were installed on both sides of the ramp. The Secretary proposes a penalty of \$300 for this alleged violation.

I find that the Secretary established a violation. Good Construction does not dispute the fact that there were no berms on the sides of the ramp leading to the feed hopper of the crusher. Good Construction argues that there was no real danger of overtravel or overturning for a number of reasons. The ramp was only 6 feet above the ground at the top and it was only 25 feet long. (Tr. 96-97). Because loaders are about 22 feet long, the rear wheels would only be a few feet above the ground level when the loader operator was dumping material into the feeder. (Tr. 123). The ramp was about 22 feet wide and the loaders were about 8 feet wide. (Tr. 25, 107). The area around the ramp was flat and open so it was not difficult to approach the ramp head on. (Tr. 122). I find that these factors relate to the gravity of the violation rather than the fact of violation. The lack of berms presented a hazard that one of the front wheels of a loader would travel off the edge of the ramp as the operator was approaching the feeder. I find that the gravity was low, however, because such an event was unlikely given the facts discussed above.

I also find that the violation was not the result of Good Construction's unwarrantable failure. Inspector Pederson testified that he based his unwarrantable failure determination on the fact that, when questioned, Mr. Good could not offer any excuse for the lack of berms. (Tr. 25). There is no dispute that the crusher had been recently moved within the quarry and a new ramp was constructed out of earth and rock. That ramp had been in use for about a week. (Tr. 24, 106). Prior to the move, the ramp to the feeder had been provided with berms. (Tr. 106). Good Construction's conduct does not demonstrate reckless disregard or intentional misconduct with respect to the requirements of the safety standard. It could indicate indifference or a serious lack of reasonable care, however. In this case it appears that the lack of berms was an oversight. A new ramp had to be constructed when the crusher was moved and, due to an oversight, berms were not added. The condition had existed for about a week but the violation did not create a serious safety hazard. I find that the violation was the result of Good Construction's ordinary negligence. The order is modified to a section 104(a) citation.

C. Citation No. 7962493

This citation alleges a violation of 30 C.F.R. ' 56.14132(b)(1), as follows:

An automatic reverse signal alarm was not installed on the ... fuel truck that is used to store and dispense fuel for equipment at the mine. The fuel truck is driven in the mine occasionally.

Inspector Pederson determined that the violation was not S&S and was the result of Good Construction's moderate negligence. He issued the citation under section 104(a) of the Mine Act. Section 56.14132(b)(1) provides, in part, that "[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have a backup alarm or an observer to signal when it is safe to back up." The citation was terminated the following day after a wheel bell was installed. The Secretary proposes a penalty of \$50 for this alleged violation.

The fuel truck had an obstructed view to the rear and it was not equipped with a backup alarm. Good Construction contends that it complied with this standard by having an observer to signal the driver of the fuel truck when it is safe to back up the fuel truck. (Tr. 103, 107, 115). It is not disputed that this truck is rarely moved. Other vehicles in the quarry are driven to the fuel truck when refueling is necessary. The fuel truck is not licensed so it never leaves the quarry. Mr. Good stated that the fuel truck is moved from time to time and that it may be required to back up when it is moved. (Tr. 101-03). He stated that an observer is present when the truck is backed up. (Tr. 103, 107, 115). Inspector Pederson did not observe the fuel truck backing up. (Tr. 27). He testified that during his inspection, Mr. Good did not mention about having an observer, although [that's] not to say there couldn't have been [one]. (Tr. 28). On the other hand, Inspector Peterson also stated that Mr. Good told him that they normally would not use an observer. *Id.* This testimony is rather ambiguous.

It is not clear from the testimony whether Good Construction has backed up the fuel truck without having an observer present. The truck was not moved on the day of the inspection. The

inspector's testimony is somewhat ambiguous as to the conversation he had with Mr. Good and there is no direct proof that the fuel truck was backed up without an observer being present. Another administrative law judge held that the Secretary had not established a violation when faced with a similar dispute concerning whether an observer had been used in lieu of an alarm. The judge discussed the issue as follows:

I find that in order to have made a *prima facie* case of a violation, the Secretary must have produced some evidence that the respondent was operating the equipment without a reverse signal alarm or an observer at some definite time or at least some date certain. To hold otherwise would force the respondent to prove the negative, *i.e.* that it did not operate the equipment in violation of the standard on *any* day since it was first acquired, which was years before the citation was written.

River Cement Co., 10 FMSHRC 1027, 1029-30 (August 1988)(emphasis in original). I agree with the judge's reasoning. The Secretary contends that there have been occasions in which the fuel truck was backed up without an observer present, but she offered insufficient evidence to support her contention. Since the Secretary bears the burden of proof, I vacate the citation.

D. Citation No. 7962494

This citation alleges a violation of 30 C.F.R. ' 56.14132(b)(1), as follows:

The Ford utility truck, with an air compressor and welding machine in the back, had an obstructed view to the rear. An automatic reverse signal alarm was not installed to warn people when backing. The truck is used in the plant for maintenance and construction purposes.

Inspector Pederson determined that the violation was not S&S and was the result of Good Construction's moderate negligence. He issued the citation under section 104(a) of the Mine Act. The citation was terminated the following day after a signal alarm was installed. The Secretary proposes a penalty of \$50 for this alleged violation.

The utility truck was not equipped with a backup alarm. Good Construction contends that the view to the rear of this truck was not obstructed. Mr. Good testified that the view to the rear of the utility truck was as clear as the view to the rear in a pick-up truck with the tail gate closed. (Tr. 111). He testified that the welding equipment and the air compressor did not obstruct the driver's view sufficiently to prevent him from seeing a pedestrian behind the truck. Although I agree that the utility truck driver would be able to see most pedestrians, blind spots existed that created a hazard. (Tr. 32; Ex. R-5). I find that the cited utility truck had an obstructed rear view. Accordingly, I find that the Secretary established a violation and I affirm the citation.

Based on the evidence presented at the hearing, I find that an accident was unlikely and that the violation was not serious. I find that Good Construction's negligence was slightly less than that determined by the inspector. First, the view to the rear of the vehicle was only slightly obstructed. Second, this quarry has been inspected by MSHA on many occasions, Good Construction's utility trucks were not equipped with backup alarms, and no citations were previously issued. (Tr. 105-06).

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that no citations were issued at the quarry during the two years prior to this inspection. (Ex. P-1; Sec. Prehearing Submission). The quarry is a relatively small-to medium-sized facility that employed about 10 miners in 1997 and worked 26,339 man-hours in 1996. The record does not reveal that Mr. Good owns any other facilities. The violations were rapidly abated. The penalties assessed in this decision will not have an adverse effect on Good Construction's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. ' </u>	<u>Penalty</u>
WEST 98-139-M		
7962493	56.14132(b)(1)	Vacated
7962494	56.14132(b)(1)	\$40.00
WEST 98-178-M		
7962491	56.9300(a)	80.00
7962495	56.9301	80.00

Accordingly, the citations listed above are hereby **VACATED, AFFIRMED, or MODIFIED** as set forth above, and Good Construction is **ORDERED TO PAY** the Secretary of Labor the sum of \$200.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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