

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 15, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-136-M
Petitioner	:	A. C. No. 35-03308-05511
v.	:	
	:	Applegate Aggregates
APPLEGATE AGGREGATES, INC.	:	
Respondent	:	

DECISION

Appearances: Paul A. Belanger, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Vacaville, California, for Petitioner;
E. W. Mignot, President, Applegate Aggregates, Inc., Grants Pass, Oregon,
Pro Se.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Applegate Aggregates, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges five violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$312.00. A hearing was held in Medford, Oregon. For the reasons set forth below, I affirm the citations and assess a penalty of \$312.00.

Background

Applegate operates a shale crushing plant in Josephine County, near Grants Pass, Oregon. It generally consists of a crusher with associated conveyor belts, screens and stockpiles. Most of the time, there are no more than four employees at the site.

MSHA Inspector Larry Orton conducted an inspection of the crushing plant on February 3, 1998. As a result of this inspection, he issued five citations, all of which are contested by the Respondent. The citations will be discussed *seriatim*.

Findings of Fact and Conclusions of Law

Citation No. 4374008

This citation alleges a violation of section 56.12028 of the Secretary's Regulations, 30 C.F.R. § 56.12028, because: "The continuity and resistance tests of the grounding system at the plant has [*sic*] not been done or documented in the last year." (Govt. Ex. 1.) Section 56.12028 requires that: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative."

Inspector Orton testified that he asked Dan Huff, the employee accompanying him on the inspection, if there was a record of the most recent resistance measurements. He said that Huff looked around and could not find anything. E. W. Mignot, President of Applegate, stated that he had no idea whether the testing had been performed. The citation was abated on the inspector's return trip when documentation that the testing had been performed was shown to him.

Based on this evidence, I conclude that the Operator violated the regulation as alleged.

Citation No. 4374010

This citation charges a violation of section 56.14103(b), 30 C.F.R. § 56.14103(b), because:

The windshields on the 980 Cat Front-end loader were cracked in several areas obscuring the operator's visibility. The unit is used to feed the plant, load trucks and stock pile materials. The area is exposed to outside conditions and is congested. The unit is used on a daily basis when the plant operates. Employees are in and out of the plant area when the plant operates.

(Govt. Ex. 2.) Section 56.14103(b) provides 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. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

Inspector Orton testified that it appeared that a rock had struck the bottom of the center front window of the loader, causing cracks to radiate up the window. He said that visibility for the loader operator is restricted by the bucket in the front of the loader and the size of the loader and that with the distortion caused by the cracks he considered it unsafe to operate the loader. He related that he terminated the citation on his next visit. Dan Sinclair, a mechanic for the operator, advised him that the window had been replaced. After visually verifying this, Orton terminated the citation.

Mr. Mignot claimed that the window had not been replaced. He presented three pictures of a front-end loader, (Resp. Exs. A, B and C), that he maintained was the loader in question and which did not appear to show a crack in the front window. The inspector testified that the loader in the pictures "look[ed] to be the same" one as the one he had cited. (Tr. 82.)

I conclude that the Respondent violated the regulation. In reaching this conclusion, I accept the testimony of the inspector over that of the operator. Mr. Mignot was not present during the inspection. Therefore, he did not observe the loader when it was inspected, nor was he in a position to say that the pictures he offered into evidence were of the loader that was inspected. No one from the company, who was present during the inspection or during the citation's termination, testified. It was further apparent at the hearing that Mr. Mignot resented having his operation inspected and bore some animus toward the inspector. (*See, e.g.* Tr. 33, 77, 98, 138.)

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 1007 (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.

The inspector testified that he considered the violation to be S&S because the loader was operating in a congested area, with people and haulage trucks going in and out of the area. He opined that combining that with obscured visibility made a serious injury a likely event. The Respondent presented no evidence on this issue. I agree with the inspector and conclude that the violation was "significant and substantial."

Citation No. 434011

This citation alleges a violation of section 56.14132(a), 30 C.F.R. § 56.14132(a), in that:

The back-up alarm on the 980 Cat Front-end loader did not function. To warn employees in the area that the unit is backing up. [*Sic*] The unit is used around the plant area to load trucks, feed the plant, and stock pile materials. The area is exposed to outside condition [*sic*] and the area is congested. There are employees in and out of the area. The unit is used on a daily basis when plant [*sic*] operates.

(Govt. Ex. 3.) Section 56.14132(a) requires that: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

The inspector testified that he first saw the loader in operation and could not hear any back-up alarm. To be sure he went over to the machine, had the operator put it in reverse and back up several times. There was no alarm. Mr. Mignot testified that the alarm had worked "periodically" prior to the citation and that it worked fine after the dirt was washed off of it. (Tr. 102.)

Obviously, the alarm was not maintained in functional condition. Accordingly, I conclude that the company violation section 56.14132(a) as alleged.

Significant and Substantial

The inspector found this violation to be "significant and substantial" for the same reasons he found the previous violation to be S&S. I concur and conclude that the violation was "significant and substantial."

Citation No. 4374014

This citation charges a violation of section 56.12032, 30 C.F.R. § 56.12032, since: "The junction box on the 480 V. drive motor for the 1½ inch conveyor was not provided with a cover to protect the splice wires and prevent water from entering the motor. These condition [sic] create a shock and electrocution hazard. The motor is exposed to outside condition [sic]. It is about 15 feet above ground level." (Govt. Ex. 4.) Section 56.12032 requires that: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Inspector Orton testified that the cover was not on the junction box on the drive motor for the conveyor and that neither testing nor repairs were being performed. Mr. Mignot testified that his electrician told him that the cover had vibrated off of the box. Based on this evidence, I conclude that the section was violated.

Citation No. 4374018

This citation alleges a violation of section 56.18010, 30 C.F.R. § 56.18010, because: "No one at the mine had a current First Aid card." (Govt. Ex. 5.) Section 56.18010 requires, in pertinent part, that: "An individual capable of providing first aid shall be available on all shifts. The individual shall be currently trained and have the skills to perform patient assessment and artificial respiration; control bleeding; and treat shock, wounds, burns, and musculo-skeletal injuries."

Inspector Orton testified that none of the employees at the mine had first aid cards. He further stated that he inquired of all of them if they were currently trained in first aid and that none of them was. Mr. Mignot testified that he might have one or two people trained as required by the regulation, but that they were located at another site, six to eight miles away from the crushing plant.

I find that the company did not have an individual capable of providing first aid available at the mine. Assuming that there were one or two individuals with the required training, their location six to eight miles from mine would not meet the regulation's requirement of availability. The local rescue squad could be summoned in the same time that these individuals could. That clearly does not provide the type of "first aid" required by the regulation. Accordingly, I conclude that the Respondent violated section 56.18010 as alleged.

Civil Penalty Assessment

The Secretary has proposed penalties of \$312.00 for these 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).

In connection with the penalty criteria, the parties have stipulated that the proposed penalty will not adversely affect the Respondent's ability to remain in business, that the operator demonstrated good faith in rapidly abating the violations and that Applegate Aggregates is a small operation. (Tr. 23-27.) The Assessed Violation History Report, (Govt. Ex. 6), shows that in the two years prior to the inspection in this case, the Respondent had not been cited for any violations of the regulations. Therefore, I conclude the its history of violations is very good.

The gravity of Citation Nos. 4374010 and 4374011 is fairly serious since a serious injury could have resulted from either violation. The gravity of the other three violations is relatively minor as the inspector found that there was little or no likelihood of an injury occurring from them. I find, as did the inspector, that the company was moderately negligent in all of the violations, since they were rather obvious.

Taking all of these factors into consideration, I conclude that the penalty proposed by the Secretary is appropriate. Accordingly, I impose the following penalties:

Citation No. 4374008	\$ 50.00
Citation No. 4374010	\$ 81.00
Citation No. 4374011	\$ 81.00
Citation No. 4374014	\$ 50.00
Citation No. 4371018	<u>\$ 50.00</u>
Total	\$312.00

Order

The five citations in this case are **AFFIRMED**. Applegate Aggregates, Inc., is **ORDERED TO PAY** a civil penalty of **\$312.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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