FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

August 18, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-309-M
Petitioner	:	A. C. No. 35-02761-05521
v.	:	
	:	
PORTABLE ROCK PRODUCTION CO., INC.,	:	
Respondent	:	Portable Rock Production Co., Inc.
	:	(Sears Road Pit)

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Dept. of Labor, Seattle, Washington, for the Petitioner;
E. Jay Perry, Esq., P.O. Box 7126, Eugene, Oregon, for the Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Portable Rock Production Company Inc. (Portable Rock) with three violations of mandatory standards and proposing civil penalties of $80,000.00 for those violations. The general issue before me is whether Portable Rock violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed concerning the criteria under Section 110(i) of the Act.

On September 2, 1998, bulldozer operator Vernon Smith suffered massive head injuries when the outer edge of the third level bench at Portable Rock's Sears Road Pit failed, causing his bulldozer to overturn. It is undisputed that material had been removed from the second level bench the day before, thereby undercutting and removing adequate support for the third level bench at the location of the bench failure. Smith died of his injuries several days later.

Citation No. 4135309 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3130 and charges as follows:

> A fatal accident occurred at this mine on September 2, 1998, when a bulldozer overturned in the pit. When the bulldozer operator traversed the third level bench, the outer edge of the bench failed, causing the bulldozer to overturn.

> Removal of material from the second level bench the previous day eliminated adequate support for the third level bench. The mine operator failed to use mining methods that would maintain wall, bank, and slope stability in this area.

The cited standard provides as follows:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

It is undisputed that material had indeed been removed from the second level bench on September 1, 1998, the day before the accident at issue. As a result of such action the third level bench was undercut and rendered unstable for travel by Smith's bulldozer. The failure of the third level bench in this case causing the bulldozer to overturn was a direct result of the Respondent's failure to have maintained the stability of the cited wall. These facts clearly establish a violation of the cited standard.

Since the violation was the direct cause of the fatal accident it was therefore also unquestionably of high gravity and "significant and substantial." A violation is properly designated as "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 safety 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 -- that is, 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.

See also Austin Power Inc. 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 event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *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).

While the citation at issue alleges that the violation was the result of "moderate"

negligence the Secretary has cited no theories or evidence to support such a conclusion. Indeed, the undisputed evidence does not support a finding of any significant operator negligence. While it is noted that the deceased, Vernon Smith, had previously been a mine superintendent for Portable Rock it is undisputed that he had retired from that position a number of years before and at the time of the accident had been working only as a rank and file bulldozer operator. As such, Smith was not an agent of the operator whose negligent conduct can be imputed to the operator . *See Secretary v. Whayne Supply Company*, 19 FMSHRC 447 (March 1997). While the Commission held in the *Whayne Supply* case that where a rank and file employee has violated the Act, the operator's supervision training and discipline of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank and file miner's violative conduct, no evidence in this regard with respect to this violation was presented at hearing.

It is also undisputed that Smith had advised both co-worker Edward Wright and the operator's agent, crusher foreman Art Squires, that he was about to repair the subject undercut. Smith also told Wright at the end of the shift on the previous day that the following day he would be carrying diesel fuel to the upper bench but would first repair the bench. Moreover, on the morning of the accident Smith confirmed to Squires that he would need to build the road up the hill in order to haul fuel to Wright. Squires was then aware that the bench road had been undermined and that it needed new material to provide support. Squires believed that Smith was the best qualified person to perform this work.

Under the circumstances it is apparent that foreman Squires reasonably and in good faith believed that Smith would remedy the hazardous condition of the third level bench before it would be used as a roadway. Accordingly, I find the operator chargeable with but little negligence and significant weight is given this criterion in determining the appropriate penalty herein.

Citation No. 4135311, issued pursuant to Section 104(d)(1) of the Act,[1] alleges a

---

[1] Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator

under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also

"significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(g) and charges as follows:

> A fatal accident occurred at this mine on September 2, 1998, when a bulldozer overturned in the pit. The third level bench caved from beneath the bulldozer, causing it to roll 2 ½ times.
>
> The victim was not wearing the seat belt. The mine operator's failure to require and ensure that the bulldozer operator wore the seat belt is a lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides as relevant hereto that "[s]eat belts shall be worn by the equipment operator."

The Secretary's proof in this regard is based on circumstantial evidence, primarily observations following the accident. MSHA inspector and special investigator Randall Cardwell, arrived at the mine site at 9:30 on the morning of the accident. Cardwell examined the bulldozer lying on its side below the failed bench and noted that one end of its seat belt was "tucked" beneath the seat. Cardwell also interviewed Portable Rock employee Kenny Johnson who was first on the scene of the accident. Johnson at first stated he could not recall whether he found the deceased wearing the seat belt but later told Cardwell that in fact he did find the deceased "out of his seat belt." Johnson nevertheless still claimed that he did not know whether the deceased was wearing it. According to Cardwell, on the following day, September 3, 1998, Johnson finally acknowledged to him that the deceased was not wearing a seat belt when he found him.[2] I am satisfied from the above evidence alone that the Secretary has sustained her burden of proving that Smith had not at the time of his accident been wearing a seat belt. The violation is accordingly proven as charged. Under all the circumstances there is also no doubt that the violation was of high gravity and "significant and substantial."

---

caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

[2] While Johnson testified that he could not recall at the time of the hearing whether he found Smith wearing a seat belt I recognize that at the time of his testimony he remained an employee of Portable Rock. I find Inspector Cardwell's testimony regarding Johnson's statements to him on the date of the accident and the day after, corroborated by Cardwell's notes, to be the most reliable and credible evidence on this issue.

I also find the operator chargeable with high negligence based upon the credible evidence of its prior failure to have enforced its policy requiring the use of seat belts against Smith. According to Inspector Cardwell, Portable Rock President, Jack Bessett, admitted during his investigation that he had seen Smith operating without a seat belt on prior occasions and that Smith explained that he wanted to be able to jump free if the equipment rolled over.

According to MSHA supervisory inspector Colin Galloway, Portable Rock Vice-President Lonnie Bessett admitted to him at the September 10, 1998, "closeout conference" that Smith "sometimes wore his seat belts" and asked rhetorically "how do you discipline somebody that's been with the company since it started?" While recognizing that Jack Bessett had apparently retired from active participation in the Portable Rock operations in 1994, his unchallenged admissions, when considered with those of current Vice-President Lonnie Bessett, provide a sufficient foundation from which it may reasonably be inferred that indeed Smith had disregarded the seat belt requirements with impunity and without fear of disciplinary action. Within this framework of evidence I find the operator chargeable with high negligence. The same evidence also supports a finding that the violation was caused by the operator's unwarrantable failure.

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). Clearly the evidence that both Lonnie and Jack Bassett failed to enforce the seat belt policy against the deceased constitutes a serious lack of reasonable care and reckless disregard within the framework of the cited law.

Order No. 4135313, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(i) and charges as follows:

> A fatal accident occurred at this mine on September 2, 1998, when a bulldozer overturned in the pit. The seat belts on the bulldozer were not maintained in functional condition in that the belt had been cut or torn 2 ½ inches from the flat metal end, preventing adjustment of the belt to a flat metal end, preventing adjustment of the belt to a longer length. Further, the belt was cut or torn slightly on each edge, approximately 8 inches from the buckle. The mine operator's failure to ensure that the seat belts were properly maintained is a lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides that "seat belts shall be maintained in functional condition and replaced when necessary to assure proper performance."

The Secretary acknowledges in her post-hearing brief that the cited seat belt in fact "did work" and upon testing found that the "buckle components of the belt" held (Petitioner's Brief at p. 5). At hearing the citing inspector also acknowledged that he was unaware of any mandatory standard governing the length of seat belts, that he was unaware of the length of the seat belt at issue, that he was unaware of the waist size of any of the operator's employees, that he was unaware of any specific requirement for seat belt strength, that no strength testing had been performed on the seat belt at issue and that he did not know whether the dirt (and presumably also the oil stains) found on the belt had resulted from the accident at issue. The inspector further acknowledged that while he could have photographed both of the alleged cuts or tears in the seat belt he photographed only one. Moreover the barely visible cut or tear shown in the photograph in evidence is not in itself sufficient to demonstrate that the subject seat belt was not maintained in a functional condition or that it should have been replaced to assure proper performance. Under the circumstances I cannot find that the Secretary has sustained her burden of proving the violation at issue. Accordingly, Order No. 4135313 must be vacated.

Civil Penalties

The Act requires that, "[i]n assessing civil monetary penalties, the Commission shall consider" the following six statutory criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In determining appropriate civil penalties herein I have considered the gravity and negligence findings previously made as to each violation. I have also considered the small size of the operator (approximately 9,282 hours worked at the subject mine in the calendar year prior to the violations, its history of violations (a bad history consisting of 43 paid violations within the two preceding years 21 of which were "significant and substantial") and the Secretary's admission that the violative conditions were abated as directed and within the time specified. There is no claim or evidence that even the Secretary's proposed penalties would affect Respondent's ability to remain in business. There is a presumption therefore that the penalties herein would not affect its ability to remain in business.

ORDER

Order No. 4135313 is vacated. Citation No. 4135311 is modified to a citation under Section 104(a) of the Act and is affirmed as a "significant and substantial" citation. Citation No. 4135309 is affirmed as a "significant and substantial" citation. Portable Rock Production Company, Inc., is hereby directed to pay civil penalties of $5,000.00 for the violation charged in Citation No. 4135309 and $25,000.00 for the violation charged in Citation No. 4135311, within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

William W. Kates, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

E. Jay Perry, Esq., Employers Defense Counsel, P.O. Box 7126, Eugene, OR 97401

\mca