FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 28, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-315-M
Petitioner	:	A.C. No. 05-01506-05526
	:	
v.	:	
	:	Golden Wonder
AU MINING INCORPORATED,	:	
Respondent	:	

DECISION

Appearance: Edward Falkowski, Esq., U.S. Department of Labor, Denver, Colorado, for Petitioner;
Lance Barker, Pro Se, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charged Au Mining Incorporated (Au Mining) with the violation of the mandatory safety standards 30 C.F.R. § 57.14130(a) and § 57.14132(b) and proposed penalties of $300.00 for the violations.

Au Mining filed a timely answer challenging the citation. A hearing on the merits was held in Grand Junction, Colorado. The parties presented testimony and documentary evidence and filed post-hearing statements of their position as to their interpretation and applicability of the cited standard to the facts of this case. The main issue in the case is the applicability of the ROPS standard to a wheel loader known as an LHD (which is the abbreviation for a load, haul and dump loader) when the loader is intermittently used on the surface area of an underground mine. See Pet.'s Exs. 12-A, B, C, D and F for photographs of the LHD. Apparently, the applicability of the ROPS standard to an LHD is a case of first impression.

Stipulations

1. Respondent Au Mining, Inc., is engaged in mining in the United States.

2. Respondent is owner and operator of a gold mine known as the Golden Wonder mine having MSHA ID number 05-01506.

3. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. The proposed penalties, if upheld, will not affect the Respondent's ability to continue in business.

5. The operator demonstrated good faith in abating the violations.

6. The Respondent is a small operator. Approximately 4,000 person hours are worked at the mine per year.

Facts

The evidence presented at the hearing demonstrates that there is no dispute as to the basic relevant facts. Au Mining owns and operates a small underground gold mine named the Golden Wonder Mine. The mine is essentially a two-man operation. The two owners do the mining work themselves. They enter the mine and do the drilling and blasting in the underground area being mined. They then retrieve the mined material using a Wagner model ST2, "load, haul, and dump loader" which is referred to by its initials LHD. The LHD was manufactured in 1975 and acquired by Au Mining in 1997. The LHD is driven bucket-first into the mine portal, travels bucket first through the mine, scoops up a load of mined material and then is backed out of the mine. (Tr. 47-48). The LHD operator sits sideways on the machine so that he can look either toward the front or the rear as he drives. (Tr. 42). There is no seat belt.

After backing the loader out of the mine portal onto the surface portion of the mine, the operator turns the LHD around and hauls the load, traveling approximately 100 feet, to a box lined with a large plastic bag and dumps the load of muck into the bag in much the same manner as any wheeled front-end loader would dump its load. See photographs in Pet.'s Ex. 12. The operator then again turns the loader around, so the bucket is facing toward the portal, and enters the portal to retrieve another load. If necessary, the loader is fueled while on the surface of the mine before reentering the underground portion of the mine.

Mr. Barker testified that the mine started using the LHD in 1997 and states it is still the original equipment which is used just as designed to be used. It was never equipped with ROPS or a seat belt. It appears from Mr. Barker's testimony that it was designed to be driven to the portal of the mine, enter into the mine one way, scoop muck in its bucket, back out of the underground portion of the mine, turn around, haul the load in its bucket along the surface area

to the dump box where the muck is dumped. He stated "obviously it was designed to go in and come out." It has been used exactly as it was designed to be used. Asked as to how often the LHD goes into the mine and comes out, Barker testified that it varies with production from "as high as 20 times a day to as low as twice a week."

Citation No. 7924004

On March 9, 1999, MSHA Inspector George Rendon issued Citation No. 7924004, alleging an S&S violation of 30 C.F.R. § 57.14130(a), because the loader was not equipped with a ROPS or a seat belt, and it was being used on the surface area of the mine each time it came out of the portal of the mine to haul and dump a load of mined material.

The citation, in pertinent part reads as follows:

> The ST2 frontend loader that the miners use to tram the muck from under ground to the surface was not equipped with seat belts, backup alarm or ROPS. The travels a distance of approx. 100' when on the surface on level ground.

Shortly after receiving the citation charging the mine with the violation of the standard, Mr. Barker wrote to MSHA headquarters in Arlington, Virginia, to complain about the application of § 57.14130(a) to equipment that is used primarily underground. By letter dated July 1, 1999, Earnest C. Teaster, Jr., Administrator for Metal and Nonmetal Mine Safety and Health at MSHA, replied to Mr. Barker as follows:

> Thank you for your letter of May 27 concerning the application of [section 57.14130(a)] to a piece of equipment that you use at the surface areas of your underground mine. The equipment is used in the underground section of your mine and also works at the surface . . .
>
> It is the Mine Safety and Health Administration's (MSHA) position that mobile equipment used at the surface areas of underground mines is surface equipment. MSHA promulgated these standards to address a number of serious hazards that can occur when miners operate a piece of mobile equipment on the surface. **Although the piece of equipment came from the underground mining area, it is still required to meet all applicable standards when used at surface areas of a mine.** (Emphasis supplied).

Mr. Teaster's letter was received in evidence as Pet.'s Ex. 8.

Discussion

30 C.F.R. § 57.14130 in pertinent part provides:

> **§ 57.14130 Roll-over protective structures (ROPS) and seat belts for surface equipment.**
>
> (a) Equipment included. Roll-over protective structures (ROPS) and seat belts shall be installed on--
> (1) Crawler tractors and crawler loaders;
> (2) Graders;
> (3) Wheel loaders and wheel tractors; (emphasis supplied)

The Secretary's interpretation of this safety standard is that the standard requires a ROPS and a seat belt be installed on any equipment listed in the standard even if used only intermittently for short periods of time on the surface area of an underground mine. The LHD is a "wheel loader" (See Pet.'s Ex. 12) which is listed in subsection (a)(3) of the cited standard as requiring ROPS and a seat belt when used on the surface of an underground mine. It is immaterial whether the amount of time the equipment is used on the surface is brief in comparison to the amount of time the equipment is regularly used underground.

The Secretary's counsel set forth the regulatory history of the standard stating that this history clearly shows that promulgators of the standard clearly intended by use of the term "surface equipment" to include any equipment listed in the cited standard such as "wheel loaders" (which is what the LHD is) that is used, however briefly, in a surface area of the mine.

The standard was first promulgated a mandatory ROPS standard for metal/non-metal mines in 1977 by MSHA's predecessor, the Mine Enforcement and Safety Administration (MESA) of the Department of the Interior. In adopting the standard, MESA stated:

> Section 57.9, Loading, hauling, dumping, is amended as follows: New mandatory standard 57.9-88 which is **applicable to surface only** is added to read as follows:
>
> § 57.9 Loading, hauling, dumping
> * * * * *
>
> 57.9-88 Mandatory. (A) Excluding equipment that is operated by remote control, all self-propelled track-type (crawler mounted) or wheeled (rubber-tired) scrapers; front-end loaders; dozers; tractors; including industrial and agricultural tractors . . .; all as used in metal and non-metal mining operations, with or without attachments, shall be used in such mining only when equipped with (1) Roll-Over Protective Structures (ROPS) . . ., and (2) seat belts . . . . (Emphasis supplied).

42 Fed. Reg. 7010 (Feb. 4, 1977).

After Congress enacted the Federal Mine Safety and Health Act in 1977, the duty to promulgate and enforce mine safety and health standards was transferred from MESA to the newly created MSHA. On January 29, 1985, MSHA recodified and renumbered the Part 57 standards, including MESA's ROPS standard, without changing the text of the standards, except to add descriptive headings. See 50 Fed. Reg. 4048, 4107-4108 (Jan. 20, 1985). The recodified standard reads as follows:

SURFACE ONLY

§ 57.9088 Roll-Over protective structures (ROPS) and seat belts.

(A) Excluding equipment that is operated by remote control, all self-propelled track-type (crawler mounted) or wheeled (rubber-tired) scrapers; front-end loaders; dozers; tractors; including industrial and agricultural tractors . . .; all as used in metal and non-metal mining operations, with or without attachments, shall be used in such mining only when equipped with (1) Roll-Over Protective Structures (ROPS) . . ., and (2) seat belts . . . . (Emphasis supplied).

Id; see also Petitioner's Ex. 4 (30 C.F.R. § 57.9088 (July 1, 1987).

The agency further explained that regulations appearing under the heading "surface only" as in the case of the ROPS standard, "apply . . . to the surface operations of underground mines." 30 C.F.R. § 57.1 (Jul. 1, 1985). The standard thus clearly required that whenever any listed equipment was used in a "surface operation" (such as the operation of hauling and dumping mined material into a surface bin), the equipment had to be equipped with a ROPS and a seat belt.

The standard was modified to its current form in August 1988. The 1988 revision: (a) updated the references to the documents that are incorporated by reference in the standard (which contain the performance criteria for the required ROPS and seat belts); (b) required that each ROPS must bear a permanent label, identifying among other things the ROPS manufacturer and model number; (c) required that each ROPS must be installed in accordance with manufacturer's recommendations; and (d) required that each ROPS must be maintained in a condition that meets the performance requirements of the standard. In modifying the standard, however, MSHA made it clear that it was not changing the scope of the standard, which would continue to apply to listed equipment that was used in a "surface" area. Thus the final standard retains the existing standard's scope and applies to surface mines and surface areas of underground mines. 53 Fed. Reg. 32511 (Aug. 25, 1988) (Petitioner's Ex. 5). Accordingly, the standard, as revised in 1988 (and as it exists today), continues to require that ROPS and seat belts must be installed on any listed equipment which is used for any length of time in a surface area.

Courts defer to an agency interpretation of its regulations "so long as it is reasonable, that is so long as the interpretation sensibly conforms to the purpose and wording of the regulations" Martin v. OSHRC 499 U.S. 144, 150-51, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991).

I find the Secretary's interpretation of its regulation in question and its applicability to the LHD in this case is reasonable and sensibly conforms to the purpose and wording of the regulation. The LHD is a wheel loader which is a listed piece of equipment covered by the standard. Every time the LHD goes into the mine, it comes out to the surface and hauls over the surface of the mine its load to the point on the surface where it dumps the load and then is driven back over the surface of the mine until it enters the portal of the mine. It makes this trip back and forth along the surface of the mine, sometimes as often as 20 times a day.

The Secretary's interpretation of its standard and its applicability to the LHD in this case is consistent with the safety promoting purpose of the Mine Act. I find the evidence presented establishes a violation of the cited standard 30 C.F.R. § 57.14130(a).

Significant & Substantial

Citation No. 7924004 alleges that the failure to comply with the provision of the cited standard when the LHD is used on the surface of the mine was a significant and substantial violation. I disagree. Based on the evidence presented in this case and the Commission's interpretation of significant and substantial as set forth in *Texasgulf, Inc*., 10 FMSHRC 498, 501-03 (April 1998). The significant and substantial designation of the violation should be deleted.
The evidence presented does not establish the third *Mathies* element.

Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it 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." 30 U.S.C. § 814(d)(1). A violation is properly designated 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*, 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.

The Commission has explained further that the third element of the *Mathies* formulation "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 Commission emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *Id*. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." *U.S. Steel Mining Co*., 6 FMSHRC 1573, 1574 (July 1984). The Commission has held that the resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc*., 10 FMSHRC 498, 501 (April 1988). Applying these principles to the instant case, I conclude that the cited violation was not of a significant and substantial nature.

In the course of continued normal operations at this mine, the LHD would be driven approximately 100 feet on a flat level surface, from the portal of the mine to a dump box, and then returns on a flat level surface to and through the portal of the mine. In fact, there was a level area just outside the portal of the mine of approximately 300 to 400 feet. (Tr. 50). I am aware that there is a possibility that the LHD without a roll-over protective system could turn over on level ground but that is not reasonably likely in this case based on the particular facts surrounding the violation. On evaluation of the evidence I find the preponderance of the evidence presented in this case fails to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is a serious injury. I, therefore, find the violation of the cited standard in this case was not of a serious and substantial nature.

Citation No. 7924021

This citation was issued by mine inspector George Rendon on March 9, 1999, because the LHD while hauling muck as it was traveling on the surface of the mine did not have a back up alarm. At the hearing, Inspector Rendon testified that the LHD did not have any obstructive view to the rear. This also appears to be evident from the photograph of the LHD. (Pet.'s Ex. 12). Counsel for Petitioner moved to vacate the citation.

Citation No. 7924021 is vacated.

Appropriate Penalty

The parties stipulated that Respondent is a small operator. The mine is operated by the two owners who do the mining work themselves. It is stipulated that the operator demonstrated good faith in timely abating the violative conditions. Au Mining abated the violation by agreeing in writing they will use the LHD only underground. The history of prior violations is not excessive. Petitioner states that it is moderate. The violation history for the 2 years prior to the citations was received as Petitioner's Ex. 2. I find the operator's negligence to be very low. The violation resulted from the operator's erroneous but understandable and in good faith belief that the ROPS regulation cited was not applicable to the LHD when it was used in the surface area of the underground mine. The LHD was used on the surface area of the mine for only brief

periods and then only on the flat level surface. I find the gravity of the violation is low. Under the evidence presented, my deletion of the S&S designation and my findings above, I find the appropriate civil penalty in this case is $55.00. Assessment of this penalty will not adversely affect Au Mining's ability to continue in business.

ORDER

Citation No. 7924021 is **VACATED** in accordance with MSHA's motion at the hearing to vacate that citation.

Citation No. 7924004 is modified by deleting the S&S designation, changing the negligence factor to "very low" and the injury likelihood to "unlikely." The citation as so modified is **AFFIRMED** and Au Mining is **ORDERED TO PAY** a civil penalty of $55.00 for this affirmed violation within 40 days of the date of this decision and order.

August F. Cetti
Administrative Law Judge

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