FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 21, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-38-M
Petitioner	:	A.C. No. 35-03345-05512
	:	
v.	:	Docket No. WEST 99-53-M
	:	A.C. No. 35-03345-05513
HARNEY ROCK & PAVING CO.,	:	
Respondent	:	Crusher No. 1

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Troy Hooker, Hines, Oregon, for Respondent.

Before: Judge Cetti

These consolidated civil penalty cases are before me upon Petitions for Assessment of Civil Penalty, filed by the Secretary of Labor (Secretary) seeking the imposition of civil penalties against Harney Rock and Paving Co. (Harney Rock) based upon eight citations alleging violations of mandatory standards which are set forth in Title 30 of the Code of Federal Regulations. Respondent filed a timely answer and, pursuant to notice, the cases were heard in Boise, Idaho. At the hearing the parties presented testimony and documentary evidence which I have carefully considered in reaching this decision.

Each of these consolidated civil penalty proceedings arise out of an inspection conducted of the Respondent's mine facility known as Crusher No. 1, located in the vicinity of North Powder, Oregon. The inspection was conducted by Brian T. Yesko, a Mine Safety and Health Inspector of the Mine Safety and Health Administration, U.S. Department of Labor. As a result of the inspection, Inspector Yesko issued the eight citations of violations of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 *et seq.*) (hereinafter the Mine Act) at issue in these proceedings. A proposed assessment of penalty for such violations was thereafter issued to and contested by the Respondent.

The parties state they discussed the possible resolution of this matter, short of formal hearing, but were unable to resolve this matter.

Inspector Yesko was the sole MSHA witness at the hearing. His testimony describes the factual conditions and practices which he observed during the inspection. His testimony includes the factual detail underlying each of the violations. The factual detail is set forth in each of the citations issued to the Respondent.

Respondent presented the testimony of Lester Watkins, Superintendent for Crusher No. 1 operations and Troy Hooker, Vice-President of Respondent Harney Rock.

Stipulations

At the hearing, the parties entered into the record the following stipulations:

1. Harney Rock & Paving Co., is a corporation with the main home office and mailing address Post Office Box 800, Hines, Oregon 97738.

2. Crusher No. 1 at the time of the inspection was located at the site in the vicinity of North Powder, Oregon.

3. Respondent is under the jurisdiction of the Mine Act at its Crusher No. 1 mine facility.

4. Respondent, in the 24 months prior to the violations at issue, has a history of having received 16 assessed violations during the course of 12 inspection days (see Govt. Ex. 1 which is a printout from the Mine Safety and Health Administration that's been certified by an official with the Civil Penalty Collection Office setting forth the history of violations at this mine).

The Inspection and Citations

Federal Mine Inspector Brian Yesko during his September 1, 1998, inspection of the mine site located in the vicinity of Power, Oregon, was accompanied by Respondent's Superintendent Lester Watkins. The inspector volunteered that Superintendent Watkins was cooperative during his three- day inspection of the mine site.

Citation No. 7710199

The inspector accompanied by Watkins first inspected the GMC fuel truck at the site. The fuel tank extended over the top of the truck and obstructed the view to the rear as well as the view through the rear view mirror. The truck was equipped with side view mirrors but the view to the rear was very limited. Any person or object within the area immediately behind the truck would not be visible. The truck was not equipped with a backup alarm. The inspector observed the truck in use and testified that no observer or spotter was used to signal when it was safe to back up. I credit Inspector Yesko's testimony that the truck had an obstructed view to the rear and had no backup alarm. Respondent did not contest the assertion that no spotter was used.

The Respondent, by way of mitigation, presented evidence that the crusher operator was the only person who drove the fuel truck. The truck is backed up only once a week and that is when the crusher operator backs up the fuel truck to fuel the crusher. The operator does this weekly fueling of the crusher at the end of the shift when there is hardly anyone around. (Tr. 100).

Significant and Substantial

A "significant and substantial" violation is described in section 104(d) of the Mine 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." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

In *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor 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.

In *United States Steel Mining Company, Inc*., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Tell Mining Company, Inc*., 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Company, Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

I find the testimony of Inspector Yesko established the four elements of the *Mathies* formula for designating the violation S&S. There is a reasonable likelihood that the hazard contributed to will result in an injury and a reasonable likelihood that the injury in question will be of a reasonably serious nature.

I agree with the inspector's finding that gravity was relatively high and negligence was moderate. The S&S violation of the cited standard was established.

Citation No. 7710200

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.14101(a)(2) which reads as follows:

> (a) *Minimum requirements*. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.
> (2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

Mr. Yesko presented credible testimony that established the parking brake on the GMC fuel truck CO#3-33 would not hold when tested on a slight grade. The ground is not level in the area where the truck is used. The truck could strike an employee. I agree with the inspector that injury was reasonably likely; the gravity was high; and the negligence was moderate. The evidence presented establishes an S&S, 104(a) violation of the cited standard. The citation is affirmed as written.

Citation No. 7720207

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.11002 which in relevant part reads as follows:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition.

Inspector Yesko presented credible testimony that during his inspection of the site he observed the hand rails around the rolls unit elevated walkway which is 8½ feet high are in poor condition; one corner post is broken off and hanging below the walkway by the cables used for hand rails; several other posts were cracked or broken near the point where they are welded to the walkway. Mr. Yesko observed employees using this walkway.

I agree with Inspector Yesko's finding that the violation was S&S. His testimony established all four factors of the *Mathies* formula. I find the operator's negligence was moderate. The citation is affirmed as written.

Citation No. 7720208

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.1101 which reads as follows:

> Safe means of access shall be provided and maintained to all working places.

During his inspection, Inspector Yesko observed and concluded that a safe means of access was not provided to the 8½ foot high elevated walkway around the rolls unit. The ladder to access this area was unsecured and an opening in the hand railing for access to the walkway was not provided. Employees were observed going up the ladder and over the top rail of the hand rail to gain access to this elevated walkway which was a working place.

I credit Inspector Yesko's testimony. I agree with the Inspector's findings set forth in this citation that serious injury was reasonably likely; that negligence was moderate; and the violation was S&S. The citation is affirmed as written.

Citation No. 7720209

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.9300(b) which reads as follows:

> (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

Inspector Yesko testified he observed some large 50-ton haul trucks backing up a long ramp that formed into the five-foot high stockpile. The berms along the five-foot high D-ballast stockpile measured 26 inches at the highest point. Mid-axle height on the Cat 769C haul truck backing up and dumping material on the stockpile measures 37 inches. The inspector testified adequate warning would not be given to the driver by this under sized berm in the event of overtravel. Asked as to what type of accident might happen, the inspector testified the truck could rollover on its side, but he did not believe it could rollover on its top. Asked as to his determination of likelihood of such an accident, he replied it would be "reasonably likely." The operators of the trucks were wearing their seat belts but if a truck were to rollover on its side, it could result in a whiplash injury. I agree with the inspector that the violation was S&S and the operator's negligence was moderate. MSHA Form 1000-179 which is part of the record shows a proposed penalty of $104.00. I believe a penalty of only $104.00 is appropriate since there was a berm composed of sound substance even though it was not the required mid-axle height. The under sized berm was composed of crushed basalt that packs down and is quite solid. It was undisputed, while backing up, the trucks travel only three to five miles per hour. (Tr. 123).

Citation Nos. 7720210

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.14132(b)(1) that when the operator of mobile equipment has an obstructed view to the rear, requires a backup alarm or an observer to signal when it's safe to backup.

Inspector Yesko testified that he observed the Kenworth Water Truck CO#3-11had a large water tank on the rear of the truck which obstructed the view to the rear. The truck was used to wet down the road throughout the mine site. The truck did not have a backup alarm and there was no observer or spotter to signal the driver when it was safe to backup. This is a serious violation of 30 C.F.R. § 56.14132(a). I agree with Inspector Yesko who found the violation to be an S&S violation and evaluated the operator's negligence to be moderate. The preponderance of the evidence established the four elements of the *Mathies* formula. The gravity of the violation was high. I affirm the citation as written.

Citation No. 7720213

The citation charges Respondent Harney Rock with the violation of the safety standard set forth in 30 C.F.R. § 56.14132(a) which reads as follows:

> (a) Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Inspector Yesko testified that the backup alarm and horn on the Cat 992A front end loader CO #7-146 used to load the rail cars would not work at the time of inspection. He observed the loader going forward and also backing up. The loader did not have a complete clear view to the rear. There was no one serving as a spotter or assisting as to when it was safe to backup. There was a hazard of an accident with other mobile equipment in use in the area which could result in a serious or fatal injury. Thus, the gravity was high.

A violation of the cited standard was established. I agree with Inspector Yesko that negligence was moderate and injury was reasonably likely. I affirm the citation as written.

Docket No. WEST 99-53-M

Citation No. 7720211

This citation charges the operator with an S&S unwarrantable failure violation of 30 C.F.R. § 56.14130(g) for the failure of one of the dozer operators to wear the seat belt provided by the operator. The citation written by Inspector Yesko reads as follows:

> The operator of the Fiat Allis HD-31 S/N84MO1340 dozer was observed operating the dozer with the doors and windows open and without wearing the seat belt provided while pushing material over the approx. 45 to 50 feet high, high wall. The seat belt was tucked in down below the seat and the operator refused to put the seat belts on when I requested him to do so. The company does have a seat belt policy. Spot checks of seat belt usage have not been conducted.
> Violation is an unwarrantable failure.

The inspector described the dozer as being an 18-foot long Caterpillar tracked vehicle. He observed the dozer pushing material off the high wall. The inspector entered the cab of the dozer and saw the seat belt tucked down below the seat. The driver refused the inspector's request to put the seat belt on, stating that he knew people who "got killed" wearing a seat belt when pushing material over a high wall. Inspector Yesko told the driver of several cases where people survived going over high walls in a dozer wearing seat belts. The inspector said the driver still declined to put the seat belt on.

No one else was in the cab of the dozer during the discussion between the inspector and the driver. Superintendent Watkins was not present as he was standing on the ground below the dozer where the conversation could not be heard.

The inspector, after instructing the driver not to operate the dozer, left the cab and talked to Superintendent Watkins who then entered the cab. Watkins talked to the driver who then put on and fastened his seat belt. Watkins came down from the cab and reported to the inspector that the driver was wearing his seat belt. Thereafter, the dozer driver continued to wear his seat belt. Obviously, the driver was concerned with his safety and felt he could escape injury if he jumped off the bulldozer, if it should start to turn over or start to go over the high wall, and that he could do so more easily if he were not wearing a seat belt, cf. *Walker Stone Co. Inc.*, 21 FMSHRC (October 1999).

Inspector Yesko testified that Respondent Harney Rock has a written policy requiring the use of seat belts by drivers of mobile equipment. The inspector read the policy. The operator requires each newly hired employee to read and sign the seat belt policy. Although the operator was unable to find a written seat belt policy signed by the driver in question, the operator insisted the driver signed one or he would not be working for Harney Rock. The operator's Employee

Handbook specifically requires each driver of mobile equipment to wear the seat belt. The foreman spot checks drivers to make sure all drivers are wearing their seat belts. (Tr. 122).

The evidence presented clearly established a serious violation of the cited belt standard. The gravity was high. I also find the inspector properly designated the violation S&S. The evidence presented established all four elements of the *Mathies* formula. I affirm the inspector's S&S finding but on the basis of the evidence presented, I do not find the violation resulted from aggravated conduct on the part of the operator and, thus, find that the violation was not a result of the operator's unwarrantable failure.

Unwarrantable Failure

Unwarrantable failure" is aggravated conduct consisting of more than ordinary negligence. *Emery Mining Corp*., 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a serious lack of reasonable care. *Id* at 2001-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (February 1991).

The Commission in its decisions has discussed, among the factors to be considered, in determining whether a violation resulted from aggravated conduct on the part of the operator are "the extensiveness of the violation, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co*., 16 FMSHRC 192, 195 (February 1994). The culpability determination required for a finding of unwarrantable failure is more than a "knew or should have known" test. *Virginia Crews Coal Co*., 15 FMSHRC 2103, 2107 (October 1993). Upon consideration of all these factors, I find that the violation of the cited standard was not a result of the operator's aggravated conduct. The warrantable failure designation in the citation should be deleted and the finding, as to negligence, should be amended to moderate negligence.

I place no evidentiary weight on the vague statements overheard by the inspector in the lunchroom, where employees were eating, as there was no identification as to the identity of the two employees making the statements and only speculation as to the identity of the employee they were talking about.

Evidence was also presented that it is difficult for a person standing on level ground to see whether a bulldozer operator is wearing his seat belt.

Although the conduct of the driver of the dozer operator may have been aggravating, the driver was not an agent of the mine operator. *REB Enterprises, Inc*., 20 FMSHRC 203, 211-12 (Mar. 1998) *Whayne Supply Co*., 19 FMSHRC 447 (Mar. 1997). The Commission has held that "[t]he conduct of a rank-and-file miner is not imputable to the operator to establish unwarrantable failure violation or the penalty. *Fertilizer-Cullor, Inc*. 17 FMSHRC 1112, 1116 (July 1995). I credit the evidence presented by Respondent that it enforces its seat belt policy with spot

inspections. The fact remains that the driver in question violated the policy and the standard. The evidence presented established a serious S&S violation of the cited seat belt standard.

Appropriate Civil Penalties

I am required by Commission Rule 30, 29 C.F.R. § 2700.30, as well as by the Mine Act itself, to consider the statutory criteria set forth in § 110(i) [1] of the Mine Act in determining the appropriate civil penalty for each violation.

Size of Business of the Operator and History of Previous Violations

The operator's business is small and it does not have a history of excessive previous violations.

The parties stipulated at the hearing that Respondent, in the 24 months prior to the violations at issue, has a history of having received 16 assessed violations during the course of 12 inspection days (see Govt. Ex. 1, which is a printout from the Mine Safety and Health Administration that has been certified by an official with the Civil Penalty Collection Office setting forth the history of violations at this mine).

Govt. Ex. 2 shows Respondent has approximately 10 employees and sets forth the number of production hours worked each quarter from 1996 through October 1998.

In my assessment of each of the penalties, I have placed considerable weight on the fact that the operator's business is small and the operator does not have a history of excessive previous violations and demonstrated good faith in rapid compliance.

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[1]Section 110(i) provides in relevant part:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Operator's Ability to Continue in Business

The parties presented no evidence on the effect of the proposed penalties on the operator's ability to continue in business. I, therefore, presume that the proposed penalties would not affect the operator's ability to continue in business. The validity of this presumption in the absence of contrary evidence is well established. See *Sellersburg*, 5 FMSHRC at 294.

Negligence

In my separate discussion of each citation, I found the operator's negligence was moderate. This means I found the Respondent failed to exhibit the ordinary care that was required by the circumstances.

Gravity

The Commission stated that the gravity penalty criterion contained in § 110(i) of the Mine Act requires an evaluation of the seriousness of the violations and that the focus of the gravity criterion is on, "the effect of the hazard if it occurs" (*Hubb Corp*., 22 FMSHRC 606, 609 (May 2000) (quoting *Consolidation Coal Co*., 18 FMSHRC 1541, 1550 (September 1996). Fortunately, in these cases, none of the hazards cited resulted in any injury whatsoever but the likely effect of each hazard cited, if it occurred, would have been a serious injury or death. Consequently, I find the degree of gravity in all eight violations is relatively high. I agree with the inspector that all violations were significant and substantial.

Good Faith in Rapid Compliance

I find the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation with respect to each of the violations. All violations were timely abated.

On the basis of my foregoing findings and conclusions and my *de novo* consideration of the civil penalty assessment criteria found in § 110(i) of the Act, I conclude and find that the following penalty assessments are reasonable and appropriate for the violations that have been affirmed in these proceedings.

Citation No.	30 C.F.R. Section	Assessment
7710199	56.14132(1)	$ 200.00
7710200	56.14101(a)(2)	200.00
7710207	56.11002	200.00
7710208	56.11001	200.00
7710209	56.9300(b)	104.00
7710210	56.14132(b)(1)	300.00
7710213	56.14132(a)	300.00

7720211	56.14130(g)	400.00
	TOTAL	$1,904.00

ORDER

Accordingly, it is **ORDERED THAT HARNEY ROCK & PAVING CO., PAY** a civil penalty of $1,904.00 to the Secretary of Labor within 30 days of the date of this decision. Within the same 30 days, the Secretary shall modify Citation No. 7720211 to delete the unwarrantable failure finding and change the degree of negligence to "moderate." Upon receipt of full payment of the penalties, these proceedings are dismissed.

August F. Cetti
Administrative Law Judge

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