

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

June 27, 2003

VANDALIA RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2002-145-R
v.	:	Order No. 4642757; 8/7/2002
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA	:	Alloy/4 Mile Surface Mine
Respondent	:	Mine ID 46-07537

DECISION

Appearances: David J. Hardy, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, for Contestant;
Francine A. Serafin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Notice of Contest brought by Vandalia Resources, Inc., against the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company challenges the issuance to it of Order No. 4642757, an “imminent danger” order,. A hearing was held in Charleston, West Virginia. For the reasons set forth below, I vacate the order and dismiss the case.

Background

Vandalia Resources operates a surface coal mine in Fayette County, West Virginia, known as the Alloy/Four Mile Surface Mine. On August 7, 2002, MSHA Inspector Sherman Slaughter and his supervisor, Harold Owens, went to the mine to observe a highwall operation. The inspectors had to travel through the surface mine to get to the highwall. They completed their examination of the highwall and left the area in their car at 3:25 p.m.

While the inspectors were driving back across the mine property, they passed an area where reclamation work was being performed. They pulled off of the road to observe the operation. Inspector Slaughter got out of the car to get a better look. He saw a bulldozer that

appeared to be sliding on the slope. The inspector then reached into his car for his camera and told Owens to “look at that dozer sliding on the slope.” (Tr. 21.) The two inspectors talked about the situation a minute and then Slaughter took a picture of the scene. By the time he took the picture, the bulldozer had reached the bottom of the slope and was heading toward the up ramp.

Slaughter got back into the car and began driving around the access road through the hollow to get to the other side to stop the work. As they arrived at the reclamation site, Slaughter saw a second bulldozer start down the slope, slide “sideways some,” and then straighten out and proceed the rest of the way down the hill. (Tr. 21.) The inspectors got out of car and the two bulldozer operators came over to them.

Slaughter had decided to issue an “imminent danger” order when he observed the first bulldozer. When the operators got to the inspectors, Slaughter told one of the operators, Mikel Neal, that he was sliding coming down the hill and did not have full control of the bulldozer. Neal disagreed. He then told the other operator, Edward Hamon, the same thing. Hamon also did not agree with Slaughter’s assessment. Slaughter then told them he was issuing an “imminent danger” order and that they could not continue to work that way.

The “imminent danger” order, Order No. 4642757, was issued at 3:35 p.m. It alleges a violation of section 107(a) of the Act, 30 U.S.C. § 817(a), because:

Two bull bulldozers were observed pushing material down a steep reclaim slope (approx. 1.56/1) in pit 180 of the mine. One bulldozer, a D10N with a ripper, would lose traction and slide straight down the slope on areas of the slope and the other bulldozer, a D10R bobtail, would lose traction and slide sideways on areas of the slope. The bulldozer operators did not have full control of the machines in that they would slide as they worked the slope. It was determined that the type of bulldozers and the slope conditions (steep and loose materials) made it reasonable to expect the bulldozers to slide out of control (on the steep slope) and result in serious injury. An imminent danger exists.

(Govt. Ex. 4.) No citation or order was issued for a violation of any of the Secretary’s mandatory safety or health standards.

Findings of Fact and Conclusions of Law

Section 107(a) of the Act provides that:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of

the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative . . . determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act, 30 U.S.C. § 802(j), defines an “imminent danger” as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.”

In interpreting this definition, the Commission has stated that “an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Eastern Associated Coal Corp. v. Interior Bd. Of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted) (*R&P*). The Commission has elaborated that “[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.” *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991).

An inspector’s finding of an imminent danger must be supported “unless there is evidence that he has abused his discretion or authority.” *R&P*, 11 FMSHRC at 2164, quoting *Old Ben Coal Corp. v. Interior Bd. Of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted). “An inspector abuses his discretion, making a decision that is not in accordance with law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety.” *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858-59 (June 1996) (citation omitted).

In determining whether he has abused his discretion, an inspector “is granted wide discretion because he must act quickly to remove miners from a situation he believes is hazardous.” *Id.* at 859. In assessing an inspector’s exercise of his discretion, the focus is on “whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported the issuance of the imminent danger order.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (August 1992).

Based on the evidence in this case, I am constrained to conclude that the inspectors did not make a reasonable investigation of the facts, that no imminent danger existed and, thus, that they abused their discretion. With regard to their investigation, the inspectors were initially too far away from the bulldozers to accurately observe their operation, did not observe either bulldozer make a complete run down the slope and did not discuss the operations with the

bulldozer operators or their foreman. Furthermore, too little time elapsed for the inspectors to make a reasonable investigation of the facts. Indeed, a reasonable investigation would have revealed that there was no imminent danger.

The inspectors were at least 200 yards from the slope when they observed the bulldozer from their car. (Tr. 265.) Actually, looking at the picture taken by Inspector Slaughter, (Govt. Ex. 1), it appears that 200 yards is a conservative estimate. From this distance, Inspector Slaughter concluded that Hamon's bulldozer was sliding straight down the hill because "[t]he way the sun was hitting the tracks, I could see the grouser (phonetic) of the cleats, the tracks themselves. I could tell that they weren't moving, they were stationary." (Tr. 26-27.)

Assuming that he could see that well, the inspector still could not observe the slope of the hill, the actions of the operator, the type of material the bulldozer was operating in or precisely how the bulldozer was performing. Yet based on this one observation, Inspector Slaughter decided to issue an imminent danger order. As he said, "When I seen [*sic*] the first bulldozer, saw him sliding, I knew that that was [*im*]minent then As we were going around, I was talking to my supervisor and I told him we'd have to issue an order for this, we have to get them to stop." (Tr. 30-31.)

Moreover, at the time Inspector Slaughter made his decision, he had only seen one bulldozer come part way down the slope. The first bulldozer was already coming down the slope when he first observed it and it is clear from the picture, which shows the second bulldozer going across the top of the slope, that the second bulldozer had not yet started down the slope when the inspectors began driving around the access road and through the hollow to get to the slope. Either while they were driving or right after they arrived, the inspectors saw the second bulldozer slide "sideways some" and then straighten back up as it came down the slope. (Tr. 21.) However, it appears that rather than sliding sideways, the bulldozer actually "fishtailed" to the left.¹ Nevertheless, even if Inspector Slaughter had not decided to issue an imminent danger order until after observing the second bulldozer, the issuance of the order would have been premature.

¹ Slaughter would not use the term "fishtail," but testified as follows on cross-examination:

Q. What he told me was that — and he'll testify here today is that it fishtailed a little to the left, and then he compensated and straightened up; is that what you saw?

A. I saw him slide to the left and straighten it up. That's right.

It would have been premature because when the inspectors arrived at the slope, they did not discuss the situation with the inspectors. Instead, Inspector Slaughter confronted the operators with his conclusions that they were “sliding coming down the slope” and “you don’t have full control of your bulldozer.” (Tr. 31-32.) When the operators stated that, even though the bulldozer may have been sliding, they still had full control, the inspector did not pursue the matter further, but announced that he was issuing an imminent danger order.

Again, had the inspector not already decided to issue the order, he still had not conducted a sufficient investigation at this point. He did not know how much experience each operator had operating a bulldozer, the mechanical condition of the bulldozers, how long they had been operating on the slope, what problems, if any, they had experienced while operating on the slope, or the basis for their claims that they believed themselves to be in control of the bulldozers. In addition, no discussion was had with the foreman who directed the grooming of the slope.²

Ultimately, I find it significant on the issue of whether the inspectors made a reasonable investigation of the facts, that only ten minutes elapsed from the time the inspectors completed their inspection of the highwall until they issued the imminent danger order. (Tr. 58.) In that time, the inspectors left the highwall pit area, drove for some time until they observed the reclaiming operation [Inspector Slaughter would not estimate how long that took (Tr. 57)], stopped the car, got out of the car, observed the first bulldozer, had a discussion for “a minute” with each other, got a camera out of the car, took a picture, got back in the car, drove to the slope area, got out of the car, talked to the operators and issued the citation. While this certainly was enough time to indicate to the inspectors that the situation needed further investigation, it was not enough time to complete the investigation.

If instead of issuing an imminent danger order, the inspectors had conducted a more thorough investigation, they may well have concluded, as I do, that an imminent danger did not exist. Prior to becoming authorized representatives of the Secretary, Inspector Slaughter had only nine months experience as a surface miner and Inspector Owens had none. (Tr. 54, 121.) In addition, neither Inspector Slaughter nor Inspector Owens had ever operated the types of bulldozers involved in the reclaiming project, although Inspector Slaughter had apparently operated some types of bulldozers during his short surface mining career.

On the other hand, Hamon has 21 years experience as a surface miner and had been operating bulldozers for five years. (Tr. 140-41.) Neal has been a surface miner for 25 years, almost all of it operating bulldozers. (Tr. 187.) Both were considered to be skilled operators and Neal was the most experienced reclamation employee the company had. (Tr. 217, 255.) Additionally, Harold Arbaugh, the foreman, had almost 30 years experience as a surface miner, 24 years of it as a certified mine foreman, and has operated the types of bulldozers at issue here. (Tr. 215.)

² Inspector Owens testified: “We discussed the situation with the equipment operators and the mine foreman who came up there later after we issued the order.” (Tr. 112.)

Inspector Slaughter testified that he believed the situation involved an imminent danger because: “When I seen [*sic*] these bulldozers slide, I knew that they could hit a rock and if they hit a rock . . . it could cause the bulldozer to go sideways and if it did, it could roll off the embankment when it’s steep. It won’t just roll — it will roll all the way to the bottom and I suspected it would be a fatal injury.” (Tr. 46.) None of the company’s witnesses disagreed with the inspector’s assertion that if a bulldozer got completely sideways on the slope, there was a danger that it could roll over. They did disagree, however, that that was a danger in their work reclaiming the slope.

Hamon testified that the work he was performing was routine, that he felt safe, that he had operated on steeper slopes, that in the six hours he had been working he had encountered only one rock, that he had control of the bulldozer at all times, that he never felt that he was in danger of a rollover, and that if had felt that he was not safe, he would have stopped working. (Tr. 143, 145, 147-48, 151-53.) Neal testified that he had been up and down the site between 40 and 50 times with no problems before the inspectors arrived, that he had operated on steeper slopes, that he had rolled a bulldozer once before, knew how dangerous it was, but at no time did he feel in danger of a rollover or that the work was unsafe and that he felt in control of the bulldozer at all times. (Tr. 194, 196-97, 208-09, 212.) Arbaugh testified that the slope was not steep enough for the bulldozers to turn sideways and rollover. (Tr. 231.)

Neal and Arbaugh also testified that it is not unusual for bulldozers to slide on occasion, but that does not mean that the operator cannot control it. (Tr. 194, 226.) Hamon and Neal stated that if a bulldozer does start to slide there are a number of ways to stop it, among them cross-steering, using the blade as a brake or using a combination of the blade and the brakes. (Tr. 156, 181, 195, 203.)

Lastly, the slope of the hill was not as steep as the inspectors believed it to be. The inspectors measured the slope with an Abney level and determined that it was 1.56:1, or a 64 percent grade. However, the company had the slope surveyed by its engineers, who then drew a profile of the slope. (Cont. Ex. 1.) It shows that while one section of the slope was 1.56:1, it varied from 1.26:1 (79 percent grade) at the very top to 2.21:1 (45 percent grade) and that average of the slope was 1.68:1 (60 percent grade).

In determining that there was not an imminent danger, I accept the testimony of the experienced operators and foreman over the conjecture of the inspectors. Their testimony is bolstered by the evidence that when the company determines that a slope is too steep for its employees to operate on, it hires specialists to reclaim it. (Tr. 250-51, 277.) This demonstrates that the company takes the slope into consideration before assigning employees to work on it.

Conclusion

The inspectors did not conduct of reasonable investigation of the facts and circumstances in this case. Instead of taking the time to observe the operation close at hand to see how the

bulldozers were actually operating, and interviewing the operators, they chose to issue an imminent danger order based on a distant view of one bulldozer coming down the slope. In fact, had the situation been further investigated, the conclusion that there was no imminent danger would have been reached. Consequently, I conclude that the inspectors abused their discretion in issuing the imminent danger order in this case.

Order

Accordingly, it is **ORDERED** that Order No. 4642757 is **VACATED** and this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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