FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 15, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2003-33
Petitioner	:	A. C. No. 46-07537-03557
v.	:	
	:	
VANDALIA RESOURCES, INCORPORATED,	:	
Respondent	:	Alloy / 4 Mile Mine

DECISION

Appearances: Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and James F. Bowman, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Mt. Hope, West Virginia, on behalf of Petitioner;
David Hardy, Esq., Spilman, Thomas & Battle, Charleston, West Virginia, on behalf of 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 of 1977, 30 U.S.C. § 801 (1994), *et seq.*, the "Act," charging Vandalia Resources, Incorporated (Vandalia) with three violations of mandatory standards and proposing civil penalties of $1,948.00, for those violations. The general issue before me is whether Vandalia violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Citation No. 4642772, issued pursuant to Section 104(d)(1) of the Act, alleges two "significant and substantial" violations of the standard at 30 C.F.R. § 77.1713(a) for which the Secretary seeks a single civil penalty of $1,500.00.[1] The citation charges as follows:

---

[1] Section 104(d)(1) of the Act 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

After the certified mine foreman examined the Black Top Roadway at the mine between 5:15 a.m. and 6:15 a.m. he noted in the Preshift-Mining Examiners Report book that the roadway was "snow covered, slick." The report was dated 01/18/02. The condition of the roadway was not corrected and the foreman did not report the condition to anyone else. The foreman did not stop traffic from using the roadway. At approx. 8:30 a.m. a tractor-trailer slid out of control on the same slick roadway and went into the roadway ditch. Approx. 30 minutes later a second truck slid out of control on the roadway and slid backwards into the first truck that wrecked. The foreman knew the roadway was hazardous and did not make any effort to correct the condition.[2]

The cited standard, 30 C.F.R. § 1713(a), provides that "[a]t least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator."

The Alloy/4 Mile Mine is a surface coal mine with about 12 miles of roadways. Most of the roads are gravel but some have been paved with blacktop. The area at which the cited accidents occurred was the upper and steeper portion of the blacktop roadway. Certified Mine Foreman Grover Waggoner arrived at the mine around 5:15 a.m., on January 18, 2002, and began his preshift examination traveling all 12 miles of roads. He observed while driving the gravel road along the ridge, the highest area, that it was cold, probably 30 degrees to 32 degrees, and

---

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 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] According to the citation the first violation occurred based on snow conditions extant between 5:15 and 6:15 a.m., and the second violation occurred based on conditions extant 2 ½ to 3 hours later when Foreman Waggoner learned of the first accident caused by the tractor-trailer sliding on ice, and continuing to the second accident. The credible evidence shows that, by the time of the accidents, the road conditions had changed from merely snow covered to icy - - presumably from compaction of the snow by vehicular traffic.

was snowing but not "hard." It continued to snow for another 10 or 15 minutes. Waggoner maintains that he nevertheless had no trouble driving the area. He then met with the road grader operator and directed him to continue working on the roads and to "take care of the snow problems." (Tr. 295).

Waggoner then drove to the blacktop road, passing at around 6:00 a.m., the area where the accidents later occurred. The road was snow-covered with, according to Waggoner, about one-half inch of snow. Waggoner admitted at hearing that such roads, when snow covered, are usually slippery. After completing his preshift examination, Waggoner filled out his preshift report. He noted on this report under the heading "Violations and Other Hazardous Conditions Observed and Reported," and the under the subheading "Location," that "haul roads-snow covered, slick." In addition, under the "Remarks" subheading he noted "LT. snow." (Gov't Exh. No. 6).

There is no evidence that snow was cleared from the blacktop road after Waggoner filed his preshift and onshift reports and before the accidents. Moreover, Waggoner did not stop traffic from using the road or notify the guard shack at the mine entrance to bar entry. Shortly after 8:30 a.m., a tractor-trailer slid on ice on the blacktop road and went out of control into a ditch. About 30 minutes later, a second truck slid out of control in the same area and struck the first truck.

Within the above framework of evidence I find that Waggoner indeed, found and reported that between 5:15 a.m. and 6:15 a.m. on January 18, 2002, the haul roads, including the blacktop road, were hazardous and that such conditions, at least in the area of road where the accidents later occurred, were not corrected. It is undisputed that the road was still slippery from ice at around 8:30 a.m. to 9:00 a.m., when the truck accidents occurred. (Tr. 29, 40; 185-186). Indeed, based on the credible testimony of Inspector Slaughter, of the Department of Labor's Mine Safety and Health Administration (MSHA) I find that even after more than an hour following the second accident, evidence of ice was still present. (Tr. 63, 72).

Under the circumstances I find that the first violation has been proven as charged. In reaching this conclusion I have not disregarded Waggoner's claims that when he made the entry in the preshift examination book "haul roads - snow covered, slick" he meant only the "haul road down toward the pit area, near the bottom" and not the area of blacktop haul road where the accidents occurred (Tr. 258). I can give such self-serving testimony but little weight, however, in light of Waggoner's contemporaneous and contrary written preshift and onshift report. A certified mine foreman such as Waggoner must be held accountable for the wording and accuracy of such reports and he is at peril for any lack of specificity or undisclosed intent.

Within the above framework of evidence it is also clear that the violation was "significant and substantial" and of high gravity. 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).

The slick conditions of the road could have and, indeed, did result in at least two truck accidents. Based on the credible and largely undisputed testimony of Inspector Slaughter, I find that these trucks were reasonably likely to have struck other vehicles using the haul road, to have passed over the berm or caused a fire by rupturing a fuel tank. Under such circumstances it is reasonably likely for serious injuries or fatalities to be expected.

The Secretary also alleges that the first violation alleged in the citation was the result of "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). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of *Emery* was that unwarrantable failure results

from aggravated conduct, constituting more than ordinary negligence. *Secretary v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

I find as to the first violation alleged in the citation that the Secretary has failed to sustain her burden of proving "unwarrantable failure." I accept the undisputed testimony of certified Foreman Waggoner that, after he discovered the snow conditions on the haul roads between 5:15 and 6:15 a.m., he instructed the road grader operator to continue working on the roads and to "take care of the snow problems." I further note that Waggoner also wrote in his on-shift report that the grader had been operating since 5:40 that morning. Under these mitigating circumstances I do not find Respondent chargeable with that high degree of negligence required to constitute "unwarrantable failure."

In reaching this conclusion I have not disregarded the Secretary's claims that a road grader could not, in any event, adequately remove snow from a paved road. I do not, however, find these claims sufficient to discredit the mitigating efforts of Waggoner. Administrative notice may be taken of the fact that public agencies often use similar equipment for snow removal on paved roads.[3]

The second violation alleged in Citation No. 4642772 is based upon the road conditions extant some 2 ½ to 3 hours later, at the time of the first accident and continuing to the time of the second accident. Contract truck driver Doug Hassler arrived at the mine around 8:30 a.m. and proceeded up the haul road (Tr. 68, 184). As he was approaching the top of the hill he felt that he was on ice. According to Hassler his truck broke traction and, with its brakes locked, slid backwards on the ice into a ditch next to a berm. Hassler then called Foreman Waggoner on the CB and told him that the road was "too slick, and I slid back over against the bank into the ditch" (Tr. 186-187). Waggoner responded by sending a grader to pull the truck out of the ditch. According to Hassler, the grader later arrived but could not stop because the road was "too slick." The road was so slippery Hassler had difficulty even walking on it. Hassler also testified that a logging truck also failed to make the hill, sliding back into the left-hand ditch.

Waggoner acknowledged that he was notified of the first accident involving Hassler's ammonium nitrate truck around 9:00 or 9:15 that morning. He sent the grader to pull the truck out of the ditch. Waggoner also went to the accident scene about 30 minutes after it was reported to him. According to Waggoner, he never left his truck to observe the road conditions but he "didn't think there was any snow to be cleared in that area" (Tr. 298). He thought the road was

---

[3] The Secretary appears to also argue in her post-hearing brief that this violation, based on conditions extant between 5:15 and 6:15 a.m., *i.e.*, snow on the road, was the result of "unwarrantable failure" based upon the knowledge of conditions present when Foreman Waggoner was at the cited area following the first truck accident at around 9:00 or 9:15 a.m., *i.e.*, ice on the road. However, such knowledge of conditions extant some three hours after the alleged violation could not show that the earlier violation, based on knowledge of different conditions, was the result of "unwarrantable failure" (or of high negligence).

"mostly just wet at that time" (Tr. 297). Waggoner acknowledged that even after notice of the accident and visiting the accident scene he did nothing to clear the road.

According to the undisputed testimony of Walter Carte, a truck driver employed by an independent contractor, when he approached the top of the haul road (apparently after 9:15 a.m.) he observed the tanker truck stuck in the ditch. After passing this truck, Carte's tires started to spin on the icy road. He "killed" his engine but began sliding backwards on the ice. Carte's truck then slid into the tanker containing ammonium nitrate. According to Carte, the road did not appear to have been treated and he could not even see the blacktop beneath the ice (Tr. 30-32, 40, 44, 50). Indeed, even later, at around 10:30 that morning, when Inspector Slaughter arrived, he could see slide marks in the ice beneath the truck and melting ice on the road (Tr. 72). This credible testimony is not disputed.

Within this framework of evidence I conclude that, under the cited standard, Waggoner had a duty, after having knowledge of the circumstances of the first accident and knowledge of the extant conditions when he was on site shortly thereafter, to correct the slippery road conditions. His failure to correct those conditions, which led to the second accident, constituted the second violation of the cited standard. In light of the credible testimony of both truck drivers and Inspector Slaughter and the fact that both trucks slid on the icy road, I do not find credible Waggoner's self-serving testimony that when he saw the road after the first accident he thought the road only looked "wet" and that he "didn't think there was any snow to be cleared." This violation was also "significant and substantial" and of high gravity for the same reasons previously stated.

This violation was also the result of "unwarrantable failure" and of high negligence. The law regarding "unwarrantable failure" has previously been discussed. Here, Waggoner's failure to assure that corrective measures were taken to remedy the slippery road conditions, after specific notice of such conditions causing the first accident and having observed the road conditions first-hand, clearly constituted an aggravated omission equivalent to reckless disregard, indifference and a serious lack of reasonable care.

Citations No. 4642773 and 4642774 allege "significant and substantial" violations of the standard at 30 C.F.R. Section 77.1607(b). That standard provides that "mobile equipment operators shall have full control of the equipment while it is in motion."

More specifically, Citation No. 4642773 charges as follows:

> The driver of the Freightliner tractor -trailer truck (Car No. 1167) being used at the mine to haul ammonium nitrate over the Black Top Road did not have full control of the truck while it was in motion. It slid backwards out of control and wrecked because the roadway was snow covered and slick. The driver was a contractor employee. The foreman for this production operator examined the roadway before the accident occurred and noted the "snow covered and slick"

roadway in the examiner's report but the company did not correct the hazardous condition. The truck slid out of control near the top of the grade of the Black Top Road near the parking area and maintenance area at the mine.

Citation No. 4642774 charges as follows:

> The driver of the Ford LTL 9000 tandem gravel truck (Veh. ID No. A45270) being used at the mine did not have full control of the truck while it was in motion in that the driver lost control on the snow covered, slick Black Top Road near the top of the grade near the parking lot and maintenance area and the truck slid backwards out of control down the grade and stopped when it hit another truck that had already slid out of control at the same location. The driver was a contractor employee. The foreman for this company examined the roadway before the accident occurred and noted the "snow covered and slick" roadway in the examiner's report but the company did not correct the hazardous condition.

It is undisputed that both of the cited truck drivers were employed by independent contractors and not Vandalia. Vandalia claims that it was an abuse of the Secretary's discretion to therefore charge it for violations of its independent contractors. It is well-established law, however that the Secretary may hold an operator strictly liable for all violations of the Act which occur on its mine site, whether committed by its own employees or those of its contractors. *Mingo Logan Coal Company,* 19 FMSHRC 246, 249 (February 1997), *aff'd* 133 F.3d 916 (4th Cir. 1998)(table)(citing *Bulk Transportation Services*, 13 FMSHRC 1354, 1359-60) (September 1991).

The Commission has also recognized the Secretary's discretion in proceeding against an operator, its independent contractor, or both, for violations committed by a contractor. *Id.* (citing *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989). An operator challenging the Secretary's enforcement discretion bears a heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on a misunderstanding of the law. *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (January 1998)(citing *Mingo Logan*, 19 FMSHRC at 249-250 n.5). The Commission has considered various factors in determining whether an enforcement action constitutes an abuse of the Secretary's discretion, including the operator's day-to-day involvement in the mine's operations, whether the operator is in the best position to effect safety, and whether the action is consistent with the purpose and policies of the Act. *Extra Energy, Inc.*, 20 FMSHRC at 5.

Vandalia has cited no evidence and presents no argument to support its bald claim that the Secretary abused her discretion in citing it, as well as its contractors, for these two violations. In any event it is clear in this case from the prior discussion of credible evidence that Vandalia was in the best position to maintain its roads in safe condition and that Vandalia's agent, foreman Waggoner, was negligent in failing to correct the known hazardous road conditions. Thus, the failure of truck drivers Hassler and Carte to maintain full control of their vehicles was clearly a

foreseeable result of Vandalia's action and negligent inaction. Accordingly, the Respondent's claims of Secretarial abuse are, in any event, without merit.

In essence, the citations allege that the drivers of the two trucks that slid out of control on the morning of January 18, did not have full control of the trucks, in violation of the cited standard. The testimony of truck driver Doug Hassler is undisputed. It has previously been discussed in reference to Citation No. 4642772 but is necessarily again reviewed herein. On the morning of January 18, 2002, he was employed as a driver by independent contractor Nelson Brothers. According to Hassler, because of the snow conditions that morning, he checked at the guard shack upon entering mine property to determine the best way to travel in the mine and to obtain hazard training. He inquired of the returning truck drivers and was advised that the road was slick but that he should not have any trouble. Hassler testified that he geared down as he approached the top area of the road but found that he was on ice and "broke traction." He locked his brakes and slid backwards into a ditch. Hassler further testified that the road did not look icy where he had slipped.

Walter Carte testified that he was at the mine premises on January 18, 2002, driving a Ford LTL 2000 dump truck for another independent contractor, the Morton Trucking Company. His testimony was also previously discussed, but is also necessarily again reviewed herein. He was loaded with crushed stone to be delivered to the pit. He had been at the mine 15 to 20 times before and was well acquainted with it. He initially had no difficulty with traction and proceeded around the ditched truck. As he began climbing the steepest part of the hill around 9 or 9:15 that morning his wheels started to spin, the brakes locked, the engine stalled and the truck slid backwards striking the ditched truck. Carte also slipped on the ice as he exited his truck. There was about 1 inch of snow on the ground and road had not been plowed or treated with salt. Carte admitted that some "driver error" was involved and acknowledged that when he saw the truck in the ditch he could have stopped his truck. Within the above framework of evidence it is clear that the violations were proven as charged and that the violations were "significant and substantial."

Inspector Slaughter opined in this regard that any of the trucks slipping backwards could have passed through the berm and rolled over. Under such circumstances it would be highly likely for the driver to be seriously injured or killed. Slaughter also noted that the fuel tanks on the trucks could have been punctured in such an accident and ignited. The aluminum nitrate carried by the tractor trailer was also flammable. Finally, he observed that pedestrians could have been crushed between the trucks. Within this framework of evidence I conclude that indeed, the violation was "significant and substantial."

I find the operator chargeable with moderate negligence for these violations. The failure of these truck drivers to have full control of their vehicles was a direct result of Vandalia foreman Waggoner's negligent failure to remedy the hazardous road conditions. The negligence of its agent, its foreman, is imputed to the mine operator, Vandalia. *Fort Scott Fertilizer-Cullor, Inc.*,

17 FMSHRC 1112 (July 1995); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189 (February 1991).

Civil Penalties

I find that the first violation charged in Citation No. 4642772 was of high gravity and the result of moderate negligence and the second violation was of high gravity and the result of high negligence. I further find that both violations in Citation No. 4642773 and 4642774 were the result of moderate negligence and involved high gravity. The violations were apparently abated to the Secretary's satisfaction. The operator is large in size and does not have a significant history of violations. It has been stipulated that penalties would not affect the ability of the operator to remain in business. Under the circumstances I consider the Secretary's proposed civil penalties of $1,500.00, $224.00 and $224.00, to be appropriate for the violations charged in Citations No. 4642772, 4642773 and 4642774, respectively.

ORDER

Citations No. 4642772, 4642773 and 4642774 are affirmed and Vandalia Resources, Incorporated, is directed to pay civil penalties of $1,948.00, to the Secretary within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Karen Barefield, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

David J. Hardy, Esq., Spilman Thomas & Battle, PLLC, Spilman Center, 300 Kanawha Blvd., East, P.O. Box 273, Charleston, WV 25321-0273

\mca