FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 22, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-49-M
Petitioner	:	A. C. No. 37-00181-05515
v.	:	
	:	
CONSTRUCTION MATERIALS CORP.,	:	
Respondent	:	Construction Materials Corp.

DECISION

Appearances: Kathryn A. Joyce, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for the Petitioner;
Jeffrey A. Douglas, President, Construction Materials Corporation, Tiverton, Rhode Island, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Construction Materials Corporation. The petition seeks to impose a total civil penalty of $334.00 for three alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines. One of the three alleged violative conditions was characterized as significant and substantial (S&S) in nature.[1] This matter was heard on February 27, 2001, in Providence, Rhode Island.

At the beginning of the hearing, the parties were advised that I would defer my ruling on the three citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties waived the filing of briefs. This written decision formalizes the bench decision issued with respect to the contested citations. This decision contains an edited version of the bench decision issued at trial with added references to pertinent case law. The bench decision vacated the citation designated as S&S and affirmed the two non-S&S citations. A total civil penalty of $110.00 was imposed.

[1] A violation is properly designated as significant and substantial "if based upon 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." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty to be assessed, Section 110(i) provides, in pertinent part:

> 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.

Construction Materials Corporation is a small mine operator that is subject to the jurisdiction of the Mine Act. The evidence reflects that Construction Materials Corporation has a good compliance history with respect to previous violations in that, although it was cited for 22 violations of mandatory health and safety standards during the previous two years preceding the issuance of the citations in issue, half of the cited conditions were designated as non-S&S (Gov. Ex. 6); that Construction Materials Corporation abated the cited conditions in a timely manner; and that the $334.00 total civil penalty initially proposed by the Secretary in these matters will not effect Construction Materials Corporation's ability to continue in business.

II. Findings and Conclusions

Construction Materials Corporation is a family run quarry located in Tiverton, Rhode Island. The facility is a small quarry with approximately 25 employees. There are 12 varieties of stone products that are extracted and crushed on site. Construction Materials Corporation operates several trucks that it uses to deliver its product to customers. Some customers use their own trucks which are loaded on site. The citations that are the subject of these proceedings were issued on February 2, 2000, by Mine Safety and Health Administration (MSHA) Inspector John Newby. The citations were issued during the course of Newby's regular bi-yearly inspection of Construction Materials Corporation's quarry facility.

A. Citation No. 7726955

Inspector Newby arrived at the Tiverton, Rhode Island quarry at approximately 9:00 a.m. on February 2, 2000. Newby reported to the scale house in an effort to locate Construction Materials Corporation's President, Jeffrey Douglas, so that Douglas could accompany him during the inspection. Newby was informed that Douglas was unavailable and that mechanic Roger Branin would be the company representative participating in the inspection.

Newby proceeded with Branin from the scale house to the garage. Upon entering the garage, Newby noted several fire extinguishers that were kept inside. Section 56.4201, 30 C.F.R. § 56.4201, contains the Secretary's mandatory safety standards with respect to the inspection of firefighting equipment. Section 56.4201(a)(1) requires fire extinguishers to be visually inspected at least once a month to determine that they are fully charged and operable. Section 56.4201(a)(2) further provides that more thorough maintenance checks of fire extinguishers to check mechanical parts, the amount and condition of the extinguishing agent and expellant, and the condition of the hose, nozzle and vessel must be performed annually. Section 56.4201(b) requires certifications documenting the monthly visual checks as well as the more thorough annual maintenance checks to be recorded on inspection tags located on each fire extinguisher.

Newby inspected the fire extinguisher tags and determined that, although all of the fire extinguishers had been visually inspected on a monthly basis as required by the mandatory safety standard, with respect to two fire extinguishers, more than 18 months had elapsed since the last documented physical inspection in June 1998. Consequently, Newby issued Citation No. 7726955 citing a non-S&S violation of the annual inspection requirements of section 56.4201(a)(2). Newby considered the violation to be non-S&S in nature because there were other fire extinguishers in the garage that had been currently inspected that could have been used in the event of a fire.

In defense of the citation, Douglas testified that he never personally observed the outdated tags in issue. Douglas contended that he has a full-time employee that is responsible for ensuring that the fire extinguishers are inspected annually as required. Douglas stated that he believed the subject fire extinguishers were only in service approximately 10 months. However, he could not explain why the inspection tag reflected they had been placed in service in June 1998.

The bench decision noted that, as a threshold matter, the Secretary has the burden of proving, by a preponderance of the evidence, that a violation of the cited mandatory safety standard has occurred. *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (November 1992) (citations omitted). Section 56.4201(a)(2), the cited standard, requires annual physical inspection of fire extinguishers. The only way this standard can be enforced is by the MSHA inspector's reliance on the notations on the fire extinguisher inspection tags. It is the responsibility of the mine operator to ensure that these tags accurately reflect the fire extinguisher's maintenance history. Although, Douglas maintains the cited fire extinguishers were placed in service only 10 months prior to Newby's February 2000, inspection, Douglas could not explain why the inspection stickers reflected the fire extinguishers had last been physically inspected in June 1998. Consequently, Construction Materials Corporation has failed to rebut the Secretary's *prima facie* case. Accordingly, the Secretary has met her burden of proof and **Citation No. 7726955 shall be affirmed**.

However, given the fact that all other monthly and annual fire extinguisher inspections were current, as well as the fact that there was no evidence that the cited fire extinguishers were not in good working condition, Citation No. 7726955 shall be modified to reflect that the violation was attributable to a low degree of negligence and that the cited conditions were not likely to result in any lost workdays. Construction Materials Corporation shall pay the $55.00 civil penalty sought to be imposed by the Secretary. (Tr. 74-80).

B. Citation No. 7726956

Upon arriving at the garage, Newby observed a Mack D2 haulage truck parked in the western portion of the gravel area outside the garage. The bed of the truck normally rests on framework that extends the length of the truck on both sides. The outer perimeter of the truck bed extends approximately two feet beyond the truck frame. Newby noted that the truck bed was raised in the fully extended position at an angle of approximately 87 degrees. Newby observed that the truck driver apparently was performing his pre-shift inspection. Newby saw the driver standing outside the outer perimeter of the raised truck bed extend his arm under the bed to check the tread on the rear tires. Newby estimated the driver's arm was extended under the truck bed for approximately 10 seconds. (Tr. 121). Newby also observed the driver extend his upper torso over the truck frame and under the raised truck bed to observe the condition of the hydraulic cylinder that raises the truck. Newby estimated the driver was in this position for "maybe 10 seconds, 10, 15 [seconds]" *Id.* Thus, Newby estimated the sum total of exposure was 20 seconds - - 10 seconds by the rear tires, and 10 seconds leaning over the frame at the location of the hydraulic cylinder. *Id.*

The truck is equipped with a locking mechanism that is utilized to block the raised truck bed against motion. This locking mechanism consists of a steel bar that is located between the center of the truck frame. To engage the steel bar requires leaning under the raised truck bed to dislodge the steel bar from the steel frame and engage it in a hole in the bottom of the raised truck bed. Newby testified that it would only take "3, 4, 5 seconds" to dislodge the bar stored in the frame and place it in position. (Tr. 129). Newby also testified that, if the hydraulic line broke, "the bed would fall like a rock." (Tr. 84-85, 97).

As a result of his observations, Newby issued Citation No. 7726956 citing an alleged significant and substantial violation of the mandatory safety standard in section 56.14211(a), 30 C.F.R. § 56.14211(a). This mandatory standard provides:

> **Persons shall not work** on top of, **under**, or work from **mobile equipment in a raised position** until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidentally. (Emphasis added).

At the hearing, the Secretary agreed that the purpose of section 56.14211(a) is to limit exposure to unblocked, raised equipment. Consequently, the Secretary admitted that, under these circumstances, the act of blocking the truck bed may result in greater exposure to raised equipment than the momentary exposure observed by Newby in this case. Understandably uncomfortable by this dilemma, the Secretary explained that when applying mandatory safety standards, "sometimes logic does not seem to prevail." (Tr. 133-135).

The bench decision noted the concept that where the language of a regulatory provision is clear, the terms of the provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). It is only when the meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984).

Ordinarily, an administrative law judge should not substitute his interpretation of a regulatory provision for the Secretary's interpretation unless the Secretary's interpretation is clearly erroneous or otherwise leads to an absurd result. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 462 (D.C. Cir. 1994), relying on *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987) *citing In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631 (1978). In the current case, the Secretary's application of section 56.14211(a) is illogical.

Section 56.14211(a) does not strictly prohibit persons from going under unblocked, raised equipment. Rather, section 56.14211(a) prohibits persons from "working" under equipment in a raised position unless the equipment is blocked. Here, under the circumstances of this case, the Secretary's asserted meaning of the term "work" to include any act, regardless of how *de minimis*, thwarts the purpose of a regulation that seeks to minimize exposure to raised equipment where blocking and unblocking the equipment results in as much, or more, exposure than the act sought to be prohibited. In this instance, the acts of the truck driver observed by Newby of momentarily leaning under, and, extending an arm under, an unblocked truck bed resulted in less exposure to the hazards of a hydraulic failure than the time required to go under the raised truck bed to block and unblock the truck. In this regard, I cannot credit Newby's testimony that the acts of blocking and unblocking the truck bed would only take "3, 4, 5 seconds"

Moreover, whether a particular act constitutes "working" under raised equipment as contemplated by section 56.14211(a) must be evaluated on a case-by-case basis since the regulations do not define "work." The dictionary definitions of the term "work" include an "activity in which one exerts strength or faculties . . ." and "sustained physical or mental effort . . . [to] . . . achieve an objective." *Webster's Third New International Dictionary* (*Unabridged*) (1993). Thus, the term "work" contemplates activity that is more than fleeting or momentary in

nature. For example, reaching under raised equipment to retrieve a fallen glove would not be considered work. *But cf. Root Neal & Company*, 22 FMSHRC 94 (January 2000) (ALJ) (failure to block a front-end loader bucket during installation of a scale connected to the hydraulic lift system violated section 56.14211).

In the final analysis, a mandatory safety standard, as applied, cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Thus, whether the acts observed by Newby in this case fit within the term "work" should be resolved based on the Commission's reasonably prudent person test. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). Whether application of section 56.14211(a) to the facts of this case provides adequate notice must be determined by considering whether a reasonably prudent person familiar with the quarry industry, and the protective purposes of section 56.14211(a), would have recognized that the blocking and unblocking of a raised truck bed, given the exposure incidental to such acts, was required to protect against a total exposure of less than 20 seconds in duration. I think not. Accordingly, **Citation No. 7726956 shall be vacated.**

In reaching this conclusion, I am not trivializing the hazards associated with working under unblocked, raised equipment. While we routinely take for granted the reliability of hydraulic systems in equipment such as automobiles and airplanes, of course, as expressed by Newby, there is a possibility that hydraulic systems can fail without warning. Obviously, going under unsecured hydraulically raised equipment is not prudent. However, the result in this case is dictated by the evidence presented by the Secretary. Surely section 56.14211(a) cannot be construed to require greater exposure to the risk of unblocked equipment through the act of blocking than the purported prohibited conduct. In this regard, the result in this case would be different if the driver observed by Newby had a screw driver or grease gun in hand, or, if there was other evidence of more than momentary exposure. (Tr. 140-151). Thus, I emphasize, the results in this case should be strictly limited to the evidentiary facts.

C. Citation No. 7726957

At the gravel area immediately outside and south of the garage, in the vicinity where Newby observed the truck driver performing his pre-shift examination, Newby observed five additional parked haulage trucks. The gravel area was graded with a decline in a northerly direction towards the garage. Newby noted two of the trucks had chock blocks on the wheels with snow around the wheels indicating these trucks had been parked for a significant period. Across from these trucks, Newby observed two other trucks that were not chocked against movement because the area where they were parked did not have a significant grade. Newby noted the remaining truck was parked on an approximate eight percent grade without the wheels being chocked. The gears of this truck were in the parked position and the parking brake was set.

As a result of his observations, Newby issued Citation No. 7726957 citing an alleged violation of the mandatory standard in section 56.14207, 30 C.F.R. § 56.14207, that requires that, when parked on a grade, wheels of mobile equipment must be chocked or turned into a bank. Newby testified that, since there was no bank in the gravel area outside the garage, the cited mandatory standard required the wheels to be chocked. Newby characterized the cited condition as non-S&S because, although the gravel was frozen, it was unlikely that the truck would roll because the parking brake was engaged and the gears were in park. Newby attributed a low degree of negligence to Construction Materials Corporation since the other trucks in the area that were parked on a grade were chocked.

In defending against the cited violation, Douglas indicated that it is company policy to chock unattended vehicles that are parked on grades. However, Douglas asserted the parking area south of the garage is a zero percent grade. Moreover, he contended the truck was parked in ruts in the gravel and could not roll. Douglas stated the truck was not unattended. Rather, he maintained the driver of the truck was in the process of bleeding the brakes and waxing the truck when the parked vehicle was observed by Newby.

The Bench decision noted that the condition precedent to application of section 56.14207 is that the truck be parked on a grade. As previously noted, the Secretary has the burden of proving the facts supporting the cited violation. *Southern Ohio Coal Co., supra*. Here, Newby has testified that the truck was parked on an eight percent grade. Moreover, Construction Materials Corporation was on notice that the subject area was alleged to be graded by virtue of the subject Citation No. 7726957 that states, ". . . [the] haul truck was left unattended on an approximate 8 degree grade without the wheels . . . chocked or blocked against movement. (Gov. Ex. 7). Thus, the burden shifts to Construction Materials Corporation to rebut the Secretary's *prima facie* case.

In response, Douglas failed to present any independent evidence, such as photographs, to support his self-serving assertion that the gravel area south of the garage observed by Newby was not graded. Moreover, Douglas' assertion that the gravel area had a zero grade is inconsistent with Newby's unrebutted testimony that other trucks parked in the immediate vicinity of the cited truck were chocked. In addition, Douglas' testimony that the truck driver was in the vicinity of the truck waxing it and bleeding the brakes illustrates the importance of chocking the tires. If the truck had rolled down the grade toward the garage it could have pinned the truck driver between the truck and the garage. Finally, Douglas' assertion that his company was never cited for a similar violation in the past is not a defense to liability. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981); accord *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984).

Accordingly, **Citation No. 7726957** citing a non-S&S violation of the mandatory standard in section 56.14207 that requires the wheels of vehicles parked on grades to be chocked against movement **shall be affirmed**. The $55.00 civil penalty sought to be imposed by the Secretary against Construction Materials Corporation shall be assessed.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 7726955 and 7726957 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Citation No. 7726956 **IS VACATED**.

IT IS FURTHER ORDERED that Construction Materials Corporation **shall pay a total civil penalty of $110.00** in satisfaction of Citation Nos. 7726955 and 7726957. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket No. YORK 2000-49-M **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

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/hs