FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 20, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-53-M
Petitioner	:	A.C. No. 19-00020-05530
v.	:	
	:	Swampscott Quarry
BARDON TRIMOUNT, INC.,	:	
Respondent	:	

DECISION

Appearances: David L. Baskin, Esq, Office of the Solicitor, U. S. Department of Labor, Boston, Massachusetts, for the Secretary;
Richard D. Wayne, Esq., Hinckley, Allen & Snyder, Boston, Massachusetts, for Respondent.

Before:Judge Weisberger

Statement of the Case

In this civil penalty proceeding, the Secretary of Labor ("Secretary") seeks the imposition of civil penalties against Bardon Trimount, Inc., ("Bardon") for allegedly violating 30 C.F.R. §§ 56.14131(a) and 56.9300(b). Pursuant to notice, the case was heard in Cambridge, Massachusetts, on May 4-5, 1999. On June 25, 1999, the Secretary filed a Post Hearing Brief, and the Respondent filed Proposed Findings of Fact and a Post Hearing Brief.

Introduction

On July 25, 1997, Daniel F. English, Jr., a truck driver with 28 years experience, was driving a 50 ton truck down the haulage road located at Bardon's Swampscott Quarry in Swampscott, Massachusetts. His truck ran against concrete blocks located long the side of the road to his right.[1] These concrete blocks, uniform in size, are 4,000 pounds each, and each block is 30 inches high, 36 inches long, and 24 inches wide. The concrete blocks are held together by cables that are inserted in eyes drilled in the blocks. After English's truck was driven parallel to these blocks, it ended up with its front wheel on top of the blocks. There were tire marks for

[1]/ English was sitting in the left side of the truck (the driver's seat), as it traveled parallel to the blocks.

57 feet along the blocks. The undercarriage of the truck struck the top of the concrete blocks and knocked off several of the blocks. After English struggled with the truck it fell 45 feet over the outside of the blocks and English was killed.

Subsequent to an investigation conducted by William C. Jensen, an MSHA Inspector and Accident Investigator, which commenced on July 26, 1997, Jensen issued a citation alleging a violation of section 56.14131(a), which required that seatbelts be ". . . provided and worn in haulage trucks," and another citation alleging a violation of section 56.9300(b), which provides, as pertinent, that "[b]erms . . . shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway."

I. Violation of Section 56.14131(a), supra

In order to meet its burden of establishing a violation under section 56.14131(a), supra, the Secretary must establish either that a seatbelt was not provided in the vehicle at issue, or was provided but not worn. It is not controverted that the vehicle was equipped with a seatbelt. The Secretary argues, in essence, that it has established that English was not wearing his seatbelt in that before English's truck went over the berm, English was observed struggling to control the truck, that subsequent to the accident the two sections of the seatbelt were found behind the driver's seat, that Marty McKenney, the site superintendent, told MSHA Field Office Supervisor Inspector Randall Gadway[2] that after the accident, English was found lying on the ground, that a Mr. Lindsey, a truck driver, told Gadway that he saw English fall out of the truck window, that an autopsy report indicated that English had substantial right side trauma to the head and upper torso, and that according to MSHA Inspector William Jensen,[3] the inside of the truck windshield was damaged on the right side. For the reasons that follow, I find that the Secretary has not met its burden of establishing that English was not wearing a seatbelt.

Although Jensen found the two sections of the seatbelt behind the driver's seat, I note that when Jensen made this observation the truck had already been turned upright, had been hoisted by a crane onto a flatbed truck, and had been transported from the site of the accident to the location where it was observed by Jensen. In this connection, the Secretary refers to an order issued on July 25, 1997, by MSHA Inspector John Newby under section 103(k) of the Act, ". . . prohibit[ing] personnel from entering the accident site pending an investigation . . . ." (Ex. G-6). The Secretary argues, in essence, that accordingly it should be found that no one entered the cab until Jensen examined it. The Secretary did not offer any evidence that would tend to establish that no one had, in actuality, entered the truck cab in spite of the section 103(k)

[2]/ Gadway was involved in investigating English's fatal accident.

[3]/ Jensen investigated English's fatal accident, and issued the citations at issue.

Order, from the time of the accident until the time the truck was observed by Jensen. Also, the Secretary did not proffer the testimony of any witnesses having personal knowledge of the position of the seatbelt immediately after the accident. Thus, there is insufficient evidence to support a conclusion that the two sections of the seatbelt were positioned behind the driver's seat at the time of the accident before the truck had been moved and placed upright.

The Secretary's assertion that English had been observed "standing up" in the cab struggling to control the vehicle does not find support in the record. The Secretary has cited the following testimony of Jensen as support for its assertion:

> Q. Your investigation also revealed that the driver was struggling to keep the truck on the road; isn't that correct?
>
> A. Through eyewitnesses, yes, sir (Tr. 163).

I note that Jensen's testimony does not contain the words "standing up." Further, Jensen's testimony is not accorded much weight in that his answer was in response to a leading question, and consists of uncorroborated hearsay. Jensen did not identify the eyewitnesses. Nor did the Secretary indicate why any eyewitnesses were not called to testify.

Although the autopsy report does indicate that English had suffered trauma to the right side of the head and upper torso, there is no medical expert opinion in the record that would tend to establish whether or not these injuries would be consistent with the wearing or not wearing of a seatbelt. In this connection, I note that Jensen opined if English was wearing a seatbelt, then his abdomen would have been bruised in the accident as a result of the restraining effect of the seatbelt. In this connection, I note that the autopsy report indicates as follows: "blue contusions lower abdomen," (Ex. G-7), which, according to Jensen, would be consistent with the wearing of a seatbelt.

The Secretary argues, in essence, that since the autopsy report indicates that English suffered trauma to the right side of his head and torso, and the windshield was cracked on the inside opposite the passenger seat as testified to by Jensen, it should be found that English had not been wearing a seatbelt. I do not accept the Secretary's argument. There is no evidence in the record to base a conclusion that the crack had occurred at the time of the accident, and not either before or after. There is no evidence as to the condition of the windshield prior to the accident. Also, there is no evidence that the windshield, when observed by Jensen, was in the same condition as it was at the time of the accident, i.e., before the truck had been turned upright, and moved to the location observed by Jensen. Also, the record does not contain either any physical evidence or expert opinion testimony, that English's head could have come in contact with the windshield, only if he had not been wearing a seatbelt.

Further, in evaluating the probative weight to be accorded the Secretary's evidence, I note that the Secretary did not proffer the testimony of any eyewitnesses to the events at issue, nor did

it present the testimony of any eyewitnesses who came upon the scene immediately after the accident. I do not assign much weight to Gadway's hearsay testimony regarding statements made to him by McKenny and Lindsey. The Secretary did not adduce any written statements made by these individuals, nor did it offer any explanation why it did not call these individuals to testify. It thus might reasonably be inferred that the Secretary had concluded not to call these witnesses, as it was concerned that the weight of their direct testimony would have been effectively diluted or impeached on cross-examination. Also, the record does not contain any corroboration of either McKenny's, or Lindsey's statements. Indeed, upon cross-examination, Jensen conceded that he had reviewed a report of the Swampscott Police Department which contained a statement that David Wyckoff had reported that he had observed the accident at issue, and had stated that he had run to the truck and started pulling rocks off the driver ". . . that had fallen into the cab" (Tr. 156). This hearsay statement would tend to establish that, after the accident occurred, English was still in the truck. Hence, this hearsay statement would tend to contradict the hearsay statements of Lindsey and McKenny upon which the Secretary relies. For these reasons, I assign little probative weight to the Secretary's hearsay evidence.

Therefore, for all the above reasons, I conclude that the Secretary has failed to establish that a seatbelt had not been worn by English. Thus I conclude that the Secretary has failed to establish that Bardon violated section 56.14131(a), supra.

II. Violation of Section 56.9300(b), supra

Section 56.9300(b) provides as follows: "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." Thus, the language of section 56.9300(b), supra, is clear and unambiguous in mandating only one criteria of a berm in order to satisfy its requirements, i.e., it should, "[b]e at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." It is not contested by Bardon that the height of the concrete berm that was in place was less than the mid-axle height of the caterpillar 773-B which English had been driving, and which is the largest piece of mobile equipment which usually traveled on the road in question. Bardon argues, nontheless, that the berm in question did satisfy section 56.9300(b), supra, in that it fulfilled the purpose of section 56.9300(b), supra, as set forth in a statement made by the Secretary in the Federal Register, as including "alert[ing] the equipment operator of the hazardous situation, moderat[ing] the force of the equipment, provid[ing] time for corrective action, and assisting the operator in regaining control of the equipment." (53 Fed. Reg. 32496, 32501, (August 25, 1998)). Bardon argues, in essence, when the instant accident occurred, the purposes of section 56.9300(b), supra, were fulfilled, in that the berm held firm upon impact, which would have alerted English that he was in a hazardous situation, and that it slowed down the truck providing English with adequate time to apply his brakes and control the truck. I find no merit to Bardon's argument. The manner in which the berm functioned in the instant peculiar accident, is not relevant in determining whether the berm satisfied the requirements of section 56.9300(b), supra. Since the berm did not met the only unqualified mandatory requirement of section 56.9300(b), supra, i.e., its height was less than the mid-axle height of the largest truck

which usually travels the roadway, I find that Bardon did violate section 56.9300(b), supra.

A. Significant and Substantial

The citation at issue alleges that the violation was significant and substantial.

A "significant and substantial" violation is described in section 104(d)(1) 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)(l). 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 explained further that 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). 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. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

The record clearly establishes that the first and second factors set forth in *Mathies*, supra, as Bardon did violate a mandatary standard, and this violation contributed to the hazard of a vehicle going off the road and overturning. The road at issue was at an incline, and the 773-B truck, the largest truck that usually traveled the roadway at issue, made 25 round trips per shift. Also, a Caterpillar 992 truck, whose tires were higher than those of the 773-B truck, also traveled the roadway one round trip daily. Gadway testified he has investigated haulage road accidents involving vehicles traveling a haulage road, and assessed the effect inadequate berms.

Gadway opined, based upon his investigation of the instant accident, and upon studies and tests that he did not identify, that if the berm is below mid-axle height, it ". . . act[s] just like a stair and lift[s] th[e] truck" (Tr. 203). In this connection, I note that the mid-axle height of the truck, at 40 inches, was 10 inches higher than the 30 inch high berm. It also is clear, as evidenced by the accident at issue, that should a vehicle have over traveled the berm as a consequence of the inadequate height of the berm, it is reasonably likely that a serious injury would have resulted. Therefore, for all the above reasons, I conclude that the third and fourth elements set forth have in Mathies, supra, have been met. I thus conclude that it has been established that the violation was significant and substantial.

B. Penalty

The cited violation was abated in a timely fashion, and in good faith. Although Bardon is controlled by Aggregate Industries, PLC, the Swampscott Quarry at issue, during the 12 month period immediately proceeding the accident at issue, employed approximately 26 employees who worked approximately 60,000 hours at the quarry. The Assessed Violation History report, relied upon by the Secretary, indicates, that in the period from June 16, 1996, through the date to instant citations at issue in this proceeding were issued, Bardon received 16 citations excluding the two at issue in these proceedings. A Mine Inspection and Violation History report proffered by Bardon indicates that Bardon was issued 32 citations in the period from December 12, 1995 through the date the citations at issue were issued. This report indicates it covers the period from April 1993 through May 1998, but there were no citations listed prior to December 12, 1995. Bardon has conceded that the imposition of the penalty will not effect its ability to remain in business. Based on the testimony of Gadway, and considering that a fatality occurred herein, that the roadway along which the berm was located was regularly used, and was at an incline, that there was a 10 inch difference between the height of the berm and the mid-axle of the truck at issue, and that there was a drop off beyond the berm, I conclude that the violation herein was of a high level of gravity, as the violative condition could have resulted in a fatality or serious injuries.

Regarding Bardon's negligence, I find that the existence of the berm was most obvious as it ran along a regularly used roadway. Therefore, Bardon reasonably should have been aware of the berm, and reasonably should have measured it to ascertain if it was in compliance. Hence, Bardon should reasonably have been expected to know that the berm was less than the mid-axle height of the largest truck used on the road and hence was not in compliance with section 56.9300(b), supra. The record is not clear as to the precisely how long the violative berm was in existence prior to its being cited. Douglas Gallant, Bardon's lead laborer on the site, testified at the hearing on May 5, 1999, that he had installed the berm at issue in the summer of 1996. On the other hand, MSHA Inspector Carl Onder testified that in his inspection in December 1996, the area in question, the west side, was bermed only with oversized bolders which he indicated to be at eye level.[4] This would appear to confirm the hearsay statements of

[4]/ Onder testified that he is 68 inches tall.

McKenny to Newby and Jensen that the berm was installed in January 1997. It would also confirm a statement made by Cristos Sarhanis, Bardon's safety risk manager, that he made in a letter to James R. Petree, the Northeast District Manager of MSHA on May 29, 1998, as follows: "[s]peaking with various people at the Swampscott Quarry, the berm was placed at the location in January of 1997" (Ex. G-4). Hence, at a minimum, the violative berm had existed for over 6 months and until it was cited. Bardon, argues, in essences, that any negligence on its part should be greatly mitigated by considering Gallant's testimony that in the summer of 1996, during an MSHA inspection, an MSHA inspector told him to replace the existing stone berm, that varied from 3 to 5 feet in diameter, with concrete blocks to be at a height of half the distance of the wheel base of the highest object in the quarry. According to Gallant, approximately a month later, an MSHA official returned, and recommended that he tie the blocks together. However, Gallant was unable to identify the MSHA official who provided these instructions. On the other hand, MSHA Inspector Robert Dow testified in rebuttal, that Gallant did not participate in an inspection of the site that he (Dow) made in July 1996. Dow also indicated that he did not tell Bardon or Gallant to install concrete blocks as a berm. I accept Dow's version over Gallant's. I observed Dow's demeanor and found him to be a very credible witness. Further, the record does not contain even a scintilla of evidence to provide Dow with a motive for telling Bardon to remove an existing berm, whose height was never considered to be out of compliance, and instead to install concrete blocks, that were in violation of section 56.9300(b), supra. Also, Gallant could not identify the MSHA person who instructed him to install the violative berm. There is no evidence that any inspector other than Dow inspected the site on the dates in question until December 1996. Further, I note Sarhanis' testimony that on May 3, 1999, two days before Gallant testified at the hearing, he (Gallant) had told him (Sarhanis) that he had been instructed by McKenny to install the concrete blocks. Within this context, I consider the level Bardon's negligence to have been relatively high.

Considering all the above factors set forth in section 110(i) of the Act, and giving considerable weight to Bardon's negligence and the gravity of the violative condition, I find that a penalty of $35,000.00 is appropriate for this violation.

ORDER

It is **ORDERED** that Citation No. 7707459 be **DISMISSED**. It is further **ORDERED** that, within 30 days of the date of this decision, Bardon shall pay a total civil penalty of $35,000.00.

Avram Weisberger
Administrative Law Judge

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