

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 24, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-24-M
Petitioner	:	A. C. No. 30-02863-05501 8UQ
v.	:	
	:	West Bloomfield Mine
ROOT NEAL & COMPANY,	:	
Respondent	:	

DECISION

Appearances: James A. Magenheimer, Esq., Office of the Solicitor,
U.S. Department of Labor, New York, New York, for the Petitioner;
Robert G. Walsh, Esq., Walsh, Fleming & Chiacchia, P.C.,
Blasdell, New York, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor (the Secretary) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The Secretary seeks to impose a total civil penalty of \$5,102.00 against the respondent, Root Neal & Company (Root Neal), for two alleged violations of Part 56 of the Secretary’s mandatory safety standards. 30 C.F. R. Part 56. Root Neal is a contractor that had performed services at the West Bloomfield Mine in Geneva, New York. The West Bloomfield Mine is a surface mine owned and operated by Elam Sand and Gravel, Inc. (Elam).

Specifically, this matter involves an accident that occurred at Elam’s West Bloomfield facility on May 9, 1998, when Michael Corbin, an Elam employee, was pinned under the bucket of a front-end loader when the raised, unsecured bucket suddenly descended on Corbin while he was under the vehicle. At the time of the accident, Corbin had been assigned by Elam to assist Root Neal employees in the installation and calibration of hydraulically operated scales on Elam’s front-end loader vehicles.

As a result of the Mine Safety and Health Administration’s (MSHA’s) accident investigation, Root Neal was issued 104(d)(1) Citation No. 7714628 alleging an unwarrantable and significant and substantial (S&S) violation of the mandatory safety standard in section 56.14211(c), 30 C.F.R. §56.14211(c), that requires raised components of mobile equipment to be secured to prevent accidental lowering when persons are working on or around such equipment. The Secretary proposes a \$5,000.00 civil penalty for this alleged violation. In addition, the Secretary seeks to impose a \$102.00 civil penalty for 104(a) Citation No. 7714627 for Root Neal’s alleged S&S violation of the provisions of section 56.18006, 30 C.F.R. § 56.18006, that require new employees to be trained in safety rules and safe work procedures.

The hearing in this proceeding was conducted on August 3 and August 4, 1999, in Rochester, New York.¹ The record was left open to allow Root Neal to depose John Patterson, an MSHA special investigator. Patterson's deposition was conducted on October 22, 1999, at which time the record was closed. The parties' post-hearing briefs have been considered in the disposition of this matter.

I. Findings of Fact

Elam Sand & Gravel, Inc., operates several quarries, and provides trucking services, in the Rochester, New York area. At its facilities, Elam produces sand, gravel, crushed stone and washed stone. The West Bloomfield mine is a single bench sand and gravel mine. At West Bloomfield, front-end loaders are used to load haulage trucks that transport extracted material to the primary crushing plant where the material is crushed, sized, and conveyed to stockpiles.

Front-end loader scales are mounted on loader buckets. They measure the rpm's of the loader motor and the hydraulic pump pressure of the bucket system to determine the amount of material loaded into haulage trucks throughout the day. (Tr. I, 54). The scales can be used to measure the amount of finished product loaded for sale, as well as the amount of tonnage hauled to the processing plant. In addition, the scales can be used to ensure that haulage trucks traveling over public roads are not overloaded.

Elam had three loader scales that had been purchased from a vendor of commercial scales, Evergreen Weigh (Evergreen), a Division of SI Technologies, Inc., headquartered in Seattle, Washington. The scales had been installed by a company named 5-Star, located in Rochester, New York. In the beginning of 1998, Elam decided to buy two additional scales for its other front-end loaders. However, Elam's President, David Spallina, was unhappy with the accuracy of the loader scales that had been installed by 5-Star. In late January or early February 1998, Spallina contacted Evergreen to purchase two new scales. During sales negotiations concerning pricing and installation, Evergreen offered to send a sales representative to Elam from out of town that would install the loader scales. However, Elam would have to incur the sales representative's travel and lodging costs. Approximately one week later, Evergreen called Spallina to inform him that Root Neal & Company, located in Buffalo, New York, could do the installation at Elam's West Bloomfield mine.

In March 1998, Spallina spoke to Richard T. Neal, Root Neal & Company's corporate Secretary, about installation of the scales. Richard Neal had been informed by Evergreen of Elam's desire to have the scales installed. Spallina told Neal the scales were to be installed on two 980G Caterpillar front-end loaders. Neal asked Spallina to fax a schematic of the

¹ Transcript references refer to the two volume condensed version of the transcript. The August 3 and August 4, 1999, transcripts are referred to as volumes I and II, respectively.

Caterpillar Model 980G so that Neal could examine the loader's hydraulic system. A few days later, Spallina faxed the schematic to Neal that Spallina had obtained from Elam's Caterpillar dealer, Syracuse Supply.

Shortly after receiving the loader's hydraulic specifications, Neal contacted Spallina and agreed to install the scales. Spallina told Neal he wanted two scales installed with the possibility of needing two additional scales installed in the near future. Neal stated he would send two technicians in a service truck to Elam's West Bloomfield site. Neal agreed to install two scales on a Saturday from 6:00 a.m. until 5:00 p.m., so that Elam would not have to take its loaders out of service during the week.

The installation required welding electronic eye brackets to the outside of the boom. As the boom is raised, the electronic eyes send a message to initiate operation of the scale. During the sales negotiations, Neal told Spallina there was no welding machine on Root Neal's service truck. Spallina agreed to supply an Elam welding machine and an Elam employee to "stick weld" the brackets on the outside of the bucket arms.

Spallina testified, in addition to Elam providing a welder, the agreement included allowing Elam's mechanic to observe the Root Neal technicians' installation of the scales so that the Elam mechanic could learn how the scales worked in case of future problems. In this regard, Spallina testified he wanted his main mechanic, Harold Robinson, to observe how the hoses on the scale were connected during installation in case a hose broke or something went wrong with a scale. (Tr. I, 39, 45). Spallina also testified that the parties also agreed that an Elam loader operator would be present to learn how to calibrate the scales once they were installed.

Richard Neal's recollection of the agreement differs markedly from that of Spallina. Neal testified that his technicians "were to have an understanding of the set up and get involved with the scale set up, but it was important for Elam to provide a[n] operator to raise and lower the bucket and that they have a mechanic/welder, that was one or two people." (Tr. II, 164). Neal explained he required Elam's personnel to be present because Root Neal's technicians were not qualified welders or certified mechanics knowledgeable in hydraulics. (Tr. II, 165).

On April 15, 1998, Richard Neal faxed Dave Spallina a memorandum memorializing their agreement. (Resp. Ex. 1). The memorandum, signed by Richard Neal, noted that two Root Neal scale technicians were scheduled to install and calibrate loader scales on Saturday, April 25, 1998, for a fee of \$900. In addition, Root Neal's technicians were to calibrate and check existing loader scales for a \$300 service charge. (*Id.*) The April 15, 1998, memorandum was silent with regard to any actions that were required by Elam personnel.

On Saturday, April 25, 1998, from approximately 6:30 a.m. until 6:00 p.m., Root Neal's senior scale technician Francis (Frank) Pluta, and his assistant, John Wall, installed and calibrated two new scales, and calibrated two existing scales, on loaders at Elam's West Bloomfield mine. As agreed, Elam mechanic Harold Robinson was present during the installation. Robinson is a certified mechanic qualified to work on the hydraulic systems of the

Caterpillar machine. Wall testified that Robinson directed the installation work. Pluta also testified all work done on the hydraulic system was performed by Robinson.

Contrary to the testimony of Wall and Pluta, Spallina testified Robinson only was there to observe the installation and to perform the welding. Elam also provided a loader operator, John Collet, to operate the machine. Collet also was there to observe how the scales were calibrated. (Tr. I, 37, 39). Spallina explained the loader operator has to know how to calibrate the bucket at different speed rates in order to obtain accurate weight readings. (Tr. I, 45).

Despite Wall and Pluta's testimony that the hydraulic installation was performed by Robinson, on April 25, 1998, Pluta completed a hand-written invoice, numbered 17609, reflecting "Install 2 tuffer payloader scales and isp and cal 2 others. 4 total. All adj cal and tested O.K. Per quote price \$1200." (Rep. Ex. 11). The April 25, 1998, scale service work was followed by a formal invoice, dated April 30, 1998, itemizing the fees for work performed on April 25, 1998, as a \$900 "scale service" fee for "installation and calibration," and a \$300 "scale service" fee for calibration of existing scales. (Resp. Ex.10). Thus, the invoices reflect a service charge of \$900 for installed scales, and only a \$300 service fee for previously installed scales that were calibrated. Consistent with Root Neal's April 15, 1998, memorandum of understanding, Root Neal's invoices do not reflect that Root Neal played a limited role in the installation process, or, that Elam was otherwise responsible for the installation process.

After the April 25, 1998, installation, Spallina purchased two more scales from Evergreen. Spallina arranged for Evergreen to ship the scales to Root Neal. Richard Neal and Spallina again agreed that Root Neal would install and calibrate the two scales on a Saturday for a fee of \$900. Spallina also requested Root Neal to recalibrate the scales they had been installed on April 25, 1998, because they were not performing properly. Spallina testified that, prior to the second installation by Root Neal, he did not discuss with Richard Neal which Elam employees would be present at the second installation. (Tr. I, 50).

On Saturday, May 9, 1998, at approximately 7:30 a.m., Pluta and Wall arrived at Elam's West Bloomfield mine to install two additional scales. The scales were to be installed on Caterpillar Model 966F and Caterpillar Model 980G loaders. Once again, senior scale technician Pluta, who had worked for Root Neal for 18 years, was in charge. Wall again served as Pluta's assistant. Spallina introduced Pluta and Wall to Alan (Jody) Randolph, Elam's superintendent. Randolph assigned Michael Corbin to assist Pluta and Wall. Corbin had worked for Elam since March 1994 as a welder/fabricator, a plant operator, and a loader operator. Corbin was not a mechanic, nor did he have any experience with respect to hydraulic systems. (Tr. I, 205). Pluta and Wall told Corbin they were expecting Harold Robinson, and that they were disappointed that Robinson was not there to help them. (Tr. I, 186, 205).

The first scale was to be installed on the Caterpillar Model 966F front-end loader. The Caterpillar 966F has a five-cubic yard bucket that weighs more than one ton when empty. (Tr. I, 55, 159). The loader's motor is in the back, and there is an operator's cab in the center of the machine. There are two arms supported by hydraulic pumps that raise the bucket from behind.

Installation of the first loader scale began at the mine's maintenance shop. At the April 25, 1998, scale installation, Pluta and Wall used tools that were furnished by Robinson. Since Robinson was not present on May 9, 1998, Pluta asked Corbin to obtain the necessary tools.

Corbin was going to use a welding machine that was located in the shop. Consequently, Corbin backed the 966F Caterpillar into the shop. However, the bucket could not be raised in the shop. At Pluta's direction, Corbin pulled the loader forward so that the bucket was positioned outside of the shop on the ground. As Corbin prepared the welder for use, Pluta, who was not a qualified loader operator, took the controls of the loader. Pluta raised and lowered the bucket while Wall determined the appropriate location for Corbin to weld the brackets to the bucket's arms.

Corbin, following Pluta's directions, spot welded the brackets. As Corbin was welding, Randolph came to the shop and asked Pluta to check the scales that were installed on April 25, 1998, that were on loaders that were parked outside the shop. When Pluta exited the cab to leave the shop, he left the loader bucket ". . . about three-quarters of the way in the air," without securing or blocking the loader against accidental lowering. (Tr. II, 139, 224-25). Pluta stated it was common sense that working under an unsecured elevated bucket was a dangerous condition. (Tr. II, 140-41).

When Pluta left the shop, he did not direct the work to be discontinued in his absence. Thus, Corbin was left to work under the direction of Wall. Wall began to read the scale installation instruction pamphlet. While reading the instructions, Wall instructed Corbin to drill a hole in the floor of the cab so that wires could be run to the scale. Wall then told Corbin to "fish" a red wire into the cab. Wall next instructed Corbin to go underneath the loader to install the scale hoses that would connect the scale in line with the hydraulic system. (Tr. I, 193-96). From a kneeling position between the right front and rear tires, Wall pointed to hoses and told Corbin, "we need some wrenches to take them (sic) lines off." (Tr. I, 194). At that time, the bucket continued to be raised and unsecured in the air.

Corbin crawled out from under the loader and went to his truck to get the necessary wrenches. Corbin returned and was told by Wall to go back underneath the loader. Wall gave Corbin an empty coffee can, explaining to Corbin "You're going to get a little bit of oil. Instead of making a mess on the floor, we'll put it in the can." (Tr. I, 196). Wall, lying down behind the front tire, with his head facing toward the bucket, pointed to a hose line and told Corbin, "Okay, I want you to take that line off. We got to put this little block on." (Tr. I, 197). The "block" contained a fitting that was designed to connect the scale to the hydraulic line.

Corbin testified Wall appeared confused and instructed Corbin to tighten the hose and disconnect an adjacent hose. Corbin began loosening the second hose at which time Wall changed his mind and instructed Corbin, “Okay take the first one back off.” (Tr. I, 198). Unbeknownst to Corbin, that hose was the loader’s hydraulic line that was used to support the bucket. The hose was connected with four bolts. Corbin removed the first bolt. As he was removing the second bolt, the hose suddenly “blew” spilling warm hydraulic oil in Corbin’s eyes and mouth, and on his face. Temporarily blinded by the oil, Corbin tried to crawl out from underneath the loader. Corbin crawled towards the light at the front of the loader. As he did, he was struck by, and pinned under, the descending 3,000 pound bucket.

Corbin’s head and arms were pinned under the bucket. He was ultimately rescued by the fire department. Fortunately, Corbin was not crushed by the bucket because of an indentation in the ground where he fell, and because there was an open space under the bucket in an area between two steel skid plates that were welded to the bottom of the bucket. Corbin was briefly hospitalized and he has received chiropractic treatment for an arm injury.

MSHA accident investigators determined the primary cause of the accident was the failure to support the raised bucket from movement, or, in the alternative, the failure to lower the bucket to the ground. The investigators also concluded a contributing factor was Corbin’s lack of training in the task he was performing. As a result of MSHA’s investigation, on May 20, 1998, 104(d)(1) Citation No. 7714628 was issued to Root Neal citing an alleged S&S violation of the provisions of section 56.14211(c). MSHA concluded the violation was attributable to Root Neal’s unwarrantable failure. Section 56.14211(c) provides:

A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.

The accident investigation also resulted in the May 20, 1998, issuance of 104(a) Citation No. 7714627 citing an alleged S&S violation of the mandatory safety standard in section 56.18006. This mandatory standard requires new employees to “be indoctrinated in safety rules and safe work procedures.”

II. Further Findings and Conclusions

A. Jurisdiction

Section 3(d) of the 1977 Mine Act expanded the definition of “operator” contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977), to include “any independent contractor performing services . . . at such mine.” However, Root Neal asserts that, despite its contractor status and its performance of services at Elam’s mine, it should not be subject to Mine Act jurisdiction because it did not have “substantial

participation” in the operation of the mine as evidenced by its short term presence on mine property. Thus, Root Neal relies on the Fourth Circuit Court of Appeals decision in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (1985), wherein the court concluded a power company that installed, maintained and read an electric meter monthly at a substation, that was separated from the rest of mine property by a chain link fence, was not an operator within the meaning of section 3(d) of the Mine Act. In addition, Root Neal seeks shelter in the Third Circuit Court of Appeals holding in *National Indus. Sand Ass’n v. Marshall*, 601 F.2d 689, 701 (1979) in which the court stated “there may be a point . . . at which an independent contractor’s contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed.”

The Commission has addressed the narrower jurisdictional approaches discussed in *Old Dominion* and *National Industrial Sand*, noting that the 1977 Mine Act expressly expanded its statutory jurisdiction to include “any independent contractor performing services” at a mine. See e.g., *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1357 (September 1991). The Commission established a two pronged-test for determining whether an independent contractor shall be considered to be an “operator” under section 3(d) in its *Otis Elevator Company* cases. 11 FMSHRC 1896 (October 1989) (“*Otis I*”) and 11 FMSHRC 1918 (October 1989) (“*Otis II*”), *aff’d on other grounds*, 921 F.2d 1285 (D.C. Cir. 1990).

First, “the independent contractor’s proximity to the extraction process” and whether its work is “sufficiently related” to that process are examined. *Otis I*, 11 FMSHRC at 1902. The Commission has determined a contractor’s activities are sufficiently related to the extraction process when its employees are exposed to mining hazards and they have “a direct effect on the safety of others . . .” *Id.* Second, the Commission examines “the extent of [the contractor’s] presence at the mine.” *Id.* The Commission has articulated that the essence of this test is whether the contractor’s “contacts with the . . . mine were not so rare, infrequent and attenuated as to bring [the] case within the holding of *Old Dominion* . . .” *Otis II*, 11 FMSHRC at 1922-23; see also *Joy Technologies Inc.*, 99 F.3d 991, 999 (10th Cir. 1996) (expressly rejecting the *Old Dominion* approach and adopting the broad jurisdictional reach in *Otis Elevator*).

Applying the Commission’s two-pronged test set forth in its *Otis Elevator* cases, it is clear that the servicing of heavy mine equipment, such as front-end loaders, is “sufficiently related,” if not indispensable, to the extraction process. Moreover, the fact that Root Neal’s activities had “a direct effect on the safety of others” is self evident in this case. Finally, Root Neal’s limited presence at Elam’s West Bloomfield mine site on only two occasions on April 25 and May 9, 1998, was a reflection of its unsatisfactory performance, rather than the *de minimis* nature of its services. Although Root Neal purportedly had installed a similar loader scale on only one previous occasion, it was representing itself as a provider of scale service to all mine operators operating front-end loaders throughout the mining industry. Thus, it cannot be said that its services were so attenuated or otherwise far removed from the mining industry to warrant an exemption from Mine Act jurisdiction. Accordingly, by virtue of

its independent contractor scale service activities, Root Neal is an “operator” as contemplated by section 3(d) of the Act, and, as such, is subject to Mine Act jurisdiction.²

B. 104(d)(1) Citation No. 7714628

i. Fact of Occurrence of the Violation

As noted above, 104(d)(1) Citation No. 7714628 alleges an unwarrantable and S&S violation of the mandatory safety standard in section 56.14211(c) that requires raised components of mobile equipment to be secured from accidental lowering when persons are working on or around such equipment. Root Neal concedes “there can be little doubt that [the cited standard requires] a bucket on a front-end loader should be blocked or lowered to prevent an accident when employees are working under the bucket.” (Root Neal post-hrg. br. at 18). However, Root Neal asserts, at the time of the accident, Wall and Corbin were under the direct supervision and control of Elam’s superintendent Randolph, and, that it was Randolph, rather than Pluta, who was supervising the installation of the scale. Accordingly, Root Neal argues it should not be held accountable for the obvious violation of section 56.14211(c).

As a threshold matter, the evidence fails to support Root Neal’s assertion that it was merely responsible for calibrating, rather than installing, the scales on Elam’s Caterpillar loaders. In the first instance, Evergreen referred Spallina to Root Neal as a contractor that could perform the installation service. Root Neal’s assertion that it did not contract to provide installation service is belied by its invoices, as well as its pricing structure. Root Neal’s invoices reflect services for both installation and calibration. In addition, the \$900 scale service fee for the two scales installed and calibrated on April 25, 1998, was three times the \$300 scale service fee for the two existing scales that were calibrated but not installed on April 25, 1998. Thus, it is apparent that the \$600 difference in service fee reflects the additional services rendered with respect to installation. Consequently, Root Neal’s assertion that it was not responsible for installing the scales is not supported by the evidence and must be rejected.

Although Elam agreed to furnish an employee to assist Pluta and Wall in the installation of the scales, the installation was performed under Pluta’s supervision and control. In this regard, Pluta testified that, before leaving the maintenance shop area, he instructed Wall and Corbin not to do any work under the loader while the bucket was raised. In fact, Pluta’s testimony demonstrates that he was in charge of Wall and Corbin:

² Section 4 of the Mine Act provides:

Each coal or other mine, the product of which enter commerce, . . .
and each operator of such mine, and every miner in such mine
shall be subject to the provisions of this Act. 30 U.S.C. § 803
(emphasis added).

Pluta : I let the guys know that there was to be no work done underneath the bucket, that I did say when I left, and I asked them if they were comfortable working together while I had to go work on the other two machines.

Q: You told the guys not to do any work under the bucket?

Pluta: Yes, common sense tells you not to do anything under something that is suspended in the air.

Q: What did you say to them?

Pluta: "Don't work under the bucket until it is down."

Q: Until it is down?

Pluta: Yes, and he - - they agreed to work together and I left to go work with Jody [Randolph].

Q: When you say you told "them," you mean John Wall and Michael Corbin?

Pluta: Yes.

(Tr. II, 140).

The Secretary may cite both an operator and its independent contractor for violations of mandatory safety standards committed by the independent contractor. *Consolidation Coal Company*, 11 FMSHRC 1439 (August 1989); *Bulk Transportation Services, Inc., supra*. In this instance, Elam was cited for violations related to Corbin's accident and elected not to contest the citations. The fact that Elam's superintendent Randolph may also have been responsible for ensuring that the raised bucket was blocked or lowered, does not preclude the Secretary's action in this matter against Root Neal based on Pluta's failure to prevent Corbin's exposure to the unsecured bucket. Thus, the Secretary has demonstrated that Root Neal is liable for the cited section 56.14211(c) in 104(d)(1) Citation No. 7714628.

ii. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (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 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria 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).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

In this case, the significant and substantial nature of the violation involving the failure to secure the 3000 pound loader bucket when persons are working underneath the loader is self evident. This violation caused the hazard that resulted in Corbin’s serious accident and injury. Accordingly, the violation was properly designated as significant and substantial.

iii. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

A fundamental issue is whether Root Neal's scale technicians had the requisite knowledge and expertise to safely install loader scales in line with a front-end loader's hydraulic system. Richard Neal testified that Root Neal is an industrial supply company with five major divisions. Its scale sales and service division stocks and distributes analytical and accounting scales, truck scales, and specialty type scales. (Tr. II, 158). When asked how much experience Root Neal had in servicing front-end loader scales, Neal replied, "it's something we touched upon . . ." (Tr. II 159).

Senior scale technician Francis Pluta, has been employed by Root Neal since 1981. Pluta testified his duties consist of :

Going out and setting up and calibrating various types of scales. Basically, the senior position means I've been there longer [I work on] various kinds [of scales], most often platform scales, truck scales, small analytical scales with different parameters have to be set up, calibrated and sent out to the customer or the customer just starts using it from that point.

(Tr. II, 91).

Pluta testified, that during his 18 year tenure with Root Neal, he had only been involved in the "setting up and calibrating" of one similar front-end loader scale that had occurred within one year of the Elam installations. (Tr. II, 97, 122). With respect to his assistant John Wall's expertise, Pluta testified, Wall "was just a set of hands to hold a wrench, to hold a tool, to read a paragraph in a manual." (Tr. II, 104). Thus, it is apparent that Root Neal's scale technicians lacked the background and expertise to install scales that required modification of the hydraulic systems on heavy mining equipment. Consequently, Richard Neal's acceptance of Spallina's request to provide scale service for Elam's front-end loaders, a job that Root Neal was not qualified to perform safely, constituted unjustifiable conduct evidencing an unwarrantable failure.

Notwithstanding the fact that the acceptance of the Elam job was unwarrantable conduct, the high negligence demonstrated by Pluta and Wall at the job site is imputable to Root Neal and also provides a basis for an unwarrantable failure finding. Pluta, as senior scale technician, was in charge of the Elam job. Pluta testified there are several hoses connected to the hydraulic lifting cylinders on the Caterpillar loader. Removal of the pressure line would cause the bucket to descend. Pluta stated that neither he nor Wall knew which hose was the pressure line. Pluta and Wall also conceded Corbin also had no knowledge of hydraulic systems. Pluta was asked, if he, Wall and Corbin didn't know about hydraulics, who knew which line was the pressure hose? Pluta responded, "Nobody knew." (Tr. II, 152-53). Attempting to modify the hydraulic system on a hazardous piece of heavy mining equipment without the requisite knowledge of how such a modification should be performed is the essence of an unwarrantable failure.

In addition, Pluta left Wall in charge immediately before the accident when Pluta left the maintenance shop area with Randolph to calibrate other scales. Pluta knew Wall was not

qualified to proceed with the installation process, yet he asked Corbin and Wall if they felt comfortable working together in his absence. After Pluta left the maintenance shop area with the front-end loader bucket suspended in the air, Wall directed Corbin to remove the pressure hose that resulted in Corbin's accident. Pluta's decision to leave Wall in charge, and Wall's decision to attempt to continue the installation process when he was not qualified to do so, manifest a high degree of negligence on the part of each of these individuals.

The negligence of management personnel is imputable to an operator for unwarrantable failure and civil penalty assessment purposes. Thus, Pluta's negligence is imputable to Root Neal. While the negligence of rank-and-file employees is ordinarily not imputable to an operator, an employee's negligence is imputable if there was a lack of supervision and training. *Fort Scott Fertilizer*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261, *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). It is obvious that Wall lacked adequate supervision and training. Accordingly, Wall's high degree of negligence also is imputable to Root Neal.

In short, the evidence of record amply supports the Secretary's unwarrantable failure charge. Accordingly, 104(d)(1) Citation No. 7714628 shall be affirmed. Root Neal is a moderate size company with little, if any, previous exposure to the mining industry and it has no history of previous mine safety violations. Given the very high degree of negligence and the serious gravity associated with the cited violation of section 56.14211(c), the \$5,000 civil penalty initially proposed by the Secretary for 104(d)(1) Citation No. 7714628 shall be assessed.

C. 104(a) Citation No. 7714627

i. Fact of Occurrence of the Violation

104(a) Citation No. 7714627, citing a violation of section 56.18006, states:

An employee was not indoctrinated in safety rules and safe work procedures as evidenced on May 9, 1998, when he was seriously injured by a descending loader bucket. The employee had removed a hydraulic line supporting the raised bucket without first either blocking the bucket against movement or lowering the bucket to the ground. The employee was not a mechanic and this was the first time he aided in installing a bucket scale which required modification to the hydraulic system.

Section 56.18006 provides "new employees shall be indoctrinated in safety rules and safe work procedures."

Ordinarily, I would be reluctant to impose liability on an independent contractor for the lack of training of an employee of the operator. However, in this instance Root Neal preferred the assistance of mechanic Harold Robinson rather than Michael Corbin because it knew

Corbin was a laborer with no mechanical expertise. Thus, Wall's directive that Corbin remove the hydraulic pressure line, a task Pluta and Wall knew, or should have known, Corbin was not qualified to do, constitutes a violation of section 56.18006. Given the consequences that followed, it is apparent that the violation was properly characterized as significant and substantial. The high degree of negligence and serious gravity associated with this violation clearly warrants the relatively small \$102.00 civil penalty the Secretary seeks to impose.

ORDER

In view of the above, 104(d)(1) Citation No. 7714628, and 104(a) Citation No. 7714627, **ARE AFFIRMED.**

IT IS ORDERED that Root Neal & Company **SHALL PAY** a total civil penalty of \$5,102.00 in satisfaction of the subject citations. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the \$5,102.00 civil penalty, Docket No. YORK 99-24-M **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

Distribution:

James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor,
201 Varick Street, Room 707, New York, NY 10014 (Certified Mail)

Robert G. Walsh, Esq., Walsh, Fleming & Chiacchia, P.C., 3819 South Park Avenue, Box 1909,
Blasdell, New York, 14219-0109 (Certified Mail)

/mh