FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 19, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-39-M
Petitioner	:	A. C. No. 30-02851-05504
v.	:	
	:	
DOUGLAS R. RUSHFORD TRUCKING,	:	
Respondent	:	Seymour Road Pit

DECISION

Appearances: Suzanne Demetrio, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, on behalf of Petitioner;
Thomas M. Murnane, Esq., Stafford, Trombley, Owen & Curtin, PC, Plattsburgh, New York, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Douglas R. Rushford Trucking (Rushford) with four violations of mandatory standards and proposing civil penalties of $27,000.00 for those violations.[1] The general issue before me is whether Rushford 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.

On August 28, 1998, mechanic and welder Nile Arnold, was injured when a wheel rim exploded while he was inflating a tire on a 1967 Chevrolet fuel truck. He died on August 30, 1998, as a result of those injuries. The truck was customarily used as a stationery storage tank to fuel mobile equipment. The 2-piece wheel rim which exploded consisted of a center section and an outer ring. The inner surface of the center section was corroded and had rusted through in several locations. The rim was mounted with a recapped tire with a tube and stem. The tire was not marked with a maximum inflation pressure and had been flat for an unknown period of time prior to the accident. According to the investigation report, as the tire was being inflated by Arnold, the force of the expanding inner tube caused the center section of the rim to separate

[1] During hearings Citation No. 7716908, charging one of these violations, was vacated by the Secretary.

where it had corroded. The section along the perimeter of the rim exploded outward hitting Arnold in the head. Arnold was apparently kneeling with his head close to the wheel at the time.

Mark Goddeau had been working for Rushford for about one year at the time of the accident. Mine owner Douglas Rushford, had directed Goddeau that day to wash the power screen and to inflate one of the four tires on the screen. There was no standoff inflation device available and Goddeau had never seen one at the pit. He therefore used a tire chuck which must be held onto the valve stem while the tire is inflated.

At this time Arnold had already begun welding on the power screen. The welder ran out of fuel oil so Goddeau went to get the fuel truck. One of its tires was low on air so Arnold began inflating it using the same tire chuck Goddeau had used. Goddeau was standing 6 to 8 inches behind Arnold and, after inflating the tire for 20 to 30 seconds, it exploded. Arnold fell back with a gash on his head. He was unresponsive so Goddeau ran for help. Goddeau was at the pit when the ambulance arrived. According to Goddeau there was no room for the rescue workers so he and co-worker Fonze Rushford, moved the fuel truck and backhoe about 10 feet away.

New York State corrections officer Vernal Favreau was a captain in the responding volunteer fire department on September 28, 1998. When he arrived the vehicles and the victim were in the positions depicted on Government Exhibit No. 1. The victim was lying two to three feet from the fuel truck. Favreau gave orders to an employee to move the backhoe to enable the ambulance to get closer to the victim. He did not consider the fuel truck to be a hazard and did not give orders to have it moved.

New York State police Sergeant Patrick Jones also responded to the accident scene arriving at 4:10 to 4:15 p.m. He was present when another investigator took photographs at the accident scene. According to Jones those photographs (Gov't Exh. No. 3/1 - 3/12) accurately depict the scene as he observed it on August 28, 1998, around 5:30 p.m. He did not then see any white Toyota truck. Jones also testified that the fuel truck was then parked parallel to the trailers approximately 150 yards from the victim and as depicted on Government Exhibit No. 4. The Occupational Safety and Health Administration (OSHA) was notified of the accident by another state police investigator.

Fonze Rushford is a grandson of owner Douglas Rushford. He was in the pit area at the time of the accident and maintains that he saw Arnold's pickup truck at the accident scene at point "A" on Government Exhibit No. 10. He maintains an "EMT" told him to move the backhoe and he did so. The police said only that they were "finished with it."

Todd Lapham is owner Douglas Rushford's son in-law. He was in the pit on the day of the accident but did not see it. At the time he went to lunch that day he saw Arnold's truck in the pit area at position "A" on Government Exhibit No. 11. He did not observe it later that day. Lapham testified that some 1 ½ to 2 months later he drove the truck from the shopyard in Plattsburgh to his house. As he was planning to paint the truck he removed the tool box on the back of the truck and gave the tools contained therein to Douglas Rushford. He maintains that he

then observed a standoff device in the truck. He claims to have seen the same device in the Plattsburgh shop before.

Supervisory mine inspector Randall Gadway, testified that the Mine Safety and Health Administration (MSHA) district office was first notified of the August 28, 1998 accident on September 1, 1998 by "OSHA." Gadway described the Seymour Pit when he arrived on September 2, 1998, as depicted in Government Exhibit No. 2 with the fuel truck parked parallel to the work trailers at "F" and the backhoe located at Box "B." Gadway concluded that no standoff device had been used to inflate the tire. He found moreover, that none of the employees had received training in the use of a standoff inflation device. Indeed, none of the employees present, including Mark Goddeau, Fonze Rushford, Todd Lapham, even knew at that time what a standoff inflation device was. Douglas Rushford told Gadway that he had a standoff inflation device at the shop but Gadway was later shown only three clip-on air chucks. Gadway later found it necessary to draw Douglas Rushford a picture of a standoff inflation device to describe it. Rushford never produced any standoff inflation device during the time of Gadway's investigation.

Citation No. 7716903

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.141104(b)(2) and charges as follows:

> A mechanic/welder was fatally injured at this operation on August 28, 1998, when he was struck by a section of wheel rim which exploded while he was inflating a truck tire. A stand-off-inflation device was not used. The mine operator's failure to provide and require the use of a stand-off-device for inflating tires is a lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R. § 56.14104(b), provides as follows:

> To prevent injury from wheel rims during tire inflation, one of the following shall be used: (1) a wheel cage or other restraining device that will constrain all wheel rim components during an explosive separation of a multi piece wheel rim, or during the sudden release of contained air in a single piece rim wheel; or (2) a stand-off inflation device which permits persons to stand outside of the potential trajectory of wheel components.

There is no dispute in this case that neither a wheel cage nor a stand-off inflation device was used when employee Nile Arnold inflated the tire on the fuel truck at Respondent's Seymour Road Pit. Since mine operators are liable without fault for violations at its mines the violation is proven as charged. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112 (July 1995). The violation was also "significant and substantial." 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 failure to use a wheel cage or other restraining device or a stand-off inflation device under the circumstances of this case resulted in Arnold's fatal injuries. There can be no question on the facts of this case that the violation was therefore "significant and substantial."

I also conclude that the violation was also the result of "unwarrantable failure" and high negligence. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Jim Walter Resources Inc., v. Secretary*, 103 F.3d 1020 (D.C. Cir. 1997); *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). 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") *Emery Mining Corp.*. 9 FMSHRC at 2001. Unwarrantable failure is also 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).

In finding unwarrantable failure and high negligence in this case I have considered the evidence that Rushford had never bothered to obtain a copy of the health and safety regulations governing the operation of his mine and the credible evidence that not only did the deceased fail to use an appropriate device for protection during tire inflation but that no such device was available either at the mine site where the accident occurred or at the mine shop in Plattsburgh. In fact, Douglas Rushford made no provision for compliance with the cited standard and indeed, had himself directed another employee to inflate a tire at the mine site without a stand-off device

on the same day as this fatality. In addition, I find credible Inspector Gadway's testimony that mine owner Douglas Rushford did not even know what a stand-off inflation device was. The hazard presented by this violation was also particularly dangerous as evidenced by the fatality. These factors clearly support a finding of unwarrantability and gross negligence .

In reaching this conclusion I have not disregarded the testimony of Todd Lapham, Douglas Rushford's son in-law, that several months after the fatal accident he found a stand-off inflation device in the tool box of the victim's pickup truck. Rushford thought that the device was discovered about one and one half months after the accident. Even assuming, *arguendo,* that this testimony is credible and that a stand-off device was found in the victim's truck six weeks or more after the accident, such evidence is clearly insufficient to permit an inference that such a device was available to the victim on the date of the accident. It could very well have been a device that Rushford subsequently purchased to abate the citation. This conclusion is supported by Mark Goddeau's testimony that he did not see such a device in the victim's truck on the date of the accident and, indeed, had never seen such a device at the mine.

Citation No. 7716904

The citation alleges a violation of the standard at 30 C.F.R. § 50.10 and charges as follows:

> A mechanic/welder was fatally injured at this operation on August 28, 1998, when he was struck by a section of wheel rim which exploded while he was inflating a truck tire. He died on August 30, 1998. The mine operator failed to notify MSHA of the accident.

The cited standard, 30 C.F.R. § 50.10, provides as follows:

> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict office, it shall immediately contact the MSHA headquarters in Arlington, Virginia by telephone at 800-746-1553.

There is no dispute in this case that Rushford failed to notify MSHA of the accident as required by the cited standard. The New York State police officer who responded to the accident notified the Occupational Safety and Health Administration which, in turn, notified MSHA. The violation is accordingly proven as charged.

Rushford argues that any negligence should nevertheless be negated or mitigated by its efforts, albeit unsuccessful, to contact MSHA. Rushford bookkeeper, Mary Pelkey, attempted to call MSHA by using a telephone number she had been given by an MSHA employee around 1991. Pelkey called that number but received only a recorded message that the number had been disconnected and no forwarding number was provided. It is undisputed that the MSHA offices had moved in the interim and their telephone number changed. Pelkey was unaware of the toll

free number provided in the Secretary's regulations. She also acknowledged that she did not attempt to call "information" to obtain the current MSHA telephone number and made no further attempts to call MSHA after her father, Douglas Rushford, told her that the state police would tell MSHA anyway. She did call the victim's wife and for emergency services.

I agree that Pelkey's efforts to contact MSHA, while clearly inadequate, do warrant some consideration. Accordingly, I find Respondent chargeable with only moderate negligence. The Secretary's low gravity findings are accepted for purposes of assessing a civil penalty.

Citation No. 7716905

This citation alleges a violation of the standard at 30 C.F.R. § 50.12 and charges as follows:

> A mechanic/welder was fatally injured at this operation on August 28, 1998, when he was struck by a section of wheel rim which exploded while he was inflating a truck tire. The mine operator altered the accident site by moving the truck involved in the accident before MSHA was notified and initiated its investigation.

The cited standard, 30 C.F.R. § 50.12 provides as follows:

> Unless granted permission by a MSHA's District Manager or Subdistrict Manager, no operator may alter an accident site or an related area until completion of all investigation pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

There is no dispute that the fuel truck at issue was moved by Rushford employee Mark Goddeau before MSHA was notified of the accident and initiated its investigation. Rushford maintains that there was nevertheless no violation because of the need to rescue and recover the victim in this case.

According to the undisputed testimony of Mark Goddeau, who was standing directly behind the deceased when the tire exploded, the deceased was knocked onto his back with his feet only about 6- inches from the wheel. His arm was lying on the backhoe bucket and the bucket was only 1 to 1 ½ feet from the fuel truck. Goddeau was also present when the emergency personnel arrived. He thought it was necessary to move the fuel truck because there was insufficient space for emergency personnel to aid the victim. Goddeau then drove the truck about 20 to 25 feet away. I find that, under the circumstances, it was reasonable for Goddeau to have moved the truck in the good faith and reasonable belief that it was necessary to aid in the rescue of Arnold. There is no evidence of any attempt to alter the accident scene for purposes of concealing the cause of the accident, and indeed, in the end, the movement of the truck and backhoe had little, if any, impact on the MSHA investigation. It would indeed be counterproductive and contrary to public policy to discourage the safe and prompt recovery of

accident victims based on the reasonable and good faith actions of rescuers. Under the circumstances I find that there was no violation of the cited standard as charged and Citation No. 7716905 must accordingly be vacated.

In assessing civil penalties herein I have also considered the operator's small size, lack of a history of recent violations, apparent good faith abatement and absence of evidence that the penalties would affect its ability to stay in business.

ORDER

Citations No. 7716905 and 7716908 are vacated. Citation Nos. 7716903 and 7716904 are affirmed and Douglas R. Rushford Trucking is directed to pay civil penalties of $3,000.00 and $100.00, respectively, for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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