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FMSHRC-WDC
April 30, 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. LAKE 85-47

WILMOT MINING COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), the following issues are presented on review: (1) whether the Commission administrative law judge below abused his discretion in rejecting a proposed settlement between the parties; (2) whether the cited operator, Wilmot Mining Company ("Wilmot"), violated 30 C.F.R. $ 48.28(a), a miner training regulation; (3) whether Wilmot was negligent in connection with the use of a frontend loader without a rollover protective structure ("ROPS"); and (4) whether Wilmot violated 30 C.F.R. $ 77.1605(b) by failing to equip a front-end loader with adequate brakes and, if so, whether Wilmot was negligent in connection with that violation. For the reasons that follow, we reverse the judge's conclusion that a violation of 30 C.F.R. $ 48.28(a) was established, but otherwise affirm the judge's decision.

At about 2:00 p.m. on May 25 1984, John Schrock, Stripping Superintendent in charge of Wilmot's North Mine, a surface coal mine located in Navarre, Ohio, was leaving the 001-0 pit driving a Terex 72-41 front-end loader ("Terex"). As Schrock was exiting the pit, he stopped about 100 feet from the bottom and backed down the road to make room for a descending coal truck. Schrock's Terex began

to roll backwards, went off the road, struck the face of the highwall and rolled over. The cab was crushed and Schrock was killed.

Not long before the accident, Harold Bain, Wilmot's General Manager, observed Schrock with the Terex planting trees near the road leading into the pit area. Bain gave Schrock paychecks to deliver to the miners working in the pit. Just before the accident, Schrock drove

the Terex to the equipment parking lot near the pit entrance and told a mechanic that he had "lost" his brakes. Before the mechanic could inspect the brakes, however, Schrock drove the Terex into the pit area where the fatal accident occurred.

An inspector of the Department of Labor s Mine Safety and Health Administration ("MSHA") investigated the accident. He found that the Terex did not have a ROPS and cited Wilmot for a violation of 30 C.F.R. $ 77.403a(a), a mandatory safety standard requiring loaders and certain other specified types of heavy mobile equipment to "be provided with ... ROPS." The inspector also checked the Terex's brake system after the Terex was removed from the pit. The inspector found that the brake lines and cylinders were intact but that the brake fluid was low. When the brakes were tested on level ground, at a "reasonably slow speed," the Terex took 36 feet to stop. The inspector opined that the Terex's normal stopping distance in such a test should have been five to ten feet. Consequently, he cited Wilmot for a violation of 30 C.F.R. $ 77.1605(b), a mandatory safety standard requiring mobile equipment to be "equipped with adequate brakes."

The inspector also reviewed Wilmot s training records and his review indicated that the last training at the mine had been given in 1980 and that Wilmot had provided no annual refresher training in 1982 or 1983. 30 C.F.R. $ 48.28(a) provides: "Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section." The inspector cited Wilmot for violating section 48.28(a) by failing to provide eight hours of annual refresher training in 1982 or 1983 to the fourteen miners employed at the mine at the time of citation.

Commission Judge William Fauver scheduled a hearing in this proceeding for August 20, 1985, and directed the parties to explore settlement. On August 15, 1985, the Secretary of Labor requested the judge to approve a proposed settlement including stipulated civil penalties totalling $2,300. The judge continued the hearing until August 27, 1985, and the hearing went forward on that date. The judge issued no order stating that settlement was rejected and provided no notation or explanation on the record addressing the proposed settlement.

In his decision, the judge concluded that the Secretary had established a prima facie case of a violation of the annual refresher training regulation. 8 FMSHRC 509, 512-13 (April 1986)(ALJ). The judge stated: "The Secretary ... show[ed] that 14 miners were employed at the time of the inspection [in May 1984], that the mine

was a going concern in 1982 and 1983, and that no refresher training was conducted for any miner in 1982 or 1983." 8 FMSHRC at 512. In sustaining the ROPS citation, the judge found that Schrock operated the Terex front-end loader without a ROPS and that, consequently, the standard was violated. 8 FMSHRC at 513. In assessing a civil penalty, the judge determined that Wilmot was grossly negligent in allowing Schrock to operate the Terex in the pit. The judge concluded that Bain knew that Schrock was operating the Terex without the ROPS when he gave Schrock the paychecks and that Bain knew or should have known that Schrock would drive the

Terex into the pit to deliver the paychecks. 8 FMSHRC at 510, 514. ln addition, the judge found Schrock grossly negligent in driving the Terex into the pit and imputed that negligence to Wilmot. 8 FMSHRC at 514. The judge also sustained the brake citation finding that the brakes were defective. Underlying this conclusion were the judge's findings that the cylinders were very low in brake fluid and that when the Terex was tested on level ground it took 36 feet to stop and that on a steep road such as the pit road the loader "would have virtually no brakes at all." 8 FMSHRC at 515. In assessing a civil penalty, the judge emphasized that Schrock's conduct in driving with brakes known to be defective was gross negligence, which was imputed to Wilmot. 8 FMSHRC at 515. The judge assessed civil penalties totalling $7,500 for the three violations.

Wilmot argues as a threshold issue that the judge, without explanation, improperly rejected the settlement agreement. Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. $ 820(k); see Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). The Commission has held repeatedly that if a judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing. See. e.g., Knox County Stone Co., 3 FMSHRC 2478, 2480-81 (November 1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.

On the present record, we cannot conclude that the judge committed error. Wilmot apparently never objected to the judge's procedure in going forward with the hearing. It did not object at the hearing or argue this point to him in its post-hearing brief. Failure to object in a timely manner to an alleged procedural error ordinarily waives the right to complain of the error on appeal, and the Mine Act prohibits, except for good cause shown, the raising of matters not first presented to the judge. 30 U.S.C. $ 823(d)(2)(iii); 29 C.F.R. $ 2700.70(d). Wilmot has not shown good cause for its failure to raise this objection before the judge and consequently we cannot consider it. 1/

With respect to the alleged violation of section 48.28(a), Wilmot argues that the Secretary failed to show that any of the fourteen employees at issue were miners who required annual refresher training during 1982 and 1983 and did not receive it. We agree.

The requirement for miner annual refresher training is contained in section 115(a)(3) of the Mine Act, 30 U.S.C. $ 825(a)(3), and is

implemented by the Secretary's training regulations at 30 C.F.R. Part 48. The requirement for annual refresher training means that an operator must provide each covered miner in its employ with refresher

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1/ In general, however, we believe that better practice requires that if a judge rejects a written settlement proposal he issue an order to that effect. Specifying the reasons for the rejection might sharpen the issues for trial and even possibly encourage an acceptable settlement proposal.

training within twelve months of his last training. Emery Mining Corp., 5 FMSHRC 1400, 1401-03 (August 1983), aff'd, 744 F.2d 1411 (lOth Cir. 1984)(construing section 115(a)(3) of the Mine Act and 30 C.F.R. $ 48.8(a), a regulation identical to section 48.28(a) providing for refresher training for underground miners). The Secretary's evidence as to the alleged training violation here is insufficient. The Secretary showed that the last training was given in 1980; that no records reflected that the operator had provided annual refresher training for the years 1982 and 1983; and that fourteen employees were on Wilmot's payroll at the time of the citation in May 1984. These facts alone, however, do not prove that any of the employees in question needed refresher training during any twelve month period ending in the cited time frame of 1982-83 and were not provided such training. In sum, we find lacking any relevant proof as to the employment and training histories of the fourteen employees in question. Significantly, in Emery, supra, the Secretary proved the violation by showing that five miners had received refresher training in June 1980 and that fifteen months had elapsed since their last training. 5 FMSHRC at 1401. Thus, we conclude that in the present case the Secretary did not establish a violation of section 48.28(a) as to any of the fourteen individuals during the time period to which the citation refers and that there is not substantial evidence supporting the judge's finding of a violation.

Turning to the issue of the operator's failure to provide a ROPS on the loader, Wilmot does not contest the judge:s finding of a violation of section 77.403a(a) but argues that it was not negligent in connection with that violation. Wilmot submits that it was unforeseeable that Schrock would drive the Terex into the pit without a ROPS and that his negligence in doing so should not be imputed to the company. We disagree.

It is well established that the negligent actions of an operator:s foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty. See, e.g., Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-64 (August 1982). In Nacco Mining Co., 3 FMSHRC 848 (April 1981), the Commission recognized a narrow and limited exception to this principle. The Commission held that the negligent misconduct of a supervisor will not be imputed to an operator if: (1) the operator has taken reasonable steps to avoid the particular class of accident involved in the violation; and (2) the supervisor's erring conduct was unforeseeable and exposed only himself to risk. 3 FMSHRC at 850. The Commission emphasized, however, that even a supervisory agent's unexpected, unpredictable

misconduct may result in a negligence finding where his lack of care exposed others to risk or harm or the operator was otherwise blameworthy in hire, training, general safety procedures, or the accident or dangerous condition in question. 3 FMSHRC at 851. We reject Wilmot's assertion that a Nacco defense was established.

With regard to the foreseeability of Schrock:s conduct, substantial evidence supports the judge's finding that Bain, as general manager, knew or should have known that Schrock would drive to the pit in the Terex loader when he gave Schrock the paychecks to deliver to the miners in the pit. 8 FMSHRC at 514. At the time Bain gave the paychecks

of Schrock, the superintendent of the pit, Schrock was working with the Terex near the access road to the pit. It was or should have been foreseeable to Bain that Schrock would use the Terex for delivery of the paychecks in the pit area. Also, Wilmot has not established that it took reasonable steps to avoid the particular class of violation involved here, specifically, it has not shown that it took effective steps to prevent a loader without a ROPS from being operated in the pit area.

We emphasize that managers, such as Schrock, who was superintendent and overall supervisor of the pit operation, must be held to a demanding standard of care in safety matters. Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.

Wilmot contests the judge's findings of a violation of section 77.1605(b) and associated negligence. Concerning the violation, Wilmot argues essentially that the record evidence does not support the judge's finding as to the cause of the inadequacy of the brakes. To prove a violation of this standard, however, the Secretary is not required to elaborate a complete mechanical explanation of the inadequacy of the brakes. A demonstrated inadequacy itself may be sufficient. The inspector checked the Terex's brake fluid levels and found them to be below normal. He detected no leaks in the braking system and found the major components of the system to be undamaged by the accident. When the Terex was tested at a reasonably slow speed, thirty-six feet and successively greater distances were required to stop the vehicle. His testimony that at normal "operating capacity" during such a test the Terex should have stopped within five to ten feet was unrefuted. We note also that Bain conceded that the brakes were inadequate (Tr. 112), disputing only the cause, which, in his view, was a blown booster cylinder. Whatever the precise cause of the braking defect, the evidence amply supports the judge s finding that the Terex was not "equipped with adequate brakes," in violation of the cited standard. 2/

On the issue of negligence, Wilmot again raises a Nacco defense. There is no question that Schrock's conduct was highly negligent; he told a mechanic shortly before the accident that he had "lost" his brakes but proceeded to drive the Terex down a grade

into the pit area. Whether Schrock's actions were foreseeable, the judge properly found that his conduct "greatly endangered himself and other persons who might have been injured in an accident involving the Terex." 8 FMSHRC at 515. Therefore, the Nacco defense was not established. 3 FMSHRC at 850-51.

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2/ Wilmot objects to the judge s finding that "when fluid was added to the normal level, it took only five to ten feet to stop." 8 FMSHRC at 515. There is no evidence that the inspector added braking fluid in testing the Terex. The evidence summarized above, however, independently supports the finding of violation.

Finally, Wilmot's argument that the penalties proposed by the Secretary and assessed by the judge are excessive is rejected, with respect to the 30 C.F.R. $ 77.403a(a) and $ 77.!605(b) violations. The penalties assessed are supported by the record and reflect proper consideration of the statutory penalty criteria. We will not disturb them on review. Shamrock Coal Co., ! FMSHRC 469 (June !979).

Accordingly, we reverse the judge's finding that Wilmot TOPlated 30 C.F.R. $ 48.28(a) and vacate the penalty assessed for that violation. We affirm the judge's decision as to the other violations and civil penalties.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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