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SOL (MSHA) V. STEELE BRANCH MINING
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April 22, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
:
v. : Docket Nos. WEVA 91-2077
: WEVA 91-2123
STEELE BRANCH MINING :

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). It involves a dispute between the Secretary of Labor and Steele Branch Mining ("Steele Branch") regarding two citations alleging violations of 30 C.F.R.

77.404(a)(Footnote 1) and 50.11(b).(Footnote 2) Following an evidential hearing, Commission

1 30 C.F.R. 77.404 provides, in relevant part:

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

2 30 C.F.R. 50.11 provides, in relevant part:

* * *

(b) Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation. No operator may use Form 7000-1 as a report, except that an operator of a mine at which fewer than twenty miners are employed may, with respect to that mine, use Form 7000-1 as an investigation report respecting an occupational injury not related to an accident. No operator may use an investigation or an investigation report conducted or prepared by MSHA to

Administrative Law Judge Avram Weisberger found that Steele Branch violated both provisions and that its violation of section 77.404(a) was significant and substantial ("S&S").(Footnote 3) 14 FMSHRC 871 (May 1992)(ALJ). The Commission granted Steele Branch's petition for discretionary review, which raises the following issues: (1) whether the operator violated section 77.404(a) because 270 to 300 degrees of slack existed in the steering wheel of a road grader, measured while the grader was not in operation; and (2) whether the operator violated section 50.11(b) when it did not promptly submit an accident investigation report upon the request of the Department of Labor's Mine Safety and Health Administration ("MSHA"). For the reasons set forth herein, we affirm the judge's conclusion on the first issue and reverse his conclusion on the second.

I.

Factual and Procedural Background

Steele Branch, which is owned by the Geupel Construction Company, operates a surface coal mine in Logan County, West Virginia. On April 23, 1991, MSHA inspected Steele Branch following a fatal accident. Rayburn Browning operated the No. 9 road grader used to maintain a haulage road at the mine. The grader's engine had stalled on a hill and the grader began rolling backwards. Unable to control the vehicle, Browning jumped off, and the grader ran over him.

MSHA Inspector Donald Mills inspected the grader and observed that there was between 270 and 300 degrees of slack in the steering wheel. The inspector did not test the slack while the grader was operating. Inspector Mills issued a citation, alleging a violation of section 77.404(a). The citation stated that the road grader "was not maintained in a safe operating condition[] in that excessive slack was present at the steering wheel...."(Footnote 4) The inspector determined that the violation was S&S.

2(...continued)

comply with this paragraph. An operator shall submit a copy of any investigation report to MSHA at its request....

3 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

4 This citation also alleged that the grader's primary fuel filter was not properly installed. The judge determined that the Secretary had failed to establish that the inoperative primary filter violated the safety standard because the secondary filters on the vehicle would have adequately "screened and trapped" any contaminants and that, as a consequence, the grader was in safe operating condition as to its fuel-filtering system. 14 FMSHRC at 872-73. The Secretary did not seek review of this finding.

That same day, another MSHA Inspector, James E. Davis, requested that Steele Branch prepare an investigation report of the accident, as required by section 50.11(b). On April 24 and 26, Inspector Davis reiterated his request. On April 29, he spoke with Mark Potnick, the Steele Branch official in charge of safety. Potnick described to Davis the preventive measures that Steele Branch planned to take to avoid such an accident in the future. MSHA made follow-up requests for the written report on May 8 and 9.

On May 13, MSHA cited Steele Branch, alleging an S&S violation of section 50.11(b), for its failure to submit an accident investigation report. The citation stated:

During and after the investigation of a fatal accident at this mine several requests were made to the operator for a copy of the required Company investigation report and a description of steps taken to prevent a similar occurrence in the future. The requests were made to the mine management on April 23, 24, 26, May 8 and 9, 1991. The requests have not been complied with as required by 30 C.F.R. 50.11(b).

MSHA proposed a special assessment of \$500 for the operator's failure to provide the report. Steele Branch submitted the accident report on May 16. The report reiterated the measures described by Potnick to Davis to prevent a recurrence of the accident.

Steele Branch's contests of the citations were consolidated for hearing. In concluding that Steele Branch violated section 77.404(a) and that the violation was S&S, the judge found that the grader in question was not in safe operating condition due to excessive play in the steering wheel. 14 FMSHRC at 874. In concluding that Steele Branch violated section 50.11(b), the judge found that it failed to submit an investigation report in spite of numerous requests by MSHA. 14 FMSHRC at 875-76. The judge concluded, however, that the latter violation was not S&S. As a consequence, he assessed a penalty of \$10, rather than \$500 proposed by the Secretary. 14 FMSHRC at 877.

II.

Disposition of Issues

A. Violation of Section 77.404(a)

Steele Branch asserts that, because the grader was equipped with "hydraulic steering," slack is always present when its engine is off and that such slack is eliminated when the grader is running. Thus, MSHA's inspection of the steering wheel was deficient because the grader was not operated during the inspection. Steele Branch relies primarily on the testimony of Edward Casto, an independent mechanic who operated the grader within a few hours after the accident. Casto testified that he noticed "some play, but not any great amount" when he operated the grader up a hill. Tr. 261, 262. Steele Branch also points out that Wiley Queen, its head mechanic, drove the grader sometime prior to the accident and did not perceive excess slack. After the

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accident, Queen replaced all loose parts in the steering and testified as follows: "To me it wasn't that loose ... to cause it to be unsafe to operate." Tr. 215.(Footnote 5)

The judge concluded that the steering wheel exhibited approximately 270 to 300 degrees of slack when the engine was off and that such slack was "clearly evidence of play in the steering wheel to a more than non-significant degree when the engine is on." 14 FMSHRC at 874. The judge determined that Steel Branch violated 30 C.F.R. 77.404(a) based on excessive slack in the steering, and on the fact that the grader was being operated on a road containing curves and an eight to nine percent grade. Id.

The Commission is bound by the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [a] conclusion." See, e.g., Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989) quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Considering the record before us, we conclude that substantial evidence supports the judge's determination that the steering wheel exhibited excessive play, thereby making the grader unsafe to operate.

Inspector Mills' testimony that, on the day of the accident, slack of between 270 and 300 degrees existed in the steering wheel of the road grader was uncontradicted. Tr. 87. William Roberts, Steele Branch's equipment manager, testified that steering play when the engine is off should amount to no more than 120 degrees. Tr. 378, 394. He further testified that 270 degrees of slack in the steering mechanism when the grader was off would be considered "excess play." Tr. 395. Inspector Mills also testified that the haulage road was hilly with narrow curves and that excessive slack could delay movement of the wheels toward the direction turned and, consequently, result in an accident. Tr. 88-91.

5 Steele Branch also argues that the deceased miner had an excellent safety record and, if excess slack in fact existed, he would have noticed it during his pre-shift equipment inspection. Steele Branch further argues that, to the extent that Browning failed to adequately inspect the grader, his negligence should not be imputed to Steele Branch. The latter argument is without merit. The Commission has held repeatedly that an operator is liable for violations of mandatory standards committed by its employees. Asarco, Inc., 8 FMSHRC 1632, 1634 (November 1986); Southern Ohio Coal Co., 4 FMSHRC 1459, 1462 (August 1982). In any event, the judge determined that Steele Branch's evidence that Browning was a careful employee who would not have operated the grader if it was unsafe was "insufficient to contradict or impeach the specific testimony of Mill[s] that, on April 23, 1990, when he tested the steering there was between 270 to 300 degrees of play." 14 FMSHRC at 874.

In addition to challenging the evidentiary support to the judge's finding of a violation of the regulation, Steele Branch contends that the regulation addresses only "the condition of the ... vehicle while it is operating." SB Br. 8, 10. Steele Branch notes that the grader was not in operation when Mills inspected it. There is no dispute, however, that the grader was operating at the time of the accident and Steele Branch has not asserted that the slack detected by MSHA was caused by the accident. The judge concluded, and we have affirmed as supported by substantial evidence, that "play in the steering wheel of approximately 270 degrees when the engine is off, is clearly evidence of play in the steering wheel to a more than non-significant degree when the engine is on." 14 FMSHRC at 874.

B. Violation of Section 50.11(b)

Steele Branch argues that the regulation does not set a specific time for the submission of an accident investigation report. It maintains that, as a consequence, reports must be submitted within a reasonable time, and that its submission met this requirement. We agree, and reverse the judge's finding of a violation.

The judge found that Steele Branch violated that part of section 50.11(b) requiring operators to "submit a copy of any investigation report to MSHA at its request." The evidence established that MSHA had made numerous requests for a report. Although the judge credited Steele Branch's evidence that the "delay" was reasonable under the circumstances, he determined that Steele Branch's evidence was "insufficient to rebut the Petitioner's case that by [the date of the citation], Respondent had failed to submit a copy of its investigation report in spite of numerous requests by MSHA." 14 FMSHRC at 876. Nevertheless, because the judge found that Steele Branch's delay in submitting the report was reasonable, he held that Steele Branch was not negligent and reduced the penalty from \$500 to \$10. 14 FMSHRC at 876-77.

Section 50.11(b) requires operators to investigate all accidents and to "develop a report" of each investigation. A copy of the report must be submitted "to MSHA at its request," but no period of time is specified in the regulation, or indicated in the regulatory history or in MSHA's policy guide. The Commission has not previously addressed the issue of the time allowed for submission of a report pursuant to this standard. Under the judge's approach, an operator violates the regulation if it fails to submit an investigation report upon MSHA's demand, even if there are legitimate reasons why the report has not been completed and, therefore, is not ready for submission. Under this interpretation, operators could be forced to prepare reports hastily in order to comply with the regulation, to the detriment of accuracy and thoroughness.

Where a standard is silent as to the period of time required for compliance, the Commission has imputed a reasonable time. In Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981), the Commission noted that it is implicit in a roof control plan that the operator has a reasonable time to file a plan. In Monterey Coal Co., 5 FMSHRC 1010, 1019 (June 1983), the Commission imputed a reasonable time for the operator to submit a revised engineering plan. Further, in Old Ben Coal Co., 3 FMSHRC 608, 610-11 (March

1981), the Commission interpreted a standard requiring a foreman to countersign a weekly hazardous conditions report as allowing a reasonable period for such signing.

Consistent with this approach, we conclude that section 50.11(b) requires operators to submit an accident investigation report within a reasonable period of time after MSHA's request, taking into consideration the specific circumstances. Factors pertinent to whether the operator complied with the section within a reasonable time may include the volume and complexity of information to be reviewed, and the circumstances surrounding the preparation and submission of the report. Such an approach accords with the purpose of the regulation, which is to "ensure that operators are in fact investigating accidents and injuries and are engaged in constant upgrading of health and safety practices." 42 Fed. Reg. 65534 (December 30, 1977).

We believe the evidence shows that Steele Branch responded in a reasonably timely manner in submitting its report. Inspector Davis issued the citation just 14 working days after the accident and 10 working days after MSHA completed its accident inspection. The judge found that Steele Branch had orally informed MSHA, six days after the accident, of the critical portion of the investigation report, i.e., the preventive steps Steele Branch would take to avoid a similar accident. 14 FMSHRC at 876-77. Additionally, he found that the operator acted in good faith in submitting the report in mid-May. He further found that Steele Branch's delay was caused by its thorough compilation of the facts relating to the accident, by its company policy requiring supervisory review of such reports and by a death in the family of the employee preparing the report. 14 FMSHRC at 876. The judge determined that Steele Branch's failure to submit the report by May 13 was justified under the circumstances. He held that Steele Branch was not negligent and he reduced the penalty from \$500 to \$10. 14 FMSHRC at 876-77.(Footnote 6) We rely upon the judge's findings of fact in reaching the conclusion that Steele Branch submitted its report within a reasonable time following MSHA's request and, therefore did not violate the regulation.

6 We note that MSHA's accident investigation report of the Browning accident was not completed until September 1991, four months after Steele Branch submitted its report. Tr. 62.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision with regard to 30 C.F.R. 77.404(a), but reverse his conclusion that Steele Branch violated 30 C.F.R. 50.11(b).

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner