

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, DC 20001-2021  
TELEPHONE: 202-434-9964 / FAX: 202-434-9949

May 23, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2007-447-M
Petitioner	:	A.C. No. 09-00023-125618 E027
v.	:	
	:	Mine: Lithonia Mine Site
S & S DREDGING,	:	
Respondent	:	

**DECISION**

Appearances: Jonathan J. Hoffmeister, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner,  
Patty Schildt, Pro Se, S&S Dredging, Lilburn, Georgia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) alleging that S&S Dredging (“S&S”) violated 30 C.F.R. §56.14100(b). The petition is based on a citation issued by the Secretary to S&S under Section 104(d) of the Federal Mine Safety and Health Act of 1977 (“Act”).<sup>1</sup> A hearing was held in Atlanta, Georgia on May 4, 2011. At the conclusion of the hearing, a bench decision was made. The decision is set forth below, with the correction of non-substantive matters.

Finding of Facts and Conclusions of Law

a. Violation of Section 56.14100(b)

On May 3rd, 2007, Robert Knight, an MSHA inspector who has had experience as a health and safety manager in private employment, inspected the Lithonia mine, located in DeKalb County, Georgia. S&S is an independent contractor that operates on the site.

---

<sup>1</sup>This citation had initially been issued as an order under Section 104(d)(1) of the Act, but was subsequently amended to a citation under Section 104(d)(1), *supra*.

In the course of Knight's inspection, he specifically examined an L160 Michigan loader that was owned and operated by S&S. He observed that there were two steps that were defective. The lower step was attached only in the front of the step by two chains, with one on each side of the step. Normally, the step should have also been supported by two cables, one on each side of the rear end of the step. In addition, the upper step was bent upwards and contained a hole.

The inspector testified as to various hazards of falling or slipping that could occur as a result of a person ascending or descending these steps and slipping or falling.

The citation the inspector issued alleges a violation of Section 56.14100(b), which provides as follows: "defects on any equipment, machinery and tools that affects safety shall be corrected in a timely fashion to prevent the creation of a hazard to persons."

According to the parties' stipulations filed at the hearing, the condition of the steps had been in existence for approximately two years prior to the time that the citation was issued.

Based on the parties' stipulations and the testimony of Knight, I conclude that the loader in question did have defects that did affect safety and that had not been corrected in a timely manner.

Accordingly, I conclude that S&S did violate Section 56.14100, as alleged.

b. Significant and Substantial

Knight also found this condition to be significant and substantial. He indicated that this determination was based upon a reasonable likelihood of injury. In support of this determination, he explained that because of the lack of adequate connection of the lower step, a person ascending or descending the loader could slip and contact his shins and could also sprain or break an ankle, or strain his back.

In addition, Knight noted that there was a cable sticking up from the lower step, so that if one falls, the cable then could impact a person's shin, causing some type of abrasion. As he indicated, these injuries could occur when one ascends or descends the first step.

Knight also indicated that there was a reasonable likelihood of injury if a person, in ascending or descending the loader, would avoid the lower step and instead use the next step. He explained that this step was bent upwards and also had a hole. Knight indicated that a person ascending or descending the loader could step in mud or water and therefore have mud or water on his shoes. If this occurred, there would be a heightened danger of slipping from the upper step, which was bent and had a hole, and a person could then fall to the ground. Knight indicated the upper step was approximately 3 feet above the ground. A fall from the upper step could therefore cause injuries, such as a sprained ankle, a broken ankle, or a strain to a back.

Essentially, Knight indicated, and the evidence supports his testimony, that the loader at issue was used regularly, and in a day in which it's operated, a person using the loader would have to ascend or descend the loader many times.

Knight also indicated that he took into account the fact that this loader travels on-site, over various different types of terrain, and at any one place the loader could stop, requiring the operator to get off. He indicated that although there were not any “overly large aggregates” on the ground, there is “uneven ground in many locations and they do have gravel.” (Tr. 33).

He concluded that based on all of these conditions, there was a reasonable likelihood of a serious injury, and therefore the violation was significant and substantial.

The determination of whether a violation is significant and substantial is governed by case law as cited by Government counsel.

The Commission has explained that:

[i]n 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.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan.1984).

It is clear, based on the earlier discussion, that the first two factors have been established here: one, the underlying violation of a mandatory safety standard, and two, a discrete safety hazard.

The third element requires a reasonable likelihood of an injury-producing event. In the situation at bar, this translates to a reasonable likelihood of a fall, i.e. somebody slipping or falling due to the conditions referred to earlier.

Based on the usage of the loader and the need to ascend and descend more than once in its use, and taking into account the continuing operation, I find that there was a reasonable likelihood that the hazard of the violation, specifically the condition the loader's steps were in, would result in an injury-producing event.

The key issue in this case is the fourth element, which is a reasonable likelihood that the injury in question “will be of a reasonably serious nature.” *Mathies*, 6 FMSHRC 3-4. This, in essence, is the problem in the Secretary's case.

The inspector testified that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature based upon his opinion that injuries would result in lost workdays. There is not any evidence that any of the possible type of injuries that he set forth, specifically, sprains, possibly a broken ankle, would require hospitalization or surgeries.

He also indicated that there was not any “overly large aggregate” on the ground. The ground was uneven in “many locations,” and there was gravel. (Tr. 22).

However, significantly, there is an absence of any objects that would be likely to cause a serious injury, such as boulders, rocks, or sharp objects. I place particular emphasis on the absence of evidence of the objects that would cause head injuries, neurological injuries or any injuries that would have some lasting impact or would have a high likelihood of a long period of recuperation.

Further, the height at which these steps are located does not appear to be very significant in terms of a contributing factor to a serious injury. The lower step was only one foot off the ground. The inspector estimated the higher step the inspector to be at a height of three feet. There wasn't any evidence of an exact measurement, and it is unclear what the inspector's approximation was based upon.

I conclude that, based upon all of these factors, the Secretary has failed to prove, as required by case law, that the injury in question “will be of a reasonably serious nature.” *Mathies, supra*, at 4. Therefore, I find that the violation was not significant and substantial.

c. Unwarrantable Failure

The Secretary also asserts that the violation was as a result of the operator's unwarrantable failure as support for the Secretary's issuance of citation under Section 104(d)(1) of the Act. That section requires as follows:

If upon inspection of a coal or other mine, an authorized representative of the Secretary finds there has been a violation of any mandatory or health standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. . . he shall include such finding in a citation given to the operator under this Act.

30 U.S.C. §814(d)(1).

Based upon the wording of Section 104(d)(1), it is clear that the unwarrantable failure aspect of the violation must be predicated upon a finding of significant and substantial. Therefore, in order to find that a violation was the result of an unwarrantable failure, it first must be established that the violation was significant and substantial. For the reasons I indicated

above, I find that the Secretary has not established that the violation was significant and substantial. Based upon that finding, and the clear wording of Section (d)(1), I find that unwarrantable failure does not apply in this case.

Therefore, I find that the Secretary did establish a violation of Section 56.14100(b), but that violation was neither significant or substantial, nor an unwarrantable failure.

d. Penalty

The next matter to be resolved is the issue of a penalty. The Act, under Section 110(i), requires the following factors be considered by the Commission in assessing a penalty: the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. §820(i).

As to negligence, the evidence established here that the operator was negligent to a high degree. The condition involved two steps. Based upon the parties stipulations, the operator was aware of these conditions and the conditions had been in existence for two years.

With regard to gravity, the gravity was not of a highly significant nature, for the reasons set out earlier in discussing significant and substantial.

As to the size of the operator, there is uncontradicted testimony that two persons work at the mine. I conclude that the mine is very small in size, and this is a significant factor to be taken into account. Regarding the history of violations, I note the operator only received six violations within the last fifteen months. There isn't any evidence that this is an unusually high number for an operator of this size.

Another factor is whether the imposition of a penalty would have an effect on the operator's ability to continue in business. The owner and operator, Patty Schildt, testified that the company is no longer in business. The parties stipulated that the company went out of business after receiving the citation.

The last fact to be considered is good faith abatement, and there is not any evidence that the abatement was not abated in good faith.

Considering all these factors and placing considerable weight on the size of the operator and the ability to continue in business, and the history of violations, I find that a penalty of \$300 is appropriate.

ORDER

It is ORDERED that S&S shall pay a penalty of **\$300.00** within thirty (30) days of this decision.

Avram Weisberger  
Administrative Law Judge

Distribution (Via Certified Mail Return Receipt Requested):

Jonathan J. Hoffmeister, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, S.W., Room 7T10, Atlanta GA 30303

Patty Schildt, Pro Se, S&S Dredging, 5126 Remington Court, N.W., Lilburn, GA 30047

/cmj