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June 17, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2010-1508-M
Petitioner	:	A.C. No. 26-02314-223636 A3V
	:	
v.	:	
	:	
SMALL MINE DEVELOPMENT,	:	
Respondent	:	Mine: Midas Mine

DECISION

Appearances: Isabella M. Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, CA, on behalf of the Secretary of Labor;
Charles W. Newcom, Esq., Sherman & Howard, 633 Seventeenth Street, Suite 3000 Denver, CO 80202, on behalf of Small Mine Development.

Before: Judge Kenneth Andrews

This case is before me upon the petition for assessment of a civil penalty filed by the Secretary of Labor (“Secretary”) 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 Small Mine Development (“Respondent”) with violations of mandatory standards and seeking civil penalties in the Special Assessment amount of \$52,500.00 for one safety violation. The order is a section 104(d)(1) action. Section 104(d)(1) of the Act provides as follows:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine

within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

A hearing was held on March 15, 2011 in Reno, Nevada.

The general issues before me are whether Small Mine Development violated the cited standard as charged and, if so, what are the appropriate civil penalties to be assessed for those violations. Additional specific issues are addressed as noted below.

Discussion with Findings of Fact and Conclusions of Law

The Midas Mine is an underground gold mine, which necessitates quarterly inspections. Hearing Transcript (Tr.) 25.

On February 9, 2010, Mine Safety and Health Administration (“MSHA”) Inspector Lawrence King performed an E01 inspection of the Midas Mine. (Tr. 18). Before working for MSHA, Inspector King spent 21 years as a supervisor of heavy construction projects for E.T. Simonds, where he gained experience with fall protection and fall arrest systems. (Tr. 22-23). Inspector King also received 23 weeks of training at the Mine Safety and Health Academy in Beckley, West Virginia. (Tr. 23). Interspersed with his training in West Virginia, Inspector King traveled to Anchorage, Alaska for field training with experienced MSHA inspectors. (Tr. 23).

Citation No. 85554051

Citation No. 85554051, issued at 1055 hours, alleges a violation of a mandatory safety standard, section 57.15005, and states:

The project superintendent John Boltz and a second miner was [*sic*] observed on the roof of a connex without safety belts and lines. One side had a tent like structure used as a temporary shop to prevent a fall, but one side and both ends had no rails to prevent falling. The connex was approxatimly [*sic*] 8 feet 8 inches high from the ground, and 8 foot wide and 40 foot long. This creates a fall hazard to miners. Project superintendent John Boltz engaged in aggravated conduct constituting more than ordinary negligence by allowing a miner and himself to be on the roof

of the connex with no fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

Petitioner (“P”) Exhibit (“Ex.”) 2.

Inspector King testified that from a distance he noticed a man without fall protection climbing a ladder that leaned against an unfamiliar structure. (Tr. 26). As he approached, King realized that the structure consisted of two connexes with a tent in between them. (Tr. 26). King learned that the man on top of one of the connexes was project superintendent John Boltz. (Tr. 27). Although he could not see what Boltz was doing, King insisted that Boltz return to the ground because Boltz did not have any fall protection. (Tr. 26-27). King says that Boltz claimed he was tying down the tent, and that he “sheepish[ly]” admitted to forgetting fall protection. (Tr. 27).

Inspector King determined that failing to use fall protection in this situation constituted a violation of MSHA standard 57.15005. King found that the connex was eight feet wide, 40 feet long and eight feet, eight inches tall. (Tr. 29). He said that there was no railing on the 8 foot wide front. (Tr. 32). Based upon what Boltz told him, King also says that Boltz was moving from kneeling to standing while he worked. (Tr. 36).

30 C.F.R §57.15005 states:

Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

A violation of 30 C.F.R §57.15005 is determined by an objective standard that does not consider the skill of the miner involved. It occurs when “a reasonably prudent person...would recognize a hazard warranting corrective action.” *Secretary of Labor v. Great Western Electric Company* 5 FMSHRC 840, 841 (1983); *See also Secretary of Labor v. Lexicon Inc., D/B/A Schuek Steel Company* 24 FMSHRC 1014, 1021 (2002).

John Boltz was admittedly not wearing fall protection, and I credit Inspector King’s testimony that the unguarded front edge presented a danger of falling. Therefore, Small Mine Development violated the mandatory safety standard at section 57.15005.

Significant and Substantial

The inspector designated citation No. 85554051 as significant and substantial (“S&S”). A violation is S&S when it 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.” 30 U.S.C. §814(d)(1). A violation is properly designated as S&S “if, based upon 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.”

Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish that a violation is S&S, 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.

Secretary of Labor v. Mathies Coal Company, 6 FMSHRC 1, 3 (Jan.1984); *See also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The evaluation is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

I have found a violation of the cited mandatory safety standard, which meets the first criterion. John Boltz did not wear a safety belt or fall protection as required by 30 C.F.R §57.15005. Inspector King found, and the Secretary proved on this record, a danger of falling existed on the front edge of the connex where the ladder was placed. There were no railings along that edge of the connex. (Tr. 31-32); *see also* P. Ex. 4. Showing that a violation should be designated S&S, however, requires a finding “to be made in addition to a finding of a violation; something more than the violation of a standard itself is required.” *National Gypsum*, 3 FMSHRC at 826 (emphasis in original).

In accordance with Inspector King’s testimony, I find that the discrete safety hazard of falling existed at the unprotected front edge of the connex. Respondent did not deny King’s testimony that the 8-foot front edge of the connex where the ladder was placed did not have a railing. King estimated that the ladder extended no more than 18 inches from the top of the connex, which would not act as a safety railing for a falling miner. (Tr. 31-35). Considering that a miner had to use the ladder to travel between the ground and the top of the connex, the front edge presented a danger of falling that could not be avoided. (Tr. 102). The act of getting on and off of the ladder made a miner even more likely to fall due to the movements involved in the process and the need to approach the edge of the connex. Fall protection would have removed this hazard. The failure to wear fall protection in violation of §57.15005 contributed to the discrete safety hazard of falling from a height of 8 feet 8 inches.

Furthermore, at some point Boltz would have to secure the tie-downs closest to the front edge of the connex. Considering that he stood up to move between tie-downs, the possibility that he could lose his balance and fall in the process of securing the last tie downs increased. (Tr. 31-32). Although Boltz did not work near the front edge for the entire time he was on the connex, he could reasonably have fallen over that edge due to the

fact that he had no fall protection, had to use the unsecured ladder leaning against the front edge, and had to approach the edge to secure the last tie downs.

In the reasonably likely circumstance that a miner were to fall off of the front edge of the connex, it is reasonably likely that a fatal injury could occur. Three to four inch rocks- comprised the base around the connexes. (Tr. 28). Based on personal experience and MSHA fatalgrams, Inspector King testified that an 8 foot fall onto stone ground could kill a miner. (Tr. 34-35). John Boltz also testified that he had heard of 8 foot-fall resulting in broken bones and fatalities. (Tr.106). There was a reasonable likelihood that falling would result in an injury of a reasonably serious nature. Accordingly, I find that the violation was S&S.

Unwarrantable Failure

The inspector also designated citation No. 85554051 as an unwarrantable failure, as set forth in section 104(d)(1) of the Mine Act, 30 U.S.C. §814(d)(1). Unwarrantable failure means “aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.” *Emery Mining Corporation v. Secretary of Labor*, 9 FMSHRC 1997, 1997 (Dec. 1987). An unwarrantable failure is characterized by language such as: “reckless disregard” “intentional misconduct” “indifference” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Secretary of labor v. Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (Feb. 1991).

In *Mullins & Sons Coal Co.*, the Commission set forth factors to be considered in an unwarrantable failure (“UWF”) analysis: “the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Secretary of Labor v. Consolidation Coal Co.*, 18 FMSHRC 1541, 1548 (Sept. 1996), *citing Secretary of Labor v. Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994).

The violative condition was eliminated even before receipt of the citation. When Inspector King noticed the two miners on top of the connex, he approached them immediately and told them to return to the ground. (Tr. 26). The miners complied and Inspector King subsequently wrote the citation and recorded the violation as terminated. *See P. Ex. 2.*

The violation existed for a short period of time. The work of tying down the tent needed to be done only once. (*See Tr. 73-74*). The miners spent less than one hour on top of the connex. (Tr. 104). This violation did not threaten the safety of the miners continuously over a long period of time; it did not even last as long as the MSHA inspection.

Respondent had no prior notice that greater efforts were necessary for compliance, such as warnings from MSHA personnel or even conversations with inspectors about working on the connex. Respondent was not previously cited for this type of violation, even though they had used the tent structure before. (*See* Tr. 118). John Boltz testified that he was convinced he was safe without fall protection at the time of the violation. (Tr. 93-94); (*see also* Tr. 90-91). Without a citation or other communication from MSHA about the safety standard, there is insufficient evidence that Respondent was on notice that compliance required greater efforts on their part.

Although the extent of this violation endangered the lives of two miners, Respondent had no advance notice of the problem. Furthermore, the violation was terminated immediately and only lasted a short period of time. This violation does not constitute any intentional, indifferent or reckless behavior, or even a serious lack of reasonable care. Therefore, the Secretary has not carried the burden of proof by a preponderance of the evidence that the violation constituted UWF on the part of Respondent Small Mine Development.

Notwithstanding that UWF is not established, I find that the degree of negligence was correctly designated as “High”. As a supervisor, Boltz should have known of the requirement of fall protection for persons working at unprotected heights, such as the top of the connex with no hand or guard rails installed, and no secure ladder access. Considering supervisory responsibility to protect workers, mitigating circumstances are not shown.

Lastly, It is again noted that the violation was abated immediately and in good faith.

Penalty

Pursuant to section 110(i) of the Act, “[t]he Commission shall have authority to assess all civil penalties provided in this Act.” §30 U.S.C. 820(i). The following six statutory criteria are to be considered:

The operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, 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 person charged in attempting to achieve rapid compliance after notification and violation.

Id. I have considered each of the statutory criteria in assessing the penalties.

Citation No. 85554051 is found to be S&S, non-UWF, and with high negligence. This results in a penalty reduction from \$52,500.00 to \$9,882.00.

ORDER

For the reasons set forth above, Citation No. 85554051 is **MODIFIED** to delete the unwarrantable failure designation. Small Mine Development is hereby **ORDERED TO PAY** the sum of **\$9,882.00** within 30 days of the date of this decision.¹ Upon receipt of payment, this case is **DISMISSED**.



Kenneth R. Andrews
Administrative Law Judge

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¹ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390