

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 1998

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 97-284-M
Petitioner : A.C. No. 24-01501-05510
: :
v. :
: STS Gravel
STS GRAVEL, :
Respondent :

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
John M. Kauffman, Esq., Kasting, Combs & Kauffman, P.C.,
Bozeman, Montana,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.* the Mine Act. The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges STS Gravel with four violations involving the brakes on a rubber tired front-end loader. Three of the citations allege a violation of 30 C.F.R. ' 56.14101(a) and the fourth citation alleges a violation for failure to report the defects in the braking system that are cited in the first three citations. The total proposed penalty for these 4 violations involving the brakes on the 980-B front-end loader is \$12,500.00.

The STS Gravel Mine is a multiple bench open pit sand and gravel operation located near Livingston, Park County, Montana. It is owned and operated by Larry Stands. Mr. Stands is a working owner-operator and had only one other employee who did actual mining work rather than indoor clerical work. Thus, STS Gravel is essentially a small two-man mining operation consisting of the working owner operator, Mr. Stands, and the decedent Mr. Beagle.

Basically, the accident involved a rollover of a front-end loader as it traveled in first gear down the grade of the cut into the gravel pit. Mr. Beagle, the operator of the front-end loader, involved in the accident had been repeatedly driving the loader down into the pit and extracting material from the pit which he then transported and fed to the crusher. Tracks could be seen where the loader had proceeded down the cut into the pit. The accident occurred at the steepest grade near the bottom of the cut when the right front tire of the loader hit and climbed the wall of the pit as the left front tire continued to travel down the decline. The action of the right front wheel climbing the pit wall and the left front wheel continuing down the decline caused the loader to turn over on its left side. It is undisputed that the loader was traveling forward in first gear and that the maximum speed of the loader in first gear is 4 to 5 miles per hour.

Two days after the accident, MSHA inspected the braking system on the front-end loader and found inadequate service brakes and parking brakes. MSHA also found a small air leak in the diaphragm of the air-activated service brake mechanism, and also found a low air pressure warning device located on the instrument panel of the loader was nonfunctional. The purpose of the warning device was to indicate to the operator that the air pressure of the braking system was dropping. If it continued to leak and the air pressure dropped below a certain point (40 psi), it would activate the parking brake in a manner that would halt the loader.

It is the operator's contention that the accident was not caused by the defects in the braking system but by the fact the operator of the loader, who was in poor health, was unconscious or severely distracted and for this reason, failed to steer the loader that was traveling in first gear at only 4 or 5 miles per hour in a manner that would have avoided striking the pit wall and, thus, would have easily avoided the accident.

Respondent entered in evidence the reports and testimony of the Park County undersheriff Henry Tashjian and the testimony and report of the deputy coroner, Mr. Mike Fitzpatrick. The report and testimony of both of these officers tend to support Respondent's contention that the defects in the braking system was not the cause of the accident.

The report of the county undersheriff (Res. Ex. F-2) states in part:

Faint tracks could be seen where the loader proceeded down into the pit at approx. 20-30 degrees to the wall of the pit, causing the right tire of the loader to climb the wall, which overturned the loader. The accident appeared to have happened at slow speed as there were no marks made by the loader to indicate that it had rocked or bounced after it overturned, or that it hit the wall at a high rate of speed. It also appeared that Beagle was unconscious after the loader came to rest, as the position of one of his arms was on the door frame, and any movement of Beagle trying to extricate himself or just the movement of his arm would have left visible marks in the dust on the frame. It appears that no action was taken by Beagle (steering, dropping the bucket) to avoid hitting the wall

or stopping the loader. I had Stands explain the gear shift pattern on the loader to me before I had him check (with me present) to see what gear the loader was in. The loader was in first gear, forward.

The report of Mr. Fitzpatrick, the deputy coroner, (Res. Ex. E) states in part:

The physical evidence at the scene indicated there was no speed or erratic action of the loader. It appeared the operator was completely distracted or possibly unconscious at the time of the accident. Due to the appearance of no action taken by the operator to steer off the bank or later to try to extract himself from the loader, I believe the operator was unconscious at the time of the accident and died at the scene of mechanical asphyxiation.

The coroner's report states that the autopsy by the county coroner revealed that there were no external or internal injuries. It is also undisputed Mr. Beagle had one lung and part of the right rib cage surgically removed prior to the accident. His remaining lung showed some signs of emphysema. Due to his diminished capacity to breathe and the position his body was in after the accident, the coroner concluded that Mr. Beagle's death was caused by mechanical asphyxiation.

STIPULATIONS

Stipulations entered into the record at the request of the Respondent are as follows:.

- A. STS Gravel operates a gravel quarry near Livingston, Montana.
- B. On or about October 11, 1996, it was issued citations by the Mine Safety and Health Administration, and that these citations are 7921013, 7921014, 7921015 and 7921016.
- C. Prior to the accident, Mr. Beagle had one lung removed and his remaining lung showed signs of emphysema.
- D. At or about the time of the accident, Mr. Beagle was operating a 980-B Caterpillar front-end loader.
- E. Mr. Beagle was an experienced operator of the 980-B Caterpillar front-end loader.

Stipulations entered into the record at the request of the Petitioner are as follows:

1. Respondent engaged in the mining and selling of gravel in the United States, and its mining operations affect interstate commerce.
2. Respondent is the owner and proprietor of the STS Gravel Mine, MSHA Number 24-01501-S.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, *et seq.*, (the Act).

4. The Administrative Law Judge has jurisdiction in the matter.

5. Respondent is a mine operator with 3,016 tons/hours of production in 1996 as reported in quarterly reports by Respondent to MSHA.

Citation No. 7921013 (service brakes) and Citation No. 7921014 (parking brakes)

The 980-B front-end loader had air-actuated drum/shoe service brakes. It was equipped with an air-actuated service brake mechanism and a spring-actuated emergency parking brake mechanism in each brake chamber. There were six air brake chambers, four on the front axle (two per wheel) and two on the rear axle (one per wheel). The brake system automatically provided positive braking at all four wheels when the system air pressure dropped to approximately 40 pounds per square inch (psi). The spring-actuated mechanism could also be applied manually with a dash-mounted control valve when setting parking brakes.

Measurements were taken of the distance that each air chamber push rod traveled upon applying the service brake. The four front rods each traveled 2.5 inches, the left rear push rod traveled 2.75 inches, and the right rear push rod traveled 3 inches. These measurements were in excess of the manufacturer's service manual recommendation which states that brake adjustment is needed when travel of a brake chamber rod exceeds a maximum of 2 inches.

Both Citation No. 7921013 and Citation No. 7921014 allege a violation of 30 C.F.R. ' 56.14101(a). Section 1 of the regulation concerns service brakes and in pertinent part reads as follows:

(a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

Section (2) of the above regulation concerns parking brakes and provides:

(2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

The steepest grade on which the loader traveled was 25 degrees which was located at the bottom of the cut into the pit where the accident occurred.

MSHA performed appropriate tests of the loader braking system. These tests clearly establish a violation of this mandatory minimum requirement of both the service brake system and the parking brakes. Neither the service brake or the parking brake was capable of holding the front-end loader on the maximum grade it traveled.

I credit the testimony of Inspector Laufenberg and Inspector Marti explaining how and where the tests were conducted. I credit their testimony that these tests clearly demonstrated violations of the cited safety regulations. Both violations are affirmed. Both violations were significant and substantial (S&S) violations

S&S violations and the appropriate penalty will be discussed below under appropriate headings.

Citation No. 7921015

This citation alleges an S&S violation of the third section 30 C.F.R. ' 56.14101(a). The third section in its entirety simply provides "All braking systems installed on the equipment shall be maintained in functional condition."

The citation in pertinent part states:

The recovery of the loader from the accident site and the mechanical inspection was made on October 11, 1996. The inspection revealed defects in the audio and visible air pressure indicator unit, a component part of the braking system. Because of the defects, the operator would not have audio warning on low air pressure.

Inspector Laufenberg testified that the front-end loader had a warning air pressure indicator that was not functional. This indicator is a component of the braking system. In the event the braking system air pressure drops below 77 psi, a light and buzzer are activated. The inspector conceded that failure of this warning indicator to work does not affect the functioning of the service brake or parking brake. This warning device is a separate component, which gives a warning that the air pressure is dropping and that if it continues to drop, the parking brake is going to set up. When the air pressure drops to around 40 psi, there is a spring in a canister that automatically applies the parking brake that halts the equipment. (Tr. 28).

On cross examination Inspector Laufenberg admitted that the loader had another component of the braking system, an air pressure gauge, that was fully functional. This functioning pressure gauge visually shows the operator the amount of air pressure in the braking system by merely looking at the pressure gauge. Thus, the operator can tell the status of the braking system's air pressure without the non-functioning component that was cited. It is also noted there is no specific legal requirement that the front-end loader be equipped with either the functional air pressure gauge or the non-functioning component that was cited.

Everything considered, I find the failure to maintain the cited audio-visual air pressure indicator unit a non S&S violation of the cited safety standard.

Citation No. 7921016

This citation alleges an S&S violation of 30 C.F.R. ' 56.14100 which provides as follows:

(D) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

The citation alleges that the inspection revealed several safety defects that were not reported to the mine owner. It is undisputed that no defects were reported to the mine operator.

The mine owner, Larry Stands, testified that he had only one employee that worked in the outdoor areas of the mine and that employee was the decedent, John Beagle. Beagle had worked for Mr. Stands for more than ten years. Beagle's main job was operating the 980-B loader and doing the maintenance work on that loader. He lubricated the loader every day, checked the oil and air cleaner and did other maintenance work on the loader including adjustment of the brakes. Part of his assigned job responsibility was to see that the loader was in good functional condition. One of the defects found on mechanical inspection of the front-end loader was a small leak in the diaphragm of the braking system. It was undisputed that leak may have first occurred the day of the accident. There was a replacement diaphragm in the shop and Beagle knew how to replace a diaphragm in the brake system.

A couple of months before the accident the whole front end of the loader was ~~Atorn out@~~ and the differential completely rebuilt along with installation of a new carrier bearing. At that time the brakes were adjusted and were functioning properly. After that mechanical work was completed, Beagle never indicated to Mr. Stands that there was any problem with the loader. It is undisputed that Beagle never complained or reported any defects in the braking system of the loader and, thus, there was no record of defects available to show the inspector. Under these facts I find the failure of the decedent to report the defects of the braking system to the mine operator constituted a non S&S violation of the cited safety standard.

Discussion

Significant and Substantial Violations

A significant and substantial (S&S) violation is described in section 104(d)(1) of the Act as a violation of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. 30 C.F.R. § 814(d)(1). 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'd* 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).

MSHA designated all four citations issued to STS Gravel on October 11, 1996, as significant and substantial violations. All four citations concern the inadequacy of the brakes on the 980-B Caterpillar front-end loader in question.

I agree with the inspector's findings that the violations of section (1) (service brakes) and section (2) (parking brakes) of 30 C.F.R. § 56.14101(a) were significant and substantial violations. I base my S&S findings on the testimony of Richard Laufenberg, Supervisory Mine Inspector in the Denver field office and Inspector Marti. I find the inadequacy of the service and parking brakes of the loader particularly in view of the steep grades of the roadway into the pit were significant and substantial violations of the cited safety standards. (Tr. 63-65 and Tr. 67-70).

Assessment of Civil Penalties

In assessing a civil penalty under section 110(i) of the Act, the judge is required to give consideration to the appropriateness of the penalty to the size of the operator's business, the probable effect on the operator's ability to continue in business, the operator's history of previous violations, the operator's negligence, the gravity of the violations and the operator's good faith abatement.

The size of the business was small. The operator was the working owner, Mr. Stands. It was essentially a two man mining operation. Other than indoor clerical help, this working operator had only one other employee, his friend, the decedent. The mine worked one shift a day. It was stipulated the mine had 3,016 tons/hours of production in 1996 as reported in quarterly reports by Respondent to MSHA. Mr. Stands testified the mine had less than 10,000 hours work. (Tr. 166). With respect to history of prior violations the parties stipulated that there were more than 2.1 violations per inspection over the last 24 months. All citations were abated in good faith and timely manner.

In all four citations MSHA has properly alleged moderate negligence. The mine operator, Mr. Stands, has the ultimate legal responsibility to see that the equipment and the required reports are in compliance with the safety regulations and standards. The operator cannot avoid this legal responsibility by assigning the job or the responsibility to an employee. Thus, the negligence of the designated employee, in this case, the decedent Mr. Beagle, in failing to report defects in the braking system is attributed to the operator. In my *de novo* review I agree with the inspector's evaluation of the operator's negligence in all four violations as moderate.

Taking into consideration all the statutory criteria set forth in section 110(i) of the Act I find the following civil penalties appropriate for the violations charged:

CFR Section Violated

56.14101(a)(1)	\$3,000.00
56.14101(a)(2)	1,300.00
56.14101(a)(3)	100.00
56.14100	200.00

ORDER

Accordingly, Citation Nos. 7921013 and 7921014 including the S&S findings are **AFFIRMED** AND Citations Nos. 7921015 and 7921016 are **MODIFIED** by deleting the S&S designation and as so modified are **AFFIRMED**.

It is further **ORDERED THAT RESPONDENT PAY** civil penalties of \$4,600.00 within
40
days of

the
date of
this
decisio
n. On
receipt
of
payme
nt, this
case is
dismiss
ed.

August F. Cetti
Administrative Law Judge

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