

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 22, 2014

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

v.

FOUR STAR RESOURCES, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2012-772
A.C. No. 15-18889-282185-01

Mine: Harlan Strip No. 1

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq. U.S. Department of Labor, Office of the Solicitor,
Nashville, TN, for Petitioner

James F. Bowman, Midway, WV, for Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Respondent was issued a single citation for an alleged violation 30 C.F.R. § 77.1607, failure to maintain control of a vehicle.¹ The Secretary proposed a penalty of \$52,500.00. A hearing was held in Kingsport, Tennessee on March 19, 2014. The parties submitted post hearing briefs which were considered in rendering this decision.

For the reasons set forth below, I find the Respondent violated the mandatory standard and impose a penalty of \$52,500.00.

The parties stipulated to the following facts relative to this proceeding: 1) Respondent is subject to the Federal Mine Safety and Health Act of 1977 (the "Act") and to the jurisdiction of the Federal Mine Safety and Health Review Commission; 2) The Administrative Law Judge has authority to hear and decide the case; 3) Respondent has an effect upon commerce within the meaning of the Act; 4) Respondent is the operator of Panther Harlan Strip No. 1 Mine; 5) The violation in this docket is complete, authentic and admissible; 6) The inspector's notes for the violation are complete, authentic and admissible; 7) Respondent mined 190,056 tons of

¹ Docket KENT 2013-116 was settled prior to hearing and a Decision Approving Settlement was issued by me on March 27, 2014.

bituminous coal in 2011 at Panther Harlan Strip No. 1; 8) The Secretary proposed an assessment of \$52,500 for Citation Number 8349347 in Docket KENT 2012-772; 9) The violation was properly served on Respondent by a duly authorized representative of the Secretary on the date stated therein; 10) The penalty proposed will not affect Respondent's ability to remain in business; and, 11) Respondent abated the citation in a timely manner and in good faith. JE-A.

Findings of Fact

On July 25, 2011 at approximately 11:30 p.m., a Caterpillar 777 dump truck ran off the haul road down an embankment, traveled 84 feet, and came to rest against a tree with its front bumper buried into the ground. The right side of the truck was crushed, the frame was bent, the steering wheel was broken and the engine was damaged. Tr. 27, 31-33; photographs S-13, 14 and 15. The driver, Phillip Short, was uninjured in the accident. Tr. 15.

Shortly after the accident occurred, MSHA inspector Argus Brock received an anonymous phone call informing him of the events. He arrived on scene at 12:05 a.m. to conduct an accident investigation, during which he learned of the conditions surrounding the accident. He estimated that he arrived 35 minutes after the accident had occurred. It was drizzling when he arrived. Tr. 85. J.B. Frasure, the evening shift foreman, informed Brock that Short had told him that the road was slick and muddy. As he applied his brakes, the truck slid and then started to "wheel hop" (or bounce). He lost control of the truck as it slid sideways and went over the berm and down the hill. The truck was loaded with about 50 to 70 tons of rock at the time. Tr. 17. It had been raining on and off that day, making the road muddy and slick. As a consequence, Frasure said they had had to push a truck up the hill with a bull dozer that evening. He also informed Brock that he felt the road was too narrow for adequate berms for the haul trucks. He stated that he discussed this with the superintendent, Don Browning several times. Tr. 18; Ex. S-1 pg. 11. Frasure told Brock that he had put gravel down on the road which had helped "some." Ex. S-1 pg.10. Brock also interviewed miners on the scene who stated that they felt the road was too muddy, slick and narrow to run trucks. Ex. S-1 pg. 8, 12.

On the 26th, Brock met with Superintendent Don Browning at 8:30 a.m. Brock began taking measurements of the road, berms and the truck. He measured the grade of the road at 18 to 23% which Brock testified would call for additional safeguards such as higher berms, runaway ramps and travel berms. Tr. 22. He measured the width of the road as ranging from 16 to 24 feet wide and the width of the Caterpillar 777 truck at 15 feet 8 inches wide. According to Brock, the roadway should be twice the width of the largest equipment used on it. Tr. 23-24. The berm, which was made up of mostly loose material, measured 2 to 3 feet in height; a 40 foot stretch of which was 2 feet in height and included the site where the truck left the roadway. Tr. 21. The mid-axle height of the truck measured 4 feet 6 inches which should have been the height of the berm as well. Tr. 24-25. The haul road is unlit, the only illumination coming from the headlights of the vehicles traveling on the road. Tr. 114.

The Violation

As a result of his investigation, Brock issued a citation under 30 C.F.R. § 77.1607(b) which provides “[m]obile equipment operators shall have full control of the equipment while it is in motion.” The narrative portion of the violation reads:

The operator failed to maintain control of the Caterpillar 777A Rock Truck, SN-84A0899, while descending the mine haul roads #6 Hill. Due to the haul road being narrow, wet, muddy and slick, the driver lost control of the loaded truck resulting in traveling over an 85 foot embankment. The overall grade of this section of the haul road was approximately 21 per cent.

Ex. S-9.

Brock testified that he has 14 years of experience with MSHA, including 6 years as a surface specialist and 20 years as underground miner. Tr. 10-13. Brock stated that he has investigated many haul road accidents in the same geographic area. It has been his experience that these accidents result in fatalities or serious injuries due to the steep roads. Tr. 38-39. He marked the violation as significant and substantial (“S&S”) because it is highly likely that such an accident would result when management knowingly puts a driver in harm’s way under such adverse road conditions. Tr. 44. Management was aware of the slick muddy conditions on this steep and unlighted road with berms that were inadequate and the roadway too narrow to operate this type of truck based upon the obvious conditions and the admissions made by Frasure at the scene. For this reason, he felt there were no mitigating circumstances and marked the negligence as high. Tr. 41-44. The Secretary proposes a specially assessed penalty of \$52,500.00.

The operator admits to the violation.

Significant and Substantial

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); see also, *Buck Creek Coal Co., Inc.*, 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

Respondent contests the S&S designation and the gravity based upon the fact that the accident did occur and there were no severe injuries. Brock, therefore, should have assessed the accident as unlikely to result in serious injuries. As the Secretary correctly states “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011). Likewise, that a fatal injury did not occur here does not preclude a finding of S&S or a gravity of likely to be fatal. They also assert that the berms were adequate and the road was not too narrow for safe operation of the rock truck and did not pose a hazard.

Superintendent Don Browning, Respondent’s sole witness, testified that the roadway was not too narrow and that they stopped running equipment on the road from 12:30 p.m. until 4:30 p.m. while it was raining. Tr. 28. He informed Frasure, the night foreman, to wait until the rain had stopped and they had dried the road before running equipment again. He estimated this to be at midnight since it was raining again at 6 p.m. when he left the mine, and it had rained “quite a while” requiring some time to dry out the road. Tr. 108. He stated that Frasure put gravel on the road but acknowledged that “those rock trucks, a loaded rock truck in that condition, once they run up and down that hill a couple times the gravel is going to mash out of site.” Tr. 100, 109. Browning stated that the width of the haul road was the same as it had always been and that MSHA had never cited it before. Tr. 97-98, 102. He stated that they had followed the appropriate procedures to dry the road by cutting the mud off the road and pushing it to the side. He stated that this would make the road narrower by a couple of feet. Tr. 98, 110. However, when the road dried out, they would grade the road, dragging the material back across the road and making the road wider again. Tr. 101. He believed the road was approximately 16 feet wide where the accident occurred. Tr. 101. Browning denied having ever spoken to Frasure about the width of the road being an issue. Tr. 103. He also stated that the berms were sufficiently high but not wide enough at the base. Tr. 110. He believed the cause of the accident was the driver losing control of his truck because the road was not sufficiently dry, causing it to slide and bounce. Tr. 105-06. Browning acknowledged that a truck had to be pushed up the road during the night shift as Frasure had told Brock. Tr. 121.

I find that Browning’s testimony does not support the Respondent’s argument that the violation was not S&S.

When Brock questioned Browning on July 26th as to whether he thought the road was too narrow to establish adequate berms, Browning responded that it was. Ex. S-2 pg. 8-9. His admission to Brock was recorded by Brock at the time the statement was made. It is consistent with Frasure's statement that the haul road was too narrow and that he had discussed it with Browning on several occasions. I find Browning's denial at trial that he had such a conversation with Frasure is self-serving and not credible. Ex. S-1 pg. 11. It is also indicative of the fact that Browning was well aware of the hazards posed by running trucks on a narrow road with inadequate berms. Brock pointed out in Exhibit S-10, a photograph of the haul road, it was apparent that as the truck was sliding down the road, it was running berm to berm; it took up the entire width of the road. Tr. 29-30. While Browning testified that the tracks on one side were from another vehicle, Brock measured the road at 16 to 18 feet wide where the accident occurred while the truck measured 15 ½ feet wide, confirming Brock's observations. Tr. 21, 101. Browning also admitted that the roadway where the truck ran over the berms was about 16 feet wide. Tr. 101. As Brock testified, it should have been twice the width of the truck. Tr. 23-24.

Browning testified that the road has always been this same width. However, as Brock explained, this road had never been used by these significantly larger 777 rock trucks. Tr. 60. Browning confirmed that it had only been used to haul rock trucks for about two weeks at the time of this accident. Tr. 108-09. Regardless of whether MSHA had been aware that large trucks were using this road and had not issued a citation, it is readily apparent that the roadway was only inches wider than the rock truck and was too narrow. Both Browning and Frasure are experienced in mining and were well aware of the hazards. That other trucks may have used the road without incident, as Browning claimed, is also of no import. *See Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (operator's assertions that it had no history of accidents and that equipment had been driven for many months in cited condition is not dispositive of S&S determination).

Browning went on to explain that when the wet material is removed from the road and put to the side, it could narrow the roadway by as much as 2 feet. When the road is dried and the material is spread back across, it is widened again. Tr. 100, 110. Even assuming this were true, Browning testified that by the time the trucks started running again that night, the road had been dried and the gravel brought across the road, which would mean it was at its widest point when the accident occurred. Tr. 101. Nothing had been altered at the scene from that time until Brock took his measurements and photographs.

With respect to the height of the berms, Browning testified that the berms were adequate in height but were too narrow at the base. Tr. 110. Brock measured the berms at 24 to 36 inches high with a span of some 40 feet where it was only 24 inches. This being where the truck went off the road. Tr. 21. The mid-axle height of the dump truck was measured at 54" which should have been the height of the berms, not taking into account the 18-23 per cent grade which would require higher berms or runaway ramps. Tr. 22-24. Browning confirmed that the citation was correctly written and that it was highly likely to result in an injury and that the injury could be fatal. Tr. 113.

Brock testified that in his opinion, the violation is S&S based upon the narrowness of the road coupled with the inadequate berms, the steep grade and the adverse weather conditions. It has been his experience having investigated haul road accidents in this geographic area that they are highly likely to result in a fatality. Tr. 38-39. In many instances, when an operator loses control of a vehicle, especially one as large as the instant one, the driver will jump from the truck resulting in death. A truck could also very easily flip over or run into a tree, as this one did, causing severe injuries or death from traumatic impact or impalement. Tr. 31-32. Short was extremely fortunate in not having been impaled by the tree that landed just inches from the driver's window. Ex. S-15.

I find Brock's designation of this violation as S&S to be fully supported by the evidence. Browning and Frasure were well aware of the weather and road conditions throughout the day and evening. Putting the driver behind the wheel under these conditions in which maintaining control of the truck was all but impossible was highly likely to result in an accident in which injuries would be highly likely to be very serious or fatal.

Negligence

Negligence is conduct which falls below the standard of care established under the Mine Act. Under the Act, an operator is held to a high standard of care and is required to be on alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 100(d). High Negligence is defined as when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." 30 C.F.R. § 100.3 Table X.

Four Star contests the negligence, alleging that the operator took all normal precautions in making the road safe for travel which should be considered in mitigation of high negligence. It contends that the trucks were laid up while it was raining. Then, the road was graded and gravel was put down which is the normal procedure for compensating for adverse weather conditions.

Frasure was told to park the trucks and dry the road before running them again on the 25th. It had been raining on and off all day and continued to rain through the evening. Tr. 96, 107-08. It was still raining and foggy when Brock arrived at the mine at 12:05 a.m., about 30 minutes after the accident occurred. Tr. 16. Despite the weather conditions, Frasure elected to run the rock trucks. Although he put some gravel on the road, he told Brock that it had only helped "some." Ex. S-1. The ineffectiveness of the gravel was obvious to Frasure as he told Brock that a truck had to be pushed up the hill that evening due to the slick roads. Tr. 18; Ex. S-6. Browning acknowledged that pushing a truck up the hill was unsafe practice. He said, "if it's so slick you have to push them up the hill, it's too slick to haul down the hill." Tr. 121; Ex. S-2. Browning added that gravel is only effective for a short period of time in providing traction. Tr. 109. Based upon their experience as miners and foremen, Browning and Frasure knew the meager attempts made in putting some gravel on the road would not prevent an accident under these circumstances. I find no mitigation.

Clearly, the weather, the steep grade and narrowness of the road, and the lack of adequate berms presented an extremely hazardous situation. Both Browning and Frasure were well aware of the hazards and, yet, instead of making the prudent decision not to run the trucks that night, they put the life of a miner in serious jeopardy. I find high negligence is appropriate.

Gravity

Gravity is an evaluation of the seriousness of the violation. It is the likelihood of the occurrence the standard seeks to prevent and the severity of the illness or injury and number of persons potentially affected by the event should it occur. 30 C.F.R. § 100.3(e). It is the effect of the hazard if it occurs that determines the gravity of a violation rather than the likelihood of serious injury which is the focus of whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541 (Sep. 1996).

I find the effect of the hazard, the losing control of a rock truck on a steep haul road under these treacherous conditions, is very likely to result in the death of the truck driver. I find the gravity to be extremely serious.

PENALTY

The Commission has recently reiterated that Section 110(i) of the Mine Act delegates to the Commission and its judges the “authority to assess all civil penalties provided in the Act.” 30 C.F.R. § 820(i). *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760 (Aug. 2012). The Act delegates the duty of proposing penalties de novo to the Commission ALJ and requires that the following six statutory criteria be considered: 1) the history of violations, 2) the size of the operator, 3) the negligence of the operator, 4) the gravity of the violation, 5) the ability of the operator to continue in business and, 6) good faith in attempting to achieve rapid compliance after notification of the violation. Not all criterions need be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495 (Sept. 1997). It is appropriate for the ALJ to give the magnitude of the gravity of a violation and negligence of the operator greater weight in imposing a substantial penalty. *Musser Engineering, Inc.*, 32 FMSHRC 1257 (Oct. 2010).

I have addressed the negligence and gravity of the violation above. The parties have stipulated to the size of the operator and that it abated the violation in good faith. They further stipulated that the proposed special assessment will not affect the operator’s ability to continue in business. The Secretary has provided that the operator does not have any previous violations of 30 C.F.R. § 77.1607(b).

Based upon the high negligence and the very serious gravity of this violation, which demonstrated a complete disregard for the safety of a miner by running production in such hazardous conditions, I find the special assessment proposed by the Secretary appropriate.

ORDER

Four Star Resources, LLC is hereby ORDERED to pay a total penalty of \$52,500.00 within 30 (thirty) days of this decision.²



Priscilla M. Rae
Administrative Law Judge

Distribution:

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² 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.