

CCASE:  
SOL (MSHA) V. STANDARD BUILDING MATERIAL  
DDATE:  
19790628  
TTEXT:

~702

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. DENV 79-60-PM  
A.C. No. 21-00620-05001

v.

Sand & Gravel Mine

STANDARD BUILDING MATERIAL CO.,  
RESPONDENT

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor,  
U.S. Department of Labor, for Petitioner  
Roger N. Knutson, Esq., Grannis & Grannis,  
St. Paul, Minnesota, for Respondent

Before: Judge Moore

The above case came on for hearing in Minneapolis, Minnesota, on June 7, 1979. The evidence shows that while the company was substantial, employing 45 to 80 workers, only eight or nine usually worked in the mining part of the company's operation. The inspector testified that all of the five citations involved in this case were abated promptly and in good faith. No prior history of violations of the 1977 Act was introduced and I will assume in the absence of evidence to the contrary that no penalty assessed by me would affect Respondent's ability to continue in business.

Citation No. 289403 charges that a berm was not provided on the outer edge of the elevated sand pile where the front-end loader was moving materials away from the discharge conveyor. Although it was not mentioned in the testimony, there is a notation on the bottom of Government Exhibit No. 1 (the citation) stating "--was working to put berms." I cannot read the first word of the notation, but the testimony indicates that the sand and gravel operation had just been working for 2-1/2 weeks after an all-winter shut down and that the front-end loader had just been sent on to the sand pile to move the higher portions of the sand away from the discharge conveyor mechanism. He was moving sand off of the edge of the pile and building berms, but at the time the inspector observed the operation there were areas where there were no berms and where the front-end loader was backing.

~703

The evidence adduced did not present a clear picture of the operation being conducted. I am satisfied that there were no berms in a particular hazardous area at the time the inspector issued the citation, but what was not made clear was exactly when, in the type of operation being conducted, berms should be constructed. There was testimony that there were berms in some areas and worn down or weathered berms in others and that berms are constantly changing. There was uncontradicted evidence that the berms had to be made of the same material as the stockpile in order to avoid contaminating the pile and obviously you would have to construct some kind of flat area before you can put berms around it. It may be that the sequence followed by the front-end loader operator was erroneous and that he should have spent more of his effort in building berms rather than flattening out any area to put the berms around. But I am not sufficiently convinced of that to find that as a fact. I therefore find that MSHA has failed to carry its burden of proof with respect to this violation and the citation is accordingly VACATED.(FOOTNOTE 1)

Citation No. 289404 alleges a guard was not provided on the drive shaft on the pan feeder. Inasmuch as the standard 30 CFR 56.14-1 only requires a guard where a drive shaft of this type might cause injury, the inspector stated that the existence of a proper stop cord would have so minimized the possibility of injury as to eliminate the violation. This same inspector had previously approved the emergency stop cord at this particular location. The inspector was perfectly candid about the fact that he simply changed his mind about the safety of the arrangement. At the time of the hearing, he did not think the stop cord was close enough to the area where the miner might get caught in the drive shaft. In my opinion, an inspector has a right to change his mind concerning a hazardous situation. But, in the absence of imminent danger, I do not think MSHA has a right to issue a citation for which a penalty must be sought without first informing the respondent or operator that there has been a change of opinion. This is not a matter of estoppel. The Government is not estopped from changing its mind and forcing a new policy, but issuing a citation

~704

and seeking a penalty for a condition which the Government has caused by its advice approaches harassment and that is not what the Act was designed to do. The citation is VACATED.

Citation No. 289405 alleges that the compressed gas cylinders were standing in the shop area unsecured in violation of 30 CFR 56.16-5. There is no question but what the inspector found the acetylene and oxygen cylinders standing unsecured in an area where they were normally stored and where securing devices were readily available. I can readily see how it was a clear violation in his eyes. The fact of the matter, however, is Mr. Leaf, the watch plant operator foreman, was responsible for securing oxygen and acetylene tanks when they were delivered by a private seller. The tanks were delivered to the appropriate place by the seller and in ordinary circumstances Mr. Leaf would have secured them immediately. In this case, however, Mr. Leaf was a part of the inspection team at the time of the delivery and was with the inspector. As stated before, there are only a few miners in this operation and as soon as the inspection party reached the area of the unsecured cylinders, they were secured by Mr. Leaf. The testimony did not disclose whether or not the inspector was informed of the circumstances, but in my opinion, if he had known all the facts and still issued the citation, he would have been acting in an arbitrary manner. The citation is VACATED.

Citation No. 289406 alleges "the handrailing on the stairway to the grizzly does not project 3 feet above the landing for safe access." The standard alleged to have been violated, 30 CFR 56.11-6, states: Mandatory. Fixed ladders shall project at least 3 feet above landings, or substantial handholds shall be provided above the landings." Inasmuch as the standard requires that the ladder itself project above the landing or that handholds be provided, the citation which charges that the handrailing did not project 3 feet above the landing does not allege a violation of the standard. I think the standard was intended for vertical ladders where, unless they project above the landing surface, it is very difficult to get off at the landing surface, but it is even more difficult to get back on the ladder going down. The ladder in this case was more like a stairway and it did have a handrailing which could be held on to when the climber was on the top rung of the steps. From the best description I could get after lengthy questions by both the attorneys and me, I conclude that a violation did not exist when the citation was issued. The citation is accordingly VACATED.

Citation No. 289407 alleges that haul truck No. 208 was backing under the bins and was not provided with an audible reverse signal alarm. The inspector noticed the truck backing into the area numerous times while he was at the mine and stated there was

~705

no helper guiding the driver and that there was no audible backup alarm. It may well have been, as suggested by Respondent, that the backup alarm went out immediately before the inspection. And I accept the testimony that the drivers were required and instructed to report malfunctions such as a nonworking backup alarm. But when the inspector observed that the backup alarm was not working and issued a citation, it was somebody's duty to inquire as to how long that backup alarm had been malfunctioning. In my opinion, it was the duty of the operator to obtain that evidence if he intended to rely on the fact that the alarm had just broken prior to the inspection. The Respondent did establish that it could have been that the malfunction occurred just prior to the inspection, but he had no positive evidence to offer that it, in fact, did occur at that time. In the absence of such evidence, I think the inspector was perfectly justified in issuing the citation. Also, in the absence of such evidence, I think I can assume negligence because unless it occurred just prior to the inspection, Respondent should have known of the condition of the backup alarm. The gravity is moderate and I consider that a penalty of \$120 is appropriate.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, within 30 days of the entry of this decision, a civil penalty in the amount of \$120.

Charles C. Moore, Jr.  
Administrative Law Judge

AAAAAAAAAAAAAAAAAAAAAAAAAAAA

FOOTNOTES START HERE

~FOOTNOTE\_ONE

1 In approximately 7 years, of hearing cases under both the 1969 and 1977 Mine Acts, I have never heard a case involving the lack of berms at a surface coal mine or in the surface area of any underground coal mine even though the surface coal mine standard is identical to the metal/nonmetal standard. And in all of the cases where modification of the berm standard was sought by a coal mine operator, modification was granted so that berms were not required as long as certain conditions were met. These modifications were all with the consent of MESA, the predecessor of MSHA. With one exception, however, every noncoal mine case that I have heard has involved an alleged violation of the berm standard.