

CCASE:  
SOL (MSHA) V. BRUBAKER-MANN  
DDATE:  
19800129  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

PETITIONER

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-193-M

ASSESSMENT CONTROL NO. 04-00030-05001

v.

BRUBAKER-MANN, INCORPORATED,

RESPONDENT

MINE NAME: BRUBAKER-MANN  
QUARRY AND MILL

DECISION

APPEARANCES: Linda R. Bytof, Esq. and Marshall P. Salzman, Esq.,  
Office of Daniel W. Teehan, Regional Solicitor,  
United States Department of Labor, San Francisco,  
California, for the Petitioner Jennifer Mann and  
William J. Mann, of Barstow, California, appearing  
pro se, for Respondent

Before: Judge John J. Morris

Respondent is charged with failing to guard the edge of its  
elevated access road, with failing to barricade a walkway, and  
with failing to require the use of a safety belt at its grizzly  
dump. Petitioner contends these conditions violate standards  
promulgated under the authority of the Federal Mine Safety and  
Health Amendments Act of 1977, (30 U.S.C. 801 et seq).

ISSUES

The issues are whether the violations occurred; whether the  
fines adversely affect respondent; whether "instant fines" are  
legally permissible and finally, whether the California  
Occupational Safety and Health Administration (CAL-OSHA)  
pre-empts the Federal Mine Safety and Health Administration  
(MSHA).

CITATION 376433

This citation alleges a violation of 30 CFR 56.9-22.(FOOTNOTE 1)

The uncontroverted evidence on this issue establishes the following facts.

1. Respondent's front end loaders use an elevated access road, 25 to 30 feet wide, to reach a diesel pump (Tr 14-16, R1).
2. There is a 25 foot drop off within 6 feet of the pump (Tr 16-19).
3. The roadway lacks berms or guards on its outer edge (Tr 15).
4. A berm or guard consists of material such as rocks or dirt that could restrain a vehicle from overturning or from rolling off of an elevated roadway (Tr 15).

This citation should be affirmed.

Respondent asserts it abated the condition and that no accidents have occurred on its road. Further, respondent contends the compliance officer admitted being unfamiliar with the safety devices on the truck.

I reject these arguments.

Abatement of a violation is an element to be considered in assessing a penalty under the Act,(FOOTNOTE 2) but subsequent abatement cannot excuse prior noncompliance.

The mere fact that no accidents have occurred is not dispositive of whether respondent violated the standard. The purpose of a safety regulation is to prevent the first accident, Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864 (10th Cir., 1975).

Respondent's argument concerning safety devices on the vehicles is likewise rejected. Guardrails would be a safety feature completely apart from any safety devices on the truck.

CITATION 346434

This citation alleges a violation of 30 CFR 56.11.2.(FOOTNOTE 3)

The evidence is conflicting and I find the following facts on this citation.

5. Respondent's bulk tank is constructed from an old railroad car; it sits 35 feet high (Tr 22-23, R-2).

6. There was no reason for anyone to be on the top of the bulk tank; the operator diverts materials from a guarded railed platform (Tr 54-55).

7. Respondent's president had never seen an employee on top of the tank (Tr 56).

This citation should be vacated. There is sufficient evidence in petitioner's case to infer that workers used the walkway (Tr 27-28), but this directly conflicts with the testimony of the quarry operator. Inasmuch as the operator should be more familiar with his company's work activities, I find his testimony more credible than that of the inspector.

Petitioner's post trial brief argues those facts most favorable to his position. However, as indicated, I have rejected those facts for the reasons stated.

CITATION 376435

This citation alleges a violation of 29 CFR 56.15-5.(FOOTNOTE 4)

The evidence is uncontroverted.

8. A front end loader moves limestone to the grizzly dump (Tr 30, R3, R4).

9. A set of grizzlies are rails 7 to 8 feet long and set 13 1/4 inches apart. The grizzlies are 4 to 5 feet above a conveyor which moves material (Tr 30-31).

10. A worker, without a safety belt and life lines, pushes the rock through the grizzly dump opening. If the pieces are too large, the worker breaks them up with a sledge hammer (Tr 30).

11. If a person fell through the grizzlies, he would fall onto a conveyor moving toward a crusher (Tr 31).

This citation should be vacated. The gravamen of this citation revolves on the single issue of whether a worker could fall through the 13 1/4 inch grizzly opening.

The evidence is in conclusory form. Petitioner's evidence show that a normal size worker could fall through this space (Tr 31, 71); however, respondent shows that the crusher operator could not fall through the opening (Tr 63). The evidence is at best evenly balanced. Accordingly, the petitioner has not sustained his burden of proof.

CIVIL PENALTIES

Respondent contends that harassment, fines, paperwork, and the like, will make it so costly to produce its product that it can no longer remain in business.(FOOTNOTE 5) Further, respondent contends "instant fines" are unjust.

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I reject these arguments. Respondent presented no evidence in support of its "harassment" argument. The inspection appears to be of a routine nature to which members of the regulated industry are subjected.

In addition, the imposition of civil penalties in furtherance of the congressional policies is generally constitutional. *Frank Irey, Jr., Inc. v. OSHRC* 519 F.2d 1200 Cert granted-affirmed 97 S. Ct. 1261, 430 U.S.C. 442.

Respondent alleges the imposition of "instant fines" is unjust. Respondent's views overlook the pertinent provisions of the Federal Mine Safety and Health Amendments Act of 1977. Under Section 110(i) (FOOTNOTE 6) the Commission has the authority to assess "all civil penalties" provided in the Act. The "instant fines" referred to by the respondent are, in law, merely proposals of MSHA.

#### CAL-OSHA JURISDICTION

Respondent's contention that the California Occupational Safety and Health Act pre-empts the Mine Safety and Health Act lacks merit.

CAL-OSHA derives its authority from the Federal Occupational Safety and Health Act (29 U.S.C. 651 et seq). That legislation applies generally to employers engaged in a business affecting commerce. 29 U.S.C. 652(5).

The Federal Mine Safety and Health Act derives its authority from the Federal Mine Safety and Health Amendments Act of 1977. 30 U.S.C. 801 et seq. The latter Act defines in part a "coal or other mine" as an area of land from which minerals are extracted. 30 U.S.C. 802(h)(1).

Inasmuch as the Federal Mine Safety Act is more specific as it relates to miners, it is applicable over the more general statute.

FINDINGS OF FACT

I find the facts as outlined in paragraphs 1 through 11 of this decision.

CONCLUSIONS OF LAW

1. Respondent violated 30 CFR 56.9-22 and Citation 376433 should be affirmed (Facts 1, 2, 3, 4).
2. Petitioner failed to prove a violation of 30 CFR 56.11-2 and Citation 346434 should be vacated (Facts 5, 6, 7).
3. Complainant failed to prove a violation of 30 CFR 56.15-5 and Citation 376435 should be vacated (Facts 8, 9, 10, 11).

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. Citation 376433 and the proposed penalty of \$84 are affirmed.
2. Citation 346434 and all penalties therefor are vacated.
3. Citation 346435 and all penalties therefor are vacated.

John J. Morris, Judge

~FOOTNOTE 1

The standard provides as follows:  
56.9-22 Berms or guards shall be provided on the outer bank of elevated roadways.

~FOOTNOTE 2

Section 110(i), 30 U.S.C. 820(i).

~FOOTNOTE 3

The standard provides as follows:  
56.11-2 Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

~FOOTNOTE 4

This standard provides as follows:  
56.15-5 Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

~FOOTNOTE 5

The proposed penalty for the citation not vacated is \$84.

~FOOTNOTE 6

30 U.S.C. 820(i)