

CCASE:  
SOL (MSHA) V. MEDUSA CEMENT  
DDATE:  
19800515  
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. SE 79-75 A/O No. 09-00053-05003 Clinchfield Mine & Mill
v.	
MEDUSA CEMENT COMPANY, RESPONDENT	

DECISION

Appearances: Natalie Nelson, Attorney, U.S. Department of Labor,  
Atlanta, Georgia, for the petitioner Tom W. Daniel,  
Esquire, Perry, Georgia, for the respondent

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent on August 27, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. 56.9-2. Respondent filed a timely answer contesting the citation, and a hearing was held in Macon, Georgia, on February 26, 1980. Posthearing briefs were filed by the parties, and the arguments presented therein have been considered by me in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801, et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

ISSUES

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed,

~1106

and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of where appropriate in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

#### DISCUSSION

The section 104(a) Citation, No. 096981, April 3, 1979, cites a violation of 30 C.F.R. 56.9-2, and states as follows: "On the D-562 road grader, the right steering control arm block was badly worn and needed to be replaced. There was too much play for safe operation."

Mandatory safety standard 30 C.F.R. 56.9-2, provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

#### Stipulations

The parties stipulated to the following (Tr. 5-7):

1. The size of the respondent company and the mining operation at the Clinchfield Mine & Mill stated in terms of annual man hours. The mine employs approximately 200 people and the respondent company employs approximately 1,500 and operates four cement plants, including the operation in question.

2. Payment of the penalty assessed by MSHA will not adversely affect respondent's ability to remain in business.

Testimony adduced by the parties.

#### Petitioner

MSHA inspector Steve Manis testified that he conducted an inspection at the mine in question April 3 through 5, 1979. Upon inspection of the road grader in question, he observed that on the righthand side, the steering arm block connected to the drag length was completely worn out.

~1107

He confirmed his observations by instructing the operator to move the steering wheel and by hand-inspecting the steering drag length, he observed that the bearings around the pins that fit into the steering block mechanism were worn, and that the bushings in the steering block were completely worn out. As an experienced grader operator, it was his opinion that if the pin had broken or fallen out, a loss of steering on the right-hand side would occur, the wheel would become detached from the drag length bar and the wheel would go in either direction.

The inspector indicated that the grader is primarily used to keep the main haulage roads smooth and free of rocks and to grade the roads and pit area, and it travels across a railroad crossing and a highway when it travels to the plant area. The principal hazard which would result in the event the steering mechanism failed would be the inability of the operator to stay out of the way of trucks, cars, and other equipment, and the operator of the grader or any other vehicle would be exposed to such a hazard. In addition, loss of steering around an embankment or near the high walls would also expose the grader to the possibility of going over such an area, and various injuries could result from any faulty steering (Tr. 11-19).

Inspector Manis testified that when he called the condition of the grader to the attention of mine management, the grader was immediately taken to the shop for inspection and repairs. Later that day he was informed that repairs had been made and he went to the shop and confirmed this fact. He observed the old parts, and confirmed that new parts had been installed, and upon hand-testing the drag length found no movement. Upon observation of the old parts, he saw that they were badly worn, that the pin was almost completely worn out, and that the bushings and bearings around the pin were completely worn away. After noting his observations, he issued the citation the next day, April 4, 1979, citing a violation of section 56.9-2, which requires that all equipment defects be corrected before the equipment is put into operation for that day or for that shift (Tr. 20-23).

Inspector Manis indicated that the condition cited was visible upon inspection, and that it should have been detected during the daily inspection or during a regularly scheduled maintenance or servicing period. The wear on the steering mechanism was not an "overnight" problem and it may have taken a month or two for the condition to develop. He discussed the citation with mine management during a conference and no questions were raised (Tr. 24).

On cross-examination, Inspector Manis identified a copy of his citation, and his "inspector's statement" (Exhibit R-1). In explanation of his conclusion that "there was too much play for safe operation" of the steering control arm block, he indicated that it was so badly worn that under certain conditions it could fall off. In his opinion the driver could not safely operate the vehicle in the condition it was in, particularly when he has to steer around other equipment. The roads where the grader operates is wide enough for two vehicles to pass, but he has

never

~1108

observed a road grader at the mine getting out of the way of a truck (Tr. 24-31). He explained the operation of the steering mechanism and stated that steering loss would not occur to the left wheel in the event the right-hand block fell off. While the left wheel would still turn left or right, steering the grader would be difficult because of the loss of control over the right wheel. He has never driven a grader with a broken block, and could not state with any certainty whether it could be guided by the use of only the left wheel. Although he is not a mechanic, he indicated knowledge as to the mechanics of the steering mechanism on the grader and how it operates (Tr. 31-36). He believed that loss of steering would result on the right wheel if the block in question fell out, and that the grader would be unable to maneuver quickly in an emergency. The grader was on the main haul road coming towards the pit when he observed it, and it was approximately one mile from the shop. He permitted the grader to be driven to the shop, but had he believed the condition were worse, he would have issued an imminent danger withdrawal order, but that was not the case (Tr. 37-40).

In response to questions from the bench, Inspector Manis stated that at the time the citation issued, section 56.9-1, requiring inspection of equipment each shift and the reporting of any defects found was an advisory standard and not mandatory. He made no check of any inspection books and could not recall checking any records regarding the grader. He believed the condition of the loose steering mechanism could have resulted in an injury if it was left unattended. The operator exercised good faith in rapidly abating the citation and immediately took the grader to the shop. He could think of no grader equipment defects which would not affect safety. The travel speed of the grader depends on whether it is actually grading roads or moving from location to location. When the blade is down, it moves at slow speed, and the machine in question operates only on mine property and not on public roads. The grader in question is an older grader and is not required to be equipped with roll-over protection or seat belts. The grader was in operation at the time he stopped it for an inspection (Tr. 46-54).

#### Respondent's testimony and evidence

Shep Bass, motor grader operator, testified that he was operating the grader smoothing off the dump when Inspector Manis stopped him to inspect the machine. He did not have any steering or operating problems with the grader that day. Although he has operated the grader on prior occasions, Mr. Bass did not operate the grader the day before the inspection took place, and he is required to fill out an inspection form at the end of every shift regarding the safety condition of the grader (Tr. 55-57).

On cross-examination, Mr. Bass testified that he inspects the grader when he greases the steering block mechanism about once a week. The last time he greased the grader was a week prior to the citation. At that time, he noticed that the steering link was somewhat worn (Tr. 58).

~1109

In response to bench questions, Mr. Bass testified that the steering block mechanism is readily observable. If the steering arm falls off, there are wheel tilts to control the grader. As an operator, he is not that concerned about worn steering because the grader cannot operate over 15 miles per hour, and it is never operated on hills, but only on the haul road and dump. He operates the grader alone and there are no helpers around. Although there is no pedestrian traffic, there are truck drivers in the area (Tr. 58-61).

Virgil Jones, diesel mechanic, testified that he replaced the defective steering mechanism block on the day in question. As a demonstration, Mr. Jones identified a new block, the pin, and the bushing, and he explained how they are assembled and operate. He indicated that the block which was replaced had part of the bearing race still intact, but that the needle bearings were worn. While installing a new steering mechanism block, he observed that the top pin and the bushings were in good condition. The bushings were partially off of the bearing race. Although some of the needle bearings were missing, the needle bearings that were intact were worn. It is his opinion that if the steering block mechanism fell off or disintegrated, he could safely operate the grader because of its low rate of speed and tilt controls. If the steering block mechanism becomes loose, the operator can use the tilt controls to regulate the inner and outer plate of the wheel. An operator can use the tilt controls to throw the wheel to the left and take pressure off of the right wheel. In short, the two controls act as a dummy guide, and the grader can operate on one wheel. Approximately a week before the citation issued, he performed maintenance on the left wheel and observed the worn block on the right side, and since he had ordered parts they were readily available to replace the worn block. However, he did not believe it was worn to the point where it created a safety hazard or was about to fall off or break apart, and in his view, the grader could operate in a safe condition (Tr. 63-69).

In response to bench questions, Mr. Jones testified that he was with Inspector Manis when he conducted the equipment inspection, and that Mr. Manis told him that he had a "sloppy bushing." The grader was then taken to the shop, and Mr. Jones repaired it. After making the necessary repairs, he observed that the pin had very little wear and tear on it. The pin would have to be at least one-eighth of an inch before it was in danger of breaking. He indicated that the grader could operate with one wheel missing by means of the tilt controls, and he would have no reservations in operating the grader in the condition it was in at the time it was cited (Tr. 70-74).

John Fowler, quarry supervisor, testified that he was present when the motor grader was inspected. Inspector Manis told him that he had a "sloppy bushing," and parts were available to repair the bushing which did have "some play in it." He identified photographs of the grader in question, as well as the bushing (Exhibits R-2 through R-6) (Tr. 75-81). He stated that company policy requires that defective operating equipment be

reported to a supervisor immediately, and equipment operator's are required to fill out a daily operator's report, Exhibit R-7, and to submit it at the end of every shift. They are also required to shut the machine down (Tr. 81-84).



~1110

On cross-examination, Mr. Fowler testified that the equipment report (Exhibit R-7), has been in use for the past 12 years, and maintenance files are maintained on all equipment. Employees are required to indicate on the report that a part needs repair (Tr. 84-85).

In response to bench questions, Mr. Fowler testified that respondent has an equipment checkup system. Although there is no specific steering box section, employees should note any steering defects on the report. Steering is one of those areas of normal operation and normal check. During his employment, there have been cases where motor grader operators do not fill out nor submit the required report to mine management (Tr. 85-87).

Richard P. Kistler, plant manager, expressed the opinion that the citation is improper because it is based on conjecture that the condition would lead to an unsafe act. There was some wear on the top bushing and assembly, but the bottom pin and bush assembly was tight and there was no danger of the parts falling apart. Although conceding there was some wear on the parts, he believed the operator could stop the motor grader instantly. The normal operating speed for the motor grader with the blade down is 3 to 5 miles per hour, and the normal speed for the grader with the blade up is 10 to 12 miles per hour. Company policy dictates that in the event an employee observes a worn steering condition, that employee must cease operating the motor grader, inform his supervisor, and correct it. Management, as well as all employees, are involved in an extensive safety program (Tr. 91-96). Mr. Kistler identified the photograph, Exhibit R-2, and indicated that the grader which was cited is the one depicted "on the right-hand side" (Tr. 101).

Billy Barrett, employed as an administrative assistant by the respondent, testified that he took the pictures identified as Exhibits R-2 through R-6, and that they were taken during the latter part of January, 1980. He identified Exhibit R-2 as the Cleveland motor grader which was cited, and indicated that the roll bar shown has been on the grader for six to seven years (Tr. 106).

Inspector Manis was called in rebuttal and stated that while the photograph (Exhibit R-2) is a grader, similar to the one he cited, he was unsure as to whether it is in fact the specific one which he cited (Tr. 113-115). He did recall that the pin he observed was badly worn, that it was loose between the pin and the block, and that there was no bushing between the pin and the block (Tr. 115-116). As for the "burnt" block area, he did recall that the pin may have had burned places on it (Tr. 119).

Virgil Jones was recalled, and identified Exhibit R-2 as a photograph of the grader cited, and he stated that the roll protection was installed during late 1974, that only one grader was at the mine, and that he has performed maintenance on it since 1972 (Tr. 121). He again identified the pin he removed and stated that the burned bottom portion resulted when he cut it out with a torch. He no longer had the bottom portion of the pin

which he cut out in April, 1979, because it was destroyed in the cutting process, but he explained how it fit into the block and sleeve (Tr. 123). He confirmed that the play was between the pin and the block (Tr. 124).

~1111

Arguments presented by the parties

Petitioner

In its posthearing brief, petitioner asserts that the testimony of inspector Manis establishes that the grader steering drag link pin bearings were completely worn and defective, and that in such a condition a loss of steering could occur on the right side. If this were to occur, the resulting loss of steering would cause the right wheel to turn abruptly, thereby exposing the grader operator to a hazard of being struck by an oncoming vehicle or cause him to strike a pedestrian. Further, petitioner argues that the inspector verified the loose defective steering mechanism by observation and by manually manipulating the worn part, and that once repairs were effected and new parts installed, the steering arm had no movement with the new parts in place.

Since the defect in question was in the steering mechanism, petitioner argues that it is obvious that such a defect could affect the safe operation of the grader as it might cause the operator to travel into the path of oncoming vehicles or pedestrians.

Respondent

Respondent argues that the worn condition of the steering control arm block in question was not such as to render the part defective and that both the grader operator and the mechanic were aware of the worn condition, did not believe it was worn badly enough to warrant replacement, and could have replaced it at any time since the part was in stock. Respondent takes the position that all machinery in use will wear and that the question of whether the degree of wear is such as to require the replacement of a part is a subjective judgment to be made not only by an inspector, but also by the grader operator and the mechanic. Respondent asserts that it was the collective judgment of the operator and mechanic that the wear to the part did not render it defective.

Assuming that the worn part in question can be considered to be defective, respondent argues that the resulting condition was not dangerous. In support of this conclusion, respondent argues that the use of the grader in question is confined to mine property and it is primarily used for dressing the roads and leveling some of the spoil piles. Even assuming that the alleged defect caused the particular bushing to disintegrate and fall off, respondent maintains that the grader could still be driven and the steering of the left front wheel would be sufficient to control its direction. Further, respondent argues that if the grader was in the process of grading, it could be stopped almost instantly by use of both the brakes and the braking power of the blade. Finally, respondent asserts that the mechanic testified that even though the bushing has nothing to do with the attachment of the wheel, the grader could even be operated and driven with one of the front wheels missing.

Findings and Conclusions

Respondent is charged with a violation of section 56.9-2, a rather broad and general standard which provides that "[E]quipment defects affecting safety shall be corrected before the equipment is used." In order to support a violation of this standard, MSHA must first establish by a preponderance of the evidence that the cited piece of equipment was somehow defective or contained a defective part. It next must establish that the asserted defect affected the safe operation of the equipment or exposed miners to a safety hazard.

In this case, the asserted defect is described by the inspector on the face of his citation as a "badly worn right steering control arm block" on a road grader used on the surface for maintaining the mine roads and pit areas. The inspector concluded that the "badly worn" part needed to be replaced because "there was too much play for safe operation." It seems obvious to me from the inspector's testimony in support of his citation that his principal concern was the fact that in his judgment the grader in question could not be safely operated with a worn steering mechanism. The inspector believed that the condition of the "worn" control arm in question was such as to present a hazard to the grader operator in that in the event of a steering failure, he would be unable to maneuver out of the way of oncoming traffic. He was also concerned over the fact that a loss of steering near an embankment would expose the operator to the risk of going over the embankment.

I have carefully reviewed and considered the testimony presented by the parties in support of their respective positions in this case, and I conclude and find that the respondent has the better part of the argument, both as to its interpretation of the application of the cited standard as well as the facts and evidence adduced through the testimony of the witnesses who testified in this proceeding. I conclude and find that MSHA has not established that the worn control arm in question was defective to the point where it presented a real safety hazard. In short, I believe MSHA's theory of the case seems to be that any wear and tear on a steering control arm should be corrected immediately so as to preclude further deterioration which may at some future time cause a problem. If I were to accept this theory of interpretation of the cited standard, the subjective judgments of an inspector would dictate ipso facto when a change-out is required on any piece of equipment. In order to prevail on this subjective interpretation of the standard, I believe that an inspector must first establish a nexus between the asserted defect and its affect on the safe operation of the equipment cited. I cannot accept the theory that any worn part in and of itself affects safety. If this is the intent of the standard, then I believe that MSHA should promulgate a precise standard that requires that all worn parts be replaced. On the evidence presented in this case, I can only conclude that MSHA has failed to establish by a preponderance of the evidence that the worn control arm bushing in question adversely affected the safe operation of the grader, and my reasons for this conclusion

follow.

Although Inspector Manis alluded to his past experience in operating equipment, he candidly admitted that he has never operated a grader with a broken bushing of the type in question and could not state with any degree of certainty whether the grader could be controlled by use of the left wheel only. Further, while he exhibited some degree of knowledge with respect to the mechanics of steering mechanisms, it is clear that he is not a qualified mechanic. Therefore, I believe that his conclusions with respect to the loss of steering in the event the loose and worn control arm in question failed completely is conjecture. This is not to say that he is not qualified to state his opinion in this regard. However, on the basis of the testimony presented by the respondent from the operator of the grader, and the experienced mechanic who serviced and operated the grader over a period of years, I conclude that the respondent has rebutted the conclusions by the inspector and has established that the extent of the worn part cited did not render the grader unsafe.

I find Mr. Jones' testimony regarding the steering mechanism of the grader to be credible and I accept his explanation that any loss of steering caused by a defective control arm would not adversely affect the control of the grader and cause it to expose an operator to a hazard of striking other vehicles or run over an embankment. There is absolutely no evidence that the grader was otherwise defective, that it had faulty brakes or was otherwise in such a condition as to render it unsafe to operate. Further, respondent has established to my satisfaction that the grader in question was equipped with roll-over protection at the time the citation issued, and I conclude that the inspector's theory in issuing the citation in the first place was an effort on his part to force the respondent to replace a worn part which in the final analysis was a "preventive maintenance" item. In short, I conclude that the inspector believed that any worn part is on its face defective and therefore should be replaced. The problem with this is that the standard as written does not require the replacement of worn parts per se.

In support of its case, petitioner cites a recent decision by Judge Merlin rendered from the bench on October 22, 1979, in MSHA v. Phelps Dodge Corporation where he affirmed a violation of section 55.9-2, on the basis of the testimony of two inspectors who found that loose lug nuts on a truck wheel could cause the wheel to come off and thus directly affect braking. While it is true that Judge Merlin found a violation of the cited standard, his decision was based on the particular facts of that case as supported by the credible testimony of two mine inspectors. However, Phelps Dodge involved a truck which had all of its wheel lugs loose, and that condition was shown to have directly affected the braking of the truck. The testimony presented in that case established that all of the wheel lugs were loose, and based on the inspectors testimony that should the wheel come off, proper braking might not occur. Judge Merlin concluded that this condition obviously rendered the truck unsafe to operate. Further, Judge Merlin was also influenced by the fact that respondent's own mechanical foreman conceded that loose wheel

lugs presented a serious hazard. In the instant case, I conclude that respondent's testimony and evidence satisfactorily rebuts the inspector's conclusions as to the unsafe condition of the grader in question.

~1114

Although it is not a matter of record in this case, the attention of the parties is invited to a recent article which appeared in the Mine Safety & Health Reporter, published by BNA, Vol. 1, No. 22, April 9, 1980, discussing a 197-page Bureau of Mines Study entitled "Analysis of Mobile Mining Equipment Pivot Pin Wear." While I am not particularly influenced by this article, I take note of the fact that it specifically alludes to the fact that the cited study apparently concludes that the wear of the large pins which hold pivot joints together on mobile surface-mining equipment is not a hazard to miners as had been suspected. The article also states the the Bureau of Mines has concluded that pivot pins "are not currently a suitable target for regulatory standards," and that the Bureau has concluded that "setting standards for the maximum allowable wear of pin systems is impractical because the amount of permissible wear for pins is affected by so many variables, including pin composition and operating temperatures."

In summary, on the basis of all of the evidence and testimony adduced in this proceeding, I cannot find or conclude that MSHA has established a case. Accordingly, the citation issued in this matter is VACATED, and this case is DISMISSED.

George A. Koutras  
Administrative Law Judge