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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. YORK 79-68-M A/O No. 19-00553-050031
v.	Weymouth Plant
MARSHFIELD SAND & GRAVEL, INC., RESPONDENT	

DECISION

Appearances: David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner, MSHA Charles T. Callahan, Esq., Hutchings, Kopeman and Callahan, Boston, Massachusetts, for Respondent, Marshfield Sand and Gravel, Inc.

ORDER TO PAY

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by MSHA against Marshfield Sand and Gravel, Inc. A hearing was held on May 29, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 3-4):

1. The operator is the owner and operator of the subject facility;

2. The operator and mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

3. I have jurisdiction of this case;

4. The inspector who issued the subject citations was a duly authorized representative of the Secretary;

5. True and correct copies of the subject citations were properly served upon the operator;

6. The alleged violations were abated in good faith;

7. History of prior violations is noncontributory since the Solicitor does not have available at this time a printout of the history of prior violations;

8. The operator is very small in size, employing five to twelve men, seasonally, at the subject facility.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 6-93). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 124). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 124-131).

BENCH DECISION

The bench decision is as follows:

This case is a petition for the assessment of two civil penalties. The first alleged violation is of section 56.11-1 of the mandatory standards which provides as follows: "Safe means of access shall be provided and maintained to all working places."

The second alleged violation is of section 56.14-35 of the mandatory standards which provides as follows: "Machinery shall not be lubricated while in motion where a hazard exists, unless equipped with extended fittings or cups."

Both alleged violations arise out of the same accident which occurred at the Weymouth plant of the Marshfield Sand and Gravel Company. Mr. David Colter was the safety director and safety supervisor of the Weymouth plant and of the Marshfield plant of the Marshfield Sand and Gravel Company. In this position he exercised supervision over everyone at both plants, including the foreman.

At the Weymouth plant, the Mine Safety and Health Administration had approved the use of a bucket truck (also called a cherry picker) to lubricate a double Telsmith screw conveyor. In accordance with this approval lubrication was to be done only on Saturdays when the machinery was not in operation. However, on Tuesday, December 5, 1978, the safety director sent the bucket truck from the Weymouth plant to the Marshfield plant. Thereafter, because the gears on the Telsmith screw conveyor at the Weymouth plant were noisy and because production was behind that day since two men were off,

the safety director himself used a front-end loader to reach the screw conveyor and attempted to grease the screw conveyor while it was in operation. In so doing, the safety director became caught in the machinery and suffered grievous injuries including partial loss of his left arm.

I find first that a violation of Section 56.11-1 occurred. I accept the inspector's testimony that generally use of a front-end loader presents hazards which are not presented by a bucket truck including the danger of dropping in the event of a hose failure. On this basis I conclude that the front-end loader did not constitute safe access and that therefore there was a violation. I further take note of the inspector's testimony which expressly stated that the hazards associated with the use of the front-end loader were not material to the accident which occurred and that this accident could have happened even if the approved bucket truck had been the means of access. However, because the use of a front-end loader generally presents the danger of injury, although it did not do so here, I conclude that the violation of section 56.11-1 was serious.

The testimony of the safety director makes clear that he was in fact lubricating the screw conveyor while it was in motion. Also, the testimony from the inspector, although requiring the drawing of certain inferences, was to the same effect. The actions of the safety director constituted a violation of section 56.14-35. Moreover, since this violation directly caused the safety director's severe injuries, it was extremely serious.

The Commission has held that the operator is liable for violations of the mandatory standards without regard to fault and that when its employees fail to comply with the standards the operator's efforts towards enforcement are irrelevant with respect to the issue of liability. United States Steel v. Secretary of Labor, Docket No. PITT 76-160-P, dated September 17, 1979. Also, the Commission has determined that a company cannot be relieved of liability where its foreman was killed when a front-end loader with an inoperable backup alarm backed over him, even though the deceased foreman had known the backup alarm was not working and had ordered the loader to commence operation. In that case the Commission expressly rejected the argument that the foreman, not the company, committed the violation. The Commission stated that the actions of the foreman cannot be separated from those of the company. Secretary of Labor v. Ace Drilling Coal Company, Inc., Docket No. PITT 75-1-P, dated April 24, 1980. Accordingly, it is clear that the operator in this case is liable for both violations, one of which was serious and the other of which was extremely

serious.

The next matter, and the most difficult one to be considered in determining the appropriate amount of penalties to be assessed, is negligence. I previously have had occasion to consider situations analogous to that presented here. In Secretary v. Consolidation Coal Company, Docket No. VINC 79-25-P, dated December 1, 1978, petition for discretionary review denied January 9, 1979, I stated that I did not believe that with respect to the issue of negligence the operator could be held responsible for the unpredictable behavior of a fatally injured employee which was contrary to the usual and accepted manner of working in such situations as well as contrary to what the decedent himself had done before. In addition, in Mining Enforcement and Safety Administration v. NAACO Mining Company, Docket No. VINC 76-99-P, dated December 17, 1976, after reviewing many precedents on the subject, I stated as follows with respect to a violation committed by a supervisory employee which resulted in his death:

> It is one thing to hold the operator accountable for the negligence of one of its supervisors in failing to perform the regular duties required of him by the position in which the operator has placed him, especially where failure to perform could affect miners who are working under him by virtue of the supervisory position in which the operator has placed him. It is quite another thing to hold the operator responsible for the negligence which is part of the unexpected and inexplicable behavior of one of its supervisors, whose actions create the potential of harm and result in harm only to himself but not to any of the men under his supervision.

I believe this case falls within the unique circumstances set forth in the foregoing two decisions. The safety director was in charge of the Weymouth plant. Everyone working there was under his supervision and authority. In fact, he was responsible for safety and nothing in the record suggests that in the past he had been anything other than an exemplary employee. The uncontradicted evidence demonstrates that he was the one that sent the bucket truck away from the Weymouth plant so that only the front-end loader remained. Further, the safety director testified that one man had the day off and another had the afternoon off, so that they were short handed, but by virtue of his position, the safety director was the one to give permission for these people to take time off. No one senior in rank to the safety director was at the site. Indeed, only the owners of the plant were senior to him and they were at the company offices some twenty-five miles away.

Therefore, at least to some extent the safety director himself created the conditions which led him to employ unaccepted and unsafe procedures. In addition, the safety director expressly admitted that he knew that only the bucket truck was approved by the Mine Safety and Health Administration as safe access and that all employees were aware that machinery should not be lubricated while in motion. Nevertheless, contrary to everything he knew, and contrary to everything he presumably instructed his own subordinates, he used a nonapproved method of access and attempted to grease the screw conveyor while it was in motion.

I recognize that an operator acts only through its employees, supervisory and nonsupervisory. I am extremely sensitive to the fact that enforcement of the Act would be rendered meaningless if the negligence of an individual employee were not attributed to the operator except in the most extraordinary of situations. Nevertheless, I believe this is such an extraordinary situation. This is so because the actions of the safety director, duly trained and experienced, were so aberrational and unpredictable and were in no way attributable to conduct or conditions created by others placed in authority by the operator. Accordingly, I believe it would be manifestly unfair to impute the individual supervisor's negligence to the operator, where harm came to no other individual. I cannot see that more effective enforcement of the Act would be served by the imputation of negligence in such a situation. To be sure, this is a highly unusual situation which most probably should not be extended further but each case must be judged on its own facts. This is what I have tried to do here. Accordingly, I find the operator was not negligent.

The operator's vice president testified that the operator has been operating at a substantial loss for the last four years and that it has curtailed its activities as a result of these financial difficulties. The operator's corporate tax returns, which have been admitted into evidence, support this assertion. Accordingly, I conclude imposition of a very substantial penalty would adversely affect the operator's ability to continue in business.

The parties have stipulated that the operator is small in size, that prior history is noncontributory, and that the violations were abated in good faith.

In light of the foregoing, it is hereby ORDERED that a penalty of $200 be assessed for the violation of section 56.11-1.

In light of the foregoing, it is further ORDERED that a penalty of $750 be assessed for the violation of section 56.14-35.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $950 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge