FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

23 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. DENV 79-530-PM : A.O. No. 34-00282-05003-I
v.		: Marble City Mine
ST. CLAIR LIME COMPANY,	Respondent	:

DECISION

Appearances: David S. Jones, Attorney, U.S. Department of Labor, Dallas, Texas, for the petitioner;
Steven F. Dunlap, Sallisaw, Oklahoma, for the respondent.

Before: Judge Koutras

Statement of the case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking an assessment of a civil penalty for one alleged violation of the provisions of mandatory safety standard 30 C.F.R. § 57-15-5. The alleged violation was served on the respondent in a section 104(a) Citation No. 166181, issued by MSHA inspector Russell E. Smith on April 26, 1978.

Respondent filed a timely answer contesting the alleged violation and requested a hearing. A hearing was held on April 15, 1980, in Ft. Smith, Arkansas, and the parties appeared and participated fully herein. Post-hearing briefs and proposed findings and conclusions were waived by the parties, but they were afforded an opportunity to present oral arguments on the record at the hearing. Those arguments 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 issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regualtions as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriated 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 this decision.

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 issued by the inspector in this case describes the following condition or practice which the inspector believed constituted a violation of 30 C.F.R. § 57.15-5:

> Two men were working from a scaling rig raised 18 feet from the underground mine floor and were not wearing safety belts. A large scale was scaled from the rib and hit the basket breaking it loose from the boom. The men fell from the basket to the floor.

Petitioner's testimony and evidence.

MSHA supervisory inspector Russell Smith testified as to his mining background and experience, confirmed that he conducted a mine inspection on April 25 and 26, 1978, at Respondent's underground limestone mine and he indicated that the inspection was in conjunction with an accident investigation that he was conducting. Two men were injured when they fell from a scaling rig basket after it was struck by a falling rock. He issued the citation in question on April 26, 1978, citing a violation of 30 C.F.R. § 57.15-5, after he concluded his investigation of the accident, and he determined that the two men were not wearing safety belts or using safety lines as required by the cited safety standard (Tr. 6-16). In his opinion, had the men been wearing safety belts, they would not have fallen from the basket when it was struck by the rock. He measured the distance from the floor of the basket to the railing, and determined that it was 41 inches, or "waist high" to a 5-foot 7-inch body. A sudden slip or added weight to the basket would cause it to tip. He believed the men in the basket were exposed to a falling hazard while they were scaling rock because something could go wrong with the hydraulic lift device, and any sudden shifting or slipping while using the scaling bars could cause the basket to tip and spill the men out of the basket to the mine floor below (Tr. 18-19).

Inspector Smith testified that during his investigation, he determined that the mining height at the scene of the accident was some 25 feet, and that the men fell 18 feet from the basket to the floor below. The maximum operating height of the scaling rig was 30 feet, and it was designed so that two men could scale a wall from inside the basket using 7-1/2 foot scaling bars. According to an eyewitness, the two men were reaching out in a sideway position attempting to scale down a large boulder. While attempting to position themselves above the boulder, they moved the basket in front of it so as to obtain better leverage, and the boulder broke and tilted out "like a falling tree" and caught the bottom edge of the basket breaking the bolts holding the basket to the self-leveling head. This caused the basket to tip and dump the men to the floor below. The men were wearing hardhats, but his investigation detemined that there were no safety belts or lines on the scaling rig (Tr. 42, 46-50, 60-70).

Inspector Smith testified that the two men who were injured were the only two exposed to a hazard, and he believed that the condition cited was readily observable since the basket was constructed of angle-iron, was "open", and the men could be obierved from the mine floor below (Tr. 19). He also indicated that the probability of an accident occurring in similar circumstances would depend on the experience of.the individuals performing scaling, and a more experienced miner would have a tendency to be more cautious. In addition, the severity of any injuries would increase in proportion to the height at which scaling is being performed (Tr.20). Abatement was achieved within 45 minutes and the respondent installed safety belts secured to the basket-railing by ropes. Respondent also installed a shear-pin shaft through the basket self-leveling head which would permit the basket to drop only 6-inches (Tr. 20-21). Photographs of the scaling rig, including the installation of the shear-pin, were received in evidence (Exhs. R-l through R-5).

. Resoondent 's testimonv and evidence.

Gary Griffin, testified that he has been employed by the respondent for 13 years as Quality Control Director and Safety Director. He identified the two employees who were injured when they fell from the scaling basket, and their employment applications reflect that one of the men was 6 feet tall and the other 5 feet 9 inches tall. He also identified a sketch of the aerial basket in question, which includes its dimensions indicating that it is 60 inches long by 41 inches wide and has a 42-inch height from the metal floor to the top of the railing which encloses the basket. He also identified an organizational chart of key mine personnel which reflects that he is in a staff position reporting directly to the works manager and has no authority or responsibilities placed upon him by the quarry superintendent (Tr. 77-79, Exhs. R-10 through R-13).

On cross-examination, Mr. Griffin stated that he has served as quality control director since 1967 and as safety supervisor since 1971 (Tr.82). At the present time he spends about 75 percent of his time on safety matters. He indicated that the mine has a written safety program and that safety rules and regulations are issued to new employees and they are enforced, including employee discharges. He denied that he ever told Inspector Smith that employees are not safety conscious and that he can

only act in an advisory capacity on matters of safety. However, he conceded that he cannot tell the works manager what to do on safety matter, but can only advise him. He utilizes "safety cards" to advise employees about safety infractions and believes this method to be effective (Tr. 84-89; Exh. R-14).

In response to further questions, Mr. Griffin stated that he is an MSHA certified safety trainer and that mine management has specifically given him authority to immediately correct unsafe conditions by shutting down equipment when he finds such conditions (Tr.97-98). He also indicated that when men are scaling the walls they sometimes have to reach out and around the walls while attempting to position themselves to scale the rocks (Tr. 101). He believed the accident in question was a "freak" one (Tr. 101). He stated that he would feel comfortable scaling a 25 foot wall from the scaling rig without a safety belt because he has no fear of falling from the basket with the 42 inch high railing and he likened it to walking down a cat-walk. He also indicated that he did not want to be strapped to the basket and would want to be able to get away if it tipped. In his judgement, he would feel more comfortable in the scaling basket without a safety belt attached (Tr. 102).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of 30 C.F.R. § 57.15-5, which provides as follows: "Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

In this case, I believe that it is clear from the evidence adduced that the two men who were injured as a result of falling from the aerial bucket when it was struck by a rock which they were attempting to scale down while working from the bucket which was raised some 25 feet off the mine floor were not tied off by any safety lines or belts. It is also clear and without any doubt that no safety belts or lines were in the bucket for the men to use, and respondent has presented no testimony or evidence to rebut the findings of the inspector in support of the citation which he issued. Respondent's defense to the citation rests on its assertion made at closing arguments during the hearing that the aerial basket in question was of good design, and that since its purchase in 1975 it had never been cited before for lack of safety belts, even though MSHA conducted some 27 inspections at the mine. Respondent asserted further that the use of safety belts on the scaling rig increases the likelihood of injuries because in the event of a fall from the basket the basket itself may fall on the men if they were attached to it by belts or they could be left dangling in mid-air from the basket. Respondent also asserted that it exhibited good faith by rapidly installing the belt as well as a support shaft pin within 45 minutes of the accident and that on the day of the accident the men were as high as they would ever be in the mine (Tr. 104-105).

The initial question presented is whether the men who were working in the aerial bucket suspended above the mine floor were in any danger of falling. On the facts presented in this case, I believe the question

necessarily must be answered in the affirmative. Although the scaling rig bucket in question is constructed in such a manner as to afford employees some protection by means of the railing which encloses them inside the bucket, that railing is only 42 inches high, which is approximately waist high to one of average height. A description of the scaling process carried on by two men in such a raised aerial bucket, including the use of scaling bars, clearly indicates to me that the men performing this work are not always stationery and merely performing a simple chore such as changing a light bulb. They are constantly moving about the bucket, leaning over and around walls and rocks which they are attempting to scale down. In this process, they are constantly shifting their weight and position in the bucket while attempting to best manuever themselves so that proper leverage may be obtained with their scaling bars, and respondent's own safety director conceded as much during his testimony. In such circumstances, I conclude that there is always a danger of someone falling from the bucket while leaning out and shifting his weight, and, as happened in this case, there is always a danger of a falling rock striking the suspended bucket and causing it to tip over. I conclude further that the cited standard required that safety belts or lines be provided and worn by the men while they were performing such scaling duties from the scaling rig in question. The fact that the men are not too enchanted with such devices or that the safety director himself was of the view that he personally feels more comfortable without a safety belt is irrelevant. Further, I have given little weight to the safety director's testimony in this regard since there is no evidence that he performed scaling 'duties suspended from such a rig and respondent presented no competent testimony or evidence from anyone performing such duties that the use of safety belts in such situations was in itself a hazard. Based on the testimony and evidence of record, I am convinced that the use of safety belts or safety lines on the day in question could have prevented the two men who were injured from falling out of the bucket to the floor below after it was struck by the falling rock which they were attempting to dislodge. Respondent's defense is rejected and the citation is AFFIRMED.

Gravity

In clarifying his prior written inspector's statement concerning the gravity of the citation in question, Inspector Smith conceded that it was not likely that two men in question would have been working higher than 25 feet from the mine floor on the day of the accident, but that in other areas of the mine where the mining heights reach 30 or 40 feet any scaling work being performed at those heights would increase the severity of any injury resulting from a fall from the scaling rig (Tr.50-51). However, the fact remains that in this case the two men who were injured when they fell from the basket in question received serious injuries. Under the circumstances, I conclude and find that failure to provide safety belts or lines constitutes a serious violation.

Negligence

Inspector Smith identified Exhibit P-5 as a copy of a previous citation issued by him at the mine on July 15, 1971, citing the respondent with a violation of section 57.15-5 for failure to provide an underground scaling basket with safety belts. Mr. Smith stated that he discussed this prior

citation with safety supervisor Gary Griffin at the conclusion of his April 1978, inspection, and that Mr. Griffin advised him that the men wore safety belts for awhile, but since they felt the belts impeded their progress while in the scaling basket they quit wearing them (Tr.30). Mr. Smith also confirmed that Mr. Griffin was the safety director in 1971 when the previous citation was issued (Tr.31).

Inspector Smith identified Exhibit R-6, pg.3, as his inspector's report, and when asked to explain the circumstances which led him to state on that report that "the condition or practice cited could not have been known or predicted; or occurred due to circumstances beyond the operator's control," he stated that at the time of the 1978 inspection, a new mine superintendent had been hired and he was not familiar with the safety belt requirements of section 57.15-5, and was not aware of the previous citation issued in 1971 (Tr. 41-42).

Aside from the question as to whether the specific scaling rig in question was previously cited for failure to equip it with safety belts, which I find is not the case here, and aside from the fact that other inspectors may not have cited the rig in question, which I find is no defense to the citation, the fact remains that the respondent should have been aware of the fact that the two men working high above the mine floor from the scaling rig in question were exposed to a potential falling hazard. It seems obvious to me that this is not the first time the subject of safety belts on such a rig has come up at the mine in question. Inspector Smith testified that he discussed a prior citation involving the old rig with safety director Griffin during the conference held after the citation here in question was issued,' and Mr. Griffin conceded that the men did not want to wear safety belts because they felt it restricted their movements. It seems to me that such decisions should not be left to the workforce or to the judgment of each individual miner, but rather, to a responsible company safety official. Once a hazard of falling is identified, then I believe it is incumbent on a mine operator to insure that safety standards, such as the one in issue here, are strictly enforced. Under the circumstances, I conclude and find that the violation resulted from respondent's failure to exercise reasonable care to prevent the conditions cited and that respondent should have reasonably known that safety belts and lines were required. Accordingly, I find that the citation resulted from ordinary negligence by the respondent.

Good Faith Compliance

The evidence establishes, and I find, that the respondent exercised rapid good faith compliance in correcting the conditions cited and this fact has been taken into consideration by me in the assessment of the civil penalty in this case.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business.

At the time the citation was issued the underground limestone mine and associated mill were working two shifts, employing approximately 28 men on the day shift, and approximately 10 men on the evening shift (Tr.14).

Quality control director Griffin testified that current mine production is about 1,800 tons a day on a 5-day week and one crushing shift basis (Tr. 81). Under these circumstances, I conclude that the respondent is a medium-to-small operator.

Respondent stipulated that the assessment of a civil penalty in this matter will not adversely affect its ability to remain in business (Tr. 106).

History of Prior Violations

Exhibit P-3 is a computer printout itemizing respondent's mine inspection and violation history for the period January 1972 to March, 1980. Exhibit P-4 is a summary of notices and orders issued at respondent's three mining locations, namely the Sallisaw Lime Plant, and the Marble City Lime Plant, Mill and quarry (Tr. 26-27). That summary reflects that since the passage of the 1977 Act, 64 citations were issued at' and charged to, respondent's Marble City Lime Plant and quarry (Tr. 28). Although Inspector Smith alluded to the fact that he had issued a prior citation in 1971 at the mine citing section 57.15-5 for failure to have safety belts on a scaling rig, he was not sure whether this citation was for "the old scaling rig" or the one he cited in 1978 (Tr. 35-36). However, he further clarified his position by specifically stating that the "new scaling rig,' that is, the one which he issued Citation No. 0166181 against, was only previously cited for a violation of section 57.9-2, for failure to have additional counterbalance weights, and that it had never been cited for lack of safety belts (Tr. 51). Further, after reviewing previous inspection reports produced by the respondent (Exhs. R-7, R-8, and R-9), he conceded that the "old" scaling rig was removed from the mine sometime during December 1975 (Tr. 52-54

Respondent' history of prior violations includes a number of citations issued under the now repealed Federal Metal and Nonmetallic Mine Safety Act, and I take note of the fact that under that law, no civil monetary penalty assessments were levied against mine operators for infractions of mandatory safety standards. Although the language of section 110(i) of the 1977 Act simply refers to "history of previous violations" as one of the six statutory criteria to be considered in assessing penalties, without regard to whether civil penalties were assessed, the former Interior Board of Mine Operations Appeals has consistently held that 'prior history" means all violations which have been assessed against and paid by a mine operator, and section 110.3(a), of Part 100, Title 30, Code of Federal Regulations, petitioner's assessment regulations, treats "prior history" in terms of assessed violations.

In this case, the citation which issued on April 26, 1978, was issued a little over a month after the effective date of the 1977 Act on March 9, 1978, and according to the computer printout, this appears to be the first citation issued after the new Act became effective. However, I cannot overlook the fact that the respondent's history of prior violations, are reflected by Exhibits P-3 and P-4, for an operation of its size and scope, is not particularly good, and I have considered respondent's total prior history as reflected in these exhibits in assessing the civil penalty in this matter.

Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, including consideration of the six statutory criteria set forth in section 110(i) of the Act, I find that a civil penalty assessment in the amount of $1,200 is appropriate in this case for a violation of 30 C.F.R. § 57.15-5, as stated in Citation No. 166181, issued on April 26, 1978.

Order

Respondent is ORDERED to pay the civil penalty assessed by me in this matter, in the amount of $1,200 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

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