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

25 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PIKE 79-119-PM
	:	Assessment Control No. 15-09703-05002 F
v.	:	
	:	Belleview Plant
EATON SAND & GRAVEL COMPANY, Respondent	:	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; David P. Faulkner, Esq., Benjamin, Faulkner, Tepe and Sack, Cincinnati, Ohio, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 21, 1980, a hearing in the above-entitled proceeding was held on May 13, 1980, in Cincinnati, Ohio, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 61-72):

> The Petition for Assessment of Civil Penalty in this proceeding was filed on June 15, 1979, in Docket No. PIKE 79-119-PM, seeking assessment of a civil penalty for an alleged violation of 30 C.F.R. § 56.3-5 by Eaton Sand & Gravel Company. In a civil penalty proceeding the issues are whether a violation of a mandatory health and safety standard occurred and, if so, what civil penalty should be assessed based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. I shall make some findings of fact upon which my decision will be based. The findings will be set forth under numbered paragraphs.
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> 1. On April 20, 1978, inspector John Hawkins was asked to go to the Belleview Plant of Eaton Sand & Gravel Company

to investigate the occurrence of an accident at that location. Upon arrival there, the inspector first talked to some people in respondent's office and then proceeded to the site of the accident.

2. The accident resulted when a front-end loader had broken down because of a problem with the universal joint and drive shaft so that the front-end loader could not be moved. A foreman, by the name of Robert Marcum, was advised by the operator of the end loader of its inoperable condition. Whereupon, the foreman ordered some replacement parts and proceeded down to the pit area to do some preliminary work on the end loader. At that time another employee, by the name of David Kelly, crawled under this machine and Mr. Marcum was in a position which situated his body between the two wheels of the machine, whereas Mr. Kelly was entirely under the machine and parallel with the wheels. After they had been working for a period of time, some material fell from the highwall and struck the bucket of the front-end loader, pushing it backwards so that Mr. Kelly, being entirely under the mahcine, was not hit by the wheels, but causing the end loader to come to rest on top of Marcum's body.

3. Other employees raised the bucket on the end loader so as to take the pressure of the wheel off of Mr. Marcum's body. He was taken to the hospital. Although he was alive when he arrived at the hospital, he died later that evening, approximately at 7:30 p.m. It is alleged by one of the witnesses in this proceeding, Mr. Setters, that he talked to Mr. Marcum on the way to the hospital. At that time, Mr. Marcum took full responsibility for what had happened, and said that he was at fault in not proceeding in a safe way to work on the equipment.

4. Inspector Hawkins issued an order and citation on April 20, 1978, after he had discussed the accident and collected the facts cited above. His Order No. 107451 alleges that a violation of section 56.3-5 occurred because two men had worked on the front-end loader near the pit wall.

The facts set forth above show that a violation Of section 56.3-5 occurred because that section provides that "Men shall not work near or under dangerous banks. Over-hanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted." The testimony in this proceeding shows that Mr. Marcum did work on the machine in association with another employee without pulling it back from the highwall.

Respondent's testimony in this proceeding shows that respondent's General Manager, Mr. Roads, did instruct Mr. Marcum to pull the inoperable front-end loader back from the highwall before any work upon it was done. It is alleged that another front-end loader and a length of chain were taken to the pit area. It is assumed by the company and its employee, who testified in this proceeding, that Mr. Marcum intended to comply with the instructions to use the chain and other loader to pull the inoperable loader back from the highwall before any work on it was done.

It is also assumed that because Mr. Marcum was a nervous-type individual, that he went about this repair work in a very rapid manner as he was accustomed to doing all of his tasks. It is further assumed that when Mr. Marcum saw Mr. Kelly already under the machine, or about to get under it again after he already had taken bolts out of the drive shaft area, that Mr. Marcum decided to go ahead and work on the machine without pulling it back.

Even though Mr. Marcum was instructed to pull the machine back, the fact remains that it was not pulled back and work was undertaken while it was in a hazardous position. In short, the facts show that there was a violation of section 56.3-5. After a violation of a mandatory safety standard is found to have occured, the Act provides that a penalty shall be assessed.

In doing so, it is necessary that I consider six criteria. We have had stipulations of facts in this proceeding with respect to several of those criteria.

The first stipulation is that respondent is a small operator and that respondent had about nine employees at the Belleview Plant. Therefore, under the criterion of the size of respondent's business any penalty assessed in this proceeding should be in a low range of magnitude to the extent that size governs the penalty. It was also stipulated that respondent would not be caused to discontinue in business if a penalty were assessed in this proceeding.

As to the criterion of history of previous violations, there was introduced as respondent's Exhibit P-l, a two-page computer printout which shows that respondent has only been cited for two violations prior to May 20, 1978. Neither of those prior violations was of the section which has been found to have been violated in this proceeding. Therefore, no part of the penalty assessed in this proceeding will be based on the history of respondent's previous violations.

It was testified by the inspector that respondent showed an extraordinary good faith effort to achieve rapid compliance in that the employees were immediately assembled and a lecture or instructions were given to them about safety matters, particularly the necessity of putting equipment in a safe place away from the highwall before work is done upon it. Therefore, that criterion will be given full consideration in the assessment of the penalty.

The next two criteria are the most important ones in assessing penalties, apart from the criterion of size of respondent's business. There is no doubt but that the violation was very serious. Any time equipment is repaired close to a highwall, such as the one here involved, there is always a possibility of material falling. That was pointed out in the inspector's testimony in this proceeding, because he stated that the material here is a combination of rock and sand which is sufficiently soft to be susceptible to production entirely by a front-end loader. As the front-end loader digs into the base of the wall, the rock and sand crumble so as to form a slope. The wall is not sufficiently stable to produce overhanging material at the top of the wall. In other words, the wall has a tendency to crumble on a sort of continuous basis. Anytime equipment is left close to such a highwall when work is to be done on it, those who do that work must know that they are placing themselves in a hazardous position. Therefore, under the criterion of gravity, a high penalty should be assessed to the extent that a small operator is able to pay large penalties.

Then we come to the final criterion on negligence. Respondent's primary defense in this case is that it was not very negligent, or was not negligent at all. The defense under that criterion is primarily based on the fact that the general manager of the plant, Mr. Roads, did instruct Mr. Marcum, the deceased, to move the inoperable piece of equipment back from the highwall before any work was done on it. Despite those instructions, for reasons that only Mr. Marcum knows or knew, the equipment was not pulled back. It was Mr. Marcum's failure to carry out his instructions that the accident occurred and that Mr. Marcum's death resulted. We pass then to the question of whether an employee's failure to 'carry out his supervisor's specific instructions makes the negligence to be attributed to the operator any less severe than it would be if he simply failed to comply with an on-going and routine safety rule.

The facts in this proceeding are almost identical to a case decided by the Federal Mine Safety and Health Review

Commission early this year in Secretary of Labor v. Consolidation Coal Company, 2 FMSHRC 3 (1980). In that case, the Commission affirmed an administrative law judge's decision assessing a maximum penalty of $10,000 for a violation of section 77.1006 which prohibits persons from working near a dangerous highwall unless they are there to correct unsafe conditions. A foreman-trainee in that instance was killed by a landslide when he and the assistant superintendent were working near a spoil bank at which time a landslide occurred.

The instant case is also similar to the facts in another case decided by the Commission this year in Secretary of Labor v. Ace Drilling Company, Inc., 2 FMSHRC 790 (1980). In that case, the Commission stated that a foreman's failure to make sure a front-end loader was free of defects before putting it into service was a failure attributable to the operator as the foreman acts for the operator. Additionally, the Commission held that liability under the Act is not conditioned upon fault. Two other caess, U.S. Steel Corp., 1 FMSHRC 1306 (1979), and Peabody Coal Company, 1 FMSHRC 1494 (1979), decided by the Commission, would require that respondent be held fully liable in this proceeding under the criterion of negligence.

As in the Consolidation case cited above, Mr. Marcum's failure to carry out his instructions could have resulted in the death of Mr. Kelly, the employee whom he was supervising, just as easily as it resulted in his own death. And, if Mr. Kelly, instead of Mr. Marcum, had been killed, Mr. Marcum would have been held responsible and the company would have been equally liable. Under the Act, as the Commission has stated, an operator's liability is not conditioned upon fault. He is required to see that violations do not occur and if violations do occur, he is held liable. When it comes to making a finding as to the criterion of negligence, there is no doubt but that respondent was guilty of a high degree of negligence in this case because of its foreman's failure to carry out his instructions.

When it comes to assessment of a penalty, however, I am still required to consider the fact that we are dealing with a small operator. In the Consolidation case, supra, where the judge assessed a penalty of $10,000 for an almost identical violation, that company was one of the largest coal companies in the United States. I think that a maximum penalty for such a company is justified, but, in this instance, because a small company is involved, I believe a penalty of $3,000 is appropriate.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, respondent shall pay a civil penalty of $3,000.00 for the violation of section 56.3-5 cited in Order No. 107451 dated April 20, 1978.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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