

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 JUL 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-587-PM
Petitioner : A.O. No. 13-00750-05002F
v. :
: Rock Valley Pit & Plant
ROCK VALLEY CEMENT BLOCK AND TILE, :
Respondent :

DECISION

Appearances: **Jaylynn K. Fortney**, Attorney, U.S. Department of Labor,
Kansas City, Missouri, for the petitioner;
Robert J. Larson, Esquire, Sioux City, Iowa, for the
respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on March 30, 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. § 56.9-22. Respondent filed a timely answer contesting the citation., and a hearing was held in Sioux City, Iowa, on May 1, 1980. Posthearing briefs were waived by the parties, but they were afforded an opportunity to present oral arguments on the record at the hearing, and the 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, Pub. 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 this proceeding 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, 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(1) 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(1) 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.

Stipulations

The parties stipulated to the following (Tr. 13-19):

1. Respondent's mining operation at the Rock Valley Pit and Plant is a small operation in that 7,150 man-hours are worked on an annual basis, and the mine employs five **parttime** workers, three of whom are engaged in year-round operations at **the** mine site.
2. Respondent's mining operations at the mine site in question are subject to **MSHA's** regulatory jurisdiction and are covered by the Act.
3. The Rock Valley Pit and Plant has no prior history of citations under the Act.
4. Joint Exhibit J-1 is a diagram of the mine area where the inspection in question took place.
5. On the date of the inspection in question, no berms were present in the area or on the alleged roadway cited by the inspector.
6. At the time of the inspection in question, four pieces of equipment were being utilized in the area depicted by Exhibit J-1, namely, two panel trucks, a rubber-tired front-end loader, and a track-type front-end loader.
7. The parties do not dispute the fact that a fatality occurred at the mine on May 22, 1978, when a front-end Michigan

loader went over an embankment characterized by MSHA as an alleged elevated **haulway** or road causing fatal injuries to the loader operator (Tr. 27-31).

a. The parties agree that abatement was achieved by sealing off the dike area where the accident occurred (Tr. 71).

Discussion

The section 104(a) Citation **No. 177404**, issued by the inspector on May 25, 1978, describes the following condition or practice which the inspector believed constituted a violation of 30 **C.F.S. § 56.9-22**: "The outer bank on the 12 foot wide elevated **haulroad** on top of the south dike was not provided with a berm to prevent a piece of equipment from driving over the edge of the roadway."

Petitioner's Testimony and Evidence

MSHA inspector Kenneth R. Harris testified as to his mining background and confirmed that he went to the mine on **May 24, 1979**, at the instructions of his supervisor, for the purpose of investigating a **fatality** which had occurred there on May 22. He was accompanied by MSHA special investigator Larry Nichols. He described the mining operation as a sand and gravel dredging operation and indicated that this was his first visit to the mine. Upon arriving at the mine, he met with company president Conrad Van Zee and informed him of the purpose of his visit. He was taken to the accident site by **Mr. Van Zee**, and the loader which was involved in the accident had been removed to the maintenance shop and Mr. **Zee** informed him that it was moved there so as to preclude any further damage to it from flooding from the nearby Rock River. He identified Exhibit J-1 as a sketch of the accident scene (Tr. 19-25).

Inspector Harris testified that the roadway depicted in Exhibit J-1 was elevated 10 feet on the inside and outside, was 12 feet wide, and he described it as U-shaped or "horseshoe" shaped. Material was being excavated from the back end of a pit by means of a wheel-tracked loader and two dump trucks and the material was used to construct a dike for flood-control purposes. No dredging operations were taking place in the immediate area. The material was transported by the trucks in a one-way circular direction on the top of the dike, and after being dumped it was leveled out by the loader, and the process was then repeated. No berms were present on the dike roadway where the trucks and loader were operating. He identified the outer bank of the dike roadway as that portion facing the river on the right side of the one-way traffic pattern as depicted on Exhibit J-1 (Tr. 32-38).

On cross-examination, Inspector Harris testified that the dike construction activities in question were taking place approximately 300 feet west of the river, and he did not know whether the river appeared to be flooding but indicated that he simply took Mr. Van **Zee's** word for it. Actual dredging

operations were taking place some 300-400 yards to the east of the dike location, and a screening tower was located between the two locations. He described the loader which was involved in the accident as a rubber-tired medium-sized machine, indicated that the tires were about 5 feet high, and he estimated the loader engine size as 150 to 200 horsepower. He also indicated that the berm guidelines require berms of a sufficient size to restrain vehicles and that as a general rule the berm should be as high as the axle height of the largest piece of equipment operated on the elevated roadway (Tr. 38-46).

Mr. Harris stated that the question as to whether a **2-1/2-foot** berm would have prevented the front-end loader in question from going over the embankment would depend on the speed of the vehicle and the width of the berm; He considered the building of the dike to be a mining operation and the materials being used for this purpose on the day in question was compacted field dirt and clay but not sand and gravel. The trucks hauled the material to the top of the dike where it was layered and leveled by the loader. The area was not a regularly used passageway for vehicles or pedestrians other than the trucks traveling the area where the dike was being constructed.

Mr. Harris could not define a "roadway" and he indicated that the definition of a "roadway" was included as part of the regulatory standards in question. He confirmed that he issued the citation in question and that he used the word "haulroad" to describe the material being hauled on the road in question during the construction of the dike. He could not cite the specific regulatory definition of the term "haulroad." Since equipment and people were driving on the road' he believed the area cited was a haulroad, and the citation issued because there were no berms (Tr. 47-56). The width of the "roadway" at the point where the accident happened was 31 feet (Tr. 59).

On redirect, Inspector Harris stated that dredging operations would have in time been conducted at the dike area, characterized the material being excavated to construct the dike as overburden, and stated that abatement was achieved by closing off the roadway entrance and exit ramps (Tr. 60-61).

In response to bench questions, Inspector Harris stated that he did not know how long the dike construction had been going on, had never inspected the facility prior to his visit, and no one from mine management offered an explanation as to why berms were not constructed. Based on his experience at other mines, he stated that berms are constructed from earthen material or quarry rock, but indicated that he has never previously encountered a situation where a dike was being constructed as in the instant case (Tr. 63-67).

Respondent's Testimony and Evidence

Conrad Van Zee, president, Rock Valley Cement Block and Tile Company, testified that his company conducts a surface-mining operation which consists of pumping sand and gravel out of water. He described the mining operation, and stated that it includes the removal of overburden to reach the underlying

sand and gravel. The operation also includes the sizing, washing, and stockpiling of the mined material which is pumped through a pipeline or conveyor belts to an aggregate plant. Trucks are used only to haul the stockpiled materials to customers. His company also operates a **readymix** cement plant and manufactures concrete block. The mining operation is conducted from May to the middle of November. During the winter months, three of the five employees are engaged in plant and dredge repair work (Tr. 82-88).

Mr. Van Zee confirmed that he obtained a copy of the 1977 mandatory safety standards, and he **indicated that** his company is safety-conscious and has always followed the requirements of the law as closely as possible. He also confirmed that he familiarized himself with the standards as best he could but was never furnished a copy of the inspector's handbook. He has never been cited for other than minor infractions, and since May 22, 1978, has received two citations for a faulty ungrounded light plug and failure to sufficiently guard a piece of equipment. Abatement of cited infractions has always been immediate, and apart from minor cuts, he has had no lost-time accidents other than the one in question in this case (Tr. 88-91).

Mr. Van Zee described the dike construction activities taking place on the day in question and characterized them as efforts to prevent water from the river coming onto the mine and filling the pit. He stated that the primary purpose of the activity was to extend the dikes around the mine property. The dike was used only for flood protection and he asserted that the dike in question did not have a roadway on the top of it where vehicles or pedestrians traveled. He confirmed that the width of the top of the dike was 12 feet and that this width was determined to be adequate to withstand the water pressure. He had never been previously cited for any dike deficiencies either before or after the accident in question and the instant case presents the first occasion where he was informed by MSHA that a berm was required (Tr. 91-95).

Mr. Van **Zee** indicated that he did not consider the top of the dike to be an elevated roadway, and in his opinion a roadway is one that is regularly used for haulage by trucks on a day-to-day or year-to-year basis, and he could not recall discussing the matter **with** the inspector at the time the citation issued. None of the other dikes on the mine property had berms, and the mine had never been previously cited for failure to construct such berms. He has not been able to find the definition of a "roadway" as that term is used in the regulations and he has never been informed by MSHA that the failure to have berms on the dikes constituted a violation. He confirmed that the height of the loader wheels were 5 feet and he described its operation as well as the procedure for constructing the dike. Earlier dike construction utilized a crawler to push the material, but trucks were subsequently used when the dirt supply was exhausted (Tr. 96-102).

Mr. Van Zee confirmed that he went to the accident scene and he described the extent of the slope embankment where the loader overturned as a "gentle slope" and he believed that a piece of equipment could be driven there without fear of tipping over. He believed that the accident occurred when the loader

operator, for some unexplained reason, began to back down the slope and while attempting to compensate for this caused the weight of the loader to shift, thereby causing it to flip over. In his view, the existence of a berm would not have prevented the loader from going over the edge (Tr. 102-107).

On cross-examination, Mr. Van Zee stated the dike in question was a continuation of an existing dike which would eventually go around the perimeter of the entire mine property. Construction of the original dike began in 1963, but it was constructed by a contractor and no vehicles traveled at the top of the dike during that time. He was aware of the fact that berms are required on an elevated haulway, and he described the method and procedure used for the construction and continuation of the dike. Vehicles and men worked on the top of the dike for 2 days building it up from an 8-foot level to the 12-foot level as it existed on the day of the accident. It would have taken an additional 2 days to complete the short duration dike project. He conceded that a hazard does exist when men and equipment are working on the top of an elevated area without guard railings or berms (Tr. 116-127). He also indicated that the top of the dike was never used for haulage operations and he has never considered it to be a roadway (Tr. 128). In his view, a haulroad or roadway is one which is used to transport the product being mined, namely sand and gravel, and he does not consider the dike area in question, which was used to transport material for constructing the dike to be such a haulroad or roadway (Tr. 129-130). He had no previous occasion to construct berms at the mine because there are no elevated haulroads there (Tr. 134). Although dike construction was taking place on the day in question, sand and gravel would eventually be taken out (Tr. 137). The loader met the required applicable safety standards and it was not cited for any infractions (Tr. 138). Mr. Van Zee also indicated that had overburden been removed and traveling over the dike area on a regular day-to-day basis, he would consider it to be a roadway (Tr. 143).

Findings and Conclusions

Fact of Violation

MSHA asserts that it has established that the roadway in question was elevated, that vehicle traffic used it, and the fact that the berm standard is found in a section of the regulations entitled "loading, hauling or dumping" does not limit the application of the standard strictly to such enumerated activities. MSHA asserts further that its evidence has established that men and materials were transported along the dike roadway, that it was elevated, and since it had no berms, a violation has been established (Tr. 151-154).

Respondent takes the position that since the cited safety standard does not define the term "roadway," it is impossible for a mine operator to ascertain whether he is in violation, and it is unfair to penalize an operator in such a situation. Respondent asserts further that it had been previously inspected by MSHA and had never been cited for any berm violations. Respondent also argues that the so-called "roadway" was merely used as a casual

access to the top of the dike **and that** the area was never intended to be used as a roadway and was not constructed for that purpose. Conceding that "haulage" was being done, respondent asserts that it was for the purpose of building a dike rather than for the removal and transportation of mined materials over a roadway (Tr. 156-159).

In addition to the lack of a regulatory definition of the term "roadway," respondent also suggested that the construction of the dike in question was not "mining" within the meaning of the Act, and that MSHA has produced no evidence to establish that sand and gravel was being mined or transported over the so-called roadway at the time of the inspection (Tr. 62-63; 78).

In view of the foregoing arguments, the issues to be addressed are as follows:

1). Whether the dike construction activities were "mining" activities within the meaning of the Act.

2). Whether the dike area in question, which was not protected by berms, **may** be considered a roadway within the meaning of the cited standard.

3). If the answer to Issue No. 2 above is in the affirmative, was the roadway elevated?

4). If the answer to Issues Nos. 2 and 3 are in the affirmative, **has** **aviolation** been established by MSHA by a preponderance of the evidence?

Issue No. 1--Mining Activity

It **seems clear** from the testimony presented in this case that on the day of the accident, and at the time the citation was issued, respondent **was in** the process of constructing a dike to prevent possible flood waters from a nearby river from coming onto and inundating the **mine property**. In this connection, top soil or dirt, loosely characterized as overburden, was being **removed** by a loader and transported by truck to the top of the dike where it was dumped and then layered, smoothed out, and compacted by the loader which went over the embankment. It is also clear **that** no sand or gravel was being dredged or "mined" during this time (Tr. 62-64), and MSHA conceded this fact (Tr. 64).

"Overburden," as defined by section 56.2, means "material of any nature, consolidated or unconsolidated, that overlies a deposit of useful materials or ores that are to be mined." On the facts presented in this case, I conclude that the materials removed for use in the dike construction fall within this definition, particularly in light of Mr. Van Zee's candid admission that the sand and gravel underlying the removed materials would eventually be **mined** (Tr. 137).

I am not persuaded by the fact that sand and gravel was not being **excavated** at the time of the inspection, and I find that the removal and loading

of the top soil and other materials used for the dike construction, as well as the actual construction of the dike itself, was an integral part of the mining process. The removal of the material served two purposes. First, it was used to construct a dike whose purpose was to prevent water from possibly inundating the mine. Second, the removal of the material also facilitated the removal of sand and gravel, since it is clear that these materials would eventually be mined and removed from the pit area where the trucks were loading. In addition, Mr. Van Zee confirmed the fact that the dike construction was an on-going project, that the particular dike project in question was a continuation of an existing dike began in 1963, and that it would eventually cover the perimeter of the mine property.

The definition of the term "coal or other mine" found in section 3(h)(1) of the Act, particularly subsection (c), includes, "lands, excavation, * * * workings, structures, or other property including impoundments, retention dams, *** used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits * * *."

I conclude and find that the facts presented support a conclusion that the dike construction activities in question were mining activities within the meaning of the Act and that the dike itself was an integral and inseparable part of the mine. Accordingly, respondent's arguments and suggestions to the contrary are rejected.

Issue No. 2: Was the Dike Area In Question a "Roadway" Within the Meaning of Section 56.9-22?

It seems clear from the arguments advanced by the respondent that it believes that the construction to be placed on the term "roadways" as used in section 56.9-22 is one that would require berms only in those instances where the road is regularly used day in and day out as a regular truck route for haulage of materials which have been mined. Respondent believes that since the alleged roadway in question was used only for the purpose of dike construction on a short-term or sporadic basis, and since pedestrians and vehicular traffic did not use the area as a regular haulage route, the dike area in question was not a roadway within the meaning of section 56.9-22.

The term "roadway" is not defined by Part 56 of the regulations. Respondent's position on this question suggests that since section 56.99-22 is found under a regulatory heading--"Loading, hauling, dumping," the term roadway, along with the requirements for berms, should only apply in circumstances which clearly show that the mined materials are regularly and systematically loaded and hauled out of the mine along clearly **defined haulage** roadways designated and regularly used for such purposes. In short, respondent suggests a narrow and restrictive interpretation and application of the berm standard, the thrust of which is seemingly centered on the frequency and duration for which the "roadway" may be used.

After careful consideration of the arguments presented by the parties, and particularly the facts presented **in this case**, I conclude that

petitioner's position is correct and that respondent's restrictive **interpretation** must be rejected, and my reasons for these conclusions follow .

The intent of the safety standard in question is to provide protection for men and equipment which are required to travel along elevated roadways while performing work connected with the mining process, and respondent has **conceded this** fact (Tr. 127). The evidence adduced establishes that overburden, as defined by section 56.2, was being removed and loaded at the dike construction site, and respondent clearly intended to utilize the pit area from which the materials were moved as part of its regular dredging operation (Tr. 125). Thus, **it** seems clear to me that materials were in fact being loaded. Next, the materials were loaded onto dump trucks and hauled along a clearly defined route, dumped, and leveled by a loader until the required dike height was achieved. The fact that this particular project was of a relative short duration is not critical in my view. Section **56.9-22** makes no mention as to the frequency or duration for which such roadways are used. An elevated roadway utilized for a week by trucks and other equipment is no different, from one used for longer periods of time. A potential hazard along an unprotected roadway remains a hazard whether **it** be of short or long duration, and I believe that section 56.9-22 is intended to prevent such hazards in both such circumstances.

Although the dike construction in question on the day the citation issued may have been of relatively short duration, it seems clear to me from Mr. Van Zee's testimony that it was a continuation of an existing dike system that would eventually ring the perimeter of the entire mine property. And, while the method of construction apparently varies between the use of a loader which pushes materials to form the dike and the use of trucks to haul the materials to the top of the dike, in those instances where trucks and loaders are used to move materials to the top of the dike, I conclude that the area traveled by such trucks and personnel are roadways within the meaning of section 56.9-22. Consequently, if such areas are elevated and unprotected on the outer banks, berms are required.

Issue No. 3--Elevated Roadway

Inspector **Harris** described the roadway in question and indicated that it was elevated some 10 feet on the inside and outside bank, **and was approximately 12** feet wide. The flow of traffic was in a one-way direction as depicted on Exhibit J-1, and the outer bank was that portion of the roadway facing the river, and the width of the roadway at the point where the **accident** occurred was **31** feet.

Mr. Van Zee agreed with the stated width of the **roadway**, and while he characterized its **slope** at the point of the accident as a "gentle **slope**," **he** indicated that the dike had been constructed to a height of **12** feet at the time of the accident.

I **conclude** and find from the testimony and evidence presented in this case that the **dike** roadway in question was elevated above the surrounding

terrain and pit areas where materials were being removed for the dike construction. Accordingly, I conclude that petitioner has established that the roadway in question was "elevated" within the meaning of section 56.9-22.

Fact of Violation

Respondent conceded and stipulated **that no** berms were present at the location cited by the inspector. In view of my findings and conclusions that the dike area was an elevated roadway, and in view of the fact that it is clear that the outer bank of that elevated roadway, that is, the elevated portion facing the river which ran along the **mine** property at the approximate scene of the accident, was not protected by a berm, I conclude and find that petitioner has established a violation of section 56.9-22, and the citation issued in this case is AFFIRMED.

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

The parties agree that respondent is a small mine operator and I adopt this as my finding. I also find that the civil penalty assessed by me in this matter will not adversely affect respondent's ability to remain in business.

History of Prior Violations

Respondent's mining operation at the Rock Valley Pit and Plant has generated no citations prior to the one in question, and petitioner agrees that respondent's safety record is "quite good" (Tr. 154). I adopt these facts as my findings on prior history and this is reflected in the civil penalty assessed by me in this **case**.

Good Faith Compliance

Abatement was achieved timely by sealing the dike roadway area off and the inspector considered this adequate abatement (Tr. 70-71). I conclude and find that the respondent exercised good faith in achieving compliance in this case.

Gravity

Although there is no conclusive evidence that a berm would have prevented the accident which occurred in this case, I believe that it is reasonable to assume that a berm would at least have served as a warning to the loader operator that he was approaching the edge or slope of the roadway embankment. Further, respondent candidly conceded that a hazard does exist when men and equipment are working in elevated areas without berms or guards. Accordingly, I find that the violation in this case was serious.

Negligence

Respondent has established that it has never been previously cited for failure to install berms or guards on any of its other dikes. Although this is no defense to the violation, it does support respondent's assertion that it reasonably believed that the elevated dike area characterized by MSHA as a roadway after the fact was not a roadway requiring a berm. Further, this is not the first time that MSHA has been prompted by a fatality to apply a safety standard requiring berms to an elevated area that presents a hazard. See my decision in MESA v. Peabody Coal Company, VINC 77-102-P, issued December 13, 1977, where I specifically invited MESA to reexamine the identical regulatory language found in the berm standard applicable to surface coal mines and surface work areas of underground coal mines, 30 C.F.R. § 77.1605(k), for the purpose of communicating understandable, rational, and workable guidelines for the application of this standard to the mining industry.

As the parties in this case recognize, the term "roadway" is not defined in Part 56. Surprisingly, section 56.2 defines the term "highway" (public street, alley or public road), and the term "travelway," but does not define haulage road or roadway. Judges Moore and Broderick have grappled with the term "roadway" in prior cases involving section 55.9-22, MSHA v. El Paso Rock Quarries, DENV 79-139-PM, Judge Moore, December 17, 1979, MSHA v. Cleveland Cliffs Iron Company, VINC 79-240-PM, Judge Broderick, December 3, 1979, and one would think that MSHA would take note of these decisions and amend Part 56 of the standards and cure the ambiguities that apparently still exist with the interpretation of this standard, ambiguities which I suggest result from the broad and ambiguous language of the berm standard itself.

Although Mr. Van Zee conceded that equipment and men working in an unguarded elevated dike area were exposed to a potential hazard, I find him to be an honest, candid, and credible witness and accept his explanation as to his interpretation of the standard as reasonable. Under the circumstances, and after careful consideration of all of the facts and circumstances here presented, I conclude that the respondent could not reasonably have known of the violation and accordingly was not negligent.

Penalty Assessment


The parties entered into a proposed settlement of this cases but it was rejected by me when it was filed at the hearing and my rejection was based on the fact that I considered it to be untimely, (Tr. 4-9; Exh. P-1). In addition, at the conclusion of the hearing, petitioner's counsel recommended a civil penalty somewhat lower than that proposed by MSHA's Office of Assessments (\$2,500).

It is clear that I am not bound by the initial proposed assessment made in this case by the petitioner's Office of Assessment. This case was heard de novo and my finding and conclusions are made on the basis of the evidence and testimony adduced by the parties. Based on the fact that there is no

direct evidence that the fatality which occurred in this case was the result of the failure to provide a berm at the scene of the accident, and based further on the respondent's size, its immediate corrective action, the fact that it has no prior history of citations under the 1977 Act, and my finding of no negligence on its part, I conclude that a civil penalty of \$850 is appropriate and reasonable in the circumstances.

ORDER

The respondent IS **ORDERED** to pay a civil penalty in the amount of \$850 within thirty (30) days of this decision. Upon receipt of payment by the petitioner, this matter is dismissed.


George A. Koutras
Administrative Law Judge

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