

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

7 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 79-90-M
Petitioner : A.O. No. 14-00597-05001
v. :
: Topeka Maintenance Shop
MARTIN MARIETTA AGGREGATES :
CENTRAL DIVISION. :
Respondent :

DECISION

Appearances: Rochelle G. Stern, Attorney, Office of the Solicitor
U.S. Department of Labor, Kansas City, Missouri, for
petitioner;
Charles A. Bliss, Cedar Rapids, Iowa, for respondent.

Before: Judge Koutras

Statement of the Proceeding

This civil penalty proceeding concerns a proposal for assessment of a 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), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. § 56.14-29. Respondent filed a timely answer contesting the citation and requested a hearing. A hearing was held pursuant to notice on May 20, 1980, in Kansas City, Missouri, and the parties appeared and participated therein. The parties waived the filing of posthearing proposed findings, conclusions, and briefs and were given an opportunity to present oral arguments on the record.

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 a 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 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.

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(1) of the 1977 Act, 30 U.S.C. § 820(1).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

This case is one of three cases which were consolidated and heard on May 20, 1980. Bench decisions were rendered in the other two cases and they were reduced to writing in accordance with the Commission's rules and served on the parties on July 16, 1980 (MSHA v. Martin Marietta Aggregates, Docket Nos. CENT 79-171-M and CENT 79-108-M). No final bench decision was rendered in this case because of a jurisdictional question raised by me sua sponte. At that time, the parties were informed that I would afford them an opportunity to submit written arguments Addressing the following question: Whether the location of respondent's maintenance facility, located in downtown Topeka, Kansas, rather than at the actual mining site, falls within the definition of "coal or other mine" as this term is defined by section 102(b)(3) of the Act.

Upon reexamination of the jurisdictional question raised by me, I informed the parties by an order issued on June 23, 1980, of my finding and conclusion that the maintenance facility in question is a mine within the meaning of that term as defined by the Act, and therefore subject to MSHA's enforcement jurisdiction. The parties were afforded 30 days within which to file any exceptions, and since none have been filed I assume they now agree with my finding, which is herein reaffirmed. **This** finding, as stated in my June 23, 1980, order is as follows:

After review of the record and upon re-examination of the jurisdictional issue raised by me I now conclude that respondent's maintenance facility is in fact covered by the Act and that it falls within the definition of "coal or **other mine**" as those terms are defined by section 102(b)(3).

It seems clear to me that the maintenance facility in question, which is owned and operated by the respondent and used for the purpose of maintaining its mining equipment, is a structure or facility directly related to and used in the respondent's mining operation. In addition, the record reflects that the maintenance facility has always been considered part of respondent's mining operations, has consistently been regulated by MSHA and its predecessor agency MESA, and I take note of the fact that respondent stipulated that its mining operations affect commerce and that they are subject to the Act.

Stipulations

The parties stipulated to the following:

1. The violation in this case was attributable to the activities of an independent contractor who was performing maintenance work on a front-end loader at respondent's Topeka maintenance facility at the time the citation issued.
2. Respondent demonstrated rapid good faith compliance in achieving abatement of the condition cited.
3. Respondent's maintenance facility has no prior history of violations.
4. Respondent is a large mine operator and payment of the proposed civil penalty will have no effect on its ability to continue in business.
5. Respondent's mining activities affect commerce within the meaning of the Act, and the safety standard cited is a duly promulgated standard pursuant to the Act.

In addition to the foregoing, my findings and conclusions made in the previous cases rejecting respondent's independent contractor defense are herein incorporated by reference and reaffirmed. That is, I conclude and find that the respondent, as the owner-operator of the mine, may be held responsible for any violation committed by its contractor.

The section 104(a) citation issued by MSHA inspector Eldon **E. Ramage** in this case, No. 183276, January 24, 1979, cites a violation of 30 C.F.R. § 56.14-29, and the condition or practice alleged to be a violation of this standard is described as follows: "A mechanic was placing himself in a hazardous position while working on a Michigan 75 B front-end loader # 94140. The mechanic did not attach the safety bars to keep the loader from possible articulating and pinning the mechanic in the pinch point. The loader was running."

Petitioner's Testimony and Evidence

Inspector **Ramage** testified that he inspected the maintenance facility in question and identified himself to respondent's Shop Superintendent Max Bloom, who accompanied him at various times during the Inspection. Mr. **Ramage** stated that he observed a man working "in the pinch point of an articulated loader that was running". The man was standing in front of the machine working on the hydraulic valves, and was reaching through the open cab door operating the loader bucket controls. Although there was a sign on both sides of the loader stating that the loader safety bar should be in place, **he** observed that the bar was not in place. The employee was located midway between the front and rear wheels of the loader and was in the pinch point area of articulation. In his view, the employee was in a hazardous area and if the machine had pivoted at the articulation point, he would have been pinched or crushed to death in the pinch point. He issued the citation and served it on Mr. Bloom, and Mr. Bloom then spoke to the worker immediately. Mr. **Ramage** explained how an articulating loader operates and indicated that it pivots and is steered in either direction from a common center point (Tr. 136-143, **Exh.** ALJ-1).

On cross-examination, Inspector **Ramage** confirmed that by placing himself in a hazardous position at the pinch point without placing the safety bar in place, he committed an unsafe act. He also confirmed that Mr. Bloom instructed the man to immediately remove himself from **the** pinch point zone and the man complied and continued working on the machine, but from a safe location, and this in effect was sufficient to abate the citation (Tr. 143-146). Mr. **Ramage** also confirmed that he made no attempt to determine the experience or expertise of the mechanic working on the loader (Tr. 152), and no employee of the respondent was placed in jeopardy (Tr. 156).

In response to my questions, Inspector **Ramage** indicated that machine vibration can cause an articulating piece of equipment **to** move and swing around if the bar is not in place and he has personally observed this happen (Tr. 160-161). The safety bars were installed on the machine, but he did not inquire of the mechanic as to why he did not have them in place since his immediate concern **was** to remove the employee from the hazard (Tr. 162). Had the bar been in place, he would not have issued a citation, and the safety bar would in no way impede the **maintenance** work which was being performed on the machine (Tr. 162-163).

Respondent's Testimony and Evidence

Max Bloom, respondent's equipment and maintenance supervisor, described the operations of the maintenance shop and indicated that it is used to maintain and overhaul mine machinery and equipment, but that the shop is not at the actual mine site. Contractors are hired to perform maintenance on equipment on the average of once a month, and the mechanic in question was in fact employed by G. W. **VanKeppel** Company. The **mechanic** had worked on the equipment for some 10 years and is well qualified and competent, and Mr. Bloom indicated that he does not "look over his shoulder" while he does his job (Tr. 164-172).

On cross-examination, Mr. Bloom confirmed **that he** was present during most of Inspector **Ramage's** inspection, that he periodically makes equipment safety checks, and if he observes an unsafe condition, it makes no difference to him whether the employee is a contract employee or an employee of the respondent, and he would advise the employee to remove himself from the hazard **(Tr.179)**.

In response to my questions, Mr. Bloom conceded that the employee working on the loader in question was in a potentially hazardous position, and he confirmed that the shop in question is located in downtown Topeka **(Tr. 181-182)**.

Findings and Conclusions

Fact of Violation

Respondent **is** charged with a violation of the provisions of mandatory safety standard **30 C.F.R. § 56.14-29**, which states as follows: "Repairs or maintenance shall not be performed on machinery until the power **is** off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments. "

I find that the petitioner has established a violation of section 56.14-29 by a preponderance of the evidence adduced in this proceeding. The unrebutted testimony of the inspector establishes that the loader safety bar was not **in** place to prevent the articulating machine from **moving** about on its pivotal axis and possibly swinging around and entrapping the mechanic who was working on it in the pinch point. Here, it is clear that the machine was running at the time in question and the Inspector indicated that machine vibration could cause the machine to move and swing around, and the purpose of the safety bar installed on the machine is to prevent this from happening. The evidence establishes that maintenance was being performed on a piece of machinery which was running and which was not blocked against motion. Although the standard provides for an exception where machinery motion is necessary to make adjustments, **I** conclude that on the facts in this case the exception only applies where it is established that adjustments may only be made while the power is on and machine motion is **necessary to** make the adjustments. In this case, **I accept the** fact that the engine had to be running to make valve adjustments, but no evidence was advanced to support a conclusion that such adjustments could only be made with the safety bar up and not down in place to prevent machine movement. Accordingly, the citation is **AFFIRMED**.

Gravity

I find that the violation was serious. The mechanic performing maintenance on the machine was in the pinch point *zone* of hazard and if the

machine had pivoted and caught him in the pinch point it is reasonable to conclude that serious injuries would have been inflicted. Both the inspector and respondent's witness Bloom testified that such machines do on occasion "free-wheel", and given the right circumstances, serious injuries could result.

Negligence

The parties have stipulated that the work being performed on the machine was being performed by a contractor employee, and I believe that **respondent** has established that the mechanic performing the work was well qualified and competent to perform the work. Petitioner takes the position that even though a contractor was performing the work, the shop superintendent, who is employed by respondent, is obligated to insure that employees work in a safe manner and are not exposed to hazards, particularly where the shop superintendent's duties include safety at the shop. Respondent takes the position that since Mr. Bloom does not supervise the maintenance work being performed by a contractor under a maintenance agreement, he can hardly be held accountable for an unsafe act performed by any employee since such an act can be performed momentarily even while an inspector looks on.

In this case, it is true that the mechanic placed himself in jeopardy by working on a machine without placing the safety bar in its proper position to prevent machine motion, and that this is certainly an unsafe act or practice on his part. However, it also seems clear to me that the failure to have the safety bar in place was also a condition which is contrary to the requirements of the standard. I believe that in such circumstances, a shop superintendent has some obligation to insure that the equipment in his shop is secured against potential hazardous situations while it is being worked on, regardless of who does **the work**. In this case, I do not believe it is unreasonable to expect the shop foreman to at least check on a mechanic from time-to-time to insure that he is in compliance with normally acceptable Safety practices and procedures. The fact that the foreman may not wish to interfere with the actual maintenance work, does not in my view, absolve him of the responsibility to periodically check on him so as to preclude damage to himself and to the equipment due to his ignorance or lack of interest in protecting himself from injury. Under the circumstances, I conclude and find that the violation resulted from respondent's failure **to** take reasonable care to prevent the condition cited. In short, I conclude that it was not unreasonable to expect Mr. Bloom to make sure the safety bar on respondent's own equipment was in place while the mechanic was working on it, and his failure to do so amounts to ordinary negligence.

Good Faith Compliance

The parties stipulated that immediate and rapid abatement was achieved in this case and I accept and adopt this as my finding.

History of Prior Violations

The maintenance shop has no prior history of violations and this is my finding on this question.

Size of Business and Effect of the Civil Penalty on the Respondent's Ability to Continue in Business

The parties stipulated that respondent is a large mine operator and that the penalty will not adversely impact on its ability to continue in business, and I adopt these stipulations as my finding on these issues.

Penalty Assessment

On the basis of the foregoing findings and conclusions, I believe that the initial \$84 penalty assessment made in this case is appropriate and I accept it as the penalty to be levied in this case and it is affirmed.

ORDER

Respondent is ordered to pay a civil penalty in the amount of \$84 for the citation which has been affirmed in this case and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.


George A. Koutras
Administrative Law Judge

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