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SOL (MSHA) V. GENERAL PORTLAND
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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 Proceedings Docket No. DENV 79-277-PM A/O No. 41-00023-05001
v.		Docket No. CENT 79-15-M A/O No. 41-00023-05002
GENERAL PORTLAND, INC.,	RESPONDENT	Forth Worth Quarry & Mill

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanolli, Washington, D.C. for Respondent

Before: Judge Charles C. Moore, Jr.

These cases were heard March 25, 1980, in Fort Worth, Texas, pursuant to the Federal Mine Safety and Health Act of 1977 ("the Act"). Respondent General Portland, Inc. engages principally in the production of cement (Tr. 99) and employs 180 hourly and 10 supervisory employees at its Forth Worth Quarry and Mill (Tr. 110) which is the subject of these citations. Respondent's size is such that no penalty assessed herein will affect its ability to continue in business.

At the hearing, the Secretary characterized General Portland's prior history of violation as light (Tr. 147) and submitted in support thereof Petitioner's Exhibit No. M-8, a computer printout purporting to show Respondent's violations since the effective date of the 1977 Act. As the printout is not self-explanatory I can only conclude Respondent had a prior history; I am unable to say whether it was mild or extensive. I find, per stipulation of the parties, that all violations were abated promptly and in good faith (Tr. 147).

Three of the alleged violations in CENT 79-15-M: Nos. 154360, 154363 and 154633 respectively, were settled at the hearing pursuant to joint motion of the parties. They concerned an inoperable reverse signal on a front-end loader from which the operator had a virtually unobstructed view, a standard

pickup truck cited under visibility standards pertaining to heavy-duty mobile equipment, and a coupling guard which had been temporarily removed from a drive shaft located in an isolated part of the plant. The original proposed assessment was $600. I accept the settlement and assess a total penalty of $330 for the three violations.

Seven of the alleged violations concern independent contractors and the remaining citation, issued to General Portland, was submitted on stipulation. The issue of the liability of independent contractors for violations of the Act is discussed post.

Docket No. CENT 75-15-M

Citation No. 154631 alleges a violation of 30 C.F.R. 56.15-7, the standard requiring miners to wear goggles whe welding, cutting or otherwise working with molten metal. Inspector Morris observed a contractor's employee wearing only safety glasses while using a cutting torch to install metal steps in a mill building (Tr. 63). Safety glasses lack side shields and permit molten sparks to enter and cause serious injury to the eyes (Tr. 66), whereas goggles cover the entire eye area and provide superior protection (Tr. 65). An employee of Respondent accompanying the inspector immediately instructed the contractor's employee to stop cutting and put on his cutting goggles before resuming work, which the employee did (Tr. 66-67). Respondent maintains that this violation demonstrates its lack of control over and knowledge of the activities of independent contractor employees. This violation would have been readily apparent to Respondent, however, had it made even a cursory inspection of the work place. The record shows the violation to be significant and substantial. MSHA assessed a proposed penalty of $114.

Respondent made an extensive record at the hearing and in its proposed findings of fact and conclusions of law concerning the impropriety of citing operators for violations, as here, committed by independent contractors and their employees (see Tr. 77-91 and Respondent's Exhibit 3). Respondent's arguments are good and were it solely up to me, I would adopt them. But as I read the Commission's decision in Secretary of Labor v. Old Ben Coal Company, 1 FMSHRC 1480 (October 29, 1979), MSHA could have properly cited an owner-operator in the interim before rules for citing independent contractors were promulgated. The Secretary of Labor has promulgated final rules which allow independent contractors to register with MSHA in order to receive an identification number [45 Fed. Reg. 44,494 (July 1, 1980)] which MSHA will then use to identify and issue citations to independent contractors.(FOOTNOTE 1) These procedures became effective July 31, 1980. Nothing in the rules indicates they are to be applied retroactively although it is clear from the Act [30 U.S.C. 802(d) or 3(d), and Old Ben, supra, at 1483] that MSHA had the power to cite independent contractors before these rules were promulgated. Appendix A to the rules states that MSHA's policy

of citing independent contractors took effect July 1, 1980 [45 Fed. Reg. 44,497] and the rules' Summary [Id. at 44,494] speaks simply in terms of "MSHA's enforcement policy" without specifying an effective date.(FOOTNOTE 2) Since the citations before me were issued before the rules became effective, I will hold Respondent liable for violations of the Act committed by its independent contractors. However, I will consider Respondent's position when assessing negligence under 110 of the Act.

In this instance, the Secretary has upheld its burden and I assess a penalty of $100.

Citation No. 154634 alleges a violation of 30 C.F.R. 56.15-5. This standard requires safety belts and lines to b worn when there is a danger of falling. An employee of an independent contractor was observed standing on the flange of an elevator shaft 125 feet above ground without the protection of a safety belt or line, bolting a cover onto the shaft (Tr. 68-69). There were no handrails to prevent him from falling in the event he lost his footing (see Respondent's Exhibit No. 8). A safety belt could have been attached to the work platform 12 feet below (Tr. 69) which, while possibly not protecting him from minor injuries if he fell, would have prevented him from plunging to the ground (Tr. 70). MSHA assessed a proposed penalty of $920 for this violation. I find that a violation was established, that negligence was high on the part of the independent contractor but low as to Respondent and I assess a penalty of $200.

Citation No. 154361 alleges a violation of section 56.9-11, which requires vehicle cab windows to be kept clean and in good condition. The citation alleges that the windshield of a front-end loader vehicle was

cracked. The parties stipulated that the windshield was cracked and that a replacement had been ordered (Tr. 96). This is the only litigated citation in the case which did not involve employees of an independent contractor.

Respondent's Exhibit No. 1 is two photographs and a photocopy of each showing the view from the middle of the cab looking out the windshield. These photographs were taken after the windshield had been replaced so the crack is simulated as a smudge in the first photograph and in the second as a dotted line. The parties stipulated that the crack extended one-fourth of the way down the windshield and the photographs indicate that the crack was on the passenger side of the cab. Respondent's Exhibit No. 2 is a purchase order for a replacement windshield dated August 2, 1978. The citation was issued August 3, 1978. There was no testimony offered.

Respondent argues no violation occurred as it made every effort to replace the windshield. The Secretary maintains that the existence of a crack violates the standard. I find that a crack in the windshield does not constitute keeping the windshield in good condition if it interferes with the driver's vision or creates some other hazard. I cannot make a finding to that effect by looking at the photograph that was offered. MSHA has failed to satisfy its burden and the citation is vacated.

Docket No. DENV 79-277-M

Citation Nos. 154436 and 154435 concern violations of 30 C.F.R. 56.15-3 and 30 C.F.R. |56.15-2 respectively, on the part of independent contractor employees. Nine employees were preparing siding which was being hung on a building wall 30 feet above them (Tr. 17). None of the employees was wearing protective footwear, a violation of section 56.15-3, or hardhats, a violation of section 56.15-2. In addition, tools were being used to measure and cut the siding (Tr. 18). Serious injury could result if a piece of siding fell onto the men below or if a tool slipped and cut a miner's feet. On the other hand, serious injury could occur if a man fell as a result of wearing protective footwear when climbing on these structures, as was suggested at the hearing (Tr. 34). No comparable disadvantage was shown with respect to hardhats. MSHA assessed proposed penalties of $40 in both cases. I find that violations did occur and that there was negligence. I assess a penalty of $40 in Citation No. 154436 and $40 in Citation No. 154435.

Citation No. 154434 alleges a violation of section 56.16-6, a regulation requiring covers over the valves of compressed gas cylinders. Four compressed gas cylinders without valve covers were stored outside a contractor's trailer next to a roadway (Tr. 24). Without valve covers, there was a danger that the pressurized contents would escape, possibly causing a fire (Tr. 24). MSHA assessed a proposed penalty of $40. I find that a violation did occur and that negligence was present. I therefore assess a penalty of $40.

Citation No. 154359 involves a similar violation in that a compressed gas cylinder owned by an independent contractor was standing unsecured (Tr. 53). Section 56.16-5 requires compressed gas cylinders to be stored in a

safe manner. The inspector observed this cylinder standing unsecured next to a contractor's trailer alongside a travelway (Tr. 53). Vehicles and employees passed by the cylinder, and seven employees worked within 10 feet of it (Tr. 53). The cylinder, weighed between 115 and 135 pounds (Tr. 54) and could cause an injury if it fell on an employee's leg or foot. There was evidently no danger of the cylinder exploding. MSHA assessed a proposed penalty of $32. I find that a violation did occur, that the operator is liable and that negligence was present. I assess a penalty of $40.

Citation No. 154366 alleges a violation of section 56.14-30 which requires mobile equipment in a raised position to be securely blocked in place before repair work is commenced. Three employees of an independent contractor were performing maintenance work on a pit haulage truck, the bed of which had been raised and was supported by jacks. The truck bed is manufactured with two 2-inch holes through which two corresponding safety pins are inserted to support the bed in case the hydraulic system or the jacks, which also support the truck bed when maintenance work is being performed, break or collapse. In this case, one 1/2-inch rod supported the truck bed (Tr. 60). One man leaning over the bed of the truck would have been fatally injured had the truck bed fallen, while the two men working underneath would have been frightened but probably not injured. MSHA assessed a proposed penalty of $66. I find that the violation occurred, negligence was present, and a penalty of $100 is assessed.

ORDER

It is hereby ORDERED that Respondent, within 30 days, pay to MSHA penalties in the amount of $890.

Charles C. Moore, Jr.
Administrative Law Judge

~FOOTNOTE-ONE

1 The rules do not state that every independent contractor working in a mine must obtain an MSHA identification number. But independent contractors can now be cited, remedying the problems addressed in Respondent's brief.

~FOOTNOTE_TWO

2 After the parties had submitted briefs in this matter but before a decision had been entered, the Commission, on August 4, 1980, decided Secretary of Labor v. Pittsburg and Midway Coal Mining Company Docket Nos. BARB 79-307-P et seq., 1 MSHC 2465. In that decision, the Commission, at the suggestion of MSHA, remanded the case to Administrative Law Judge Koutras "for the purpose of affording the Secretary an opportunity to determine whether to continue to prosecute these citations against P&M, or any independent contractors which are claimed to have violated the standards cited, or both." (Id.)

I sent a copy of the Commission's decision in the above case to the parties for their comments. The Solicitor did not respond, but Respondent's letter states that it had been authorized to represent that the Solicitor wished to pursue the matter against General Portland and not the independent contractors since the hearing had already been conducted.

The policy reflected in the trial attorney's statement is not universally adhered to by the Solicitor when representing MSHA before our Commission and its judges. I know of at least three cases, and I strongly suspect there are more, where the administrative law judge ruled in the Government's favor at the hearing only to have the Solicitor's appellate staff argue to the Commission that the judge had erred. Secretary of Labor v. Pittsburg and Midway Coal Mining Company, supra, was one such case.