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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. CENT 79-280-M A/O No. 41-02733-05005
v.		Docket No. CENT 80-235-M A/O No. 41-02733-05007
HELDENFELS BROTHERS, INC.,	RESPONDENT	Felder Uranium Operation Mine

DECISION

Appearances: Robert Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner
H. C. Heldenfels Jr., Esq., Heldenfels Brothers, Inc., Corpus Christi, Texas, for Respondent

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter, the Act.) The hearing in these matters was held in Corpus Christi, Texas, on September 4, 1980.

At the conclusion of presentation of evidence and oral argument by the parties on an issue-by-issue basis, a decision was rendered from the bench. The decision is reduced to writing in substance as follows, pursuant to the Commission's Rules of Procedure, 29 C.F.R. 2700.65:

> The parties have stipulated(FOOTNOTE 1) that the Respondent has no history of prior violations; therefore, I find that the operator's history of previous violations is good.
>
> The parties have stipulated that Respondent's man hours for its total operations are 218,983 and for the Felder uranium operation, the man hours are 90,386 and that the Felder uranium operation is small. Therefore, I find that the size of the business of the operator is small.

In view of a stipulation to that effect between the parties, I find that the effect of the assessments will have no effect on the operator's ability to continue in business.

Docket No. CENT 79-280-M

Citation No. 170601

Citation No. 170601 was issued on 5/8/79 by Inspector D. J. Haupt, citing a violation of 30 CFR 55.9-40(c). The condition or practice noted on the citation was, "I observed an oiler's helper standing on the outside of the 631-D Caterpillar No. 3236 scraper cab while the oiler was moving the machine around in the maintenance shop yard. This created a hazard of falling from the machine and being run over."

30 CFR 55.9-40(c) provides as follows: Mandatory. Men shall not be transported (c) outside of the cabs and beds of mobile equipment, except trains.

In view of the testimony to the effect that the inspector did observe an oiler's helper standing on the outside of the Caterpillar scraper while the machine was being moved and due to the fact that the violation has not been controverted by Respondent, I find that a violation of 55.9-40(c) did exist.

In view of the fact that Heldenfels did have a rule prohibiting persons from standing on the outside of such equipment, that Heldenfels could not have known of the violation and the fact that it was conceded by the Petitioner that there was no negligence, I, therefore, find that there was no negligence on the part of the Respondent.

The testimony of Inspector Haupt establishes that there was a low probability that the man would have fallen from the vehicle. It is also established that there was a low probability that the man would have fallen off in such a manner that he would have been crushed by the wheels of the vehicle. I, therefore, find that the gravity is low.

The testimony of Inspector Haupt was to the effect that the operator showed good faith. I, therefore, find that the Respondent demonstrated good faith in attempting to achieve rapid complicance after notification of the violation.

In consideration of the statutory criteria under the Act, I find that for Citation No. 170601 an appropriate penalty is $70. A penalty of $70 is, therefore, assessed.

Citation No. 170603

Citation No. 170603 was issued on 5/8/79, by Inspector Haupt and it cited a violation of 30 CFR 55.9-22. The condition or practice noted in the citation was as follows: The about eighteen inch high berm on the outer bank of the elevated haulage roadway by the switch station for the Felder No. 1 pit water pump was not high enough for 631-D Caterpillar pan scrapers, DJB end dump and R-35 Terex end dumps hauling backfill material along the roadway. The roadway was elevated about 20 feet.

30 CFR 55.9-22 provides as follows: Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

In his testimony the inspector has corrected one of the allegations. That is, that one of the machines was alleged to be a R-35 Terex. He stated that it was actually a Terex 33-03B.

The testimony of Inspector Haupt has established that the roadway was elevated about 20 feet and that there was a slope from this elevated roadway with a base of approximately 10 feet. His testimony has established that the height of the berm was approximately 18 inches. Although he did not measure this, he was certain that the dimensions would not vary more than two inches either way.

The testimony also establishes that the berm had a base of approximately four feet, but this could vary as much as from three to five feet. The inspector has testified that the berms in place were not sufficient to restrain the vehicles using the elevated haulage roadway. He based this opinion on his prior experience wherein he had seen similar equipment, although not identical equipment, cross over elevated piles of materials, which he called "windrows", which were not sufficient to restrain those vehicles.

Although the material and consistency of the windrows were not the same as the berms in all respects, I believe that his prior experience enables him to properly state that the berms at Respondent's mine were not sufficient to restrain the vehicles in use on the elevated roadway.

Counsel has argued that it believes that there is no violation because there was a berm on the roadway and that the citation itself so states that there was a berm about 18 inches high there. Although there was a mound of material along the elevated roadway, the evidence does not establish

that there was berm on the roadway because of the definition of berm in the regulations.

A berm is defined in 30 CFR 55.1 as follows: Berm means a pile or mound of material capable of restraining a vehicle.

Since the mound of material along the elevated roadway, in this case, was not capable of restraining the vehicles in use on that roadway, there was no berm there within the meaning of the regulation. I, therefore, find that the evidence establishes a violation of 30 CFR 55.9-22.

The evidence establishes that the berm or mound of material on the elevated roadway was only approximately 18 inches in height and that this was insufficient to restrain the vehicles in use on the elevated raodway and prevent them from going over the berm. It is clear that the 18 inch mound of material was not a berm within the requirements and definitions of the Act and that it was obvious that this mound of material would not restrain a vehicle. My finding is that the operator knew or should have known of the condition and had failed to exercise reasonable care to prevent or correct the condition. I, therefore, find that operator negligent.

The testimony of Inspector Haupt establishes and Petitioner in oral argument concedes that there was a low probability that one of the vehicles involved would go over the berm and result in injury to a person. The evidence further establishes that if the operator were wearing his seat belt that an injury consisting of bruises or, perhaps, a broken bone might occur. Inspector Haupt also testifies that if the operator were not wearing his seat belt that it was possible that he might be thrown from the vehicle and crushed or severely injured. I find that it is improbable that a serious injury would occur as a result of the condition.

Inspector Haupt has testified that there was good faith on the part of the operator. Therefore, I so find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the statutory criteria prescribed by the Act, I find that an appropriate penalty in Citation 170603 is $70. Respondent is accordingly assessed a penalty of $70.

Citation No. 170604

Citation 170604, issued by Inspector D. J. Haupt on

5/9/79 cited a violation of 30 CFR 55.6-112. The condition or practice noted in the citation was as follows: The burning

rate of the safety fuse in Strawn cap magazine was not known or posted. This created a hazard of not being able to get far enough away from a blast before it goes off.

30 CFR 55.6-112 provides as follows: Mandatory. The burning rate of the safety fuse in use at any time shall be measured, posted in conspicuous locations, and brought to the attention of all men concerned with blasting.

The testimony of Inspector Haupt has established that the burning rate of the safety fuse in the magazine was not known or posted. This testimony establishes a violation of 30 CFR 55.6-112 and Respondent has conceded that a violation did, in fact, exist. I, therefore, find the violation existed.

As counsel for Respondent has noted, only one person was exposed to the condition and the blaster who was that person was an experienced individual. However, this bears on the issue of gravity. The testimony of Inspector Haupt has established that the operator should have known of the condition. Therefore, I find that the operator was negligent and it knew or should have known of condition or practice, yet failed to exercise reasonable care to prevent or correct that condition or practice.

Inspector Haupt has testified that there was good faith on the part of the operator. Therefore, I find that Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

As to gravity, the testimony of Inspector Haupt establishes that there was a low probability of an accident occurring as a result of the violation and this is conceded by Petitioner in its argument on this issue. Although it is possible that if an accident had occurred, that it might have resulted in a fatality, the evidence establishes that the normal blasting method was by electric caps and not by the use of safety fuse, that the blaster was an extremely experienced person and that there was a low probability that a fatality or serious injury would, therefore, occur. I, therefore, find that the gravity is low.

In consideration of the statutory criteria prescribed by the Act, the operator is assessed a sum of $78.

Citation No. 170605

Citation 170605, issued on 5/9/79 by Inspector D. J. Haupt, cited a violation of 30 CFR 55.6-5. The condition or

practice noted on the citation was: the explosives magazine and blasting agents storage had brush and trees within 25 feet, creating a fire and explosion hazard.

30 CFR 55.6-5 provides as follows: Mandatory. Areas surrounding magazines and facilities for the storage of blasting agents shall be kept clear of rubbish, brush, dry grass or trees (other than live trees, 10 or more feet tall) for a distance of not less than 25 feet in all directions and other unnecessary combustible materials for a distance of not less than 50 feet.

Inspector Haupt's testimony that the explosives magazine and blasting agents storage had brush and trees within 25 feet is uncontroverted and the parties have stipulated that a violation existed.(FOOTNOTE 2) I, therefore, find that there was violation of 30 CFR 55.6-5 on the part of Respondent.

Inspector Haupt has testified that there was dried grass in the immediate vicinity of the explosives storage and that there were also trees and brush. His evidence establishes that the trees were green. Respondent argues that on the basis that the trees and brushes were green, that there was no negligence on the part of Respondent. This, however, bears more on the issue of gravity than on the issue of negligence. The record establishes that it was obvious that there were trees, brush and grass within the distance prescribed by the regulation. I, therefore, find that the operator knew or should have known of the conditions or practice and that it failed to exercise reasonable care to prevent or correct the condition. It is found that the operator was negligent.

The testimony of Inspector Haupt establishes that although a serious injury could occur if there was a fire in the grass or the brush in such a manner as to cause the explosive to detonate, he further testified that the probability of such a fire was low and this is conceded by Petitioner in its argument on this issue. The evidence establishes that the location of the explosive magazine and storage was not in a regular work area. I find that the gravity is low.

The testimony of Inspector Haupt has established that the Respondent demonstrated good faith in abating the violation. Petitioner in its argument on this issue concedes that

the condition was abated within the time set by the citation. I, therefore, find that Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the statutory criteria prescribed by the Act in determining an appropriate assessment, a civil penalty in the amount of $60 is assessed for this violation.

Docket No. CENT 80-235-M

Citation No. 170682

Citation No. 170682 was issued on 11/20/79 by Inspector D. J. Haupt. The citation alleged a violation of 30 CFR 55.9-22. The condition or practice noted on the citation was as follows: The 11 degree inclined roadway along the south side of the Felders No. 7 and 4-B pit was equipped with a clay and sand mixture bladed up berm that measured from 12 to 20 inches high and varied in width at the base from five and one half to seven feet wide. The berm would not have restrained the 1-Caterpillar Model 623 or 4 Caterpillar Model 631 scrapers I observed hauling up the roadway in an emergency situation. At the bottom of this form under the heading "Action to Terminate" the Inspector noted: A berm measuring five and one half to six feet high with a base width 12 to 14 feet wide was installed immediately.

30 CFR 55.9-22 provides as follows: Mandatory. Berms or guards shall be provided on the outer banks of elevated roadways.

"Berm" is defined in 30 CFR 55.1 as follows: Berm means a pile or mound of material capable of restraining a vehicle.

Inspector Haupt has testified that the length of the roadway was approximately 600 feet and it was inclined at an angle of 11 degrees. The roadway was elevated and the ratio of the shape at the sides was a 1.1 to 1, meaning that the base of the slope was 1.1 as compared to a heighth of 1.

The testimony of Mr. Haupt establishes that at the time of his inspection the berm in place was from 12 to 20 inches high and varied in width from five and one half to seven feet. The 623 Caterpillar used for excavation and hauling of earth had wheels approximately five feet high with an axle heighth of approximately two and one half feet. The 631 Caterpillar scraper had a wheel heighth of approximately six feet with an axle heighth of approximately three feet.

The Inspector has testified that a berm of this size would be inadequate to restrain the vehicles in use under the conditions existing at the time of his inspection. Because the Inspector's testimony has not been rebutted and it is accepted, I, therefore, find that the material alongside of the haul road was inadequate to restrain the vehicles in use and that there was a violation of 30 CFR 55.9-22.

Inspector Haupt has testified that the berm in place at the time of his inspection measured from 12 to 20 inches high and varied in width at the base from five and one half to seven feet wide and that this was insufficient to restrain the vehicles in use. He has also testified that this condition was open and in plain sight. I, therefore, find that the condition was obvious and that the operator was negligent in that he should have known of the condition and that it failed to exercise reasonable care to prevent or correct the condition.

Inspector Haupt has testified that bruises, cuts could be sustained by the operator if the safety belt held and if the equipment in use did not roll into other machinery on the roadway below. The Inspector testified that he was apprehensive that the power train might fail and that the equipment might roll backward and roll over the berm. The record establishes that the vehicles were fitted with three braking systems-a service braking system, emergency braking system and a parking braking system. Under the conditions existing at the time of the violation, I find that it is improbable that a serious injury would be sustained by the operator or any other miner due to the conditions of the berm.

Mr. Haupt has testified that there was rapid compliance in building up the berm. Since the record establishes that the operator rapidly complied with the terms of the citation by building up a berm immediately, I find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the statutory criteria regarding this violation, I find that a penalty of $85 should be assessed for this violation. Respondent is accordingly assessed a penalty of $85.

It is ordered that Respondent pay Petitioner the sum of $363. This is the total sum consisting of the sum of $278 for the four violations under Docket No. 79-280-M and $85 for the violation in Docket No. CENT 80-235-M.

Motions to Dismiss

At the hearing, Respondent made an oral motion that the proceeding with respect to Docket No. CENT 80-235-M be dismissed because of the length of time taken by the Secretary of Labor to propose a penalty. Respondent's motion was denied in substance as follows:

> In this case the Citation No. 170682 was issued on November 20, 1979. The citation was terminated on that same date by the construction of an additional berm. The results of initial review are dated January 15, 1980. The notice to the mine operator, advising of his rights to an informal conference was dated January 22, 1980. The conference worksheet dated 1/5/80, stated that the conference date was February 5, 1980.
>
> The proposed assessment was dated February 13, 1980. A notice that Respondent had the right to contest the proposed assessment was dated February 22, 1980. The notice of contest was dated February 25, 1980 and the complaint proposing a penalty was dated April 4, 1980.
>
> Respondent has predicated his motion for dismissal partly on the requirements of 30 CFR 100.5. 30 CFR 100.5(a) states, "All citations which have been abated and all closure orders regardless of termination or abatement will be promptly referred by MSHA to the Office of Assessments for a determination of the fact of a violation and amount, if any, of the penalty to be proposed."
>
> There is nothing in the record on this point to support a finding that citations which had been abated were not promptly referred by MSHA to the Office of Assessments for a determination of the fact of the violation and the amount, if any, of the penalty to be proposed.
>
> The Respondent also based his motion for dismissal on the requirements of the Federal Mine Safety and Health Act of 1977. Section 105(a) of that act provides in pertinent part as follows: If after an inspection or investigation the Secretary issues a citation or order under Section 104, he shall within a reasonable time after the termination of such inspection or investigation notify the operator by certified mail of the civil penalty proposed to be assessed under Section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

The record indicates that the citation was issued as a result of an inspection on November 20, 1979, that the citation was dated November 20, 1979 and that the citation was terminated or that the condition was abated on November 20, 1979.

The proposed assessment was dated February 13, 1980 and the notice of right to contest was dated February 22, 1980. The complaint proposing a civil penalty was dated April 4, 1980.

The Petitioner has admitted that Inspector Haupt's inspection was complete on November 20, 1979, the date of the citation, and Respondent has admitted that there was no harm to Respondent as a result of any delay on the part of Petitioner in notifying Respondent of the penalty proposed to be assessed as required by Section 105(a) of the Act.

My ruling is that under the circumstances of this case the time interval between the issuance of the citation on November 20, 1979, and the time that Respondent was notified of the proposed penalty on or about February 13, 1980, was not a delay in time within the meaning of Section 105(a) of the Act, that would cause the citation issued by the inspector to be vacated. The Respondent's motion is accordingly denied.

Respondent's motion that the proceeding with respect to Docket No. CENT 79-280-M was also denied. The four citations alleged in Docket No. CENT 79-280-M had been issued on May 8 and 9, 1979. Two citations were terminated immediately and two were terminated on May 25, 1979. MSHA issued its Results of Initial Review on July 11, 1979. Approximately 60 days had elapsed between issuance of the citations and the transmittance of the Results of Initial Review. The Proposed Assessment was issued on July 26, 1979, approximately 75 days after issuance of the pertinent citations.

ORDER

It is ORDERED that the bench decision rendered in the above-captioned civil penalty proceedings is hereby AFFIRMED.

It is further ORDERED that Respondent pay the sum of $363, if it has not already done so, within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

~FOOTNOTE_ONE

1 This stipulation and the two which follow were made by the parties at the outset of the hearing, prior to the presentation

of evidence as to each alleged violation.

~FOOTNOTE_TWO
2 Mr. Heldenfels, counsel for Respondent, stated at the hearing that he would "stipulate that there was a violation .... Mr. Haupt's testimony is uncontroverted."