

CCASE:

SOL (MSHA) V. LONE STAR STEEL

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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

v.

LONE STAR STEEL COMPANY,  
RESPONDENT

Civil Penalty Proceedings

Docket No. DENV 79-291-PM  
A/O No. 41-01643-05001

Docket No. DENV 79-439-PM  
A/O No. 41-01643-05002 F

Benefication Plant

DECISION

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S.  
Department of Labor, Dallas, Texas, for Petitioner;  
Steve Wakefield, Esq., Donald Dowd, Esq., Dallas, Texas,  
for Respondent

Before: Judge Stewart

These are civil penalty proceedings brought pursuant to  
section 110(a)1 of the Federal Mine Safety and Health Act of  
1977, 30 U.S.C. 820(a), hereinafter referred to as the Act.

Petitioner timely filed petitions for assessment of civil  
penalty in these cases with the Mine Safety and Health Review  
Commission and Respondent timely filed its answers to these  
petitions. The hearing in these matters was held in Dallas,  
Texas. A brief and proposed findings of fact and conclusions of  
law were submitted by Respondent.

The primary issues are (1) whether the mine owner, Lone Star  
Steel Company, should be cited for violations of the Mine Safety  
and Health Act committed by its contractor, H. B. Zachry Company,  
(2) whether there was a violation of mandatory safety or health  
standards, and (3) the amount of the civil penalty that should be  
assessed for the violations.

The following stipulations between the parties which were  
accepted at the hearing are entered as findings:

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The Lone Star Steel Company is engaged in interstate commerce.

The employee, Tracy Alan Monkhouse, fell and was killed April 26, 1978.

He was not tied off as alleged.

The H. B. Zachry Company, reported the death some 23 hours later on April 27, 1978.

The size of the company, based on the manhours worked for 1978, is 255,573 hours.

This would indicate that Lone Star is a medium-sized mining operation.

The penalty will not affect continuation in the business.

There is no prior history of violations under this Act.

Respondent showed good faith in abating the alleged violations.

On April 26, 1978, at approximately 11:05 a.m., Tracy Alan Monkhouse fell from atop a 56-foot column to his death. At the time of his death, Mr. Monkhouse was employed by H. B. Zachry Company (Zachry). His job was to climb to the top of steel columns and connect cross-members. A column that Monkhouse had climbed tilted, causing him to fall or jump from the column.

Zachry, a large construction contractor, had entered into a contract with Lone Star Steel Company (Lone Star) to build part of a new sintering (benefication) plant for Lone Star at Lone Star's iron ore mining and processing facility near Lone Star, Texas. The iron ore facility is located approximately 3 miles northeast of Lone Star's main steel plant. The sintering plant is that part of the steelmaking operation in which raw iron ore is upgraded and prepared for melting in the blast furnace.

The benefication plant project was a major one, calling for a total expenditure of over 20 million dollars. Zachry was to remove two existing kilns, and erect and install a refurbished sintering machine at an estimated cost to Lone Star of over 2 million dollars. As many as 158 employees worked at a time and it took approximately 11 months to complete that part of the project.

According to Lone Star's project engineer and the contract itself, Zachry exercised control over the details of work. Zachry also assumed responsibility for the safety of its employees. (FOOTNOTE 2) In a meeting with the company safety director prior to the beginning of construction, Zachry

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officials stated that they were familiar with MSHA regulations. At the hearing, Zachry's project safety engineer stated that it was his understanding that Zachry was to be totally responsible for compliance with MSHA regulations. The attempt was made to isolate the job and make it off limits to Lone Star employees. The construction area was roped off and signs were posted indicating construction was in progress and warning Lone Star employees to keep out. There were at least two incidents where Lone Star employees, one of whom was the plant superintendent, were warned that the area was off limits to Lone Star personnel.

When the accident occurred, Mr. Monkhouse was wearing a safety belt. When he climbed to the top of the column, however, he did not tie-off with the belt. Testimony indicated that it was not common practice in the trade for "connectors" to tie-off and, depending upon the operation to be performed, connectors may have difficulty tying-off. Testimony also indicated that the deceased may have precipitated the tipping of the beam by rocking it and that Mr. Monkhouse may have attempted to jump from the column he was straddling to a nearby column.

Zachry reported the death to MSHA some 23 hours later. After an MSHA investigation, Lone Star was cited for violations of 30 C.F.R. 50.10 which calls for "immediate" reporting of all fatal accidents and 30 C.F.R. 55.55-5 which requires tying-off when working in high places. MSHA inspector Julian Kennedy testified that Lone Star was cited because it was MSHA policy to cite the mine owner instead of the independent contractor at that time.

Lone Star's good faith and lack of a prior history of violations were stipulated. It was also stipulated that Lone Star's mining operation was in the medium-size range. The inspector's report with regard to Citation No. 00154817 (failure to tie-off) states that the condition resulting in the fatality could not have been known or predicted by Lone Star.

The MSHA inspector's statement with respect to Citation No. 00154816 (late reporting) notes that this was a technical violation only.

#### Liability of Operator for Act of Independent Contractor

Lone Star contends that the Act requires that the contractor be cited in circumstances such as those that exist in this case and asserts that even if a citation of contractors is within the discretion of the Secretary of Labor, the Secretary has clearly abused his discretion in this case by continuing to blindly follow a policy of administrative convenience.

Although the Federal Mine Safety and Health Amendments Act of 1977 (Pub. L. 95-164, 30 U.S.C. 801 et seq.) amended the definitions of "operator" to include an "independent contractor," conditions under which the independent contractor rather than the owner-operator should be cited were not prescribed. The Act still imposes strict liability on the owner-operator for violations and

Lone Star has not been relieved of its liability by contracts and understandings with Zachry.

The Federal Mine Safety and Health Review Commission has recently ruled on this question in two cases, Secretary of Labor, Mine Safety and Health Review Commission v. Old Ben Coal Co. (MSHRC Docket No. VINC 79-119) (now pending before the Circuit Court of Appeals of the District of Columbia, Docket No. 79-2367), and Monterey Coal Company v. Secretary of Labor, Mine Safety and Health Administration and United Mine Workers (MSHA Docket Nos. HOPE 78-469 through HOPE 78-476), (now on appeal to the Fourth Circuit Court of Appeals). In Old Ben, the Commission held that the Secretary of Labor retained the discretion under the Act to cite the mine owner even though the 1977 Amendments amended the definition of "operator" to include "any independent contractor performing services or construction" at a mine. In Monterey Coal, the Commission, citing Old Ben, reversed an administrative law judge's decision in which he had held the owner not liable.

Lone Star also contends that the purposes of the Act can best be served by citing the party best able to protect the health and safety of the miner. While Zachry might have been in violation of the two cited regulations and may have also been negligent, these issues have not been litigated by the independent contractor at a hearing. The Act imposes liability on Lone Star and none of its provisions required the inspector to cite Zachry rather than Lone Star for violations. Although the inspector's report with respect to Citation No. 00154817 (failure to tie-off) states that the condition resulting in the fatality could not have been known or predicted by Lone Star, there is no requirement under the Act that Respondent must be negligent in order to be liable. Negligence is one of the statutory criteria to be considered in determining the amount of civil penalty that should be assessed, but it is not a condition for finding Respondent liable. (FOOTNOTE 3)

Citation No. 00154817

In citing a violation of 30 C.F.R. 55.15-5 on April 28, 1978, the inspector stated on the citation form issued to Respondent that some H. B. Zachry employees (connectors) were not "tying-off" with the safety belts provided while working at the top of free landing columns. 30 C.F.R. 55.15-5 provides: "Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

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The record establishes the occurrence of a violation of 30 C.F.R. 55.15-5 as alleged. Mr. Monkhouse wore a safety belt but failed to attach a line as required by the mandatory standard. Testimony was offered to the effect that it was not the common practice for connectors to tie-off. The plain language of the standard, however, requires that they do so.

It is probable that this violation would result in serious injury or death to the person failing to tie-off and it did in fact contribute to the death of Mr. Monkhouse. It would normally be expected that one person would be affected by his failure to tie-off.

Negligence on the part of Respondent has not been established; it was not shown that Respondent knew or should have known of the failure of Mr. Monkhouse to tie-off as required. Clearly, it was not established that Respondent had actual knowledge of the failure to tie-off. The area was off limits to Respondent's personnel, Respondent's management had no supervisory authority over Zachry personnel, and Zachry had assumed responsibility for the safety of its own employees. The record will not, therefore, support a finding that Respondent had constructive knowledge of the failure of Mr. Monkhouse to tie-off.

The findings with respect to the remaining statutory criteria are as follows: the operator has no history of previous violations; Respondent is a medium-sized mining operation; the civil penalty assessed will not affect the operator's ability to continue in business; and Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In view of the above, Respondent is assessed a civil penalty of \$500 for this violation.

Citation No. 00154816

In citing a violation of 30 C.F.R. 50.10 on April 28, 1978, the inspector stated on the citation forms issued to Respondent that: Tracy Allan Monkhouse, an employee of the H. B. Zachry Company died at approximately 11:05 a.m., April 26, 1978, from injuries suffered in an industrial accident which occurred at that time. The MSHA subdistrict office was notified at 11 a.m., May 27, 1978. The H. B. Zachry Company was engaged in plant construction work for the Lone Star Steel Company at this plant. Telephone communication between MSHA and the mine site was available at the time of this accident. 30 C.F.R. 50.10 provides:

Immediate Notification. If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington,

D.C., by telephone, toll free at (202) 783-5582.



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This is only a technical violation as acknowledged by the inspector in his statement and the record does not establish negligence on the part of Lone Star for the 1-day delay by Zachry in reporting the accident. The operator has no history of previous violations. Respondent is a medium-sized mining operation. The civil penalty assessed will not affect the operator's ability to continue in business. Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

The petition for assessment of civil penalty also alleged a violation of 30 C.F.R. 55.12-18. On this citation, the inspector stated: "There were several electrical disconnect switches that were not labeled to show what units they control, located in the Ore lab building." At the outset of the hearing, Petitioner announced that it would not have any evidence to offer on that matter. The proceeding in regard to that citation is accordingly dismissed.

The Federal Mine Safety and Health Review Commission, on August 4, 1980, issued its decision in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburgh & Midway Coal Mining Company (P&M). That case was remanded to the judge to allow Petitioner an additional opportunity to elect the parties against which it desired to proceed.

In view of the Commission's decision, an order was issued affording the Secretary of Labor an opportunity determine whether to continue to prosecute the citations against Lone Star, or the independent contractor which was claimed to have violated the standards cited, or both.

The Secretary complied with that order by filing a response stating that "since this matter has already been tried and submitted we choose to proceed against Lone Star only."

Proposed findings of fact and conclusions of law consistent with this decision are rejected.

In consideration of the findings of fact and conclusions of law contained in this decision, an assessment of \$550 is appropriate under the criteria of section 110 of the Act.

#### ORDER

Respondent is ORDERED to pay Petitioner the sum of \$550 within 30 days of the date of this order.

Forrest E. Stewart  
Administrative Law Judge

#### ~FOOTNOTE\_ONE

1 Section 110(a) of the Act reads as follows:

"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other

provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

~FOOTNOTE\_TWO

" 2 The contract between Zachry and Lone Star called for Zachry to comply with the Occupational Safety and Health Act of 1970, as well as all Federal and State environmental statutes and all regulations issued pursuant to such statutes. No explicit requirement was contained in the contract to the effect that Zachry was responsible for compliance with the Act and the regulations issued pursuant thereto.

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3 Section 110(i) of the Act provides:

"The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."