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SOL (MSHA) v. EL PASO ROCK
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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.

EL PASO ROCK QUARRIES, INC.,
RESPONDENT

Civil Penalty Proceedings

Docket No. DENV 79-139-PM
A/O No. 41-00046-05001

Docket No. DENV 79-176-PM
A/O No. 41-00046-05003

El Paso Quarry & Plant

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Ralph W. Scoggins, Esq., El Paso, Texas, for Respondent.

Before: Judge Charles C. Moore, Jr.

On January 28, 1981, the Commission remanded the above cases to me for further proceedings as to six of the citations which I had vacated and which the Commission has reinstated. I have already made findings as to all the necessary criteria except negligence and gravity, and in my opinion the Commission has already decided that the violations did occur. I have given the parties an opportunity to state whether they wanted to present any additional evidence and the Secretary has stated that he did not. Respondent did not reply to the order.

Citation No. 159658

I was of the opinion that the elevated roadway involved in this citation was not used for loading, hauling and dumping, and vacated the citation. The Commission disagreed because explosives were hauled to a blasting site. The lack of berms could be hazardous but there is a very low degree of negligence because the operator thought, as I did, that the standard did not require berms on this type of road. A penalty of \$100 is assessed.

Citation No. 159665

In my original decision in this case, I made the following statement concerning this citation:

Citation No. 159665. The allegation is that 30 CFR 56.9-87 was violated in that the automatic reverse alarm was inoperative on one of the company trucks. This was a 35-ton haulage truck and naturally could do serious damage if it were to back over another piece of equipment or a miner. But the evidence indicates that all such equipment is checked every morning and every night, and whenever the vehicle is backed up. The drivers are instructed to take any truck to the shop to be fixed by mechanics when a failure occurs. In the circumstances, I do not believe that the Act requires a mine operator to guarantee that a piece of equipment will not break down. His obligation is to check it often and repair it when it does break down and there is no proof in this case that the operator did not do just that. If the inspector had been able to determine when the horn became inoperative and that the mine operator should have known of it, a violation would be established. In the present circumstances, however, the citation is VACATED.

A civil penalty is supposed to be a deterrent to future violations. In a case such as this, where I believe the Respondent was doing all that could be reasonably expected in order to keep the trucks in safe operating condition, I cannot reasonably assess a penalty high enough to be a deterrent. But even if I assessed a \$10,000 penalty, it would not prevent horns from becoming inoperative, headlights from burning out, windshields from becoming cracked, etc. I am assessing a penalty of \$10.00 for this "no fault" violation.

Citation Nos. 159669, 159673, and 159695

These three citations were issued because toeboards were not attached to certain elevated platforms creating a danger to miners below of falling tools or equipment. The standard in question (30 C.F.R. 56.11-2) states that "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

I interpreted the words "where necessary" in the standard to apply to situations where there was a danger of falling from the elevated ramps or elevated walkways but the Commission has decided that the standard is also intended to protect persons under the platforms. Inasmuch as there was equipment or the platforms, and there were no toeboards, a violation was established. There was negligence in allowing the condition to exist and I think the hazard involved justifies a civil penalty of \$100 for each of these three citations, and I accordingly assess \$300 for these citations.

Citation No. 195691

The allegation in this citation was that the gate in the fence surrounding an electrical transformer was not locked. The fence had a hole in it big

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enough for someone to walk through (a penalty was assessed for this hole), and like Commissioner Backley I fail to see the point in requiring that a gate be locked when there is a big hole in the fence. Having the transformer inadequately fenced is hazardous, but I can see no additional hazard caused by the fact that the gate was not locked. Nor do I find any negligence in the circumstances. A penalty of \$5 is assessed.

ORDER

It is therefore ordered that Respondent pay to MSHA, within 30 days, a civil penalty of \$415. (FN.1)

Charles C. Moore, Jr.
Administrative Law Judge

AA

~FOOTNOTE_ONE

1 These assessments are in addition to those contained in my earlier decision.