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SOL (MSHA) v. BEN M. HOGAN

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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 Proceeding

Docket No. CENT 79-96-M
A/O No. 03-01140-05003F

v.

Searcy Quarry and Mill

BEN M. HOGAN COMPANY, INC.,
RESPONDENT

DECISION

Appearances: Gail M. Dickenson, Esq., and Eloise V. Vellucci, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Dallas, Texas, for Petitioner;
Gus Albright, Safety Director, Ben M. Hogan Company,
Inc., Little Rock, Arkansas, for Respondent.

Before: Judge Cook

I. Procedural Background

On June 25, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Ben M. Hogan Company, Inc. (Respondent), in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (Supp. III 1979) (1977 Mine Act), and alleges a violation of one provision of the Code of Federal Regulations. An answer was filed on July 5, 1979.

The case was assigned to the undersigned Administrative Law Judge on October 16, 1979, and a prehearing order was issued on October 19, 1979, which, among other things, ordered the parties to confer as to the possibility of settlement of the case. Settlement negotiations continued for several months without fruition. A notice of hearing was issued scheduling the case for August 27, 1980, in Little Rock, Arkansas. This was continued until December 2, 1980, pursuant to request by the Respondent's representative that eye surgery would prevent him from activity for at least 2 months. The case was then again continued as a result of a request by both parties to submit the case on stipulations. Time for filing stipulations and briefs was set, however, pursuant to a motion by the Petitioner, the time limit was extended.

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A stipulation of facts was filed as well as the Petitioner's motion for summary judgment. (FN.1) A memorandum in support of the Petitioner's motion was filed as well as a letter from the Respondent's representative in rebuttal to the Petitioner's memorandum.

II. Violation Charged

Citation No.	Date	30 C.F.R. Standard
162921	6/23/78	56.9-37

III. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of a mandatory safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred. In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

IV. Opinion and Findings of Fact

A. Stipulation and Findings of Fact

The stipulation provided, in part, as follows:

The parties stipulate and agree that the following documents and statements constitute all factual evidence in this case.

1. Copy of Citation No. 162921.
2. Copy of Penalty Assessment.
3. Accident report.
4. Conference worksheet which reflects violation, size of mine and previous history.

5. Letter to MSHA from Gus Albright dated July 2, 1979.

The order and citation as originally issued provided, in part, as follows:

Order No. 162921 (date - 06/23/78; time - 0700; type - 107a, 104a) [part and section: 56.9-37]

William O. Wilcox, the operator of the 980-B Caterpillar front-end loader, Serial No. 89P5256, was fatally injured on June 21, 1978, at approximately 11:30 a.m. Ed Tomlinson, a witness, stated that he observed the victim squatting on top of the front-end loader left rear wheel, facing the engine while the engine was operating at a fast idle. The front-end loader, parked on a grade, the bucket in a raised position and the wheels not blocked or turned toward the bank, started moving and the victim was pulled between the wheel and the fuel tank and subsequently run over by the left rear wheel.

The termination of such order and citation was issued on June 23, 1978, at 0800 and stated, in part, as follows: "The front-end loader operators were instructed on the proper procedure for parking and dismounting the front-end loaders."

On February 2, 1979, a modification of the original order and citation was issued which stated, in part, as follows: "Delete the 107 A order and modify to read 104 A citation only."

Pertinent parts of the accident report provide as follows:

INTRODUCTION

This report is based on an investigation made pursuant to Section 103(a) of the Federal Mine Safety and Health Act of 1977, Public Law 91-173 (83 STAT. 742) as amended by Public Law 95-164 (91 STAT. 1290).

William O. Wilcox, SSN 431-48-0037, front-end loader operator, age 62, married, with no dependents, was fatally injured at 11:30 a.m., June 21, 1978, when the parked front-end loader he was operating started a sudden forward movement, throwing the victim from a squatting position on the left rear tire, pulling him between the wheel and mudguard and ran over him. The victim had 3 years experience operating a front-end loader at this operation, and 25 years experience in related heavy equipment operations.

The Little Rock field office was notified by a telephone call from Gus Albright, safety director for Ben M.

Hogan Company, Inc. at 4:16 p.m. June 21, 1978. This accident was investigated on June 22, 1978.

Information for this report was obtained by visiting the accident site and interviewing employees and officials of the Ben M. Hogan Company, Inc. The accident site had been left undisturbed. Investigations of the accident had been conducted by the company officials in conjunction with local law enforcement officers and J. A. Riggs Tractor Company.

GENERAL INFORMATION

The Ben M. Hogan Company, Inc., Searcy Quarry and Mill is a crushed stone mining and sizing operation 3 miles north of Searcy, Arkansas. Sandstone is drilled, shot and loaded into haulage trucks, hauled to the crushing and screening plant, where crushed material is stockpiled, loaded and hauled to various areas for the construction industry.

* * * * *

PHYSICAL FACTORS INVOLVED

The rubber-tired articulated front-end loader was a Caterpillar Model 980-B, Serial No. 89P5256, equipped with a 5-1/2-cubic yard capacity bucket, 260 horsepower at 220 RPM, operating weight of 47,000 pounds, single lever planetary power shift, iron counterweight of 3,190 pounds, wheelbase of 122 inches, overall length of 24 feet 10 inches, height to top of exhaust stack 11 feet 7 inches, and a maximum hinge pin height of 13 feet 7 inches.

On the day of the accident the victim had complained to Ed Tomlinson, haulage truck operator, that it felt like a tire was low. After an investigation by the two it was decided the tires were ok.

Mobile equipment operators change oil, lubricate, and inspect their vehicles weekly. Deficiencies found at any time were reported verbally to the foreman or the superintendent and the J. A. Riggs Tractor Company sends a mechanic to repair equipment.

The west top of quarry bench was cap rock and clay that was removed by loading with a front-end loader into haulage trucks and hauled off to dump. There was a grade of about 5 percent south after the overburden was removed.

DESCRIPTION OF ACCIDENT

On Wednesday, June 21, 1978, William O. Wilcox (victim) reported for work at 7 a.m., his normal starting time. The victim performed his duties of loading the Euclid haulage trucks with stripped sail, from the west end of the quarry site, with a 980-B Caterpillar front-end loader, until about 11:30 a.m.

At this time, he parked his loader on a grade with the bucket in a raised position and the wheels not blocked or turned toward the bank.

Ed Tomlinson, a witness, stated that he observed the victim squatting on top of the front-end loader left rear wheel, facing the engine, while the engine was running at a fast idle. (See sketch.)

The victim had motioned Tomlinson to come toward him and when Tomlinson got to within 6 feet of the victim, the front-end loader suddenly moved forward and the victim was pulled between the wheel and the fuel tank and subsequently run over by the left rear wheel. The front-end loader continued down the 5 percent grade for approximately 100 feet at which point the left front wheel climbed the side of a sloped dirt bank causing the loader to turn over on its side.

After he determined that there wasn't anything he could do for the victim, Tomlinson drove his haulage truck to the mine office and notified Dwain Mason, the superintendent, about the accident. Mason immediately called the White County emergency ambulance service out of Searcy, Arkansas.

Boyce Moser, a haulage truck operator, stated that he drove up to the overturned loader, and thinking that Wilcox might be pinned under the loader, started looking for him. Moser, unable to locate Wilcox, turned the engine off since it was still running. Allen Foster, the White County coroner, pronounced Wilcox dead at the scene of the accident. The body was taken to the Powell Funeral Home in Bald Knob, Arkansas.

After the investigation was completed, it was determined that the victim had set the emergency parking brake and left the transmission in first forward gear before getting out of the loader cab. The transmission safety lever was not in the horizontal position which would have locked the transmission in neutral.

In trying to determine why the victim was on top of the rear wheel and apparently working on the engine while it was running, Jim Evans, a mechanic for J. A. Riggs Tractor Company, checked the following:

1. The operation of the transmission.
2. Transmission shift linkage.
3. Throttle control linkage.
4. Throttle control--low and high idle.
5. Brakes on all four wheels.

Results:

1. He found that the transmission link assembly was out of adjustment. The rod had been welded to the link assembly. The link assembly was replaced.
2. The link return spring on the throttle linkage was broken. The spring being broken would not return the governor to idle RPM. The spring was replaced.

CAUSE OF THE ACCIDENT

The direct cause of the accident was the victim attempting to work on the engine with the transmission in gear, the bucket in a raised position, and the loader was not blocked or turned into a bank.

The penalty assessment form states that the Respondent's company size is 320,508 man-hours per year, and that the mine size (Searcy Quarry and Mill) is 42,571 man-hours per year.

The conference worksheet states that the 1978 production of the subject company was 320,508 man-hours, and that the 1978 production of the subject mine was 42,571 man-hours.

The conference worksheet states that there were 11 assessed violations issued by MSHA at the subject mine during 1978 and that there were 11 inspection days during 1978 at the subject mine.

B. Occurrence of Violation

The Respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.9-37 in that one of its front-end loader operators parked the front-end loader on a grade with the bucket in a raised position and the wheels not blocked or turned toward the bank. The stipulation signed by both parties clearly states that this in fact did occur as charged.

Mandatory safety standard 30 C.F.R. 56.9-37 provides that:

"Mobile equipment shall not be left unattended unless the brakes are set. Mobile

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equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement."

It is clear that mandatory safety standard 30 C.F.R. 56.9-37 was violated at the time and place charged.

The Respondent, however, raises the argument that under the facts of this case the violation was caused by the equipment operator himself who then was the unfortunate victim of the fatal accident that followed. The Respondent states that its supervisor had no knowledge of the actions of the victim. The Respondent argues that it should not be held responsible for the violation.

In this regard, the letter of Gus Albright, safety director of the Respondent, dated July 2, 1979, to the Petitioner was made a part of the record by the stipulation. That letter states, in part, as follows:

Per instructions of Attorney Gail M. Dickenson, Office of the Solicitor, 555 Griffin Square Building, Dallas, Texas 75202, the Ben M. Hogan Co., Inc. submits the following reason for requesting a Hearing.

"The accidental death of William O. Wilcox was caused solely by the victim's own negligence and violation of at least four safety rules, all of which were well known by Mr. Wilcox, an operator with many years of experience. This fact was established by the only witness present and by MSHA Inspectors.

"The accident was in no way due to unsafe equipment. Mr. Wilcox had been operating the particular piece of equipment for many months and was well acquainted with it.

"Mr. Wilcox was operating the piece of equipment approximately one-quarter mile from the primary job site and his immediate supervisor. This is normal procedure around a quarry and crusher operation - no way a supervisor can be with every employee at all times."

The Ben M. Hogan Company understands that penalties and assessments are mandatory under MSHA. We understand our training and supervisory responsibilities; however, in cases as the one in question, where unquestioned evidence dictates that the cause of the accident was due to the employee's own chance-taking action, we question the fairness and advisability of assessing a civil penalty against the employer. It should at least be the very minimum.

In this regard, also, the Respondent in its letter filed in response to the Petitioner's memorandum in support of the motion

for summary judgment

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takes issue with certain factual statements made by the Petitioner. In that letter, the Respondent states in part:

Enclosed are the copies of the Stipulation which I have signed. We do not agree, however, with two references under "FACTS" submitted in your Memorandum. They are:

1. Page 1, line 4 which states: "Evidently, due to a malfunction of the transmission, the loader would not shift into neutral." We propose that there is no such statement in the Accident Investigation Report. Jim Evans, J. A. Riggs Tractor Company mechanic, found the "transmission link assembly was out of adjustment" and the "link return spring on the throttle linkage was broken." There is no evidence or testimony that the front end loader would not shift into neutral.

2. Page 2, line 6 which states, "Mr. Wilcox informed his supervisor." The Accident Investigation Report does not bear this out. At no time did Mr. Wilcox report to a "supervisor" any malfunction of the front end loader. He talked with a haul truck operator [concerning] the possibility of a low tire (concluded by both that there was not a low tire). The haul truck operator was Ed Tomlinson. Our supervisors, Foreman and Superintendent, were approximately one-half mile away, site of the quarry, crusher and office.

As relates to the Respondent's position in the above-quoted paragraph No. 1, it appears that there is nothing in the record as stipulated which clearly states that the loader would not shift into neutral. The findings by MSHA in the accident report were:

1. He found that the transmission link assembly was out of adjustment. The rod had been welded to the link assembly. The link assembly was replaced.

2. The link return spring on the throttle linkage was broken. The spring being broken would not return the governor to idle RPM. The spring was replaced.

MSHA went on to state the cause of the accident as follows: "The direct cause of the accident was the victim attempting to work on the engine with the transmission in gear, the bucket in a raised position, and the loader was not blocked or turned into a bank."

Therefore, I must reject the findings of fact proposed by the Petitioner that "the loader would not shift into neutral."

As relates to the Respondent's argument in paragraph No. 2 of its letter quoted above, the record does not sustain the finding proposed by the Petitioner that: "Mr. Wilcox had informed his supervisor earlier of what he

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thought to be a low tire * * *." The facts show that Mr. Wilcox discussed the tire with Mr. Tomlinson, a haulage truck operator.

In view of the fact that there has been no proof that the Respondent's supervisors had knowledge of the actions of the unfortunate victim of the accident, and in view of the findings by MSHA that the direct cause of the accident was the action of the victim attempting to work on the engine with the transmission in gear, the bucket in a raised position, and the loader not blocked or turned into the bank, the Respondent has demonstrated no negligence in this case.

However, the fact that the Respondent has demonstrated no negligence does not result in its lack of liability for the violation of mandatory safety standard 30 C.F.R. 56.9-37. It has been held that a mine operator may be held liable for a violation of a mandatory safety standard regardless of fault. *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 2 BNA MSHC 1132, 1981 CCH OSHD par. 25,154 (1981); *United States Steel Corporation*, 1 FMSHRC 1306, 1 BNA MSHC 2151, 1979 CCH OSHD par. 23,863 (1979); see also, *Heldenfels Brothers, Inc. v. Marshall*, No. 80-1607, 2 BNA MSHC 1107 (5th Cir., filed January 15, 1981).

Accordingly, the Respondent is found to be liable for the violation of mandatory safety standard 30 C.F.R. 56.9-37 as charged.

C. Negligence

As stated above, I find that the Respondent demonstrated no negligence.

D. Gravity of the Violation

In view of the fatal accident which resulted here, it is found that the violation is extremely serious.

E. History of Previous Violations

The record shows that 11 inspections were conducted at the subject mine during 1978, resulting in assessment by MSHA for 11 violations of the regulations. This is a moderate history.

F. Good Faith in Attempting Rapid Abatement

The record shows that the violation was terminated within 1 hour after the citation was issued by instructing the front-end loader operators in the proper procedures for parking and dismounting the front-end loaders. Good faith in attempting rapid abatement of the violation has been established on the part of the operator.

G. Appropriateness of Penalty to Operator's Size

The record establishes that the Respondent's size was

320,508 man-hours per year at the time of the violation, while the size of the mine was 42,571 man-hours per year. The Respondent is small in size.

H. Effect on Operator's Ability to Continue in Business

The Federal Mine Safety and Health Review Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that a penalty otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

V. Conclusions of Law

1. Ben M. Hogan Company, Inc., and its Searcy Quarry and Mill have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. The violation charged in Citation No. 162921, June 23, 1978, 30 C.F.R. 56.9-37, is found to have occurred as alleged.

4. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

The Petitioner and the Respondent submitted a memorandum and letter, respectively. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of a penalty is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
162921	6/23/78	56.9-37	\$300

ORDER

Based upon the stipulations of fact and the conclusions set forth above, the Petitioner's motion is GRANTED to the extent that it is determined that the

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Respondent is liable for a June 21, 1978, violation of mandatory safety standard 30 C.F.R. 56.9-37. As relates to any other matters contained therein, the motion is DENIED.

The Respondent is ORDERED to pay a civil penalty in the amount of \$300 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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~FOOTNOTE_ONE

1 The Petitioner's motion for summary judgment stated, in part, as follows:

"Comes now the Secretary and moves the court for summary judgment in favor of petitioner and against respondent affirming citation #16 2921 and proposed penalty of \$1,000.00.

"In support of said motion complainant would show the court that no genuine issue exists as to any material fact, and that complainant is entitled to judgment as a matter of law."