

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

AUG 18 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	CIVIL PENALTY PROCEEDING
)	
Petitioner,)	DOCKET NO. WEST 80-89-M
)	
v.)	A/O No. 04-01827-05006 F
)	
KAISER SAND AND GRAVEL COMPANY,)	MINE: Radum Pit and Mill
)	
Respondent.)	

DECISION

Appearances:

Marshall P. Salzman, Esq., Office of the Solicitor, United States
Department of Labor, 450 Golden Gate Avenue; Room 11071, Box 36017,
San Francisco, California 94102
 For the Petitioner

Paul M. Heylman, Esq., Schmeltzer, Aptaker and Sheppard, P.C., 1800
Massachusetts Avenue, N.W., Washington, D.C. 20036
 For the Respondent

Before: Judge Virgil E. Vail

Statement of the Case

The above-captioned civil penalty proceeding was brought pursuant to
Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30
U.S.C. § 820(a) (hereinafter referred to as "the Act").

Pursuant to notice, a hearing on the merits was held in San Francisco,
California on September 11, 1980. Richard C. Anderson, a mining engineer,
testified on behalf of the petitioner. Donald Streitz, Vernon Allen,
Tinnie Gunter and Claire Hay testified on behalf of the respondent.

Post-hearing briefs have been filed by both parties. Based on the
evidence presented at the hearing, a stipulation of facts entered into
between the parties during the course of the hearing and the contentions of
the parties, I find the following facts were established.

Findings of Fact

1. Respondent operates a sand and gravel pit and mill near
Pleasanton, California. (Tr.10).

2. Citation no. 371557 was issued to the respondent as the result of a fatal accident which occurred on June 12, 1979, 'involving Vaughn F. Higgins (hereinafter referred to as "Higgins").

3. Higgins was employed by the respondent at the Radum Pit and Operation from June 23, 1976 until the time of his death.

4. Higgins was employed in the capacity of a dragline oiler, an occupation at which he had worked for the ten years preceding his death.

5. Sometime before **5:10** a.m. on June 12, 1979, Higgins was driving his own pickup truck **enroute** to work when he drove onto the blocked old service road to the respondent's pit.

6. Higgins proceeded down this road until he was approximately 18 feet from a dirt pile blocking the road and then he stopped.

7. Tire tracks indicate that Higgins then backed his truck ^{up} the service road, a distance of 82 feet, at which point the vehicle went over the left side of the road, falling 47 feet, crushing the truck's cab and killing Higgins.

8. The old service road was approximately 400 feet in length but was blocked by a dirt pile approximately 20 feet in height at a point 183 feet down the road.

9. The pile of dirt prevented further vehicular movement down the old service road on June 12, 1979.

10. The old service **road** was approximately 27 feet wide with a slight downgrade of approximately 2 to 5%. There was a drop-off of approximately 47 feet on the left side and an embankment of approximately 10 to 12 feet high on the right side.

11. A Coroner's autopsy revealed that Higgins's blood contained 6.5 **mcg/ml** of Phenobarbital.

12. The old service road had been in use for a period of three to four weeks prior to the accident.

13. On June 11, 1979, the day prior to the fatal accident, at approximately **6:30** p.m., the old service road was "blocked off" by a dirt pile when the Ko-Cal feeder was moved over and placed on the old service road. (**Tr. 38**).

14. A new service road into the pit had been opened for approximately two weeks prior to the fatal accident. (**Tr. 38, Exhibit 2**).

15. On June 12, 1979, sunrise at Pleasanton, California was at 5:45 a.m. ; Pacific Daylight Time (Exhibit 4).

16. There were no witnesses to the fatal accident.

ISSUE

Whether the respondent violated mandatory safety standard 30 C.F.R. 56.20-11 by failing to place a barricade or warning sign at the entrance to the old service road on or before June 12, 1979?

Discussion

Citation no. 371557 ^{1/} charges the respondent with having violated mandatory safety standard 56.20-11. The standard provides that:

Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required.

The sole issue is whether the respondent violated 56.20-11 by failing to place a barricade or post warning signs at the entrance to the old service road. The respondent argues in its post-hearing brief that the company should not be cited in this instance since the hazard, a drop off on the side of the old service road, was an obvious hazard. Respondent further argues that the requirements of standard 56.20-11 applies only to health and safety hazards that are not immediately obvious to employees. In support thereof, respondent points out that the deceased was a long time employee of the respondent and familiar with the operation of the pit; that he knew the Ko-Cal feeder and the pendulum were moved every five to nine days, and that on the day prior to the fatal accident, the employees in the pit had begun to move this equipment to a point which would block off the old pit service road. Further, respondent argues that on June 12, 1979, when Higgins arrived for work he should have observed the equipment and the dirt pile barricade blocking the old pit service road from the entrance to the service road. Based upon these arguments, the respondent contends that the hazard was obvious.

1/ A fatality occurred at about 5: 10 a.m. (June 12, 1979) on an abandoned pit service road. The road was not barricaded or posted against entry. An employee entered the road and backed his vehicle over the edge. The road had been in use as the pit service road for about 6 weeks and was the main entrance into the working pit area.

The known facts in this case do not appear to be contradicted. As set out in the statement of facts, Higgins arrived at the pit sometime before 5:10 a.m. on June 12, 1979 and started down what had previously been used as a service road into the pit. He apparently found that at a point 183 feet down the road there was a pile of dirt placed as a barricade to prevent further travel. In attempting to back up, he backed over a bank and was killed. Beyond these facts, much of the respondent's arguments as to what Higgins knew or should have known is conjecture since no one actually saw the accident.

From the above facts, it must be concluded that Higgins did not know that the service road was blocked, or if he did know or should have known he forgot. The evidence does not show that Higgins would have known that the dirt barricade was placed across the road. This road had been driven by another of respondent's employees, Mr. Vernon Allen, on the night prior to the accident after 6:00 p.m. and it was not blocked. (Tr. 49). The evidence further shows that the road was blocked around 6:30 p.m. on June 11, 1979 and that no one knows what time Higgins left work that day. (Tr. 42). A time card for Higgins showed that he quit work on June 11, 1979 at 6:00 p.m. (Tr. 44).

From this evidence it cannot be assumed that Higgins knew the old service road was blocked by the pile of dirt placed thereon at approximately 6:30 p.m., on the day prior to the fatal accident. The fact that Higgins started down the road on the day he was killed would indicate he did not know it was blocked. Therefore, if a hazard existed, it was not obvious. Furthermore, Mr. Allen testified that when he arrived at the respondent's pit at approximately 5:20 a.m. for work, he also started down the old service road to enter the pit (Tr. 50 and 55). Mr. Allen, in response to why he drove down this road on June 12, 1979, after testifying that he knew it would be blocked, stated that he did so from force of habit as he had been using the same road for a couple of weeks prior thereto. (Tr. 55).

Another employee, Tinnie Gunter, also testified that when he arrived for work on June 12, 1979, he started down the old service road to the pit from force of habit. The witness also testified that he had passed the pile of dirt placed as a barricade the night before on his way out. (Tr. 60).

From the evidence of record and the testimony of the witnesses referred to above, a sign or barricade at the entrance to the old service road would have warned or reminded the respondent's employees that the road was closed and should not be travelled. The respondent argues that standard 56.20-11 does not require warning signs where safety hazards exist that are immediately obvious to employees, that is, the drop off on the left side of the road over which Higgins truck fell and crashed. Respondent further argues that "obvious", as used herein, means "plain,

evident, or known" whereas the standard applied herein refers to safety and health' hazards which employees cannot reasonably be expected to know of; rather than those which employees know or can reasonably be presumed to know of.

I am persuaded by the evidence of record that the old service road in this instance should have been posted by a sign or barricade at the entrance warning employees that the road was closed to travel. The fact that two employees, other than Higgins, started down this road on the day of the fatality, through force of habit indicates that the assumption made by the respondent that these employees should know differently, is insufficient. Further, a hazard did exist which is borne out by the results of the fatal accident. When Higgins arrived at the dirt barricade blocking the road, he was faced with either turning around or backing up the hill. That he decided to back his pickup truck up the hill, rather than turn around is immaterial at this time as any opinion of some other course of action would at best be second guessing. The fact is that the vehicle went over the side of a 47 foot embankment causing Higgins death. The dirt pile barricading the road in combination with the steep embankment is the hazard here. The evidence indicates there was not a berm on this road to warn drivers of approaching the edge of the road. If the road was not to be used at all, then a berm is not required. However, by placing the dirt pile a distance of 183 feet down the road from the entrance and failing to barricade or post notices that the road was closed at the entrance creates a hazard that is not immediately obvious to employees on the day shift and at the particular time this accident occurred.

Respondent further argues that they should not be held responsible for the aberrant and unpredictable actions of its employees, in this case the action of Higgins. Testimony was given that Higgins should have known of the barricade, that he was a fast driver and under the influence of drugs. As stated previously, the evidence does not show that Higgins left the pit the previous night after the dirt barricade was placed across the road. Also, that force of habit, as exhibited by witnesses Allen and Gunter starting down the old service road, showed that a sign or barricade at the entrance would have warned or given notice of the roads condition to those employees who either did not know or forgot the discontinuance of its use.

The testimony as to Higgins prior driving habits is not controlling here as it does not relate to the violation of the standard alleged herein. The violation was the failure to barricade or post signs warning of a safety or health hazard. Further, no witnesses saw the accident; or Higgins driving his truck prior to the accident, nor was there any evidence to show he was driving carelessly.

The fact that the Coroner's report showed that **Higgin's** blood contained a drug is meaningless unless medical testimony or expert testimony is utilized to indicate what conclusions can be drawn from such tests. The District of Columbia Court of Appeals in the case of Lister v. England 195 A. 2d 260 (D.C. App. 1963) held that blood analysis results are not even

admissible unless introduced by expert testimony. **Because**, as the Court stated, "without benefit of such testimony or resort to the statutory standards the result of the analysis is meaningless." See Also Holt v. England 196 A, 2d 87 (D. C. App. 1963) and City of Sioux Falls v. Christensen, 116 N.W. 2d 389, (S. Dak. 1962).

The argument of the respondent that they should not be held liable for the conduct of the employee, if it was aberrational and unpredictable, has been considered by the Federal Mine Safety and Health Review Commission. The Review Commission has consistently held that the operator is liable for violations of the mandatory safety standards without regard to fault. United States Steel v. Secretary of Labor 1 BNA MSHC 2151 (1979) and Secretary of Labor v. Marshfield Sand and Gravel 1 BNA MSHC 2475 (1980).

For the reasons stated above, I conclude that a **violat ion** did occur.

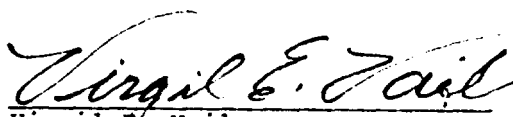
Penalty Assessment

I find that the citation issued by the inspector described a violation of 30 C.F.R. § 56.20-11. The respondent should have been aware of the hazard that existed on the morning of June 12, 1979 and that it would not be immediately obvious to its employees and therefore was negligent in permitting it to exist. However, in determining the extent of the respondent's negligence, I have considered the fact that this same service road had been used for some time by the employees coming and going to the pit and was removed from use as a means of access to the pit the preceding day by placing a dirt barrier across it. After such **cont inuous** past use, the action of Higgins in backing up this road a distance of 82 feet when he could have taken other means of exit, such as turning around and driving up, would appear to lessen the degree of negligence of the employer herein.

The respondent is a relatively large company and has a modest history of prior violations. The violation was abated immediately after the citation was issued. I conclude that a penalty of \$2,000.00 should be assessed.

ORDER

The respondent is ordered to pay the sum of \$2,000.00 within 30 days of the date of this decision.


Virgil E. Vail
Administrative Law Judge

Distribution:

Linda Bytof, Esq.
Office of the Solicitor
United States Department of Labor
450 Golden Gate Avenue, Box 36017
San Francisco, California 94102

Mr. Clair Hay
Kaiser Sand & Gravel Company
3311 Stanley Boulevard
P.O. Box 580
Pleasanton, California 94566