CCASE:
SOL (MSHA) v. ATLANTIC CEMENT
DDATE:
19810903
TTEXT:

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. YORK 81-8-M A/O No. 30-00006-05012
v.	
ATLANTIC CEMENT COMPANY, INC., RESPONDENT	Ravena Quarry & Plant

DECISION

The above-captioned case is a civil penalty proceeding 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 case was submitted by the parties for decision on a stipulated record.

The following facts were stipulated by the parties regarding the citation at issue herein, Citation No. 204374:

> Respondent, Atlantic Cement Co., operates a quarry and cement manufacturing facility in Ravena, New York. At the times relevant herein the size of the facility for the purposes of the act were slightly over seven hundred thousand man hours per year. On August 6, 1980, MSHA inspector Hopkins, on a routine inspection of Respondent's facility, issued a citation to Respondent for a violation of 56.15-5 because Hopkins observed an employee of Respondent working on top of the number two kiln and descending the side of the kiln to a ladder without the use of a safety belt and line. The top of the kiln was approximately twenty-two feet from the floor. A safety belt and line had been provided but it was not being worn by the employee. The department in which the employee was working holds, and at that time held, short safety meetings at the start and end of each shift where the use of safety belts and lines was repeatedly discussed. Because of said safety meetings, the mine inspector concluded the Respondent could not have known or predicted that the employee would not have been wearing a safety belt. The top of the kiln is a fairly smooth surface and a person would have to slip, fall or trip before an accident could occur. At the time of the alleged violation the kiln was wet due to a slight rain shower. Employees are rarely on top of the kiln.
>
> The citation was terminated by Respondent and the inspector explaining to the employee the importance of wearing a safety belt and line. Respondent gave the

> employee a three-day disciplinary suspension, which was subsequently reduced to one day. Respondent has a well established past practice of enforcing its safety rules through disciplinary measures.

Citation No. 204374 was issued pursuant to Section 104(a) of the Act by Inspector Hopkins upon his observation of the following condition or practice:

> An employee was observed working on top of #2 Kiln and descended the side of the kiln to a ladder, which gave him access to the floor. The top of the kiln was elevated approx(imately) (22) twenty-two feet from the floor. A safety belt and line (were) provided but not being worn by the workman.

The citation was terminated within 15 minutes after the "hazard of not wearing a safety belt and line was explained to the employer."

The inspector cited 30 CFR 56.15-5 which requires in pertinent part that "Safety belts and lines shall be worn when men work where there is a danger of falling." The parties' stipulation of facts clearly establishes the occurrence of a violation of the mandatory standard as alleged. The employee failed to wear safety belt or lines while working on the curved surface of a kiln, 22 feet "from the floor" -- a location where there was a danger of falling.

Respondent argues that it cannot be held to have violated section 56.15-5 because the failure of the employee to wear a safety belt and line was in violation of the company's regularly enforced safety rules. Respondent contended that the imposition on it of liability for the employee's failure was improper where the safety equipment had been provided, the employee had been instructed regularly in the need to wear the equipment, the employee had acted in direct contravention of Respondent's rules without Respondent's knowledge, and Respondent regularly enforced its safety rules through the use of disciplinary measures. Respondent contended, in short, that it had done everything within its power to provide for the safety of its employees in this regard.

The question whether an operator can be held liable for a violation of a mandatory standard regardless of fault has already been answered in the affirmative by the Commission. Secretary of Labor v. El Paso Rock Quarries, Inc., 2 MSHC 1132 (1981) (hereinafter, El Paso). In El Paso, the administrative law judge had vacated a citation alleging violation of 30 CFR 56.9-87 (failure to provide automatic reverse signal alarm on heavy duty mobile equipment) because the Secretary of Labor failed to establish that the mine operator knew or should have known of the condition. The Commission reversed, holding that, unless the standard itself so requires, an operator's negligence has no bearing on the issue of whether a violation

occurred. The Commission noted that it had previously rendered this holding in U.S. Steel Corporation v. Secretary of Labor, 1 MSCH 2151 (1979) (hereinafter, U.S. Steel) with respect to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977). The factual situation in U.S. Steel is closely analogous to the one at hand. Notices of violation were issued to U.S. Steel on two separate occasions after Federal inspectors observed a total of 3 employees of U.S. Steel neither wearing nor carrying a self-rescue device as required by 75.1714-2(a). U.S. Steel advanced the argument that it had complied with the standard by "establishing a program designed to assure that self-rescue devices are available to all employees, by training employees in the use of the devices, and by enforcing its program with due diligence." The Commission rejected the argument on the grounds that an operator is liable for violations without regard to fault.

It is found, therefore, that Respondent may be held liable in the instant case as a matter of law for the failure of its employees to wear safety belt and line where there was a danger of falling.

In issuing citation no. 204374, Inspector Hopkins found that the violation was "significant and substantial" within the meaning of the Act. Respondent contends that this finding is improper in light of the test enunciated by the Commission in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHC 822, (1981) (hereinafter, National Gypsum) The Commission held therein that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. The Commission stated further that: "(A) violation "significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety and health .... Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurs falls between these two extremes -- mere existence of a violation, and existence of an imminent danger." It was Respondent's contention that the violation herein did not "present a reasonable likelihood of causing an injury or illness which will be of a reasonably serious nature."

Respondent asserted that the inspector found that the occurrence of an accident was improbable "because the surface on which the employee was working was smooth and slightly rounded." This assertion is not supported by the record. The alleged finding by the inspector was not included in the stipulation by the parties nor was it in the text of the citation which charged a significant and substantial violation. The stipulated record establishes that the violation was significant and substantial. Even if it had been established in the record that MSHA's proposed assessment, results of initial review, or the background

material used in the preparation of those documents used the word "improbable" in referring to the likelihood of occurrence of an accident, said word would not be determinative

of the issue in this proceeding. Hearings before the Commission are de novo. The conclusions of the inspector or those of Petitioner's Office of Assessments are not binding herein.

It is found that, on the facts of this case, there existed a reasonable likelihood that a fall resulting in injury would occur because of the failure to wear belt and line. As is readily apparent from the photographs of the kiln, designated exhibits "A" and "B", the kiln at its highest point was 22 feet above the "floor" and curved downward at an increasing contour. The kiln was exposed. Its surface was fairly smooth and slightly wet. Each of these factors increased the likelihood that an accident and injury would occur.

Respondent argued that an injury expected to result in lost work days or restricted duty could not be considered of a reasonably serious nature. Again this argument is rejected since the allegations are not supported by the record. Even a fall on the smooth wet surface of the kiln could cause serious injury. A fall of 22 feet under the conditions established by the record would very likely result in an injury of such magnitude as to be clearly one of a reasonable serious nature.

Respondent's argument that the failure to wear a safety belt and line could not be the cause of an injury is completely meritless. The failure to wear belt and line increased the likelihood that the injury suffered as a result of a fall would be serious. Said failure could be a major cause of an injury suffered in a fall.

In view of the above, the violation is found to have been of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

Assessment:

Section 110(a) of the Act requires that the operator of a mine in which a violation occurs shall be assessed a civil penalty. Findings of fact pertinent to each of the six statutory criteria follow.

The gravity of the violation is determined to be moderate. As noted above in the discussion regarding the ruling that the inspector properly found the violation to be significant and substantial, the surface of the kiln was curved, fairly smooth and slightly wet. If the employee had fallen, he undoubtably would have suffered serious injury. Even though a serious injury would have occurred, the overall gravity of the situation was reduced to moderate because employees rarely had occasion to be on top of the kiln and the violation was an instance of isolated misconduct on the part of Respondent's employee.

The employee had been provided with belt and line, and had been instructed to use them. Respondent had no knowledge, actual or constructive, of the employee's failure to use the belt and line. It is found that Respondent was not negligent.

The violation was abated immediately. The employee was reinstructed on the need to use belt and line. He was also given a suspension.

Slightly over 700,000 man hours per year were worked at the Ravena Quarry and Plant. Respondent had a good history of prior violations. In the absence of evidence to the contrary, it is found that the penalty assessed herein will not adversely affect Respondent's ability to remain in business.

In view of the above, Respondent is assessed a penalty of $100.00.

ORDER

It is ORDERED that Respondent pay the sum of $100,00 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge