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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. LAKE 81-73-M
A/O No. 11-01098-05001

v.

Baugh Pit & Mill

ELBERT BAUGH EXCAVATING, INC.,
RESPONDENT

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Don C. Hammer, Esq., Hayes, Schneider, Hammer & Miles, Ltd.,
Bloomington, Illinois, for Respondent.

Before: Judge Charles C. Moore, Jr.

On October 15, 1980, Inspector Henson issued Citation No. 049957 alleging a violation of 30 C.F.R. 56.9-22 because "the elevated roads around the top of the pit walls were not provided with berms." Respondent operates a gravel pit which is more or less rectangular. The east-west road cited is at the southern end of the pit and the north-south road cited is at the eastern edge of the pit. The inspector thought that 300 feet of the east-west road needed berms and that 200 feet of the north-south road needed them.

The mine is developing toward the east, and the western edge of the pit is being filled in as the mine advances. The north-south road is therefore one which moves eastward as the mine is advanced. When the overburden is stripped on the eastern edge of the pit, it creates a drop-off of some 8 to 10 feet and a bench is created, but when the gravel is later taken out, the bench disappears and the drop-off is in the neighborhood of 20 to 25 feet. Respondent maintains that its roadway running north and south is always 60 feet from the edge of the pit and that the roadway advances eastward as the stockpiles, sandpiles, and gravel piles advance in that direction. The Government inspector saw no vehicles near this edge of the pit but he did see tire tracks which indicated to him that vehicles had been driven near the edge of the drop-off. Respondent's response is that these were old tire tracks having been made back when the road was in that location and when the edge of the pit was farther west. It maintains that there is no reason for any of its vehicles to be closer than 60 feet from the edge of the drop-off and that that edge is not a road.

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I find Respondent's position persuasive insofar as the north-south road goes. If it were a bench with a highwall on one side and a drop-off on the other, 80 or 90 feet wide, I might well hold that the entire plateau was a roadway, but where there is no evidence that equipment had to turn around in the area and the route that the equipment was required to travel was never closer than 60 feet from the drop-off, I hold that the roadway did not extend over to the edge of the pit. There is no requirement that pit walls be bermed. The requirement is only that elevated roadways used for loading, hauling, and dumping be bermed and I am holding, in the circumstances, that the north-south road was not a roadway which was elevated so as to require berms.

The east-west road is a permanent road used by both the mine and the farmer who owns the land to the south of that road. While the primary use of this east-west road is not related to loading, hauling, or dumping, it is occasionally used for that purpose and, in my opinion, it is subject to the berm standard. This road, or at least that part of it that Respondent contends is the road, is separated from the south edge of the pit by about 10 feet. There may be grass or weeds in this 10-foot strip but it is level ground and I hold that it is part of the road. If it is part of the road, then it is elevated and requires berms.(FOOTNOTE.a) I am not sure where the line should be drawn as to how close the used part of the roadway needs to be to the drop-off so that it can be considered an elevated roadway, but I think driving within 10 feet of such a drop-off is sufficiently dangerous that the area should be considered an elevated roadway. The fact that Respondent does not own the road is not controlling. (See section 3(h)(1) of the Federal Mine Safety and Health Act of 1977).

I therefore find that the inspector was correct in issuing the citation for the east-west roadway but incorrect for issuing it as to the north-south roadway. He issued only one citation and since there was justification insofar as the east-west road was concerned, I affirm the citation. In my opinion, the negligence here was small. The company is a small company and there was good faith abatement. Gravity is high because a 10-foot deviation in the route could have caused a serious injury. There is no history of prior violations. In fact, in the last 4 years there have been some eight inspections with no citations issued. In the circumstances, the Assessment Office thought \$38 was an appropriate penalty. To me, that seems entirely too low an assessment; but in the circumstances of this case where Respondent has won half of this case, I do not feel it would be fair to raise the proposed assessment. It would be like punishing Respondent for daring to challenge the propriety of the citation. On the other hand, I see no reason to cut the penalty in half just because I agree with Respondent as to the north-south road. A penalty of \$38 will therefore be assessed.

