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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.

KAISER CEMENT CORPORATION,
RESPONDENT

Civil Penalty Proceedings

Docket No. CENT 80-306-M
A/O No. 41-00038-05007

Docket No. CENT 80-354-M
A/O No. 41-00038-05008-I

Longhorn Cement Plant

DECISION

Appearances: Donald W. Hill, Esq., Office of the Solicitor, U.S.
Department of Labor, Dallas, Texas, for Secretary of
Labor, Mine Safety and Health Administration, Petitioner;
Robert E. Bettac, Esq., Foster & Associates, Inc., San
Antonio, Texas, for Kaiser Cement Corporation, Respondent.

Before: Judge Stewart

These are proceedings filed by the Secretary of Labor, Mine
Safety and Health Administration (hereinafter MSHA), under
section 110(a) of the Federal Mine Safety and Health Act of 1977,
30 U.S.C. 820(a) (hereafter the Act), to assess civil penalties
against Kaiser Cement Corporation (hereafter Kaiser) for
violations of mandatory safety standards.(FOOTNOTE.1)

STIPULATIONS

On November 24, 1980, the parties filed stipulations of fact to constitute the entire record in these proceedings. On May 18, 1981, the parties filed supplementary stipulations including the following which pertain to the statutory criteria applicable to all citations:

Size of mining operation - medium

History of previous violations - moderate

Neligence on the part of Kaiser - none

Effect of the proposed penalties on the ability of Kaiser to continue in business - none

Kaiser demonstrated good faith in attempting to achieve rapid compliance after notification of each violation.

Docket No. CENT 80-306-M (Three Citations)

The stipulations applicable to Citation Nos. 172310, 172311, 170580, and 170681 were as follows:

1. Jurisdiction over this proceeding is conferred upon the Federal Mine Safety and Health Review Commission under the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq. The alleged violations of the Act took place in or involve a mine that has products which enter commerce or has operations or products which affect commerce.

2. All statements made by the Secretary's safety inspectors on the face of the Citation forms, as amended, are true. All Citation Forms attached to the Complaint Proposing Penalty are incorporated by reference, as if fully set forth herein.

3. Each of the instant citations was issued during the course of a special inspection as described at 30 C.F.R. Part 43, which inspection was initiated by a miner or representative of miners upon written notice or complaint.

4. No copy of such written notice or complaint was provided to the Respondent by the Secretary's safety inspectors on or before the date of said special inspection, notwithstanding that Respondent requested such written notice prior to the beginning of said special inspection. The Secretary's safety inspector did, however, describe the general contents of said written complaint to an authorized representative of the Respondent prior to beginning said special inspection.

5. The violation alleged in each Citation was not due to any negligence on the part of the Respondent, and the penalty points attributable to the "Negligence" factor should be "0"2. [FOOTNOTE.2] The preceding stipulation is based on the following, further stipulations applicable to each of the alleged violations: (1) Respondent did not contribute by act or omission to the occurrence of the alleged violation; (2) the Respondent did not contribute by act or omission to the continued existence of the alleged violation; (3) none of Respondent's employees was exposed or likely to be exposed to the unsafe conditions alleged; and (4) Respondent neither knew or should have known of the allegedly unsafe conditions.

6. The unsafe practices alleged in each Citation were committed only by employees of independent contractors performing construction work at the Respondent's mine. Each such independent contractor exercised an independent employment and contracted to do the work according to its own judgment and methods, and without being subject to the control of Respondent except as to the results of the work, and each independent contractor had the right to employ and direct the actions of their respective employees, independently of Respondent and free from any superior authority of Respondent to say how the work would be done or what the laborers would do as it progressed.

7. Employees at Respondent's mine collectively worked between three-hundred thousand and five-hundred thousand hours annually, and penalty points for mine size, if any, would be 7. Employees of the company which controls the Respondent work between nine-hundred thousand and three million hours annually, and the penalty points, if any, based on the size of the controlling company would be 3. The average number of violations assessed per year in the 24 months preceding the instant alleged violations was 10.5,

and the penalty points, if any, for history of violations would be 1. The average number of violations assessed per inspection day in the 24 months preceding the instant alleged violations was .88, and the penalty points, if any, under the "Inspection Day" factor would be 6.

Stipulations Applicable to Citation No. 170580 (FOOTNOTE.3)

8. The applicable mandatory safety standard, if any, is contained at 30 C.F.R. 56.9-40(c) of the Secretary's Rules and Regulations.

9. The unsafe practice alleged herein occurred on mobile equipment owned by, and was committed by a person employed by, Jud Plumbing, Heating and Air Conditioning, an independent contractor.

10. As part of its construction contract with Jud, Respondent required Jud to keep itself fully informed and to comply with all state and federal laws affecting safety; to be responsible for accident prevention and safety in performance of the work; to take all reasonable measures to prevent injury to persons or property as a result of the performance of the contract work; to comply with all applicable safety laws, including OSHA and MSHA; to make suitable arrangements to supply first aid facilities to its employees; to guard work performed on the construction site as necessary with fences, barriers, lights, signs, etc.; to furnish all necessary protective safety equipment to its employees; to implement a safety program for its employees and to designate a coordinator of safety, security, and fire control; and to notify the Respondent of any hazardous conditions, property, or equipment at the work site that are not under Jud's control.

11. The probability, under normal circumstances, that an injury would result from a violation of the cited standard is

"probable," and the penalty points, if any, to be assigned to the "Probability of Occurrence" factor is 3. The gravity of an injury resulting from violation of the cited standard may normally be expected to involve lost work days or restricted duty, and the penalty points, if any, to be assessed under the "Gravity of Injury Expected" factor should be 3. None of the Respondent's employees was exposed to the alleged hazard, and the number of penalty points to be assessed under the "Number of Persons Affected" factor should be "0".

12. Respondent demonstrated its good faith by making the Jud employees aware of the alleged hazard immediately. Accordingly, the penalty points, if any, to be assessed to Respondent under the "Demonstrated Good Faith" factor should be -5.

Stipulations Applicable to Citation No. 172310 (FOOTNOTE.4)

13. The applicable mandatory safety standard, if any, is contained at 30 C.F.R. 56.16-7(a) of the Secretary's Rules and Regulations.

14. The unsafe practice alleged in this Citation involved the use of a crane owned by Phillips Crane Company, subcontractor to Aaction Building Systems, which in turn was subcontractor to Watson Building Systems, the general construction

contractor on the site. The alleged unsafe practice was committed by employees of one or more of the aforementioned subcontractors or general contractor.

15. As part of its construction contract with Watson Building Systems, Respondent required Watson to keep itself fully informed and to comply with all state and federal laws affecting safety; to be responsible for accident prevention and safety in performance of the work; to take all reasonable measures to prevent injury to persons or property as a result of the performance of the contract work; to comply with all applicable safety laws, including OSHA and MSHA, to make suitable arrangements to supply first aid facilities to its employees; to guard work performed on the construction site as necessary with fences, barriers, lights, signs, etc.; to furnish all necessary protective safety equipment to its employees; to implement a safety program for its employees and to designate a coordinator of safety, security, and fire control; and to notify the Respondent of any hazardous conditions, property, or equipment at the work site that were not under Watson's control. At the time of the alleged violation, Watson had assigned a Safety Director to the construction site.

16. The probability that an injury would result from a violation of the cited standard is "improbable," for there is no evidence that the affected employees were not wearing appropriate safety belts and tag lines; the penalty points, if any, to be assigned to the "Probability of Occurrence" factor is "0". For the same reason, the gravity of an injury resulting from violation of the cited standard may normally be expected to involve no lost work days, and the penalty points, if any, to be assessed under the "Gravity of Injury Expected" factor should be "0". None of Respondent's employees was exposed to the alleged hazard, and the number of penalty points to be assessed under the "Number of Persons Affected" factor should be "0".

17. Respondent demonstrated its good faith by persuading the general contractor and the two subcontractors to meet with their respective employees immediately, instruct the employees in the "tag lines" requirement, and obtain the signatures of affected employees on a written statement of the rule. Accordingly, the penalty points, if any, to be assessed to Respondent under the "Demonstrated Good Faith" factor should be -5.

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Stipulations Applicable to Citation No. 172311 (FOOTNOTE.5)

18. The applicable mandatory safety standard, if any, is contained at 30 C.F.R. 56.16-11.

19. The unsafe practice alleged involved a crane owned and operated by Phillips Crane Company, a third-tier contractor. The alleged unsafe practice was committed by employees of Watson Building Systems and/or Aaction Building Systems and/or Phillips Crane Company.

20. Stipulation No. 15 above applies equally to this citation.

21. The probability, under normal circumstances, that an injury would result from a violation of the cited standard is "probable," and the penalty points, if any, to be assigned to the "Probability of Occurrence" factor is 3. The gravity of an injury resulting from violation of the cited standard may normally be expected to involve lost work days or restricted duty, and the penalty points, if any, to be assessed under the "Gravity of Injury Expected" factor should be 3. None of Respondent's employees was exposed to the alleged hazard, and the number of penalty points to be assessed under the "Number of Persons Affected" factor should be "0".

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22. Respondent demonstrated its good faith by persuading the general contractor and the two subcontractors to meet with their respective employees immediately, instruct them of the "man cage" requirement, and obtain their signatures to a written rule to this effect. Accordingly, the penalty points, if any, to be assessed to Respondent under the "Demonstrated Good Faith" factor should be -5.

SUPPLEMENTARY STIPULATIONS

Statutory Criteria Applicable to Citation No. 170580

Gravity of violation - low

Statutory Criteria Applicable to Citation No. 172310

Gravity of violation - low

Statutory Criteria Applicable to Citation No. 172311

Gravity of violation - moderate (It is understood, however, that Respondent does not hereby stipulate that the violation has been proved.)

Dismissal of Citation No. 172311

The motion for decision on the record was disapproved because of the statement that Respondent did not stipulate that Citation No. 172311 had been proved. On July 20, 1981, the parties filed the following additional stipulation by Western Union Mailgram:

Pursuant to an agreement by telephone 7-17-81 the parties do hereby propose to withdraw a stipulation and to offer an additional stipulation concerning Citation Number 172311 as follows:

The parties hereby move to withdraw the second sentence of stipulation Number 19 contained at Page 7 of the stipulated record submitted by the parties on 11-24-80 which read as follows: "The alleged unsafe practice was committed by employees of Watson Building Systems and/or Aaction Building Systems and/or Phillips Crane Company."

The parties hereby offer the following additional stipulation: On February 6, 1980 Pat Patton opeator [sic] of a Grove Model TMS-160 18 ton crane for Phillips Crane Company, subcontractor to Watson Building Systems, subcontractor to Aaction Building Systems, stated to the Secretary's inspector that he hoisted men on the hoisting hook on February 5, 1980. Alan Redeker the Respondent's plant manager was

present when the statement was made. There is no evidence that any of Respondent's employees engaged in or was exposed to the practice described by Mr. Patton.

The foregoing stipulation is made with the understanding that the Respondent preserves its objection to the non-admissibility of such statement into evidence.

The Secretary of Labor hereby rests his case as to all citations herein and the parties ask the honorable judge to enter a decision without the need for further proceedings.

The stipulation that the alleged unsafe practice was committed by employees of three named independent contractors has been withdrawn by the parties. The stipulations as amended are inadequate to prove a violation by either an independent contractor or by Respondent. Citation No. 172311 is accordingly dismissed.

Docket No. CENT 80-354-M (One Citation)

Citation No. 170681 was issued on October 11, 1979, and described the pertinent condition or practice as follows:

On October 11, 1979, about 10:15, a 8 foot 10 inch by 2 foot beam weighing about 900 pounds was being unloaded from the bed of semi-trailer by M. M. Sundt Construction Co. to be laid on the ground level storage area. As the beam was being swung about 90' degrees by the Grove truck crane, one of the shake out hooks slipped out allowing the beam to fall from about 6 and 1/2 feet on the ground on top of two supervisors checking for lay out of iron on ground level in the area. The beam pinned both men to the ground. The extent of the injuries: The Foreman received - cracked ribs and bruises, abrasions. The General Foreman received - cracked ribs, bruises, abrasions.

In terminating the citation on October 12, 1979, the inspector noted:

The M. M. Sundt Construction Co., Michael Zimmer, Project Manager, presented a safety meeting to all their employees on staying clear of suspended loads and being aware of work environment at 07:30 hr., 10-12-79.

The citation alleged a violation of 30 C.F.R. 56.16-9 which provides that "men shall stay clear of suspended loads."

STIPULATIONS

The stipulations relating to Citation No. 170681 were as follows:

1. Jurisdiction over this proceeding is conferred upon the Federal Mine Safety and Health Review Commission under

the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq. The alleged violation of the Act took place in or involves a mine that has products which enter commerce or has operations or products which affect commerce.

2. The applicable mandatory safety standard, if any, is contained at 30 C.F.R. 56.15-9 of the Secretary's Rules and Regulations.

3. All statements made by the Secretary's safety inspector on the face of the Citation forms, as amended, are true. All Citation forms attached to the Complaint Proposing Penalty are incorporated by reference, as if fully set forth herein.

4. The unloading of said beam by Sundt employees was in performance of a construction contract between Respondent and Sundt which required Sundt to provide all necessary labor, supervision, materials, equipment, and tools required to erect certain mechanical equipment and structural steel for the 2nd Preheater Addition at the Longhorn Plant of Kaiser, at a lump sum contract price of \$1,492,000.00. Sundt exercised an independent employment and contracted to do the work according to its own judgment and methods, and without being subject to the control of Respondent except as to the results of the work, and Sundt had the right to employ and direct the actions of the workmen, independently of Respondent and free from any superior authority of Respondent to say how the work would be done or what the laborers would do as it progressed. At the time of said occurrence, Sundt was employing approximately 104 employees in the performance of said contract.

5. As part of said construction contract, Respondent required Sundt to keep itself fully informed and to comply with all state and federal laws affecting safety; to be responsible for accident prevention and safety in performance of the work; to take all reasonable measures to prevent injury to persons or property as a result of the performance of the contract work; to comply with all applicable safety laws, including OSHA and MSHA; to make suitable arrangements to supply first aid facilities to its employees; to guard work performed on the construction site as necessary with fences, barriers, lights, signs, etc.; to furnish all necessary protective safety equipment to its employees; to implement a safety program for its employees and to designate a coordinator of safety; security, and fire control; and to notify the Respondent of any hazardous conditions, property, or equipment at the work site not under Sundt's control. At the time of the alleged violation, Sundt had assigned a Safety Director to the construction site.

6. Respondent knew at all relevant times that Sundt distributes written safety rules to each employee at the time he or she is hired; and that these rules instruct the employee, inter alia, "Never work under a suspended load."

7. Employees at Respondent's mine collectively work between three-hundred thousand and five-hundred thousand hours annually, and penalty points for mine size, if any, would be 7. Employees of the company which controls Respondent work between nine-hundred thousand and three million hours annually, and the penalty points, if any, based on the size of the controlling company would be 3. The average number of violatons assessed per year in the 24 months preceding the instant alleged violation was 10.5, and the penalty points, if any, for history of violations would be 1. The average number of violations assessed per inspection day in the 24 months preceding the instant alleged violation was 1.05, and the penalty points, if any, under the "Inspection Day" factor would be 8.

8. The alleged violation was not due to any negligence on the part of the Respondent, and the penalty points attributable to the "Negligence" factor should be "0". The preceding stipulation is based on the following, further stipulations: (1) Respondent did not contribute by act or omission to the occurrence of the alleged violation; (2) the Respondent did not contribute by act or omission to the continued existence of the alleged violation; (3) none of Respondent's employees was exposed or likely to be exposed to the unsafe conditions alleged; and (4) Respondent neither knew nor should have known of the allegedly unsafe condition.

9. The probability, under normal circumstances, that an injury would result from a violation of the cited standard is "probable," and the penalty points, if any, to be assigned to the "Probability of Occurrence" factor is 3. The gravity of an injury resulting from violation of the cited standard may normally be expected to involve lost work days or restricted duty, and the penalty points, if any, to be assessed under the "Gravity of Injury Expected" factor should be 3. None of Respondent's employees was exposed to the alleged hazard, and the number of penalty points to be assessed under the "Number of Persons Affected" factor should be "0".

10. Respondent demonstrated its good faith by immediately persuading Sundt to meet with its employees and reaffirm Sundt's safety rule requiring employees to stand clear of suspended loads; such meeting occurred within 24 hours of the alleged violations. Accordingly, the penalty points, if any, to be assessed to Respondent under the "Demonstrated Good Faith" factor

should be -5.

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11. The factors or criteria upon which the Petitioner relies in proposing a discretionary penalty of \$3,000.00 for the instant citation consist solely of those articulated in 30 C.F.R. 100.4 and in the Federal Mine Safety and Health Act.

Supplementary Stipulation Docket No. CENT 80-354-M

Statutory Criteria Applicable to Violation No. 170681

Gravity of violation - moderate.

VIOLATIONS

The parties have stipulated all issues in the case with the exception of the liability of Kaiser for violation due to acts committed by the independent contractors and the sufficiency of the evidence of record to establish the violation of 30 C.F.R. 56.16-11 alleged in Citation No. 172311 which has been dismissed.

Although the Federal Mine Safety and Health Amendments Act of 1977 (Pub. L. 965-164, 30 U.S.C. 801 et seq.) amended the definitions of "operator" to include an "independent contractor," conditions under which the independent contractor rather than the owner-operator should be cited were not prescribed. The Act still imposes strict liability on the owner-operator for violations and Kaiser has not been relieved of its liability by contracts and understandings with the independent contractors.

The liability of the operator for violations by independent contractors has been established by the Federal Mine Safety and Health Review Commission. *Secretary of Labor, Mine Safety and Health Review Commission v. Old Ben Coal Company* (MSHRC Docket No. VINC 79-119, 1 MSHC 2177, affirmed by the Court of Appeals of the District of Columbia Circuit, Docket No. 79-2367, December 9, 1980), and *Monterey Coal Company v. Secretary of Labor, Mine Safety and Health Administration and United Mine Workers*, 1 FMSHRC 1781 (1979), appeal dismissed sub nom. *Monterey Coal Company v. Federal Mine Safety and Health Review Commission*, 635 F.2d 291 (4th Cir. 1980) (appeal dismissed as premature). In *Old Ben*, the Commission held that the Secretary of Labor retained the discretion under the Act to cite the mine owner even though the 1977 Amendments amended the definition of "operator" to include "any independent contractor performing services or construction" at a mine. In *Monterey Coal*, the Commission, citing *Old Ben*, reversed an administrative law judge's decision in which he had held the owner not liable.

The Federal Mine Safety and Health Review Commission, on August 4, 1980, issued its decision in *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburgh & Midway Coal Mining Company (P&M)*. That case was remanded to the judge to allow Petitioner an additional opportunity to elect the parties against which it desired to proceed. In view of the Commission's decision, an order was issued affording the Secretary of Labor an opportunity determine whether to continue to prosecute the citations against Kaiser, or

the criteria and procedures for the proposed assessment of civil penalties by the Assessment office. The point system is not utilized in the assessment of penalties herein. 29 C.F.R. 2700.29 provides as follows:

"(a) In assessing a penalty the Judge shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) of the Act, 30 U.S.C. 820(i), and incorporate such determination in a decision containing findings of fact, conclusions of law, and an order requiring that the penalty be paid.

"(b) In determining the amount of penalty neither the Judge nor the Commission shall be bound by a penalty recommended by the Secretary or by any offer of settlement made by any party."

~FOOTNOTE_THREE

Citation No. 170580 was issued on February 6, 1980, and described the pertinent condition or practice as follows:

"An employee of Jud Plumbing, Heating, and Air Conditioning, a sub-contractor working at the long horn cement plant, was observed riding on the tongue of a gas welder (tag No.) 5568 that was hooked up to a state bed truck (tag No.) CT 7555, that was traveling over a rough road where the hazard of the employee falling off and being ran over by the welder causing serious injury."

The inspector asserted that Respondent abated the violation as follows: "The truck was shut down at once. The employee was made aware of the hazard."

The citation alleged a violation of 30 C.F.R. 56.9-40(c) which provides that men shall not be transported on top of loaded haulage equipment.

~FOOTNOTE_FOUR

Citation No. 172310 was issued on February 6, 1980, and described the pertinent condition or practice as follows:

"I observed purlines supports being hoisted into place and no taglines to prevent the purline supports from swinging around in air, creating a hazard of knocking the connector men from the trusses on which they were setting to concrete floor 45 feet to 59 feet below."

On February 7, 1980, the citation was modified as noted on a subsequent action form as follows:

"This is to modify Citation No. 172310 condition or practice section to read as follows: I observed purline support being hoisted into place by employee of Watson Building Systems, sub-contractor of Aaction Building Systems, Inc, with no taglines attached to prevent the purline supports from swinging around in air, creating a hazard of knocking the connector men from the trusses on which they were setting, and falling to concrete floor

approximately 50 feet below."

In terminating the citation on February 6, 1980, the inspector noted: "All employees were instructed, and signatures were required that taglines would be used on all material being hoisted."

The citation alleged a violation of 30 C.F.R. 56.16-7(a) which provides that: "Taglines shall be attached to loads that may require steadying or guidance while suspended."

~FOOTNOTE_FIVE

Citation No. 172311 was issued on February 6, 1980, and described the pertinent condition or practice to be as follows:

"Pat Patton, operator of a Grove Model TMS-160 18-ton crane, for Phillip Crane Co, working for Watson Building Systems, Sub-contractor of Aaction Building Systems, Inc., stated on February 5, 1980, he did hoist men on the hoisting hook. Man cage was available at the cite for safe means of hoisting men."

This citation was modified on February 22, 1980, as follows:

"This is to modify the original Citation No. 172311 condition or practice section to read as follows: Pat Patton operator of a Grove Model TMS-160 18-ton crane for Phillip Crane Co., working for Watson Building Systems Sub-contractor of Aaction Building Systems Inc, stated on February 5, 1980, he did hoist men on the hoisting hook. Man cage was available at the cite [sic] for safe means of hoisting men. The hazard of the men slipping off the hook and falling to concrete floor and resulting in serious injuries."

In terminating the citation on February 6, 1980, the inspector noted: "Employees were instructed and * * * understood not to hoist men on the hoisting hook; employee signatures were required (to show) that they understood the rules."

The citation alleged a violation of 30 C.F.R. 56.16-11 which provides as follows: "Mandatory. Men shall not ride on loads being moved by cranes or derricks, nor shall they ride the hoisting hooks unless such method eliminates a greater hazard."