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SOL (MSHA) V. TEXAS INDUSTRIES  
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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.

TEXAS INDUSTRIES, INCORPORATED,  
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. CENT 79-60-M  
A/C No. 41-01849-05002 F

MINE: Beckett Road Pit and  
Plant No. 530

Appearances:

Robert A. Fitz, Esq., Office of James E. White, Regional  
Solicitor, United States Department of Labor, Dallas, Texas,  
For the Petitioner

W. Kyle Gooch, Esq., Smith, Smith, Dunlap and Canterbury,  
Dallas, Texas,

For the Respondent

Before: Judge John J. Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Texas Industries, Inc., (TXI), with a violation of Title 30, Code of Federal Regulations, Section 56. 9-5, (FOOTNOTE 1) a safety regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. Respondent denies that a violation occurred.

After notice to the parties a hearing on the merits was held in Dallas, Texas.

ISSUES

The issues are whether TXI violated the regulation. Further, if a violation occurred, what penalty, if any, is appropriate.

SUMMARY OF THE EVIDENCE

Donald Clary, in his 18th year, died on the seventh day of his employment with Texas Industries, Inc.

On August 8, 1978, Clary and plant operator Bailey, the only employees in the vicinity, were working at the log washer at the Beckett plant (Tr. 9, 40, 78, 79, 96, P2, P7, P9).

As material is dredged from the river it comes into the plant and is split at a scalping screen into waste, sand, and rock fractions. A 36 inch McLanahan log washer then removes the clays, silts, and debris. Twin counter paddle shafts, geared to 29 r.p.m., rotate in the log roller. A vertical box screen retains larger sized solids. The screen itself can become clogged and this in turn causes a water overflow. The screen can be cleaned by hammering on it on the down stream side of the log washer. The cleaning procedure does not place a person in a hazardous position (P3, P5, P11, R5, R7, R8).

On the day of the accident operator Bailey told Clary he wanted to clean the screen (Tr. 25). After lunch, about 2:15 p.m., Bailey shut down the machinery. He then showed Clary how to clean the screen (Tr. 26). Bailey then told Clary "I am going back [to the control room] to turn the fedder belt and log washer back on" (Exhibit R9). As he left Bailey saw Clary beating on the screen as he stood on the catwalk (Tr. 36, R9).

The control room portion of this plant is a level above the log washer (Tr. 11, 21, R1, R3). It takes about half a minute, or 25 to 30 seconds, for a worker to go from the catwalk to the control room switches at the upper level (Tr. 22). At the point where the controls are located Bailey could not see Clary (Tr. 32, 69, P-7, P-9, R1, R3, R6).

Bailey turned on the machinery. He then walked over to where he could see Clary. He saw him. His body was turning in the log washer. He immediately turned off the power. There was no hope of life (R9).

Clary, feet first into the paddles, was three feet from where he had been cleaning the screen (Tr. 88).

There was no reason for Clary to be above the tub or the catwalk (Tr. 87, 88, 96). Clary, when hammering on the screen, was standing on the catwalk. There is no direct evidence of the height that the steel side of the log washer extends above the catwalk but I estimate the distance at

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approximately four feet. To reach the paddles where he was found Clary had to scale that barrier (P2, R8).

An MSHA inspector indicated it is routine in the industry to use a start up signal with a time interval before activating machinery (Tr. 44). TXI's policy is to sound the alarm signal before the morning start up and after a lockout. No lockout procedure occurred here (Tr. 51-52, 94).

#### DISCUSSION

The evidence here establishes that TXI violated the regulation. It's obligation under 30 C.F.R. 56.9-5 is to be certain that all persons are clear before starting equipment. The means suggested by the standard are a "signal or other means." No signal was given here and the alternative, a broad umbrella, was neither effective nor could Bailey be "certain" that Clary was clear. I recognize that the death of Clary in and of itself does not, by its mere occurrence, prove a violation of the regulation. Lone Star Industries, Inc. 3 FMSHRC 2526 (1981).

Plant operator Bailey did not testify and his evidence is garnered from his oral and written statements made to TXI and MSHA. The direct evidence: "when he started beating the screen off, I told him I was going back to turn the feeder belt and log wash back on. I left him there beating the screen . . ." Beating on a screen can often drown out a speaker's words. Did Clary ever acknowledge that he heard Bailey's statement? If he heard the statement what did it mean to him? Would Bailey turn on the machinery "immediately" or after some interval. Or, as this was only his seventh day on the job, would Clary anticipate a start up alarm as at the start of the morning shift or after a lock out. Did Clary think there had been a lock out of the equipment? In fact, Clary had to be taught how to beat the screen to clear the clogged material. This could well indicate the machinery had not been previously shut down during Clary's prior six days. This would really leave Clary as an unknowing participant. In short, I cannot be certain that Bailey knew Clary was to be clear of the equipment. Certainly is an exactitude demanded by the regulation.

There is credible evidence in this case that the TXI warning horn, which could be activated at the control panel, was "barely audible," (Tr. 28). In its post trial brief TXI argues that an audible warning device is not relevant because TXI relied on "other means." The "other means" consisted of personal notification to be certain that Clary was clear before the operator started the equipment. I agree the defense here does not rely on a signal but relies on personal notification. However, such notification must be as effective as an audible signal. For the reasons previously stated I have found it was not.

No eye witnesses saw Clary die. TXI claims it is highly probable that his death resulted after the log washer was started when Clary took a short

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cut across an I-Beam and fell into the log washer on his way to the control station. I, too, can speculate. It appears to me that Clary, essentially inexperienced on the job, reached among the log washer paddles to retrieve a piece of wire screening (See Exhibit P-5). As he did the machine started and pulled him in. As he tried to extricate himself his feet became entangled.

I recognize that it is uncontroverted that Clary received a safety booklet when he started to work with TXI (R10). He further received 24 hours of safety instructions and he was specifically told not to go above the catwalk (Tr. 96). However, the gravamen of this case centers on the failure of the plant operator to comply with the regulation before starting the machinery. Any contributory negligence by Clary is not determinative of whether TXI violated the regulation.

For the above reasons I conclude that TXI violated 30 C.F.R. 56.9-5.

#### CIVIL PENALTY

Section 110(i) of the Act [30 U.S.C. 820(i)] provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In connection with the statutory criteria I note that TXI operates 122 plants in seven states. At the Beckett Road Pit and Plant it mines sand and gravel from the river bottom by dragline (Tr. 49, 62, P-11). All TXI employees worked approximately 855,879 man hours in 1978. The employees at the Beckett Road Pit and Plant worked 27,166 man hours. (Stipulation) TXI is accordingly a large operator.

TXI has no prior adverse history but I find TXI was highly negligent in that it did not use an alarm as is the industry practice but instead relied on the more hazardous approach of "personal notification." The gravity was apparent resulting in the death of worker Clary. After the citation was issued TXI complied by installing an audible alarm. The alarm could be heard above the operating equipment (Tr. 57).

On balance, and considering the statute, I am unwilling to disturb the proposed civil penalty of \$3,000.

