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SOL (MSHA) V. LIME PRODUCTS
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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.

LIME PRODUCTS CORPORATION,
RESPONDENT

Civil Penalty Proceeding

Docket No. YORK 81-28-M

A. C. No. 17-00431-05006I

Warren Aggregate Plant
and Quarry

DECISION

Appearances: David A. Snyder, Esq., Office of the Solicitor, U. S.
Department of Labor, Boston, Massachusetts, for Petitioner
George S. Isaacson, Esq., Brann & Isaacson, Lewiston, Maine,
for Respondent

PROCEDURAL BACKGROUND AND STATEMENT OF THE CASE

This is a civil penalty proceeding arising under the Federal
Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.
(Supp. III 1979), (FOOTNOTE 1) herein "the Act."

Following an accident which occurred at Respondent's
Aggregate Plant and Quarry located at Warren, Maine, on December
18, 1979, duly authorized representatives of the Petitioner
conducted an inspection. On January 2, 1980, Citation and
Withdrawal Order No. 201378, alleging a violation of 30 C.F.R.
56.9-2, and Citation No. 201379, alleging a violation of 30
C.F.R. 56.9-37 were issued. On both documents, the inspector
checked a box indicating that each violation "significantly and
substantially contributed to the cause and effect of a . . .
mine safety or health hazard" as provided in Section 104(d)(1) of
the Act.

Citation and Order No. 201378 alleges that:

A front-end loader operator was seriously injured on
December 18, 1979, when the Model 38-B Bucyrus Erie
shovel, with crane boom attached, rolled backwards down
a grade and overturned. The boom striking the cab of
the front-end loader. Previous to the accident, two
attempts were made to move the shovel up the grade but
failed due to the propel clutch slipping. The shovel
shall not be placed back into operation until it has
been certified safe to operate by a competent person
acceptable to MSHA. 1958 Bucyrus Erie 380, with boom
attached, shovel, Serial # 2298.

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30 C.F.R. 56.9-2 provides: "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

Citation No. 201379 alleges that:

A front-end loader operator was seriously injured on December 13, 1979, when the Model 33-B Bucyrus Erie Shovel, with crane boom attached, rolled backward down a grade and overturned. The boom striking the cab of the front-end loader. The crane was parked, on a grade, without being blocked to prevent movement. The shovel operator left the controls unattended.

30 C.F.R. 56.9-37 provides: "Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement."

PRELIMINARY FINDINGS

On December 18, 1979, Respondent's employees, under the direction of foreman Ray Roderick, were attempting to move a Bucyrus Erie crane up a grade (Tr. 32) at Respondent's Warren location.

Earl Young, a shovel operator, was using a 50-ton Bucyrus Erie crane to dig out a settling pond (Tr. 11, 31, 250). At approximately 3:00 p.m., it was decided to move the crane up a grade out of the pit area to the top of a hill (Tr. 32). An initial problem occurred in moving the crane because the machine was front heavy due to the weight of the clamshell on the front end of the boom (Tr. 13, 29). The weight of the clamshell caused the crane to tip forward when being moved. After two attempts to ascend the grade (Tr. 33) the problem was resolved by backing the crane down the hill and taking off the clamshell (Tr. 33). After the clamshell was removed the crane proceeded up the hill with full traction (Tr. 29, 34, 49), and no problems with moving the crane occurred until it reached the point where the accident in question occurred (Tr. 30), approximately two-thirds the way up the grade (Tr. 35).

To ascend the hill, it was necessary for the crane to make two turns on the roadbed (Tr. 48). The crane has no steering column and wheels as do cars or trucks. Instead, being a tracked vehicle, turns are made by using a lever to lock one track while the other track remains free to move. The resulting effect is that the crane pivots on the locked track and thereby changes direction, viz., to turn right, the right track is locked by a lever and the left track is put in forward motion (Tr. 46, 47, 71-75). Another separate lever can be used to totally lock both tracks when, for example, the crane is on a grade (Tr. 71-75).

The crane in question had been up the same hill before (Tr. 48) and could ascend almost any grade (Tr. 48, 99). The crane

successfully negotiated the first turn required to ascend the grade. At the point of the

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second turn on the hill, the crane was stopped in order to be repositioned. It was necessary to straighten the direction of the boom relative to the road so that the crane could proceed up the hill without the boom getting caught in the trees adjacent to the roadbed (Tr. 19). The location of this second turn, as previously indicated, was approximately two-thirds of the way up the hill (Tr. 35).

After straightening the crane, it was necessary to remove the track locks from their locked position in order to proceed the rest of the way up the hill. Earl Young was unable, however, to get the track locks out of their locked position (Tr. 35). The apparent reason why the track or travel locks were difficult to remove was because of the backward pressure exerted on the locks by the weight of the machine on the incline (Tr. 103).

At this point, Mr. Young motioned to David McKellar, who was at the top of the hill, to come down the hill in a 25-ton Michigan Loader (a wheeled vehicle) to assist him (Tr. 35, 52, 250), and to keep the crane from sliding (Tr. 84). Young was on the catwalk when he motioned to McKellar (Tr. 19). The purpose of so positioning the Michigan Loader, which is a large wheeled vehicle with a shovel blade on the front, was to relieve the pressure of the crane's weight on the lock, so that the travel lock could be lifted out of its locked position (Tr. 56, 76). Before Mr. McKellar positioned the Michigan Loader behind the Bucyrus Erie crane, Earl Young applied the lever to lock both tracks (Tr. 75). Earl Young again attempted to release the travel lock, but was not able to do so (Tr. 35). When McKellar got behind the crane with the loader, the boom on the crane was 20 feet in the air, the tracks were not blocked (Tr. 28-29, 89) and the tracks had not been turned into a bank or a rib (Tr. 23, 37, 38). At that point, Mr. Young thought that he had placed the digging locks back in their locked position and "got out" of the cab onto the catwalk in order to instruct Mr. McKellar to reposition the loader more directly behind the crane (Id. 79). Young told McKellar to "hold" him so he could release the lever that locked both tracks (Tr. 76). Young then released the lever which had been locking up both tracks and began moving the lever which locks one track at a time so as to get the crane to move. After trying this unsuccessfully, Young then pulled the other lever to attempt to lock up the machine again (Tr. 75-79) and got out on the catwalk (Tr. 36, 41, 68-69, 75-86).

Although Mr. Young believed that the "digging locks"--which are engaged by the single lever which locks both tracks--had been set in their locked position, they were not properly engaged. When the digging locks are properly engaged, it is not possible for the machine to roll backwards (Tr. 109). Since the digging locks were not properly engaged, the crane started to roll backwards out of control. Mr. Young jumped from the catwalk (Tr. 23) to safety (Tr. 86-88). The crane toppled over and the boom struck Mr. McKellar who had remained seated on the Michigan Loader (Tr. 21-24, 87-88).

Mr. McKellar is paralyzed as a result of neck injuries

received at this time (Tr. 25). The precise injuries sustained by Mr. McKellar and the extent to which he is paralyzed was not shown.

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On December 26, 1979, after the crane had been righted and pulled to the top of the hill, it was examined by Edward T. Wells, a supervisory Metal and Nonmetal Mine Inspector for MSHA. The digging locks were tested and it was found that they worked properly when placed in the locked position. The swing and propel clutch (which are the same) were examined visually and appeared to be in good condition with no visible wear showing on the bands. There was some lubrication around the bands which could have caused the clutch to slip, but because the engine was damaged during the accident, the crane could not be moved to determine if the clutch would slip or was out of adjustment (Exhibit R-2).

Prior to the time the accident occurred, Mr. Young had experienced no trouble with the crane (Tr. 70).

The fraction clutch on a crane, as distinguished from an automobile clutch, is designed to slip (Tr. 71, 101, 104,).

DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

MSHA's first contention, that the clutch on the crane was defective, was not established in the evidence. This theory of violation was first enunciated by Inspector Edward T. Wells in a memorandum to Subdistrict Manager Edward J. Podgorski dated January 29, 1980, in which Wells stated:

"The facts show that three attempts were made to work the crane up the hill and the clutch slipped each time. This should have shown the operator and Raymond Roderick, Foreman, who was in charge of the operation that the clutch was defective and before any further attempts were made to climb the hill the reason for the clutch slipping should have been determined and corrective adjustments made."

The question, however, arises whether the mere fact that the clutch slipped was an indication that it was defective. Petitioner primarily relies on the testimony of the crane (shovel) operator, Earl Young, that the clutch slipped and urges that it be inferred therefrom that the clutch was defective.

But Mr. Young also testified that the clutch was designed to slip:

"Q. And are the clutches -- there are several clutches that are involved in a machine like this. Are those the same as the clutch on an automobile?

A. Not likely. No. They're friction clutches.

Q. Now, a friction clutch, as compared to an automobile clutch, that they're designed to slip; the very way they work is by limited friction against them. They slip as they turn?

A. That's right.

Q. "So that if you have your vehicle in a track lock position, it's in a track lock position and you propel the vehicle forward, you're going to have a certain amount of -- and you can't remove the track lock -- you're going to have a certain amount of clutch slippage as you work against that lock; is that correct?"

A. That's right. Yes." (Tr. 71).

Mr. Young's explanation was fully supported by the testimony of Aldevard M. Robbins, a mechanic/welding operator who supervised the maintenance on the crane and whose testimony I find to be both probative and persuasive. He testified:

A. Well, this shovel is also propelled by a series of fractions. They're not called clutches as we've been calling them all morning, they're friction, and they're designed to slip. If you lock it in gear, you couldn't control it. It would be so quick and break your neck. They're designed to slip. You slip them all day long when it moves. That's the design of the rig. (Tr. 101).

In view of the persuasive testimony quoted, drawing the inference urged by Petitioner is not warranted. It is concluded that there was no violation of 30 C.F.R. 56.9-2 as charged in Citation and Order No. 201378.

Turning to the standard allegedly violated in Citation No. 201379, 30 C.F.R. 56.9-37, it is noted that it consists of two parts, the first specifying a procedure when mobile equipment is "left unattended" and the second part providing procedures applicable when mobile equipment is "parked on a grade."

Based on the findings set forth above, it is concluded that Earl Young, the crane operator, did leave the crane unattended. The task in which Young was involved immediately prior to and at the time the accident occurred was to use the loader (which is half the weight of the crane) operated by David McKellar to hold or block the crane from slipping or sliding down the hill. Considering the hazard inherently posed to the loader and its operator by this maneuver, Young's action in leaving the controls and stepping onto the catwalk for all practical purposes left the crane unattended. Thus, he removed himself from being in a position to take prompt action should the crane start to move or slide. It is well-established in mine safety law that safety legislation is to be liberally construed to effect Congressional purpose, *Magma Copper Company v. Secretary of Labor*, 645 F.2d 694 (1981).

I also infer from the facts that the crane operator, Earl Young:

1. tried to engage the digging locks on the crane, and
2. left the cab to go onto the catwalk,

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that he intended to brake the crane while he was on the catwalk and the loader was being positioned behind the crane. His attempt to brake the crane is evidence of his recognition that the circumstances obliged him to do so.

It is thus found that Mr. Young left the crane, a piece of mobile equipment, unattended when the brakes (digging locks) were not set. This constitutes a violation of the first provision of 30 C.F.R. 56.9-37.

It is also found that to accomplish the task of positioning Mr. McKellar's front end loader, Mr. Young intended to park the crane on a grade as evidenced by his effort to use the lever to engage the digging locks so as to "lock-up" or brake the entire crane. Young then exited the cab of the crane (where the controls are located) and was either partially or entirely on the catwalk of the crane when the crane started to move downhill. Since the tracks were not blocked, the crane was not turned into a bank or rib, and the boom was not lowered to the ground to prevent movement, a violation of the second provision of 30 C.F.R. 56.9-37 occurred. I specifically note in this connection the conclusion of supervisory Mine Inspector Edward T. Wells that blocking should have been placed behind the crane before the operator left the controls (Exhibit R-2).

To prove a violation of this standard, as with most standards, "non-compliance with the standard's terms need only be shown. . . ."Eastern Associated Coal Corporation v. Secretary, 4 FMSHRC 835, 840 (May 3, 1982). The mere occurrence of the infraction of the safety standard constitutes a violation since liability is imposed on the mine operator without regard to fault. El Paso Rock Quarries, 3 FMSHRC 35, 38-39 (1981). The failure of the crane operator to properly set the brakes on the crane when he left it unattended resulted in the crane's moving downhill and colliding with the loader. Likewise, the fact that the crane was not blocked or turned into a bank when it was parked on the grade was an independent cause of the accident. Thus, the negligence of the crane operator to take any of the precautionary actions required by 30 C.F.R. 56.9-37 caused the accident in question and the resultant injury to the loader operator, David McKellar. It also should be noted that in its post-hearing brief, Respondent did concede that the crane operator "had not properly engaged the locks during operation." In Heldenfels Bros. v. Marshall, 636 F.2d 312 (5th Cir. 1981) (unpublished opinion), involving an accident which also resulted solely from fault on the part of an equipment operator, the Court reaffirmed the principle of both strict liability and vicarious liability peculiar to mine safety law:

"Heldenfels claims they were denied due process by the imposition of a civil penalty for this alleged violation. Underlying this due process argument is Heldenfel's assertion that there was nothing they could have done to prevent the accident in question. The Secretary responds by pointing out the fact that the Act imposes strict liability on operators for

violations of regulations. This argument misses the mark.

Heldenfels is not claiming that it should not be held liable since it was not negligent; Heldenfels argues that it should not be held liable because it did not cause the violation of the regulation. However, Section 110(a)(1) of the Act, 30 U.S.C. 820(a)(1), authorizes assessment of a civil penalty against the operator of a mine when a violation of a mandatory regulation occurs at the mine. Thus, Congress has provided for a sort of vicarious liability to accompany the provision for strict liability." (emphasis added)

It is concluded that Respondent is liable for the violation of the mandatory safety standard committed by its employee.

Assessment of Penalty

Within the context of the evidentiary record submitted here, the amount of penalty must relate to the degree of the Respondent mine operator's culpability in terms of wilfulness or negligence, the seriousness of the violation, the business size of the Respondent, the number of violations previously discovered at the mine involved, and the Respondent's good faith in abating violative conditions. Respondent made no contention that it's ability to continue in business would be adversely affected by assessment of penalties at some particular monetary level.

Based on the parties' stipulations (Tr. 3) I find that Respondent is a small mine operator (Exhibit M-3) with a moderate history of previous violations (21 in the preceding 24-month period). Since according to the Inspector's notes, the violative condition was corrected within the time fixed for abatement (Exhibit M-2), and since the machinery involved was not returned to service until inspected by an expert approved by MSHA (Tr. 3), I conclude that Respondent exercised ordinary good faith in abating the violative condition after notification thereof. These factors militate for a lessening of the penalty. I have previously found, however, that the negligence of the crane operator caused the accident which resulted in the serious injury of another of Respondent's employees. The mine operator is responsible for a violation committed by one of its employees and the negligence of the employee in committing the violation is imputed to it. The Valley Camp Coal Company, 1 IBMA 196 (IBMA 72-22, September 29, 1972); Ace Drilling Coal Company, Inc., 2 FMSHRC 790 (1980). Since the violation also resulted in a grievous injury to one of Respondent's employees, the violation is found to be very serious.

A penalty of \$1,000.00 is assessed.

ORDER

All proposed findings of fact and conclusions of law submitted by the parties not incorporated herein are rejected.

Citation and Order No. 201378 dated January 2, 1980, is vacated.

