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SOL (MSHA) V. HILLARD BENTGEN
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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 Proceedings Docket No. LAKE 82-27-M A/O No. 20-00603-050015-A
v.	
HILLARD BENTGEN, GRANT MACKLIN, RUSSELL HEEMAN, RESPONDENTS	Docket No. LAKE 82-28-M A/O No. 20-00608-05017-A Docket No. LAKE 82-29-M A/O No. 20-00608-050019-A
	Ottawa Silica Company Michigan Division Quarry and Mill

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Frank X. Fortescue, Esq., Brown, McGlynn, Fortescue and Smith, Bloomfield Hills, Michigan, for Respondents

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Petitions were filed in each of the above cases under section 110(c) of the Federal Mine Safety and Health Act of 1977, alleging that each of the Respondents, acting as agent of the Ottawa Silica Company, a corporate mine operator, knowingly authorized, ordered, or carried out a violation of the mandatory standard contained in 30 C.F.R. 56.9-2 committed by the mine operator between October 31, 1980 and November 25, 1980. On motion of Petitioner, the three cases were consolidated for hearing and decision since they involved the same corporate mine operator and the same violation is charged against each Respondent.

Pursuant to notice, the case was heard on the merits in Detroit, Michigan, on August 4, 1982. Erwin Nowitzke, Ronald J. Baril and Russell Spencer testified on behalf of Petitioner. Peter Roan and Hillard Bentgen testified on behalf of Respondents. Counsel for Petitioner and Respondents waived their rights to file posthearing briefs and each submitted oral arguments on the record at the close of the testimony. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Ottawa Silica Company at all times pertinent hereto was the operator of a mine in Wayne County, Michigan, known as the Michigan Division Quarry and Mill, the products of which entered interstate and foreign commerce. Ottawa Silica Company is a Delaware Corporation with headquarters in Ottawa, Illinois.

2. At all times pertinent hereto, Respondent Hillard William Bentgen was employed by Ottawa Silica Company as Industrial Relations Safety Supervisor at the Michigan Division Quarry and Mill.

3. At all times pertinent hereto, Respondent Grant Macklin was employed by Ottawa Silica Company as pit foreman at the Michigan Division Quarry and Mill.

4. At all times pertinent hereto, Respondent Russell Heeman was employed by Ottawa Silica Company as maintenance foreman at the Michigan Division Quarry and Mill.

5. Ottawa Silica Company owned and used a piece of equipment known as a Grove Cherry Picker Crane #33. This was a large crane with four rubber tired wheels. It weighed between 15 and 20 tons, and had a lifting capacity of 14 tons. There were brakes on all four wheels.

6. Ottawa Silica Company required all employees operating powered industrial equipment, including the cherry picker, to complete and submit each day a form called Mobile Equipment Daily Operator Inspection.

7. At all times pertinent hereto, the employee who operated the Grove Cherry Picker Crane #33 at the subject mine was Erwin Nowitzke.

8. The report submitted by Nowitzke on October 30, 1980, indicated a defect in the emergency brake at the beginning and end of the shift. No defect was noted in the service brakes. On the reports submitted beginning October 31, 1980 and continuing through November 24, 1980, a defect was noted in the service brakes both at the beginning and the end of each shift. Thirteen such reports were submitted during that period of time. In addition to the written reports, Nowitzke orally complained of the brakes to his supervisors.

9. The reports referred to above were submitted to the mine office. They were turned over to Respondent Bentgen. After the first such report, Bentgen talked to the mechanics. Brake fluid was added to the service brakes. As the reports continued to indicate a defect, Bentgen was told that the brakes tended to fade after use, and could be brought back to an acceptable level by adding fluid. At some time between October 31, 1980 and November 6, 1980, the master cylinder was replaced, but the problem continued.

10. Ottawa Silica's mechanics were unable to fix the brakes so Contractors Machinery Company, which sold and serviced construction equipment, was called on November 6, 1980.

11. The Contractors Machinery Company representative found defective seals in the front wheel cylinders. Because parts had to be ordered, the brakes were "blocked off," that is, rendered entirely inoperative. This was done with the knowledge and authorization of Ottawa Silica officials. New parts were ordered by Contractors Machinery.

12. Respondents Bentgen, Macklin and Heeman were aware that the brakes had been blocked off on the Grove cherry picker crane at the time or shortly after this was done.

13. The Grove cherry picker crane in question was operated on sand and gravel surfaces some of which were roughly graded, and had bumps. It traversed a long curved hill with a pond at the bottom and a dropoff at the side of 50 to 60 feet. Other vehicles travelled in the area including pick up trucks. The crane had a normal speed when empty of 10 to 20 miles per hour. When loaded, it would travel 5 to 10 miles per hour. Where Nowitske travelled down a grade, he tried to keep the speed down to 2 to 3 miles per hour.

14. While the crane was carrying a load up or down the travelway described above, the rear wheels would sometimes be raised off the ground on striking a bump in the road. When the rear wheels were off the ground, the crane had no brakes at all after the front brakes were blocked off. On occasion, during this time, it was necessary for the crane operator to shift into reverse gear to slow the crane down.

15. During the period in question, Nowitzke was not involved in any accident with the crane, nor did he ever lose control of the vehicle.

16. On one or more occasions subsequent to November 6, 1980, Nowitzke was directed by Respondent Macklin to operate the crane to pick up and carry pumps to and from the pit. These weighed from 400 pounds for small pump motors to over 1,000 pounds for sand pump motors. Macklin was aware that the front brakes were blocked off during this time.

17. On one or more occasions subsequent to November 6, 1980, Nowitzke was directed by Respondent Heeman to operate the crane. Heeman was aware that the front brakes were blocked off during this time.

18. Respondent Bentgen knew that the crane was being operated after its front brakes were blocked off. Bentgen told Macklin and Heeman that in his opinion the crane was safe to operate.

19. On November 25, 1980, Federal Mine Inspector Ronald J. Baril, a duly authorized representative of the Secretary of Labor, issued a citation to the Ottawa Silica Company charging a violation of 30 C.F.R. 56.9-2. The citation alleged that the company was aware that Grove cherry picker No. 33 had defective brakes which should have been corrected on October 31, 1980, or the machine should have been removed from service. It further alleged that equipment operator inspection forms had reported the defect from October 31, 1980 on 13 separate work days.

20. The citation referred to above was terminated on the day it was issued when the Safety Manager informed company supervision that they must review the employee equipment reports and correct defects affecting safety. The brakes were repaired on November 26, 1980, and the cherry picker crane was returned to service.

21. MSHA assessed a penalty of $1,000 against Ottawa Silica Company for the alleged violation and the assessment was paid in September, 1981.

STATUTORY PROVISION

Section 110(c) of the Act provides in part as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act . . . ., any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, failure or refusal shall be subject to the same civil penalties . . . . that may be imposed upon a person under subsection[s] (a) . . . . .

REGULATORY PROVISION

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

ISSUES

1. Whether the corporate operator, Ottawa Silica Company, violated the mandatory safety standard charged in the citation involved herein?

2. If the corporate operator violated the safety standard charged, in the case of each Respondent, did he, acting as an agent of the corporation, knowingly authorize, order, or carry out such violation?

3. If Respondents or any of them did knowingly authorize, order, or carry out the violation, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. Ottawa Silica Company violated the mandatory safety standard contained in 30 C.F.R. 56.9-2 in failing to correct the defective brakes on the Grove cherry picker crane #33 during the period October 31, 1980 to September 25, 1981, while it continued to operate the crane.

DISCUSSION

There is no question that the crane had defective brakes: from October 31, 1980 to November 6, 1980, the front wheel cylinders leaked and the brakes lost their holding power each day while being used. From November 6 to November 25, the front brakes were blocked off and entirely inoperative. Respondents contend that the defect did not affect safety. This flies in the face of common sense. The vehicle was equipped with four wheel brakes and obviously having brakes on only the rear wheels seriously diminished the ability of the operator to stop. The most important evidence in this regard is the testimony of Mr. Nowitzke, the equipment operator. He stated that he considered driving the crane without brakes to be hazardous, especially when lifting and carrying loads. The crane operator and other employees working or travelling in the area of the crane were endangered by the defective brakes.

2. Each of the Respondents was an agent of Ottawa Silica Company, a corporation, during the months of October and November, 1981.

3. Respondent Grant Macklin and Respondent Russell Heeman knowingly ordered the crane operator to use the crane without having the defective brakes corrected. They thereby knowingly ordered the commission of the violation found herein to have been committed by the corporate operator.

4. Respondent Hillard Bengten, the Safety Director of the corporate operator, knowingly authorized the use of the crane without having the defective brakes corrected. He thereby knowingly authorized the violation found herein to have been committed by the corporate operator.

DISCUSSION

There is no question but that each of the Respondents knew that the crane had defective brakes. I conclude further that each of them knew or should have known that this was a defect

affecting safety. It is not necessary in order to establish a violation under section 110(c) that wilfullness or bad faith be shown. See Secretary v. Kenny Richardson, 1 FMSHRC 8 (1981).

5. The violation was a serious one in the case of each Respondent, and very serious in the case of Respondent Bentgen who was responsible for seeing to the safety of all employees at the plant. The defect was an obvious one, known to all Respondents for many days and reported orally and in writing on many occasions by the equipment operator.

6. There is no evidence in the record concerning the ability or lack of ability of any of the Respondents to pay penalties that may be assessed.

7. After the violation was cited against the operator, it was promptly abated and, so far as the record shows, each of the Respondents cooperated in the abatement.

8. I conclude that appropriate penalties for the knowing violations should be imposed as follows: on Respondent Bentgen, $700; on Respondent Macklin, $500; on Respondent Heeman, $500.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. That within 30 days of the date of this decision, Respondent Hillard Bentgen pay the sum of $700 as a civil penalty for the violation found herein to have occurred;

2. That within 30 days of the date of this decision, Respondent Grant Macklin pay the sum of $500 as a civil penalty for the violation found herein to have occurred;

3. That within 30 days of the date of this decision, Respondent Russell Heeman pay the sum of $500 as a civil penalty for the violation found herein to have occurred.

James A. Broderick
Administrative Law Judge