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SOL (MSHA) V. BILL GARRIS
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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 82-90 A/O No: 33-01068-03166 A
v.	Sunnyhill No. 9 South
BILL GARRIS, RESPONDENT	

DECISION

Appearances: Inga Watkins Sinclair, Esq. Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia, for Petitioner
Michael O. McKown, Esq., P.O. Box 235, St. Louis, MO for Respondent

Before: Judge Moore

At approximately 8 a.m. on June 19, 1980, the victim, Mr. Walter Strohl was crushed between the bed of his supply truck and a concrete loading dock. He died shortly thereafter.

No one saw the accident occur and the victim did not live long enough to tell anyone what happened. MSHA's version of how the accident happened is admittedly speculation based upon circumstantial evidence. When the would-be rescuers found the victim they were understandably more intent on saving him than on noticing the surrounding conditions. They did notice a three-thousand pound pallet of Mandoseal resting partially on the truck and partially on the loading dock. The rescuers moved the truck forward slightly to release the victim and then blocked the truck against further movement. Those witnesses who noted the position of the cable on the winch said that it was wound up on the spool, and thus not hooked to the Mandoseal pallet. There was no evidence presented which would indicate that the winch had previously been hooked to the Mandoseal pallet and somehow become unhooked. Therefore, Mr. Bill Garris' theory that the winch pulled the truck into the victim seems highly unlikely.

Mr. Strohl's normal method of loading Mandoseal at the pole barn loading dock was to back the truck up flush with the dock, place a metal bar behind the Mandoseal pallet, attach cables to the aforesaid bar and attach the other ends of the cables to his winch cable. He would then

operate the winch and pull the Mandoseal on to the truck bed. No one knows what procedure the victim followed on the day of the accident but the bar that he usually put behind the Mandoseal pallet was found between the pallet and the concrete loading dock as though he had somehow pulled it under the pallet and he could not have done that by hand; so there was speculation that he had hooked the truck directly to the Mandoseal pallet and pulled the Mandoseal to the edge of the loading dock. Actually, the Mandoseal pallet which was 4' x 4' was almost halfway off of the loading dock after the accident. How much of the weight was resting on the truckbed is unknown. When the would-be rescuers arrived at the accident site the truckbed was about 4" from the loading dock and the victim was squeezed in this 4" . He was facing the loading dock.

MSHA speculates in its accident report that the victim started the the loading operation in his normal manner with the truckbed flush against the loading dock. When the load was almost halfway on the truckbed, for some reason, probably because the winching gear had become fouled, he moved the truck away from the dock for a distance of not more than twentyfour inches. While it is not spelled out clearly I assume MSHA reached this conclusion because it thought the Mandoseal pallet would have toppled if the truckbed had been moved completely out from under it. The accident report then speculates that for some reason the victim went in between the truckbed and the loading dock probably to try and remedy the fouled gear. Then the report concludes "the accident occured because the supply truck drifted backwards due to the parking brake being inoperative."

The accident report was received in evidence at thtrial. (FOOTNOTE 1) The version of the accident contained in the accident report does not account for the fact that the winch was wound up or for the fact that when Mr. Van moved the truck so the victim could be removed, he found the parking brake handle in the off position. The condition of the parking brakes could hardly be a factor if they were not used. Under the theory, which was not advanced at the trial, that the victim did not use the parking brakes because he thought they were ineffective, one is faced with the proposition that if the victim wanted the truck to remain stationary, why did he not put it in gear since the engine was off or put chocks, which he had available, under the wheels?

There is conflicting testimony as to when the truck was first moved to a different location and when the brakes were tested. The inspectors say the brakes were tested on June 20 by having someone engage the parking brake handle and then the inspector looked at the brake housing and could see that it was not holding. The truck was then pulled forward and it rolled back. The inspectors say that the truck was not moved until noon of the 20th. The Respondent and Mr. Diose both testified that the truck was moved on June 19 to the maintenance area and that the parking brakes were tested by putting the truck in gear and engaging the

parking brakes to see if they would hold the truck while it was in gear. The testimony was that the parking brake would hold on a slight grade but would not hold against the power of the engine. Mr. Diose said that the brakes held enough to bog the engine. It was the contention of the government that if the truck was moved on the 19th it was in violation of a 103(k) order that had been issued right after the accident. That order was in my opinion of questionable validity. (See Secretary of Labor vs. Eastern Associated Coal Company, 2 FMSHRC 2467 (September 2, 1980). But I can see no advantage to Mr. Garris in the fact that the truck was moved on the 19th instead of the 20th. There is no reason that I can think of why he and Mr. Diose would make up such a story. Nor can I see any advantage to the inspector's side of the case in having the truck moved on the 20th rather than on the 19th. I think memories differ and that no perjury was involved.

Mr. Diose thought the area where the accident occurred was so level that a truck should not roll there. He moved his car into the same area, put it in neutral with the brakes off to see if it would roll. It did not. What the inspectors should have done in my opinion was to put the truck in the position where they thought it was prior to the accident and then test to see how much force it took to get the truck rolling, both in its empty condition and with the Mandoseal resting on part of the truckbed. It would seem that if almost half the weight of the Mandoseal had been resting on the truck it would have made the truck very difficult to move. I also wish they had determined the location of the metal bar that the victim customarily used to operate the winch and I wish they had determined the position of the winch control. These facts would shed light on whether the victim used the winch prior to the accident. If he had used the winch prior to the accident it does not make sense that he would wind the winch all the way back up so that the cable hook was in front of the truckbed because he obviously would need it to get the rest of the Mandoseal on the truck.

Mr. Garris testified that he was told by the victim about 30 days prior to the accident that the truck had been driven with the parking brake on. Mr. Garris said that thereafter he checked the parking brake every week and that Company records so indicate. On the last check he made, he said the parking brakes were weak but they would hold. As stated earlier, he and Mr. Diose both stated they had tested the brakes after the accident. Mr. Garris said he drove the truck and his testimony will be discussed later. I find that Mr. Diose tested the brakes and found they would hold enough to make the engine bog down but that they would not hold completely against the engine. Mr. Garris had ordered parts to repair the brakes but the wrong parts had been sent and the rights ones had not come in at the time of the accident. But inasmuch as the only evidence concerning the victim's use of the parking brake was that on the day of the accident he did not engage it, I can not make a finding that the condition of the brakes had anything to do with the

fatality. As stated before, if the victim wanted the truck to remain stationary he would have used the parking brake, and probably left the truck in gear. There were no tests or engineering studies made to determine from the position of the Mandoseal what, if any, part of its three thousand pound weight was resting on the truckbed. The truckbed was one inch lower than the dock and unless the pallet was flexible (again no evidence) it would be possible to have almost half of the pallet hanging over the edge of the dock without putting any weight on the truckbed. In that almost balanced condition it would take a very small force to partially topple the Mandoseal so that some of its weight would be resting upon the truckbed.

A version of the accident that was not put forth at the trial by the accident investigating team, but by the inspector who issued the citation, would account for the Mandoseal being partially on the truck and also account for the winch not having been used. I am adding some of my own speculations to this theory. Under this version the victim would for some reason pull the Mandoseal out towards the edge of the dock with the truck and miscalculate so as to pull it to where almost half of it was hanging over the edge of the dock. After observing how far he had pulled the Mandoseal and realizing that a spill was imminent he tried to back the truck under the Mandoseal. If the pallet is sufficiently rigid, it should be possible to back the truck under the pallet. If it happened this way, then, during the actual crushing of the victim, sufficient force must have been applied to the Mandoseal to topple it because in the various photographs of the scene, the Mandoseal does appear to be resting on the truckbed. This version does not account for why the truck moved (unless the victim got out of the truck while the truck was still moving toward the dock or used a prybar to move it), but it does account for how almost half of the Mandoseal got on to the truckbed without the use of the winch. Also, in attempting to free the towing rig the victim may have toppled the Mandoseal and it may have hit some portion of the truck making the truck move backwards before the Mandoseal came to rest on the truckbed. It is certainly easier to conceive of the truck rolling before the Mandoseal came to rest on its bed.

The possibility that the victim was trying to move the truck under the Mandoseal with a crowbar was not given consideration by any of the witnesses. Of course it is all speculation as to how the accident might have occurred. I think the latter version is more likely than MSHA's version or the one put forth by Mr. Garris but regardless of what actually happened, I can find no nexus between the fatal accident and the condition of the parking brake.

Respondent Bill Garris did not manifest an ability to make himself understood, at least by me, during the trial. He constantly answered questions before they had been finished and this made it very difficult to know whether his answer was to the question as asked or some question that he thought was going to be asked. He contradicted himself constantly

either because he was unable to make himself clear or because he was unable to understand the questions. For example, when questioned about testing the brakes in front of the shop he said he tested them by putting them on an incline and that the brakes would hold. "But it wouldn't hold the brake--it would--it would drift back on the steeper incline in gear." (Tr. 172). When asked if the parking brake would keep the truck from moving he stated "it would--it would hold it, but you had to put it in gear. It would move in gear--no problem. It would hold--it would hold the truck in neutral is what I'm saying." (Tr. 173). Referring to the 20th of the month Mr. Garris stated that the inspectors conducted the test on the steep slope in front of the shop. The following appears at 186 of the transcript.

> Q. And what were the results when they tested it?
>
> A. Like I said a minute ago, it wouldn't--it would not hold.
>
> JUDGE MOORE: It was the same as when you tested it?
>
> WITNESS: That's right.
>
> JUDGE MOORE: It wouldn't hold but it wouldn't--
>
> WITNESS: In fact, I tested it for him. I drove the truck.

After testifying that he had moved the truck on June 19th and that he had not been present when the (k) order was issued on June 19th but that he had been present on June 20th when the citation alleging faulty brakes (it was an order but referred to in the testimony as a citation) was issued, he was asked if he had read the citation (Tr. 194) and the following ensued:

> A. "I just drove it to the shop. I was mainly interested in trying to get the brake fixed
>
> Q. After the citation was issued.
>
> A. After the--yeah, the order was wrote up.
>
> Q. The citation for bad brakes.
>
> A. Yeah.

He is in effect testifying under oath that he moved the truck on June 19 right after he had received the order on June 20th. I can not decipher his testimony and I am therefore discounting most of it.

The first government witness was Inspector Tipple. From reading his entire direct testimony it would appear that the accident investigation took place on June 20th and that the only thing that happened on June 19th the day of the fatal accident, was the issuance of a 103(k) order

by Inspector Tackett who happened to be at the mine at the time of the accident. The other inspectors, Homko and Beck, say that the investigation started on June 19th and concluded on June 20th. For some reason that they tried to explain, but did not explain to my satisfaction, they issued no citations or orders on June 19th. They waited until the next day for a surface inspector Mr. Tipple to come and issue the necessary order even though they had full authority to do so.

The test conducted by Mr. Tipple is not supported by sufficient evidence. He told someone to engage the emergency brake; then he looked at the braking mechanism and observed while the truck rolled backwards. He does not know whether the brake was in fact engaged or whether the one in the truck understood the instruction to engage the brake. For that test to be sufficient someone would have to testify that he either engaged the parking brake or saw someone else engage the parking brake. As it stands it proves little. Mr. Diose on the other hand tested the brakes on level ground by pulling through them with the engine. He stated that there was enough brake left to bog the engine. There was not enough to prevent the truck from moving with the engine, however.

There are all degrees of braking efficiency. Any time a brake is applied some lining is worn off and when a brake is driven through (driven with the engine with the parking brake engaged) it wears more lining. This lining had been driven through to the extent that the operator could smell burning brake lining. Obviously somewhere along the line between brand-new brakes and linings and brakes that will not hold at all, there comes a point where failure to repair the brakes immediately would be a "knowing" violation. I think the government had the burden of showing that the brake had gotten to that point in order to prevail. I find that the government has not carried its burden of proof that Respondent was guilty of a knowing violation.

I find in favor of the Respondent and the case is accordingly DISMISSED.

Charles C. Moore, Jr.
Administrative Law Judge

FOOTNOTE START HERE-

1 The other items obtained during pretrial discovery were neither offered in evidence or used for impeachment purposes.