

CCASE:
SOL (MSHA) V. CYPRUS INDUSTRIAL
DDATE:
19831114
TTEXT:

~1947

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. WEST 82-35-M
A.C. No. 24-00163-05015 F

v.

Yellowstone Mine

CYPRUS INDUSTRIAL MINERALS
CORPORATION,
RESPONDENT

DECISION

Appearances: Phyllis Caldwell, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
Petitioner Harley W. Shaver, Esq., Canges, Shaver,
Volpe & Licht, Denver, Colorado, for Respondent

Before: Judge Melick

This case is before me upon the Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," for two violations of regulatory standards. The general issue before me is whether the Cyprus Industrial Minerals Corporation (Cyprus) has violated the cited regulatory standards and, if so, whether those violations were "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). If it is determined that violations have occurred, it will also be necessary to determine the appropriate penalty to be assessed.

On June 8, 1981, a truck driver was killed at the Cyprus Yellowstone Mine when his 35-ton haul truck went over the edge of an ore stockpile. MSHA inspector Darrel Woodbeck subsequently issued two citations under section 104(a) of the Act for regulatory violations in connection with the incident. One of the citations (No. 342876) charges a violation of the standard at 30 C.F.R. section 55.9-54 and reads as follows:

~1948

On June 8, 1981, at approximately 1330, a haul truck driver was fatally injured when the 35-ton haul truck he was driving went over the edge of a 30-foot high ore stock pile. The stockpile was located at the pit sorter area. The berm that was provided was not of sufficient height and it was not located far enough back from the dump edge to prevent overtravel onto unstable ground. Statements made by employees that were working in the area indicated that the berm was approximately two feet high. The axle height of the truck was three feet.

The cited standard requires that "berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

Cyprus readily concedes that there was no berm or other required restraint in place where the haul truck went over the edge of the stockpile but argues that it was not in violation of the standard because the haul truck was itself in the process of "dumping a berm". Cyprus claims that it had instructed its truck-drivers, including the victim in this case, to dump 15 to 20 feet back from the edge of the stockpile and that the front-end loader or bulldozer would then push the material to the edge to form a berm. The evidence shows, however, that contrary to the purported instructions, ore had in fact been previously dumped right at the edge of the stockpile. Inspector Woodbeck found this to be the case and the photographic evidence supports this finding. Moreover, according to the undisputed eyewitness testimony of the front-end loader operator, Shirley Lane, the rear wheels of the victim's haul truck would have been only 5 to 6 feet from the edge of the stockpile when the ground gave way, thus confirming that the loads were in fact not being dumped 15 to 20 feet back from the edge.

In light of the operator's contentions that the stockpile was inspected each day by management personnel and that only one trip had been made by a haul truck to the stockpile before the accident that day and the evidence that the haul trucks had for some period of time being dumping right at the edge of the stockpile, it may reasonably be inferred that agents of the operator were aware of the practice of dumping close to the edge without a berm and had not stopped the practice. I accordingly find that there was a violation of the cited standard and that the operator was negligent in permitting continuing violations of the standard for some period of time.

~1949

The violation was also of high gravity. There is no dispute that at the same time the haul trucks were dumping on the 30 foot stockpile, a front end loader was in effect undermining the stockpile directly below the dumping location as it removed the ore. Under these circumstances, I find that there indeed existed a reasonable likelihood that a truck would back too close to the unstable edge of the stockpile and fall through, thereby resulting in death or injuries of a serious nature. The fact that such an incident did occur and did cause the death of a truck driver confirms that the violation herein was "significant and substantial" and of high gravity. Secretary v. Cement Division, National Gypsum Company, supra.

The second citation arising out of this incident (Citation No. 342877) alleges a violation of the standard at 30 CFR section 55.9-55, alleging that the ground failed at the edge of the stockpile under the weight of the haul truck. The cited standard requires that "where there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped back from the edge of the bank."

As previously noted, the operator contends that its truck drivers had been instructed to dump their loads 15 to 20 feet from the edge of the stockpile. As also previously noted however, the trucks had been, for some time prior to this accident, dumping right at the edge of the stockpile and the rear wheels of the victim's haul truck were in fact only 5 to 6 feet from the edge of the stockpile when it gave way. Thus it is apparent that if such instructions had been given, those instructions were customarily ignored without any corrective action by the operator.

Since I have already found that it was the regular practice for the front end loader to remove ore and thus undermine the stockpile directly beneath the dumping location, it is clear that the operator also knew or should have known that the ground above it, near the edge of the stockpile, could very well fail to support the weight of the 35-ton haul trucks dumping at the edge above. I therefore find that the violation has been proven as charged and that the operator was negligent. Under the circumstances, there also existed a reasonable likelihood of ground failure near the edge of the stockpile and that a haul truck could very well pass through the failed portion of the 30 foot stockpile resulting in death or injuries of a serious nature. The violation was therefore "significant and substantial" and of high gravity. Secretary v. Cement Division, National Gypsum Company, supra.

In determining the appropriate penalty to be assessed in this case, I have also taken into consideration that the operator

~1950

is of medium size and that the violative practices were immediately discontinued. There is insufficient evidence of any prior violations and no evidence that the penalties here imposed would impair the operator's ability to continue in business. Under all the circumstances, I find that penalties of \$1,200 for each violation are appropriate.

ORDER

The Cyprus Industrial Minerals Corporation is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 342876	\$1,200.
Citation No. 342877	\$1,200.

Gary Melick
Assistant Chief Administrative Law Judge