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SOL (MSHA) V. MINERAL EXPLORATION
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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.

MINERALS EXPLORATION COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 81-319-M
A.C. No. 48-01181-05032 I

Sweetwater Uranium Project

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
Angeles, California, for Respondent.
for Petitioner;
Angeles, California, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Minerals Exploration Company, with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits began on October 5, 1982 in Laramie, Wyoming.

Respondent filed a post trial brief.

Issues

The issues are whether respondent violated the safety regulation and, if so, what penalty is appropriate.

Jurisdiction

Respondent admits jurisdiction (Tr. 230).

Citation 337761 alleges respondent violated Title 30, Code of Federal Regulations, Section 55.18-2(a) (FOOTNOTE 1)

Summary of the Evidence

MSHA's evidence: Arnold Acosta, respondent's safety director, advised MSHA Inspector Martin Kovick that an employee had turned over his scraper in the pit area (Tr. 159-162). The men went to the site of the accident, a stockpile area. They learned that while employee Martinez was dumping his load the rear end of the scraper slipped and the scraper turned over (Tr. 162-164).

Martinez, the injured driver, was to dump his load on top of the topsoil pit. A blade was to then smooth it off.

Photographs showed ruts where the loader slipped over the side of the area and they showed where the operator attempted to right his vehicle (Tr. 164, Exhibits P2-P5). The 20 foot roadway narrowed at its most narrow point to 17 1/2 feet (Tr. 164, 165).

In the inspector's opinion the accident would probably not have occurred if the area had been adequately bermed (Tr. 167). Further, a three to one slope would probably have prevented the accident (Tr. 167). Possibly the accident would have occurred on a two to one slope but not on a four to one slope (Tr. 174). It is the company's policy to maintain an angle at three to one but half of the employees were not aware of that policy (Tr. 168).

In the inspector's opinion the slope was too steep for the scraper. But the inspector did not measure it, nor did he determine the extent of it and he did not know what it was at the time of the accident (Tr. 175).

There was nothing to indicate that the operator had examined the work place before the shift (Tr. 169, 176). But the inspector didn't recall if he had asked Mr. Day, the supervisor, if he performed an inspection (Tr. 177). But Day told the inspector it was okay to dump there (Tr. 178).

Respondent's evidence: David Day, a field shift supervisor, and scraper operator Baca testified for the respondent (Tr. 183, 184, 209).

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On October 26 Day assigned Leonard Martinez and Fred Baca to strip topsoil in the C3 pit area (Tr. 185). The work shift began at 4 o'clock. Day arrived at the topsoil pile about 4:30 p.m. The operators had picked up their equipment from the ready line. When he arrived at the site the men got into Day's pickup and they drove the entire area, locating the limit stakes. They drove to the top of the topsoil. At that point Day pointed out a muddy area 15 to 20 feet in diameter (Tr. 186, 187). Day asked Baca to put two or three loads in the mudpile and for the blade to smooth it over to make a good base for the scrapers (Tr. 187). It took about 15 minutes for three men to drive the area (Tr. 189). During his drive around the area Day pointed out the mudhole but he didn't see any hazards affecting safety (Tr. 190).

Day learned about the rollover around 7:30 p.m., as dusk was settling in. He was then enroute to get a portable light for the dumping area (Tr. 189, 190).

Day had been working dirt with heavy equipment for three years. Starting at the north end of this stockpile there was very little slope at the edges, not less than a 4 1/2 to 5 to 1 angle. Proceeding southward the slope was about 5 to 1 (Tr. 191, 192). The banked roadway varies from a 6 to 1 slope to a 3 to 1 slope. The angle of the slope where the scraper rolled over was 5 to 1 or between 5 1/2 to 6 to 1 (Tr. 193).

Day examined the scraper's tracks. In his opinion the front end of Martinez's scraper went over the edge. Martinez could then have turned his scraper downhill or he could have waited for assistance. But he tried to drive back uphill and this caused the scraper to slide further downhill (Tr. 197). Martinez was capable of operating the scraper safely. He had driven it for a week in daylight. Further, he had been trained to operate the scraper. (Tr. 198).

Since the rollover accident the company has a written policy that there must be a 3 to 1 slope at the edge of the stockpile area (Tr. 199).

Day will evaluate slopes four to five times during a workshift. In reclamation they work 5 to 1 slopes (Tr. 200).

For various reasons MSHA's photographs do not show the angle of repose (Tr. 201-206).

Baca did not see any hazards at the site. Day instructed the operators to dump close to the edge so the blade could widen the pile (Tr. 212). The slopes of the topsoil pile varied from 3 to 1 to 5 to 1 (Tr. 213, 214).

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Baca didn't see the rollover but he saw the scraper lights shining in the air. He also saw Martinez crawling out of the overturned equipment (Tr. 212, 213).

MSHA's Rebuttal

This evidence purports to measure the angle of repose from the photographs. But Inspector Kovick had never taken angles from a photograph. Further, he had not been trained in that regard (Tr. 222).

Discussion

Section 55.18-2 requires, in part, that the operator designate a competent person to examine a working place at least once each shift for conditions that might adversely affect safety or health. MSHA's failed in its burden of proving the initial requirement of the regulation. In addition, Day's experience establishes his expertise. Further, it is virtually uncontroverted that Day made an inspection with operators Baca and Martinez at the beginning of the shift.

The evidenciary thrust of petitioner's case concerning adverse safety conditions is twofold: first, it is asserted that at the point of the turnover the area was not bermed. Further, it is asserted that an excessively sharp slope at the edge of the stockpile, (less than an angle of 3 to 1), caused the rollover.

On the issue of whether the area was adequately bermed I conclude that berms were not required. Witnesses Kovick referred to a "roadway" as being 20 feet wide. (Tr. 164, 165). But on this issue I credit Day's testimony that the area where the accident occurred was the area where the topsoil was being dumped by the scrapers (Tr. 186). In addition, if the factual situation called for berms, then MSHA should have cited respondent for violating the applicable berm or dumping regulation.

The additional facet of petitioner's case is that the excessively sharp slope caused the rollover. On this point I credit respondent's evidence. Witness Day, in charge of the area, and inspecting it daily was in a much better position than the inspector to testify as to the angle of the slope. I credit Day's version that the slope varied at various points between an angle of 3 to 1 to an angle of 7 to 1.

The inspector's contrary conclusion concerning the angle of the slope is not persuasive. He didn't measure, didn't determine, and didn't know the angle of the slope.

Further, I reject MSHA's rebuttal evidence. The measurements on Exhibits P6 and P7 do not establish the extent of the angle of

