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SOL (MSHA) v. GRANITE ROCK
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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. WEST 84-73-M
A.C. No. 04-00119-05508

v.

Docket No. WEST 84-138-M
A.C. No. 04-00119-05510

GRANITE ROCK COMPANY,
RESPONDENT

Logan Quarry

Appearances: Marshall P. Salzman, Esq., Office of the
Solicitor, U.S. Department of Labor, San
Francisco, California for Petitioner;
Gloriann Katen, Esq., for Granite Rock
Company, Watsonville, California, Respondent.

DECISION

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Federal Mine Safety and Health Act ("the Act") by the Secretary of Labor against Granite Rock Company, for alleged violations of the mandatory safety standards.

Stipulation

At the hearing, the parties agreed to the consolidation for hearing and decision of the two docket numbers (Tr. 2).

They also agreed to the following stipulations (Tr. 2-3):

1. Granite Rock Company is the owner and operator of the subject mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The presiding administrative law judge has jurisdiction over the proceedings.
4. The inspector who issued the subject citations was a duly authorized representative of the Secretary.

5. True and correct copies of the subject citations were properly served upon the operator.
6. Imposition of any penalty will not affect the operator's ability to continue in business.
7. The alleged violations were abated in good faith.
8. The operator has no previous history of violations.
9. The operator is moderate in size.
10. It was raining on November 11, 1983 (Tr. 14).

WEST 84-73

Citation No. 2088078

The Solicitor moved to dismiss this citation on the grounds that further investigation had indicated that there was insufficient evidence to sustain the citation (Tr. 3). The motion was granted from the bench (Tr. 4).

The citation is Vacated and no penalty is assessed.

Citation No. 2088077

The subject citation dated November 16, 1983, describes the condition or practice as follows:

On November 11, 1983, at approximately 5:45 p.m. the Euclid dump truck model number 202 LD went over the bank at the dump site and came to rest submerged in approximately twenty feet of water. The truck driver was about to dump a truckload of wet muck when the ground failed under the truck. The truck driver jumped off of the truck before it went over the bank and was not injured.

The citation was issued under 30 C.F.R. 56.9-55, which provides as follows:

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.

The operation is described as an open pit. Granite is drilled and blasted then pushed over a bank to the floor of the pit with D-9 caterpillars. The granite is then loaded by unloaders and hauled to the mill. At the mill the product is crushed, sized and stockpiled. The waste materials are dumped into a settling pond which is a 35 foot drop from the edge of the bank (Tr. 5-6). The dump site itself consists of dirt and rock

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and other waste material compacted due to continual truck traffic backing up to dump (Tr. 24). The inspector described the area as unconsolidated earth (Tr. 6).

As already set forth, the parties have stipulated that it was raining on Friday, November 11, 1983 (Tr. 6). The inspector testified that about 5:45 p.m. when the driver, Mr. Bispo, was backing the truck to dump his load over the bank he looked back to see a crack open (Tr. 10). Another driver had driven up and was parked with his lights facing the rear wheels of Bispo's truck, so Bispo was able to see the crack forming (Tr. 11). Bispo put his truck into first gear in order to drive out. He looked back, saw the bank giving way, and jumped out. The truck went over the bank and submerged in approximately 20 feet of water (Tr. 10).

However, although the inspector testified about Bispo's account of the accident, which happened at about 5:45 p.m. on Friday, he himself did not arrive at the site until the Monday or Tuesday following the accident (Tr. 13). The inspector agreed that the rain which continued for two days between the accident and his inspection could have caused a change in the angle of repose as he saw it on the Monday or Tuesday following the accident (Tr. 15).

The inspector expressed the view that the area immediately adjacent to where the trucks were dumping was unconsolidated (Tr. 23) and that rain would have made the ground looser and less stable (Tr. 24). The inspector conceded that he had not done compaction or soil tests (Tr. 25). According to the inspector, under normal conditions a truck could come within four to five feet of the bank when dumping (Tr. 27). But when the ground is wet and muddy it is less stable and the edge of the bank is looser (Tr. 26-27). Under such circumstances a wider margin of safety is required and a truck should remain with its rear wheels at least 15 feet from the bank (Tr. 26). The ground gave way eight feet back (Tr. 37).

Mr. Green, the superintendent and Mr. Davies, the swing shift foreman, inspected the dumping site numerous times on the day of the accident (Tr. 30, 37). Neither felt that there was anything to cause them to believe that the ground would fail to support the weight of the dump trucks (Tr. 30, 37). Neither saw any sign of ground cracks (Tr. 31, 37).

Although Davies expressed concern about the rain to Green, he testified it was not about the safety of dumping, but rather was with respect to slipperiness of the surface (Tr. 34, 36). This testimony is uncontradicted and was not challenged on cross-examination. Green stated he would not have ordered dumping to take place if he had believed it was unsafe (Tr. 36). This testimony also was unchallenged.

The mandatory standards requires "evidence that the ground at a dumping place will fail." Mr. Green inspected the site

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several times on the day of the accident, the last time being around 3:15 or 3:30 p.m., just two hours before the incident (Tr. 30). Mr. Davies was at work beginning at 3:30 p.m. the day of the accident and inspected the site two or three times prior to the accident (Tr. 37). Neither saw anything causing them to doubt the ground's stability (Tr. 30, 37). I find the testimony of these two men who themselves saw the ground conditions close to the time of the accident more credible than that of the inspector who did not see it until two or three days later. The inspector himself admitted that rain in the intervening days could change the angle of repose (Tr. 15). The only contemporaneous evidence offered by MSHA was the inspector's second-hand account of what the driver told him. The operator's evidence is more persuasive.

In light of the foregoing, I conclude MSHA has failed to sustain its burden of proving a violation of the cited mandatory standard.

Citation No. 2088079

The subject citation dated November 16, 1983, describes the condition or practice as follows:

Adequate illumination was not provided at the dump site where the Euclid truck went over the bank and into the pond on November 11, 1983.

The citation was issued under 30 C.F.R. 56.17-1, which provides as follows:

Illumination sufficient to provide safe working conditions shall be provided . . . , loading and dumping sites, and work areas.

The operator's safety director testified that the lighting at the site consisted of a light tower on the conveyor belt. The tower contained 4 westinghouse 400 watts high intensity sodium luminaires, two of which pointed away from the dump site and two which point in the general direction of the dump site (Tr. 57). The lights were approximately 50 feet up into the tower, which was 200 feet from the dump site (Tr. 61). The safety director further testified to other lighting on the pump raft in the reservoir. Although not specifically directed to the dump, he said it would have caused some general illumination at the dump site (Tr. 58).

The inspector expressed the opinion that the illumination available at the dump site was inadequate and would not be sufficient to illuminate the work area unless there were floodlights directed specifically to the bank (Tr. 45). However, he did not take a light meter reading, but merely relied upon what he said was the industry practice of using "dumping lights", which stand and beam light directly into the area (Tr. 46). Moreover, the

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inspector did not investigate on the day of the accident and he could not say what time he was at the dump site (Tr. 47). He admitted that in saying the lighting was insufficient, he was just taking the driver's word for it (Tr. 47).

Both the safety director and a former Euclid driver, testified that they found the illumination to be sufficient (Tr. 58, 61, 62, 66). The safety director stated that he was at the site at 5:45 on November 11, 1984, one year after the incident, under the same artificial lighting as was present during the accident, and was able to read his notes from the area lighting provided at the exact point the Euclid went over the bank (Tr. 58).

The former Euclid driver testified that he actually saw the truck go over the edge and that at that time there was adequate illumination to conduct the dumping operation at the site of the accident (Tr. 66). He had always considered the light sufficient to enable him to work safely (Tr. 67). He specifically stated that he saw the edge of the bank, saw a crack open up and could have seen it without his headlights shining before him (Tr. 68).

Here again the evidence of the operator is far more persuasive than that of MSHA. The operator's safety director had a precise knowledge of the lighting involved as opposed to the inspector who did not. And the safety director tested the lighting at the same time one year later. Most persuasive is the testimony of the former Euclid driver who was at the site exactly at the time cited by the inspector and who unequivocally stated the illumination was sufficient.

Accordingly, I find that illumination at the dump site was sufficient and conclude therefore that there was no violation. This citation is VACATED.

WEST 84-138-M

Citation Nos. 2363563 and 2363564

At the hearing the parties agreed that both citations should be tried together.

Citation Number 2363563, dated May 9, 1984, describes the condition or practice as follows:

The backup alarm on the No. 2636 dump truck dumping rock at the main bin for the primary crusher was inoperable.

Citation Number 2363564, dated the same, describes the condition or practice as being identical except with respect to the number (2639) of the truck.

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Both citations were issued under 30 C.F.R. 56.9-2, later modified to 30 C.F.R. 56.9-87 which provides as follows:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to backup.

The inspector testified that the Euclid trucks were customarily equipped with a horn such as one would find on an ordinary automobile (Tr. 92). He did not check for horns and was therefore unable to testify as to whether these trucks had them or not. Accordingly, it must be found in the absence of evidence to the contrary, that the trucks were so equipped.

In addition, the mandatory standard requires that where the view to the rear is obstructed, such equipment must have an automatic reverse signal or an observer to signal. The inspector was of the opinion that the view from the truck was obstructed (Tr. 70). The inspector, however, never interviewed the driver as to whether he in fact had an obstructed view (Tr. 82). Further, he testified that although he had been in a Euclid to check noise levels he did not sit in the driver's seat to check whether the view was obstructed (Tr. 80). There is therefore, no support for his opinion that the dump part of the truck itself constituted an obstruction.

The operator presented the testimony of a former employee, who previously drove a Euclid truck for the operator (Tr. 89). He testified that the view was not obstructed in any way (Tr. 89). He relied on 2 mirrors, 12 inches long by 6 inches wide, which were located on both the passenger and driver sides. With the aid of the mirrors he was able to see perfectly to the rear of the truck during all phases of the operation (Tr. 90-91).

I accept the opinion of the former Euclid driver and find that the view was not obstructed and that therefore, an audible reverse signal or an observer was not required. The Euclid is ordinarily equipped with an audible warning device such as a horn and there is nothing to show that these trucks did not have them. The operator's safety director and the former driver testified without contradiction that the trucks had air horns. On the evidence presented this was all that was required here.

Accordingly, I conclude there were no violations. These citations are VACATED.

ORDER

In light of the foregoing it is Ordered that:

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WEST 84-73

Citation No. 2088078 be VACATED

Citation No. 2088077 be VACATED

Citation No. 2088079 be VACATED

WEST 84-138-M

Citation No. 2363563 be VACATED

Citation No. 2363564 be VACATED

The above-captioned cases are hereby DISMISSED.

Paul Merlin
Chief Administrative Law Judge