

CCASE:

SOL (MSHA) V. MARTIN MARIETTA AGGREGATES & YATES CONSTRUCTION

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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. SE 86-31-M  
A.C. No. 31-00052-05504

v.

Pomona Quarry

MARTIN MARIETTA AGGREGATES,  
RESPONDENT

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. SE 86-28-M  
A.C. No. 31-00052-05501 J2K

v.

Pomona Quarry

YATES CONSTRUCTION CO., INC.,  
RESPONDENT

ORDER DENYING MOTIONS FOR  
SUMMARY DECISION

On June 18, 1986, Respondent Martin Marietta Aggregates (Martin Marietta) filed a Motion for Summary Decision together with a memorandum of law in support of the motion, affidavits of Charles K. Moore, Al Van Drop and Ira Michael Shepard, Esq. The last named affidavit included attachments. On June 26, 1986, Respondent Yates Construction Company, Inc. (Yates) filed a Motion for Summary Decision adopting the motion, memorandum and attachments previously filed by Martin Marietta. On July 1, 1986, the Secretary filed a Response to the Motion, together with an affidavit of Merle E. Slaton. On July 9, 1986, Martin Marietta filed a Reply to the Secretary's Response.

In this consolidated proceeding, Martin Marietta is charged with two violations, one of 30 C.F.R. 56.3005 and the other of 30 C.F.R. 56.18002(a). Yates was originally charged with three violations, but has agreed to pay the assessed amounts in two of them subject to the court's approval, and is presently contesting only the alleged violation of 30 C.F.R. 56.3005.

30 C.F.R. 56.3005 provides as follows:

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Persons shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

The alleged violative condition in the Martin Marietta citation issued May 1, 1985 is described in part as follows:

On April 15, 1985, loose and unconsolidated material came off the top of a 35-40 foot wall causing the loader operator . . . to retreat . . . the loader backed into the rear of a truck waiting to be loaded, fatally injuring the driver . . . .

On September 9, 1985 the citation was modified to include the following:

The unsafe ground conditions were not corrected and the area was not posted or barricaded.

The citation issued to Yates on April 16, 1985, reads in part:

A loader had been working under a high wall, when loose material was visible. The loose material came out of the wall and the loader operator trying to get out of the way of the falling material backed the loader into the rear of a truck . . . fatally injuring the truck driver . . . .

The two citations are describing in different words the same incident which occurred at about 9:00 a.m. on April 15, 1985.

Martin Marietta submitted affidavits of the Plant Manager and Pit Foreman that preshift examinations of the site of the accident performed at about 6:45 a.m. on April 15, 1985 did not reveal any indication of loose material, cracks or other hazardous conditions. Martin Marietta also referred to the depositions of Federal Inspectors Thel Hill and Merle Slaton. Hill, who issued the citations, was asked:

Q. Okay. Could you tell me what proof you have that there was loose and unconsolidated material on the high wall before the work started?

A. Before the work started?

Q. Yes.

A. I have no way of knowing.

Slaton, a supervisory inspector, testified that he did not take pictures of the site and did not speak to anyone who saw the site before work started who told him that there was loose material on top of the high wall. When asked what proof he had of loose and unconsolidated material on the high wall before work started, he replied, "General conditions."

The Secretary submitted an affidavit from Slaton with its Response to the Motion in which he stated that on April 16, 1985, he observed several cracks at the top of the wall which in his opinion were of such nature that they could not have resulted from a recent failure or collapse of the wall.

I conclude that the entire record including the pleadings, depositions and affidavits does not show that there is no genuine issue as to any material fact concerning the citations above referred to. On the contrary, the record affirmatively shows an issue of fact whether there were unsafe ground conditions not promptly corrected which resulted in the accident. Martin Marietta attempts to discredit Slaton's affidavit, terming it "conjecture" and contrasts it with its (Martin Marietta's) "direct evidence." In deciding a motion for summary judgment, it is not my responsibility to weigh the evidence, but only to determine whether an issue of material fact exists. I conclude that on this issue, it does. Summary decision is therefore not appropriate as to the alleged violations of 30 C.F.R. 56.3005.

30 C.F.R. 56.18002(a) provides:

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

Citation 2385994 issued to Martin Marietta on May 1, 1985 charges it with not having a competent person check the working conditions of the area on a daily basis.

The Motion for Summary Decision argues that the citation should be vacated since the standard does not require a preshift or commencement of shift examination, and only two hours of the shift had passed at the time of the accident. It further asserts that two preshift inspections were made and attaches affidavits from the plant manager and pit foreman that they each inspected the work area at approximately 6:45 a.m. The affidavit of Inspector Slaton attached to the Secretary's Response states that the Plant Manager Charlie Moore told Slaton "that there had been

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no inspection of the area in question." In the depositions of Slaton and Hill each testified that Moore told them that he had not inspected the area in question. Slaton testified that Moore said no one inspected before the shift began. There is clearly an issue of fact as to whether an inspection was made prior to the accident. The citation charges that the mine operator was not having a competent person check the working conditions of the area on a daily basis. The issues before me are whether that allegation is correct and whether it constitutes a violation of the standard. I do not believe the record to date establishes that there is no dispute as to the first issue.

Therefore, I conclude there is a a genuine issue as to a material fact concerning this citation. Summary decision is not appropriate.

Accordingly, the motion for Summary Decision is DENIED. The case will be called for hearing on August 27, 1986 in accordance with the notice issued June 23, 1986.

James A. Broderick  
Administrative Law Judge