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SOL (MSHA) V. COLORADO MATERIALS
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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. CENT 86-37-M A.C. No. 41-03036-05504
v.	
COLORADO MATERIALS CO., INC., RESPONDENT	Olmos Portable Crusher No. 1 M

DECISION

Appearances: Eva Chesbro, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, TX, for Petitioner;
William M. Knolle, Esq., Hearne, Knolle Lewallen, Livingston & Holcomb, Austin, TX, for Respondent.

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor for a civil penalty for an alleged violation of a safety standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

Based on the hearing evidence and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Respondent, Colorado Materials Co., Inc., at all pertinent times operated the Olmos Portable Crusher No. 2, which is a limestone (crushed and broken) plant, in Austin, Texas, engaged in interstate commerce.

2. On August 6, 1985, between 7:00 and 7:30 a.m., Respondent's crusher operator, Galdino Robledo (Decedent), was fatally injured while attempting to remove a rock or rocks from a portable rock crusher.

3. When Decedent was killed, the engine of the rock crusher was running and the machinery was not blocked against motion. Decedent apparently put the engine in neutral, climbed down to the drum and mouth of the crusher in order to dislodge a rock or rocks from the crusher drum and attempted to dislodge the obstruction by pushing the drum with his foot. In this movement, he apparently slipped and fell into the mouth of the rock crusher. His hard hat and a boot came out of the crusher and traveled on a conveyor belt a distance of about 25 feet. This distance reasonably shows that Decedent's initial contact with the drum caused the clutch to engage accidentally and thus to add engine power to drive the drum that crushed him to death.

4. On August 7, 1985, after a careful investigation of the accident, MSHA's inspector issued a citation charging Resondent with a violation of 30 C.F.R. 56.14029, which provides:

> Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

5. Decedent began working for Respondent in 1984 as a laborer, and worked his way up to the job of crusher operator by January, 1985. He was known to be a productive, careful and dependable worker.

6. Respondent produces about 600,000 tons of crushed rock a year. It is as a small to medium sized operator.

7. In the 24 months before the accident, Respondent paid penalties for five violations, which were found during six inspection days.

8. It was stipulated that payment of the proposed civil penalty of $6,000 would not impair Respondent's ability to continue in business.

9. Respondent abated the cited condition in a timely manner, by conducting a safety meeting at which all employees were instructed to shut off the power on the crusher engine and to install a blocking pin in the crusher axle before any employee entered the crusher area for removal of obstructions.

10. Many of Respondent's employees, including Decedent, were Spanish speaking rather than English speaking.

Respondent did not post safety signs or write safety notices in Spanish for the benefit of such employees. Decedent's immediate supervisor did not speak Spanish and only assumed that Decedent, although Spanish speaking, could understand enough English to follow his instructions to Decedent, but no proof was offered to show that Decedent actually had a reasonable grasp or understanding of English. His supervisor testified that Decedent could understand vocal instructions in English because Decedent would do what he was instructed. However, the supervisor did not know how much of Decedent's understanding was due to gestures and other nonverbal communications, and there was no evidence that he could read English or follow it without gestures.

DISCUSSION WITH FURTHER FINDINGS

Respondent contends that it had a policy requiring the crusher operator to shut off the power of the diesel engine driving the crusher before attempting to remove obstructions from the crusher. Additionally, Respondent asserts that the removal of obstructions fits within the exception of 56.14092, in that the materials could not be removed unless there was machinery motion. It therefore contends that it did not need to block the machinery against motion.

It is at best arguable whether Respondent had a policy requiring that the engine be shut off. Although Respondent's managerial staff testified to such a policy, they have failed to provide the records which they contend they have kept as documention of safety meetings and instructions. Moreover, testimony indicates that even if such a policy existed in theory, it was not enforced in practice, e.g. during winter months due to the difficulty of restarting machine operations.

The failure to enforce such a policy, if Respondent had one, through effective communication, training, or supervision, is tantamount to an absence of such policy.

The standard cited also requires the blocking of machinery against motion, "except where machinery motion is necessary to make adjustments." At times, obstructing rocks were removed by turning the drum shaft from the outside of the machine. At those times, the blocking safety standard would not apply. However, there were times when obstructing rocks were too big to be dislodged this way, and at those times it was necessary to pull or pick the rock or rocks away from the drum while standing inside the crusher area and over the drum and mouth of the crusher itself. At those times, Respondent has acknowledged that the machinery had to be

blocked for safety of the employee, but it contends that it had a policy in such cases: (1) that the employee had to get permission from his supervisor to enter the crusher area, (2) the power would be shut off, and (3) the drum would be blocked by employees out side holding a Stilson wrench on the shaft. Also, Respondent states that when the welder worked on the drum he would first block it with wooden wedges on both sides or weld the drum to the frame.

The requirement for blocking the machinery is specifically directed at the prevention of a safety hazard that is obvious and severe. The simple step of shutting off the engine power of a crusher mitigates the chance of motion which could otherwise occur, due to either the slippage of the clutch because of vibration of the machine, or due to an employee's accidental or intentional exertion of force on part of the machinery. Notwithstanding the required step of shutting off power, the rotating drum, conveyor, and other parts of the crusher are still capable of motion, and thus, hazardous to employees exposed to the crusher. The crusher drum weighs about 13 tons and is "freewheeling."

This residual motion and hazard is addressed by the blocking requirement of the standard. Blocking ensures that these potentially hazardous parts cannot be put into motion by either a slippage of a clutch or an employee's pressure, be it the force of a kick to start the drum rotating or the body weight of an employee who slips or falls. The evidence shows that the 56.14029 exception does not apply to the task of removing rocks by approaching the drum from above while standing in the crusher area.

Respondent's asserted blocking policy was not shown to be in writing or otherwise effectively communicated to the Decedent. Despite repeated requests by MSHA for such records, Respondent was unable to produce the records it contended it kept as documentation of safety meetings and instructions to employees. Respondent has failed to show effective communication and enforcement of its asserted blocking policy.

As in the case of Respondent's asserted policy of shutting off the engine for dislodging procedures, Respondent's failure to communicate and enforce its asserted policy of blocking the crusher--through effective communication, training and supervision of Decedent and other Spanish-speaking employees--is tantamount to an absence of such a policy.

The duty of enforcement of an employer's safety rules rests on the employer. Since the safety standards under the Act are mandatory and are not "fault" standards, a penalty proceeding is barred by a defense of employee misconduct. As the United States Court of Appeals for the Fifth Circuit noted, since the employer is in a better position to make and enforce rules than are his workers, the Act "impose[s] a kind of strict liability on the employer as an incentive for him to take all practicable measures to ensure the workers' safety" Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-894 (1982). See also Atlantic Cement Co., Inc., 2 FMSHRC 1499 (1981) (employee's failure to wear safety belt and line in direct contravention of the company's regularly enforced safety rules does not relieve employer from liability for violation of standard of no-fault statute).

I find that Respondent was negligent in failing to establish and enforce through effective communication, training, or supervision a clear safety rule implementing the standard in 30 C.F.R. 56.14029. Decedent's negligence (entering the crusher area without shutting off the engine and having the machinery blocked against motion) is imputed to Respondent. This was a most serious violation, because the risk of death or serious injury was very high.

Considering all of the criteria for assessing a civil penalty under section 110(i) of the Act, I find that a civil penalty of $6,000 is appropriate.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. 56.14029 as charged in Citation No. 2241745.

3. Respondent is ASSESSED a civil penalty of $6,000 for the above violation.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalty of $6,000 within 30 days of this Decision.

William Fauver
Administrative Law Judge