

CCASE:  
SOL (MSHA) V. DAVE ALEXANDER INC.  
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19880115  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

v.

DAVE ALEXANDER INCORPORATED,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. YORK 87-7-M  
A.C. No. 30-02035-05504

9ÄG Gravel Bank

DECISION

Appearances: James A. Magenheimer, Esq., Office of the  
Solicitor, U.S. Department of Labor, New York, New  
York, for Petitioner;  
William G. Crane, Esq., Crane, Wolfson, Roberts &  
Greller, Poughkeepsie, New York, for Respondent.

Before: Judge Melick

This case is before me upon the petition for a 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", charging Dave Alexander Incorporated (Alexander) with one violation of the regulatory standard at 30 C.F.R. 56.9055. The general issues before me are whether Alexander violated the cited regulatory standard and, if so, whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violation was "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation at bar, No. 2628512, charges as follows:

A fatal accident occurred at the above operation involving a 275BÄC Michigan front-end loader serial number 425C704C which was provided with R.O.P.S. approval number M17418F66 and adequate seat belts. The operator had removed a large portion of the concrete sand stockpile undermining the access roadway to the top of the stockpile. He then was involved in replacing the material using the access to the top of the pile when the material failed to hold the weight of the machine, and it overturned crushing the victim. The

investigation revealed the victim was not wearing the seat belt nor was it adjusted indicating it had never been worn. Both the operator and fellow workmen had on previous occasions instructed the victim as to this improper procedure. However, the instruction had not been adhered to.

The cited standard, 30 C.F.R. 56.9055, provides that "[w]here 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."

Alexander's 9ÄG Gravel Bank is a sand and gravel operation at which the product is dredged from an underwater bench utilizing a BucyrusÄErie 38B dragline. The material is then crushed, screened and separated. The sized material is then conveyed by belt to separate stockpiles.

The evidence shows that Alexander employee Todd Funk reported to work at his regular job as loader operator around 7:00 a.m. on October 31, 1986. His job consisted of loading trucks, removing sized material from beneath conveyor belts, and building stockpiles. Between 7:00 and 8:30 that morning Funk loaded a tractor trailer from the side of the stockpile of "concrete sand" removing 28 to 30 yards of the material. This had the effect of undermining the access road on top of the pile. Dragline operator Johannes Schuhknecht later saw the deceased drive up the access road with a full bucket and begin dumping it forward and to the right off the ramp. Funk drove too close to the previously undermined edge however and went over. According to Schuhknecht the loader rolled over slowly and Funk momentarily hung onto a guard rail. Funk then returned inside and the machine flipped over twice. Funk was crushed under the rollover bars and was apparently killed instantly.

According to MSHA Inspector Ralph Hopkins, the access road was 24 feet wide at the bottom but narrowed to 15 feet at the top near where the loader went over. The road was about 50 to 60 feet long and rose to a maximum height of 20 to 30 feet. There was also a 3ÄtoÄ5 foot berm on each side of the road.

Within this framework of evidence it is clear that the violation is proven as charged. The law is well established that a mine operator is liable for violations of the Act committed by its employees, even if it is totally without fault. *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066 (4th Cir.1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890 (5th Cir.1982); *Secretary v. Asarco, Inc.*, 8 FMSHRC 1632 (1986); *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (1982); *American Materials Corp.*, 4 FMSHRC 415 (1982); *KerrÄMcGee Corp.*, 3 FMSHRC 2496 (1981); *El Paso Rock Quarries, Inc.*, 3

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FMSHRC 35 (1981). Since it is also clear from that evidence that the violation was the proximate cause of the fatality it may reasonably be inferred that the violation was "significant and substantial" Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). For the same reasons the violation was also of high gravity.

With respect to negligence the Commission stated in Secretary v. A.H. Smith Stone Company, 5 FMSHRC 13 (1983) at p.15:

The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miners conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

In this case the operation of a front-end loader on the relatively narrow access road on top of a 20 to 30 foot high sand stockpile was inherently dangerous. This danger was greatly increased if material was removed from the stockpile and the access road undermined. The mine operator has a duty to address such a situation presenting a potential source of a fatal accident with a degree of care commensurate with that danger. Accordingly it is incumbent upon the mine operator to maintain proper control of the front-end loader operators conduct. A.H. Smith Stone Company supra at page 15.

While the evidence in this case shows that the deceased had received some general training in the operation of the front-end loader there is no evidence that he had received specific training or warning about the dangerous practice of undermining the same stockpile over which he would be expected to operate the front-end loader. Without such specific instruction it was indeed reasonably foreseeable that an ill-trained employee having admittedly only part-time supervision could undercut the stockpile and subsequently dump too close to the undermined area as the deceased did in this case. Under the circumstances I have no difficulty in finding that Alexander was negligent in not discharging an appropriate duty of care.

In assessing a civil penalty in this case I have also considered that the operator is small in size and has a minimal history of violations. It is unclear from the evidence what was done to abate the violation but apparently the Secretary was satisfied with the action taken. Under the circumstances I find that a penalty of \$1000 is appropriate.

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ORDER

Dave Alexander, Inc., is directed to pay a civil penalty of \$1000 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge  
(703) 756-6261