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SOL (MSHA) V. EUREKA STONE QUARRY
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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	CIVIL PENALTY PROCEEDING Docket No. PENN 87-207-M A.C. No. 36-04243-05504
v.	
EUREKA STONE QUARRY, INC., RESPONDENT	Pocono Quarry & Plant

DECISION:

Appearances: Evert H. VanWijk, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for the Secretary; John T. Kalita, Jr., Esq., Eureka Stone Quarry, Chalfont, Pennsylvania, for the Respondent.

Before: Judge Weisberger

On October 8, 1987, the Secretary (Petitioner) filed a Petition for Assessment of Civil Penalty for an alleged violation by the Respondent of 30 C.F.R. 56.15005. Respondent filed its Answer on November 23, 1987. Pursuant to notice, the case was scheduled for hearing on December 17, 1987. On December 9, 1987, Respondent requested an adjournment, in essence, alleging that he had been unable to contact a respective witness as Respondent was "in its winter shutdown." Respondent indicated that the Petitioner did not have any objections to the request for an adjournment. The case was adjourned, and subsequently rescheduled and heard in Philadelphia, Pennsylvania, on January 19, 1988. Robert Carter testified for the Petitioner, and James Cliff and Barry D. Lutz testified for the Respondent.

Petitioner submitted a Prehearing Statement and Respondent submitted a Pretrial Statement along with Proposed Findings of Fact and Conclusions of Law. Subsequent to the hearing, Respondent and Petitioner filed Proposed Findings of Facts and Memorandum of Law on February 24 and February 29, 1988, respectively.

Stipulations

At the hearing, the Parties submitted the following stipulations:

1. The Pocono Quarry & Plant Mine is owned and operated by Stone Quarry, Incorporated.

2. The Pocono Quarry & Plant Mine is subject to the provisions of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this proceeding.

4. In the 2 year period before May 29, 1987, the Pocono Quarry & Plant Mine had zero paid violations of the standards contested in this case. The size of the operator is that the Pocono Quarry & Plant Mine employs approximately 120 employees. The annual production of Eureka Stone Quarry is 304,903 tons; the annual production of the Pocono Quarry & Plant Mine is approximately 57,562 tons.

5. The Respondent operates nine mines.

6. The authenticity of the exhibits offered at the hearing is stipulated, but no stipulation is made as to the facts asserted in such exhibits.

7. The subject Citation and Termination were properly served by a duly authorized representative of the Secretary of Labor upon agents of Eureka Stone Quarry as to dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.

8. The condition was abated within the required time.

9. The imposition of a proposed penalty by the Administrative Law Judge will not affect Respondent's ability to continue in business. However, Respondent does not stipulate to the appropriateness of the imposition of any penalty.

Issues

The issues are whether the Respondent violated 30 C.F.R. 56.15005, 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. If section 56.15005 has been violated, it will be necessary to determine the appropriate

civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977.

Regulations

30 C.F.R. 56.15005 provides as follows: "Safety belts and lines shall be worn when persons work where there is danger of falling; . . . ."

Findings of Fact and Conclusions of Law

I.

Robert Carter, an inspector for the Mine Safety and Health Administration, issued, on May 29, 1987, Citation No. 2851906 alleging a violation of 30 C.F.R. 56.15005 which requires the wearing of safety belts if a person is working ". . . where there is danger of falling." In evaluating whether the following facts establish a "danger of falling," I applied the test of ". . . whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." Secretary v. Great Western Electric Co., 5 FMSHRC 840, 842 (May 1983).

Carter testified that, on May 29, 1987, he observed Respondent's driller, Barry D. Lutz, shoveling dirt on top of the highwall at Respondent's Pocono Quarry at a distance of approximately 3 to 4 feet from the face. Lutz was not wearing either a safety belt or a line at the time.

Carter testified, in essence, that there was a danger of Lutz falling inasmuch as he could trip on "numerous" backbreaks or cracks in the ground that were spread throughout the strata of the highwall. Carter described these cracks as being approximately 6 to 8 inches wide and up to approximately 1 foot deep. In addition, according to Carter, if Lutz, working 3 to 4 feet of the highwall, would have fallen off the highwall by losing his balance, he might have been fatally injured, as the distance from the top of the highwall to the top of the muck pile below was approximately 30 to 40 feet.

In contrast, James Cliff, Respondent's manager in charge of drilling and blasting, testified that, on the date in question, there were no cracks on the highwall except those backbreaks within a foot of the face. He also testified that the distance from the highwall edge to the top of the muck pile was 15 feet at most. He also testified that when he observed Lutz, on May 29, the latter was 5 or 6 feet away from the edge of the highwall. He stated that he was of the opinion that, on May 29, Lutz was not in any danger of falling. On cross examination Cliff indicated

that, on the date in question, there were cracks in the ground, but not big enough for a foot to get stuck in and they were all "filled in." (Tr. 58).

Barry D. Lutz indicated he did not perceive himself in danger of falling on May 29, 1987, and that he felt comfortable being 4 to 5 feet from the edge. He was asked whether there were cracks approximately 6 to 8 inches wide and he indicated that there were not any in the area where he was working. He indicated, however, that on May 29, he came within a couple of feet of the edge.

In reconciling the conflict between Carter and Respondent's witnesses, with regard to the condition of the highwall, I have given more weight to the version testified to by Carter based upon my observation of his demeanor. Further, I note that of the three witnesses, Lutz would have the most knowledge of the actual conditions at his work site. In this connection, Lutz testified that on May 29, he was within a couple of feet of the face at the closest, and his testimony did not negate the existence of any cracks. Also, Lutz's testimony did not contradict the opinion of Carter with regard to the distance from the top of the highwall to the muck pile. Accordingly, I find that Lutz, in working within a couple of feet of the face on a highwall surface with cracks on it, was in danger of falling.

II.

In essence, Respondent's witnesses indicated, that in the normal course of the drilling operation, a driller wearing a belt would need a cable of approximately 25 feet to enable him to perform all his tasks. It was further their testimony that working attached to such a length of cable would be hazardous as there would be a possibility of it getting tangled in the feet of the driller causing the latter to fall. They indicated that there was also a danger of the cable getting caught in the controls of the drill. It was the opinion of Lutz that the use of a belt line could prevent him from getting away from any burst of the high pressure lines. Lutz and Cliff also indicated that such a cable length of 25 feet would not prevent the hazard of an injury, as the distance from the top edge of the highwall to the top of the muck pile is only approximately 15 feet. Further, they indicated that they have never seen a driller on a highwall use a safety belt.

I find that Respondent has not established either that the wearing of a safety belt is not feasible or that it would present a greater hazard. In this connection, I note the distinct hazards of not wearing a safety belt in proximity to the edge of the highwall as delineated in the testimony of Carter as discussed above, infra. Further, I find, as agreed to by Cliff on cross

-examination, (Tr. 60Ä61), that the hazards of a driller working with a 25 foot belt line can be obviated by having a smaller length belt line that could be unsnapped when the driller has to move around the drill away from the face. Also, I find that the evidence is insufficient to conclude that tethering a belt line to the drill would create a greater hazard than working in close proximity to the edge without such a belt.

In essence, Respondent's witnesses, Cliff and Lutz, offered their opinion that Lutz was not in any danger of falling, when he was observed by Carter working without a safety belt. In addition, Cliff had testified that the cracks in the ground, were not big enough for a foot to get in and they were all filled in. Lutz testified that there were not any 6 to 8 inch cracks in the area that he was working. However, as discussed above, infra, I have found, based upon the testimony of Carter, that, indeed, the surface of the highwall near the edge did contain cracks. In this connection even Cliff indicated that there were backbreaks within 1 foot of the face. I thus find that due to the nature of the surface of the highwall that there was a danger of Lutz falling. Due to the proximity of Lutz to the edge of the highwall in the normal mining operation, I conclude that by not wearing a safety belt there was a reasonable likelihood of Lutz tripping and falling over the edge. I find, based upon observations as to the demeanor of Carter, that the distance from the top of the highwall to the muck pile was approximately 40 feet.

Based on all the above, I conclude that Lutz, being without a belt, in the condition observed by Carter, was in danger of falling and this danger would be recognized by an informed reasonably prudent person (See, Great Western Co., supra). As such, I find Respondent herein violated section 56.15005, supra. In addition, as analyzed above, I conclude that the violation herein, of Lutz not having a safety belt, contributed to a measure of danger to safety with a reasonable likelihood that the hazard contributed to will result in a injury of a reasonably serious nature, and as such the violation must be considered to be significant and substantial. (See, Mathies Coal Company, 6 FMSHRC 1 (January 1984)).

III.

For the reasons discussed above, infra, I conclude that the gravity of the violation herein to be moderately serious. Further, the evidence establishes that Lutz was not provided with a safety belt, and I conclude, based on the testimony of Carter, that Respondent should have known that working without a safety belt, under the condition testified to by Carter, would have subjected Lutz to a danger of falling. Accordingly, I find that Respondent, in violating section 56.15005, supra, was negligent

to a moderate degree. I also have considered the other factors of section 110(i) of the Federal Mine Safety and Health Act of 1977, as stipulated to by the Parties. Based on all of the above, I conclude that a fine of $126 is proper.

ORDER

It is ORDERED that the Respondent pay the sum of $126, within 30 days of this Decision, as a Civil Penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge