

CCASE:
SOL (MSHA) V. FLENIKEN'S SAND & GRAVEL
DDATE:
19881102
TTEXT:

~1509

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.

FLENIKEN'S SAND AND GRAVEL,
INCORPORATED,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 88-26-M
A.C. No. 16-01068-05504

Fleniken Pit

DECISION

Appearances: James A. Wirz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
the Petitioner;
Lyman Fleniken, President, Fleniken's Sand and
Gravel, Clinton, Louisiana, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). Petitioner seeks a civil penalty assessment in the amount of \$46 for an alleged violation of mandatory safety standard 30 C.F.R. 56.15020. The respondent filed a timely answer contesting the alleged violation, and a hearing was convened in Baton Rouge, Louisiana. The parties waived the filing of any posthearing arguments, but I have considered their oral arguments made on the hearing record in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found

~1510

in section 110(i) of the Act, and (3) whether the violation was "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

Section 104(a) "S & S" Citation No. 2866525, issued by MSHA Inspector Kenneth N. McCleary on September 9, 1987, cites a violation of mandatory safety standard 30 C.F.R. 56.15020, and the condition or practice is described as follows:

While talking to the dredge operator and loader operator, a life jacket is not worn while performing duties on the dredge boat. The railing around the perimeter of the boat is approximately 36" high, the dredge operator at times works in a kneeling position, therefore could accidentally fall into the water. The water is 25-30 ft. deep and approximately 75 ft. to shore. The dredge boat platform sets about 3 or 4 ft. above the water with no hand holds to help him get out of the water. The dredge operator works alone.

Petitioner's Testimony and Evidence

MSHA Inspector Kenneth N. McCleary, Sr., testified as to his experience and training, and he confirmed that he inspected the respondent's dredge on September 9, 1987, and issued the citation in question. The dredge was located 75 to 100 feet from the shore of a 20-25 foot deep lake where it was pumping sand and gravel through a pipeline into a separator located on shore. Mr. McCleary stated that he motioned to the dredge operator from shore, indicating that he wished to come aboard for an inspection. The operator came down out of his control tower, put on a life jacket, and got into a rowboat and came ashore to pick him up. They went back to the dredge, and the operator took off his life jacket and went back up into the control tower (Tr. 8-13).

~1511

Mr. McCleary described the duties of the dredge operator, and stated that they included the changing of engine oil, turning the engine on and off, and keeping the deck clean. The life jacket was kept on a hook at the base of the control tower, and the dredge operator advised him that he did not wear his life jacket at all times while performing duties on the dredge. Mr. McCleary confirmed that his inspection took an hour, and during this time, the operator was in the control tower and was not wearing the life jacket (Tr. 14Ä15).

Mr. McCleary stated that the metal dredge decks become slick during the rainy season, and a person could possibly fall into the water. If he did, it was doubtful that he could get back to shore in time. Mr. McCleary described the dredge, and stated that it was rectangular in size, resting on pontoons, with two diesel engines on it for pumping sand and gravel. He drew a rough sketch of the dredge, and indicated that one engine was located approximately 2 to 3 feet from the dredge perimeter, and the second engine was no more than 3 feet from the perimeter. He also located the position of the engine start-stop switches on the dredge, and indicated that they were located 3 to 4 feet from the perimeter. There was a 36 inch high cable handrail installed around the perimeter of the dredge deck, and the dredge was situated approximately 3 to 4 feet out of the water, and there were no hand holds on the sides (Tr. 15Ä2, exhibit GÄ1).

Mr. McCleary confirmed that the operator performed no work on the deck while he was conducting the inspection, but advised him that his normal duties included the washing down of the deck to remove any excess oil spill, and this would be done once or twice a day on some occasions. Although he made no determination as to whether or not the operator's duties included the changing of engine oil, Mr. McCleary assumed that this would be done since most operators assist maintenance crews in the changing of oil. He did not determine whether the operator in fact changed the oil. The operator would stop and start the engines at the beginning and end of the shift.

Mr. McCleary believed that a wet and slick deck presented a strong possibility that the operator could slip on the deck while washing it down. If he bumped his head or was possibly knocked unconscious, he could fall into the water. He could also slip and fall under the handrail and would have nothing to hold on to. If the operator were in a kneeling position while wiping or cleaning up oil spills, this would expose him even more to the possibility of falling into the water. The hand rail would not prevent the operator from falling overboard because he could slip under it and could not reach it

~1512

while slipping into the water. The operator would be positioned between the engines and the dredge perimeter while washing down the deck area around the engines. The barge had no hand holds on its sides so that someone who fell into the water could grab and possibly get back on to the deck. Mr. McCleary confirmed that there are no MSHA standards requiring hand holds (Tr. 22Ä32).

Mr. McCleary believed that due to the rainy season in Louisiana, barge decks become wet and slick, and it was highly likely that the dredge operator could fall off the barge and into the water, and that his job duties would contribute to a greater hazard exposure. In the event the operator struck his head on the engine, deck, or handrail support poles, he could be knocked unconscious, and without a life jacket on, he would probably drown if he fell overboard. A life jacket would keep him afloat if he were unconscious. Mr. McCleary confirmed that the dredge operator worked alone, and since the engines produce quite a bit of noise, he believed that any cries of help from the operator would not be heard from the shore (Tr. 32Ä35). Based on all of these considerations, Mr. McCleary believed that the violation was "significant and substantial" (Tr. 36).

Mr. McCleary confirmed that he made a finding of "low negligence" because the respondent had not previously been cited for a violation of section 56.15020, during seven prior inspections conducted during the period October, 1985 through September, 1987 (Tr. 36Ä37, exhibit GÄ2).

On cross-examination, Mr. McCleary confirmed that the dredge was clean on the day of his inspection, and he believed that the deck was smooth "on the operator's side." He agreed that a diagram and sketch made by Mr. Fleniken depicting the side view of the dredge, with the positioning of the engines, operator's cabin, pump, handrails, and ladder leading to the cabin was accurate. Although Mr. McCleary stated that he could not recall the positioning of the engines, he had no reason to question the sketch, and Mr. Fleniken confirmed that all of his dredges are constructed as shown (Tr. 46Ä48).

Mr. McCleary confirmed that the dredge operator was in no danger of falling into the water while in his control booth, and would not be required to wear a life jacket while in the booth. Once the operator left the booth and started down the ladder, he would not be in danger of falling into the water because there was a double handrail on the ladder way. He also confirmed that he issued the citation on the basis of what the dredge operator told him concerning his work duties,

~1513

and that the cited standard does not per se require the wearing of a life jacket at all times while work is being performed on the dredge. The standard only requires a life jacket where there is a danger of falling into the water (Tr. 59Ä60).

In response to a question as to the absence of any danger of falling while the operator was performing duties on the deck of the dredge, Mr. McCleary responded that "the only time that there would be a danger of falling would be performing duties around the perimeter of the dredge" (Tr. 60). Mr. McCleary did not observe the operator walking around the perimeter of the dredge while he was there, nor did he observe him checking the engines. Mr. McCleary believed that if the operator were walking around the deck inspecting the engines, he would be required to wear a life jacket (Tr. 61Ä62).

Respondent's Testimony and Evidence

Respondent's president, Lyman Fleniken, disputed the location of one of the engines drawn on the sketch by Inspector McCleary, and he indicated that it was positioned parallel to the perimeter of the dredge, rather than perpendicular as shown on the sketch. Mr. Fleniken also stated that the rear engine was located 6 feet from the edge. He drew a sketch of the dredge, with the equipment in place (exhibit RÄ1, Tr. 42Ä44). Inspector McCleary confirmed that he made no notes or diagrams at the time of his inspection (Tr. 42Ä43).

Mr. Fleniken stated that the deck of the dredge is constructed of "diamond plate," and that "it's like perforation up and down the platform that you use so that you do not have a skid. The skid factor is greatly reduced" (Tr. 50). Inspector McCleary confirmed that he could not recall the "diamond plating," and indicated that the deck on the operator's control side was a smooth surface. He described this location as the area near the ladder leading to the control booth. Mr. McCleary also stated that the rest of the deck around the dredge perimeter was "probably rigid is the best I can remember" (Tr. 52).

Mr. Fleniken stated that the operator's cabin is enclosed with a door, and is equipped with a double guard rail. He confirmed that the dredge operator had been instructed to wear a life jacket when he comes down the ladder to the lower deck to adjust the tail and head rope, but he is not requested to wear the jacket while he is involved in duties on the deck itself (Tr. 51). He also indicated that depending on the amount of diesel fuel in the back engine compartment, the dredge would sit deeper in the water. Conceding that someone

~1514

could slip under the guardrail, Mr. Fleniken believed that if someone fell into the water, he would only have to reach up 2 feet, rather than 4 feet, to grab the edge of the dredge (Tr. 50).

Mr. Fleniken stated that the dredge was built in components, and that the main decking area containing the engines and pump is 12 feet wide. pontoons are located on both sides of the decking area, and they are 6 feet wide and 38 feet long. The guard rail is positioned all the way around the outside of the dredge. Given the width of the pontoons, a person would be 6 feet from the edge of the water while at one engine location, and 4 feet from the edge at the other engine location (Tr. 53).

Mr. Fleniken stated that he has been inspected four times during the past 2 years and that no other inspector has indicated that he needs an additional guard rail, or that a life jacket was required to be worn if one steps outside the guard rail. He was told that the operator did not have to wear a life jacket while inside the enclosed cabin house (Tr. 51). Mr. Fleniken stated that prior to Mr. McCleary's inspection, no other inspector requested him to install a mid-rail in addition to the existing guardrail, and although Mr. McCleary did not require him to install a mid-rail, he told him to either install a mid-rail or require the dredge operator to wear a life jacket the entire time he is on the lower deck. Mr. McCleary confirmed that this was true, and that the citation was abated by requiring the operator to wear a life jacket while performing duties around the deck of the barge (Tr. 56). Mr. Fleniken confirmed that he has now instructed the operator and maintenance personnel to wear a life jacket while on the lower deck hosing it down, changing oil, or performing maintenance and repair work (Tr. 55).

Inspector McCleary confirmed that in the event the respondent opted to install a mid-rail to the existing hand-rail around the perimeter of the dredge, there would be no requirement for the wearing of a life jacket. He also stated that "there are no standards regulating mid-rails, but we have accepted those in the past" (Tr. 57). Mr. Fleniken believed that the installation of a mid-rail would be a foot and one-half above the dredge decking, and it would be just as likely that someone could slip under that rail (Tr. 58).

Mr. Fleniken pointed out that contrary to Mr. McCleary's sketch, the oil plugs for changing the engine oil are located on the inside of the engines as shown on exhibit RÅ2, rather than the outside between the dredge perimeter and engines.

~1515

Mr. McCleary confirmed that he did not see where the oil plugs were located (Tr. 53-54). Mr. Fleniken also confirmed that the entire dredge deck is diamond plated, even up to the cabin house, and that is the way he constructed the dredge (Tr. 54).

Mr. Fleniken confirmed that the dredge operator's job description includes duties such as keeping the decks clean, and occasionally helping out in changing oil and performing maintenance. He also confirmed that a life jacket was available for the operator, and that he wore it while going back and forth from the dredge to shore in a paddle boat (Tr. 77-78).

Mr. Fleniken confirmed that he personally constructed the dredge approximately 3 or 4 years ago. His employees are not instructed to wear any particular type of shoes while working on the dredge, but that most of them wear "work boots." No employee has ever informed him that they had ever slipped on the dredge, nor have they ever expressed a concern for their safety. A water hose is used to wash down the deck, and it can reach all areas of the deck, including the engines. He conceded that the metal deck of the dredge is slicker when it is wet, and that one has to be careful when it is wet. However, he knows of no one slipping or injuring themselves on the deck, and no oil spills have ever occurred on the deck. Any oil spilled during changes is soaked up by a powder solution, and then hosed down. No one has ever slipped and fallen into the water from the dredge. Although people have slipped into the water from a boat while connecting the pipeline together, life jackets were always worn in these instances (Tr. 85).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.15020, which requires the wearing of life jackets or belts where there is a danger of falling into water. In order to establish a violation, the petitioner has the burden of proof to establish by a preponderance of the credible and probative evidence that the cited employee was not wearing a life jacket while performing certain work duties which may have placed him in danger of falling into the water. In this case, the inspector issued the violation on the basis of several assumptions and conclusions which he made through observations of the barge and its equipment, general weather conditions, and a brief conversation with the dredge operator, during which the operator informed

~1516

him that he did not wear a life jacket at all times while performing work on the dredge which was located approximately 100 feet from shore on a 20-25 foot deep lake where the dredge was pumping sand and gravel to shore through a pipeline.

The evidence establishes that the dredge was equipped with a life jacket which was hung on a hook at the base of a stairway leading to the dredge operator's control booth. The operator put the life jacket on when he went ashore with a boat to bring the inspector to the dredge so that he could inspect it, but took it off and hung it back at the stairway location after the inspector came aboard. After a brief conversation with the inspector, the operator returned to his control booth without the life jacket and remained there until the inspector completed his inspection. The dredge operator was not called to testify in this case, and the petitioner relies on the testimony of the inspector in support of the alleged violation. The respondent relies on the testimony of its owner and mine operator who designed and constructed the dredge, and who was thoroughly familiar with its operation.

The inspector confirmed that he made no notes or sketches at the time of his inspection. Although he confirmed that he could not recall the positioning of the engines on the dredge, during the hearing he presented a sketch showing the two engines parallel to the handrail which was installed along the perimeter of the deck, and he indicated that that the engine oil changing plugs were located on the outside of the engines 4 feet from the handrail. If this were true, it would place anyone kneeling and changing oil in the area between the engines and the handrail, thus exposing him to a possible hazard if he were to slip or fall under the handrail and into the water.

Mr. Fleniken, who designed and constructed the dredge, testified that one of the engines was perpendicular to the handrail, that the oil change plugs were located to the inside of the dredge engines, and that the dredge rested on pontoons (exhibit RÅ2). The inspector confirmed that he had no reason to question Mr. Fleniken's testimony, which I find to be more credible and probative than the inspector's. Mr. Fleniken's testimony also refutes the inspector's belief that anyone changing the oil would be in danger of falling into the water if he were to slip or fall while performing this work. In light of the inspector's belief that the only time anyone would be in danger of falling would be while working around the perimeter of the dredge, I find no basis for concluding

~1517

that anyone changing or cleaning up oil around the engines would be in danger of falling into the water.

The inspector agreed that the dredge operator would not be in any danger of falling into the water while in his control booth, and would not be required to wear a life jacket while in the booth. The inspector also agreed that no life jacket would be required to be worn when the operator left his booth and started down the access ladder to the dredge deck because there was a double handrail at that location to prevent him from falling overboard. The inspector was concerned about the absence of double, or mid-rails, around the perimeter of the dredge to prevent anyone from slipping under the rail into the water, and the absence of hand-holds on the side of the dredge, which the inspector believed could be grabbed by anyone falling overboard. However, the inspector conceded that MSHA has no standards that require mid-rails or hand-holds to be installed on a dredge. In my view, if MSHA believes that such safety devices are necessary to prevent persons from falling off a dredge operating over water, it should promulgate standards covering this hazard. Requiring a miner operator to comply with a safety jacket standard as a matter of expediency or convenience in order to address what an inspector may perceive to be hazards associated with the lack of hand-holds or mid-rails can only lead to confusing and contradictory enforcement judgments by different inspectors, and gives little guidance or notice to a mine operator as to what may be required for compliance.

In the instant case, the inspector admitted that he required the respondent to either install a mid-rail around the entire perimeter of the dredge, or to require his employees to wear life jackets during the entire time they are on the deck of the dredge performing any work. The citation was abated after the respondent instructed his employees to wear life jackets at all times while working on the deck, notwithstanding the fact that the standard only requires the wearing of a life jacket where there is a danger of falling into the water. Followed to its logical conclusion, and on the facts of this case, it seems obvious to me that the inspector's interpretation of section 56.15020, is that life jackets are to be worn at all times while an employee is working on a dredge deck, regardless of any objective finding as to whether or not the employee is in danger of falling into the water.

I find the inspector's position in this case to be rather contradictory. He conceded that he did not observe the dredge operator walking around the perimeter of the dredge, and did not observe him go near the engines to inspect them, service

~1518

them, or change the oil. Yet, he concluded that the operator would be required to wear a life jacket if he were inspecting the engines or changing oil or cleaning up any oil spills, even though he believed that the only time there would be a danger of falling into the water would be when someone would be working around the perimeter of the dredge. In this case, the engines were located on the deck some 6 feet from the perimeter guarded by a handrail, with pontoons on both sides, and with the oil change plugs to the inside of the deck away from the perimeter of the deck.

With regard to the inspector's concern about someone slipping on a wet deck during the "rainy season," and possibly striking their head and falling into the water, this could occur at anytime. However, in this case, there is no evidence that the deck was wet or slick at the time of the inspection, and in fact the inspector confirmed that it was dry and clean. Further, Mr. Fleniken's testimony, which I find credible, reflects that the surface of the entire deck was constructed of "diamond plate," or perforated materials, so as to reduce the likelihood of any skidding. Mr. Fleniken also indicated that any oil spills are controlled by means of a soaking powder, and that the deck is washed down by means of a water hose which can reach any surface area of the deck. The inspector could not recall the perforated decking material, and believed that part of the decking around the operator's compartment was smooth, and that the rest was "rigid." Since the inspector took no notes when he inspected the dredge, and was unsure as to the construction of the decking, I give more credence to Mr. Fleniken's testimony since he designed and built the dredge himself and he impressed me as a credible and straightforward witness.

After careful review and consideration of all of the testimony and evidence adduced in this case, I cannot conclude that the petitioner has established that the prevailing conditions at the time of the inspection presented a hazard to the operator falling overboard into the water without a life jacket. On the facts of this case, it seems clear to me that the inspector's conclusion that the operator was in danger of falling overboard was based on the inspector's unsupported speculations and assumptions that anyone performing any kind of work on the deck of the dredge would ipso facto be placed in jeopardy of falling overboard. Given the language of the standard, I cannot come to this conclusion. In order to establish a violation, I believe it is incumbent on the petitioner to establish a reasonable credible and probative factual basis to support a conclusion that there was a danger of someone falling into the water. I find no credible evidentiary basis

~1519

for such a conclusion in this case. Under the circumstances, I conclude and find that the petitioner has failed to establish a violation, and that the citation should be vacated.

ORDER

In view of the foregoing findings and conclusions, Citation No. 2866525, September 9, 1987, citing an alleged violation of 30 C.F.R. 56.15020, IS VACATED, and the petitioner's proposed civil penalty assessment is REJECTED. This case IS DISMISSED.

George A. Ko%21utras
Administrative Law Judge