

CCASE:
SOL (MSHA) V. WILLIAMS MECHANICAL AND WELDING
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19890530
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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. SE 88-72-M
A.C. No. 38-00007-05505 M5K

v.

Giant Cement Company

WILLIAMS MECHANICAL AND
WELDING, INC.,
RESPONDENT

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for
the Secretary of Labor (Secretary); T.E. Peterson,
Esq., Charleston, South Carolina, for Williams
Mechanical & Welding, Inc. (Williams).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty in this proceeding for an alleged violation of the mandatory safety standard in 30 C.F.R. 56.16002(2)(c). Pursuant to notice, the case was heard in Charleston, South Carolina, on April 18, 1989. Thel Hill testified on behalf of the Secretary. John Infinger, Burt Ardis, Ernest H. Williams and Franklin Neal testified on behalf of Williams. At the conclusion of the hearing, counsel for both parties orally argued their positions on the record, and each waived his right to file a post hearing brief. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Williams was a contractor doing maintenance and repair work for Giant Cement Company. Giant operated a limestone quarry and cement plant in Dorchester County, South Carolina. Williams stipulated that it operated as an independent contractor at a mine site. It had approximately 25 employees. The Secretary introduced a record of Williams' history of prior violations which shows a single violation of a mandatory safety standard. On February 25, 1988, Williams was engaged in cleaning out a

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gypsum storage bin, removing the buildup of consolidated gypsum from the bin using a jackhammer. It had been engaged in this work for several weeks prior to February 25, 1988. The bin was constructed of concrete, and measured 24 feet in diameter and 46 feet in height. It had a capacity of approximately 675 tons.

On February 25, 1988, three men were working at the bin cleaning task, two inside the bin, Freddie Mack and Tyrone Gardner, and one on top of the bin, Franklin Neal, tending a lifeline which was attached to one of the men in the bin, namely, the one not operating the jackhammer. A lanyard, approximately six feet long, was hooked to his safety belt and to the jackhammer operator's belt. Gardner and Mack alternated using the jackhammer: the one not using the hammer was secured to the lifeline from the top of the bin; the one using the hammer was attached by a lanyard to the first employee.

At about 3:00 p.m., Gardner suggested that they start cutting the gypsum from the bottom of the bin rather than from the top. His foreman agreed and directed him to go up into the bin from below and "get everything down and start from the bottom." (Tr. 40) Gardner reentered the bin, took the jackhammer from Mack and began cutting the gypsum. Gardner did not attach a lifeline to his belt, nor did he attach the lanyard from Mack's belt to his own. Mack had the lifeline attached to his belt. At about 3:20 p.m., Gardner slipped and was pinned between a mass of gypsum and the side of the bin. His body was crushed and he was pronounced dead at approximately 4:00 p.m. when his body was removed from the bin.

Gardner had just turned twenty years of age, and had been employed by Williams for about two months. He had been working in the bin for about 30 days. Mack no longer works for Williams, and Williams was unable to subpoena him to testify at the hearing. Neal testified that he heard a noise when Gardner slipped and heard him say he was trapped. However, he could not see Gardner from the top of the bin.

REGULATION

30 C.F.R. 56.16002 provides in part:

(a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be --

* * *

(c) Where persons are required to enter any facility listed in this standard for maintenance or inspection purposes,

ladders, platforms, or staging shall be provided . . . Persons entering the facility shall wear a safety belt or harness equipped with a lifeline suitably fastened. A second person, similarly equipped, shall be stationed near where the lifeline is fastened and shall constantly adjust it or keep it tight as needed, with minimum slack.

ISSUES

1. Whether the evidence shows a violation of the cited standard?

2. If so, what is the appropriate penalty?

CONCLUSIONS OF LAW

I. JURISDICTION

Williams operated as an independent contractor at a mine site. As such it was a mine operator under the Mine Safety Act. I have jurisdiction over the parties and subject matter of this proceeding.

II. VIOLATION

Williams does not contest the fact that one of its employees, Tyrone Gardner, was working inside a bin or silo or tank where loose unconsolidated materials were handled, and that his safety belt was not fastened to a lifeline. This clearly constitutes a violation of 30 C.F.R. 56.16002. Williams contends that Gardner after entering the bin began using the jackhammer against a direct order, but the evidence supporting this contention is ambiguous. I conclude that Gardner was not told not to use the jackhammer after he entered the bin from the bottom.

The practice normally followed by Williams under which one of the two people in the bin was tied to a lifeline, and a lanyard was attached from that employee's belt to the belt of the other employee who operated a jackhammer does not meet the requirements of the standard. The lanyard cannot be considered a lifeline: as the Investigator testified, it permits too much slack, and would permit the person on the end of the lanyard to fall an additional 6 feet (the length of the lanyard). However, the normal practice was not being followed at the time of the accident, contrary to the investigation report. At the time of the accident, the deceased employee entered the bin to perform work and was not protected by a lifeline or a lanyard. This constitutes a violation of the mandatory standard.

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GRAVITY

The violation which I find to have occurred is a serious one. The failure to use a lifeline could result in a serious injury. The gravity is somewhat lessened by the fact that the employee was working near the bottom of the bin (5 to 7 feet from the bottom) and much of the gypsum had been removed. The fatal accident, moreover, tragic though it was, did not result from the violation. Had Gardner been attached to the lifeline tended by Neal, this would not have prevented the accident, since Neal was unable to see Gardner when the accident occurred and could not have prevented it. Nor is it clear that the accident resulted from a slip or fall. These facts mitigate the gravity of the violation.

NEGLIGENCE

As I concluded above, Williams' practice of having a single lifeline for two employees working in the bin did not comply with the standard. This practice had been followed for approximately 30 days. Williams should have been aware of the violative nature of the practice. However, there is no evidence that Williams was aware that Gardner was operating the jackhammer in the bin without being attached either to the lifeline or the lanyard. I conclude, however, that Williams should have been aware of the fact the Gardner was using the jackhammer, and was not attached to the lifeline. Williams is guilty of ordinary negligence.

PENALTY

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$900.

ORDER

Based on the above findings of fact and conclusions of law, citation 2859169 issued February 27, 1988, is AFFIRMED. Respondent is ORDERED to pay within 30 days of the date of this order \$900 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge