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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. WEST 88-202-M
A.C. No. 24-00014-05513

v.

Trident Plant & Quarry

IDEAL CEMENT COMPANY,
RESPONDENT

DECISION

Appearances: Robert Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
James J. Gonzales, Esq., Holland & Hart,
Denver, Colorado;
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charged respondent, Ideal Cement Company, (hereafter "Ideal"), with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

After notice to the parties a hearing on the merits was held in Helena, Montana.

At the hearing the parties agreed the Commission has jurisdiction to hear the case (Tr. 389).

The parties submitted post-trial briefs in support of their positions.

Summary of the Evidence

MSHA's Evidence

This case involves the death of miner Thomas E. Bertagnolli that occurred on October 19, 1987, while he was operating a front-end loader. The witnesses at times referred to the loader

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as a Bobcat and at other times as a Uniloader. The citation alleges a violation of 30 C.F.R. 56.9002.(FOOTNOTE 1)

MSHA's witnesses were Vincent J. Schafer, Stephen M. Carey, Stephen L. Livingood, Archie Huenergardt, Marvin Doornbos, Stanley Veltkamp, Robert E. Stinson, Eric Shanholtz and Darrell Woodbeck.

Bert Todd, Gary Huls, William Fairhurst and Arlene Sherman testified for respondent.

VINCENT J. SCHAFER has been employed by Ideal as a maintenance man for ten years and he was familiar with the Uniloader.

Fifty percent of the workers at the plant have operated the equipment.

The Uniloader was equipped with a seat belt and ROPS, (FOOTNOTE 2) but it was necessary to modify the ROPS so the equipment could fit in the kiln.(FOOTNOTE 3) In addition, narrower wheels had also been installed.

The Uniloader, equipped with side screens, has been operated by the witness without the side screens since before October 1987. He did not consider it unsafe to operate without side screens. The bucket affixed to the equipment takes ten seconds from its lowest setting to an upright position.

Schafer also installed a shield on the front of the loader. The shield consisted of 3/4-inch plywood. This prevented the kiln bricks from falling into it. In October 1987 Schafer would enter the equipment by climbing over the plywood. He did not consider it safe to exit the Bobcat to the rear.

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When the loader operator exits the equipment he lowers the arms and turns off the equipment. He then removes the bungee cord holding the plywood shield. The plywood makes the equipment more safe as compared to less safe.

On October 19th a cylinder popped on the loader. A new cylinder was not available so it was replaced by an old one. On the same date he had difficulty operating the loader. He turned it off because the ignition key had been broken off.

At the close of his shift he met Bertagnolli coming up the steps. He told Bertagnolli to be careful. He made this statement because it was a dangerous piece of equipment. But after he had repaired it the loader was all right.

STEPHEN CAREY, a heavy equipment operator, is familiar with the loader and he has operated it inside the kiln. He was a heavy equipment operator for over 11 years. When Bertagnolli was killed he was operating the loader without side screens; he had not been required to remove the screens. However, Carey did kiln work with the side screens attached. When not in use the screens are stored in a garage.

Carey considered himself a better loader operator than most. He had installed the plywood in the front.

The loader is easier to operate with a bucket than with the jackhammer attachment. (The jackhammer attachment is used to knock down bricks in the kiln).

Bertagnolli had sufficient training to operate the loader.

STEPHEN LIVINGOOD, a maintenance man, indicated the left-hand lever on the loader would catch. The machine would move forward on its own although it was set in neutral gear. Livingood did not learn to compensate for the "creep". He did not ask for additional training and he had the authority to "red tag" any equipment he considered defective.

The screens interfere with side vision to the rear. Since he couldn't see the rear tire he could not keep the loader on the ramp of the kiln.

Livingood did not see Bertagnolli's accident but he found him lying on the side of the kiln up against the wall. There were no side screens on the loader. Tom said the "God-damn Bobcat crushed him."

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Bertagnolli expired during the 32-mile ambulance ride to the hospital.

ARCHIE HUENERGARDT, an electrician, has picked up and moved sacks of cement with the loader bucket. He had never used the jackhammer attachment and he had operated the equipment without the screens attached.

Huenergardt stayed by the telephone and did not directly participate in Bertagnolli's rescue.

MARV DOORNBOS had been ordered to work the area at the front of the kiln on the night of the accident.

He saw Bertagnolli getting ready to run the loader. There was a front shield but no side shields on the loader.

It appeared to the witness that Bertagnolli was having trouble knocking out the first row of bricks. They appeared to resist the effort being made to break them loose.

Bertagnolli was working about 40 feet past the entrance of the kiln.

Doornbos went into the control room to get a welding helmet. When someone said Bertagnolli had been hurt, he returned to the kiln and found Bertagnolli standing up and leaning over. He was holding his side. Bertagnolli said something about the "damn Bobcat."

STANLEY VELTKAMP, a maintenance man, worked in the same area as Bertagnolli. He observed that Bertagnolli was apparently having difficulty knocking out the bricks in the kiln with the jackhammer.

When the machine idled down, Veltkamp, looking in the direction of the loader, saw Bertagnolli leaning out the right side of the equipment.(FOOTNOTE 4) In addition, he was "all over" the arms and the cylinder of the loader. Bertagnolli, who was buckled in by his seat belt, then moved back into the seat, shut off the air to the jackhammer and crawled out the left side. The arms of the loader were down.

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As he staggered down the kiln Veltkamp rushed to him. Bertagnolli said he had been crushed.

ROBERT STINSON, a person experienced in mining, issues safety citations and conducts health investigations for the State of Montana.

On October 20, 1987, he went to the Ideal plant when he learned that a man had been crushed by a loader.

That evening he and Dr. Bertagnolli, father of the victim and a medical doctor, discussed the accident. The doctor indicated there was a mark across his son's back two inches wide as well as two parallel marks across his front down through the liver area. Dr. Bertagnolli said his son had been crushed through the liver and aorta and had "bled out."

During his investigation, Inspector Stinson observed employees enter and exit the loader. Several employees entered over the rear and another entered over the lifting arms. He did not see any enter at the front.

The ROPS had been altered by cutting and rewelding four posts. There were two bolts missing in each arm. On the left wheel there was a hose that caused a hindrance to one of the controls. The side screens were missing.

When the jackhammer was raised the plate would block the view of the chipper point.

Mr. Stinson identified various photographs taken at the scene of the accident. He also expressed his opinion that if the side shields had been in place Bertagnolli would not have been injured. The guard shields are specifically designed to prevent workers from getting into the arms of the loader. In the inspector's opinion the accident would have been prevented by using a different type of machine or by using side screens.

In Mr. Stinson's view, Bertagnolli was killed when the arms of the loader caught him. The arms could have been going up or coming down.

The specification sheet from the manufacturer shows the 1835 Case Uniloader with the side shields in place.

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ERIC SHANHOLTZ, an MSHA inspector, cited the operator on December 7, 1983, for failing to have a ROPS structure on a front-end loader. This citation was not contested and it was terminated the following day (Ex. P-26).

DARRELL WOODBECK, an MSHA inspector for 14 years, is a person experienced in mining.

On the issue of prior history Mr. Woodbeck identified citations issued to Ideal in the previous two years (Ex. P-27).

Mr. Woodbeck took part in the inspection. He also concluded that side shields would have prevented the miner from placing himself in a position where he could be injured.

As a result of his inspection at the work site Woodbeck issued Citation No. 2649413. He also determined that the operator's negligence was moderate. He believed that Bertagnolli was crushed between the lifting arms of the bucket and the top of the rollover protection.

Inspector Woodbeck considered that the removal of the side screens was a violation of MSHA regulations.

Mr. Woodbeck also considered this was an S&S violation.

Respondent's Evidence

BERT TODD, a person experienced in operating small equipment, has supervised and trained Ideal employees in the use of such equipment.

The Uniloader, equipped with a jackhammer on the bucket, knocks brick out of the kiln.

Between 1984 and 1987 Todd has seen the equipment being operated without side screens. He has seen employees using the equipment without screens while MSHA inspectors were present. But he was not aware of any citations being previously issued for the absence of such screens. The absence of screens had never been previously discussed with MSHA inspectors.

Todd trained Bertagnolli in the operation of the Uniloader. He was taught to exit the machine to the front and he observed Bertagnolli following his instructions.

The loader was purchased with side screens. They prevent rocks from falling on the operator. Also they keep the operator's arms within the loader while he is operating it.

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GARY HULS, Ideal's production supervisor, accompanied an MSHA inspector in September 1987. On that occasion Tom Meyers was operating the loader cleaning up spills with the bucket. The inspector leaned into the loader but made no comments about the absence of side screens.

Ideal has a policy of red-tagging any unsafe equipment. The employees learn this policy from training and the company handbook.

WILLIAM DOUGLAS FAIRHURST, a mill supervisor, has also served as a heavy equipment operator. The safety handbook discusses all mobile equipment. It generally directs employees to enter the equipment through the front. After he enters the loader the operator sits down and buckles his seat belt. When he exits the equipment he leaves with the arms lowered. The loader involved in this accident did not have any side screens attached. It is the loader operator's decision whether or not he should use side screens.

In the afternoon before Bertagnolli's accident, the left arm of the loader had to be changed.

The safety manual also states that guards shall not be removed except when making repairs, cleaning, dressing, oiling or adjusting the equipment. In such circumstances such repairs can only be made by authorized personnel when the machines are stopped.

ARLENE SHERMAN, a person educated and experienced in safety, is the Personnel and Industrial Relations Administrator at the Trident Plant. She is responsible for all plant safety.

Until 1986 the Trident Plant worked 4000 days without a lost-time injury. This is the best safety record of all of Ideal's plants in North America. The company previously received an award when it reached 3000 consecutive days without a lost-time accident (Ex. R-7).

The company's policy, both written and in practice, is that if an employee detects a hazard he can red-tag any equipment and refuse to operate it. An employee, without any retaliation, can also refuse to operate any equipment he believes is hazardous.

Company policy also requires employees to wear seat belts when they are operating equipment.

A citation received by the company in 1983 related to ROPS on a loader (Ex. P-26). Side screens had nothing to do with that citation and they were not mentioned.

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The company prepared the MSHA form and the Workman's Compensation forms for this case. However, there were no eyewitnesses to the accident. Company representatives can only speculate as to how the accident occurred. But they are testing several theories: Bertagnolli was crushed when the side arms came down or when the arms were going up. In experimenting (with the machine) another employee placed his upper body over the side arm of the loader but he wasn't able to do this while wearing his seat belt.

Employees at times entered the loader through the back. During the operation of the equipment Ms. Sherman did not observe anything that she considered to be a defect. Before the machine was put back in operation the side screens were reinstalled.

In the company's opinion MSHA's evaluation of negligence was too high in view of the investigation and the company's past record.

The company had no information indicating the loader should not be operated without side screens in place. Further, the company did not have Exhibit P-25 (J.I. Case specifications re ROPS canopy) at the time of the accident.

The gross sales of the Trident Plant exceeded \$1,000,000 last year. However, the company is presently in a severe debt situation. About three years ago the company was close to bankruptcy.

ERIC SHANHOLTZ was called as a rebuttal witness by the Secretary. He testified that he had not been told by anyone at the plant that some unnamed safety inspector had stated the company did not have to use ROPS in certain positions and operations. Inspector Shanholtz requested the ROPS be reinstalled. They were also returned with the side shields.

Discussion

A fatality in a case, in and of itself, does not by its mere occurrence prove a violation of the regulation, Lone Star Industries, Inc., 3 FMSHRC 2526, 2529, 2530 (1981); Texas Industries, Incorporated, 4 FMSHRC 352 (1982).

The law is clear that a safety regulation that imposes civil penalties for its violation must give an employer fair warning of the conduct it prohibits or requires and must further provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

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Diamond Roofing v. Occupational Safety and Health Review Commission, 528 F.2d 645, 649-650 (5th Cir. 1976); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-1336 (6th Cir. 1978); Longview Refining Co. v. Shore, 554 F.2d 1006, 1114 (Temp. Emer. Ct. App. 1977) cert. denied, 434 U.S. 836 (1977).

A review of the record here indicates Ideal could not have anticipated that MSHA would require side screens on the equipment. It is true that when the Uniloader was purchased it had side screens. It is also uncontroverted that it was left to the discretion of employees whether to use such screens. However, the Commission has specifically rejected a per se rule that an equipment defect automatically arises "when equipment is not maintained in the manner in which it is received from the manufacturer," Allied Chemical Corporation, 6 FMSHRC 1854, 1857 (footnote 3).

A majority of the cases dealing with 56.9002 and related parallel regulations deal with factual situations where the defect affecting safety is affixed to the equipment. For example, see Allied Products Company, 2 FMSHRC 2517 (1980) (Fauver, J.) (front end loader leaking hydraulic fluid and not repaired); Grove Stone and Sand Company, 2 FMSHRC 1261 (1980) (Steffy, J.) (back-up alarm ruled not defective); Ideal Basic Industries, Cement Division, 2 FMSHRC 1352 (1980) (Koutras, J.) (hydraulic coupling inoperable); Eastern Associated Coal Corporation, 1 FMSHRC 1472 (Commission) (inoperable parking brake on a jitney); Massey Sand and Rock Company, 3 FMSHRC 2132 (1981) (Vail, J.) (emergency brake on front-end loader defective and leaking hydraulic fluid); Evansville Materials, Inc., 3 FMSHRC 704 (1981) (Fauver, J.) (leaks in braking system of front-end loader that could have been detected from audible hissing sounds lasting one or two seconds); FMC Corporation, 4 FMSHRC 1818 (1982) (Morris, J.) (idler arm, ball joint and tie rods of pickup truck were loose; linkage, which was loose, showed excessive wear); United States Steel Corporation, 5 FMSHRC 322 (1983), (Koutras, J.) (brakes defective since they would not hold truck on level incline); Walsenburg Sand and Gravel Company, Inc., 8 FMSHRC 451 (1986) (Carlson, J.) (leaking differential fluid from brakes; on conflicting evidence it was held that brake's effectiveness was not impaired).

However, it is not an absolute requirement that the defect be on the equipment. In Allied Chemical Corporation, supra, at 1858, the Commission held a violation existed where there

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were two missing bolts in chocks. However, the distinction is that in Allied Chemical the missing bolts affected the integrity of a roof support system.

In contrast, in the case at bar, there is no evidence that the lack of side screens adversely affected the operation of the Uniloader, rendered it defective, inadequate, or presented functional problems in its operation as a loader.

In short, respondent was not on notice that MSHA would require side screens on the loader. It is a fundamental principle of due process that regulations which purport to govern conduct must give an adequate warning of what they command or forbid, Diebold, 585 F.2d at 1335.

If MSHA had issued a prior notice requiring the use of side screens then it would have remedied the deficiency in the regulation's present coverage. Such prior notice could have been given by a safeguard or an interpretive bulletin. To like effect, see Peabody Coal Company, 3 FMSHRC 392 (1981) (Kennedy, J.). However, the record here does not disclose that Ideal was on notice of a requirement that side screens must be used.

The Secretary's post-trial brief points to the fact that respondent violated the identical regulation contested here in Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (1981).

The Secretary's argument is misdirected. The cited Commission case involved a violation of the same regulation. However, the defect was an observable defective hydraulic coupling. In the instant case there was no defective side screens, observable or otherwise. In short, the 1981 Commission decision would not put Ideal on notice that side screens were required on its Uniloader. To reiterate, no evidence has been presented in this case that would cause me to conclude that the side screens were in any way defective. Further, the absence of such screens did not affect the integrity of the Uniloader.

The Secretary also relies on the testimony of witness Schafer to the effect that he warned Bertagnolli "to be careful with it." This warning came on October 19, 1987, the night Bertagnolli was killed. Schafer also described the Uniloader in these terms:

It's just a dangerous piece of equipment from word one. It's probably one of the most dangerous pieces of equipment we have out here. (Tr. 46).

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The Secretary follows with a condemnation of the company in failing to train and guard its employees in the operation of this "dangerous" loader.

I reject the Secretary's view of the evidence. In actuality, Schafer is referring to his repair of the cylinder arm during the day shift. After the cylinder was repaired he didn't notice anything that needed to be repaired on the loader (Tr. 50). He also ran it for two or three hours until quitting time. It was operating normally and as he expected it to operate (Tr. 51). This was the same piece of equipment Bertagnolli used (Tr. 55). If there had been a defect of some sort on the Uniloader he would have mentioned it to Bertagnolli (Tr. 63). When he heard about the accident he thought it might have had something to do with the malfunction of the cylinder but he checked. The cylinder had not malfunctioned (Tr. 66). Schafer did not think it was unsafe to operate the Uniloader without side screens (Tr. 68).

The record does not develop any reasons for Schafer's apparently gratuitous statement relied on by the Secretary. In view of his clear factual statements to the contrary, I do not find his statements about "dangerous" equipment to be credible.

As an aside, the Secretary would have the judge conclude that at least Schafer thought the Uniloader was dangerous. But Schafer himself operated it without screens "every once in awhile". He also operated it without screens on the shift prior to Bertagnolli's accident (Tr. 40, 41, 88).

The Secretary also contends that the Uniloader operators had the option of using the side screens. Further, she argues the lack of guards violates the company's safety manual. The manual provides "guards shall not be removed except for making repairs" (Ex. P-29, p. 9).

The Secretary's arguments are rejected. The evidence required to sustain this citation is whether the company had reasonable notice of MSHA's requirements that side screens were to be installed on this equipment.

The Secretary also focuses on the evidence relating to the lowered ROPS, the make-shift plywood screen, the probability

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that Bertagnolli leaned out and was crushed by the arms, the improvised jackhammer, and, in general, the restricted work area.

It is apparent that none of the above conditions would cause Ideal to believe that MSHA would require side screens.

Inspector Stinson and Woodbeck clearly adhered to the views that the absence of side screens caused Bertagnolli's death. But such testimony is an after-the-fact evaluation. If it was so obvious after the fatality then it could have been readily observed and their installation required by MSHA before the fatality.

In support of her position that the absence of equipment such as side shields adversely affected safety within the meaning of the regulation, the Secretary relies on Jacquays Mining Corporation, 5 FMSHRC 788 (1983) (Morris, J.); Allied Products Company, 2 FMSHRC 2517 (1980) (Fauver, J.); Allied Chemical Corporation, 6 FMSHRC 1854 (1984) (Commission); United States Steel Corporation, 6 FMSHRC 1423 (1984) (Commission); FMC Corporation, 4 FMSHRC 496 (1982) (Broderick, J.).

The cases relied on by the Secretary are not controlling. In Jacquays Mining Corporation, a Gardner-Denver mucking machine did not have a step plate normally used by miners to stand on to operate the machine. However, Jacquays has no precedential value since the issue of due process was not raised as a defense.

In Allied Products Company, an oil leak existed in a Bobcat. This condition affected the Bobcat's steering. In short, there was a defect on the equipment which affected its safety. Such defects are within the scope of 56.9002.

Allied Chemical Corporation, has been previously discussed. I further recognize the Commission's statements in the case that "[i]n both ordinary and mining industry usage, a "defect" is a fault, a deficiency, or a condition impairing the usefulness of an object or a part", Allied Chemical, 6 FMSHRC at 1857. However, as previously noted, in Allied Chemical the missing bolts in two chocks affected the integrity of the roof support system. In the instant case the safety of the Uniloader itself was not affected by the absence of the side screens.

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In United States Steel Corporation, the defect consisted of failed brakes and disconnected drive shafts. Again, the Commission reiterated its view "that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation of 30 C.F.R. 56.9-2" (now the present regulation), 6 FMSHRC at 1834.

In FMC Corporation, a front leaf spring was disconnected from a shackle because of a missing bolt. The described condition of the spring shackle could affect the driver's ability to steer and stop the vehicle. In the case Judge Broderick concluded that a violation of 57.9-2 occurred. The cited case again involved a situation where the defect was on the equipment and such defect, in turn, affected the safety of the equipment.

In sum, none of the cases relied on by the Secretary support her position.

Inasmuch as the respondent was not on notice that side screens were required on its Uniloaders, it follows that the citation should be vacated. Accordingly, it is not necessary to consider the remaining issues in the case.

For the foregoing reasons I enter the following:

ORDER

Citation No. 2649413 and all proposed penalties therefore are vacated.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. The regulation allegedly violated here provides as follows:

Equipment defects affecting safety shall be corrected before the equipment is used.

~FOOTNOTE_TWO

2. Roll-over protective structure.

~FOOTNOTE_THREE

3. The kiln is 300 feet long. The loader is 12 feet long by 3 1/2 to 4 feet wide with the bucket attached.

~FOOTNOTE_FOUR

4. At the hearing Veltkamp did not remember that he saw Bertagnolli leaning out the right side of the Bobcat. However, on this point I credit his past recollection, i.e., his written statement of the facts given to by MSHA on the date of the accident (Ex. P-21).