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SOL (MSHA) V. CENTRAL CONCRETE
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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. CENT 88-100-M A.C. No. 29-00822-05505
v.	Santa Fe River Pit
CENTRAL CONCRETE PRODUCTS, RESPONDENT	

DECISION

Appearances: Terry K. Goltz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
William Donnelly, President, Central Concrete Products Company, Santa Fe, New Mexico, pro se.
Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating two safety regulations 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 Santa Fe, New Mexico.

The parties initially waived their right to file post-trial briefs and requested a bench decision. While the judge was rendering his decision respondent's president took issue with some of the judge's findings (Tr. 41).

In view of respondent's objection it was considered appropriate to review the transcript. Accordingly, the bench decision was vacated.

The parties did not file post-trial briefs.

Jurisdiction

As a threshold matter respondent contends its sand and gravel operation is not subject to the Act.

The statutes, the legislative history and the court decisions are contrary to respondent's contentions.

When Congress adopted the Mine Act it enacted this definition of a mine:

> "Coal or other mine" means (A) an area of land from which minerals are extracted * * * (B) private ways and roads appurtenant to such area, and (C) lands * * * facilities, equipment * * * or other property * * * used in, or to be used in, or resulting from the work of extracting such materials from their natural deposits * * *, or used in, or to be used in the milling of such minerals, or the work of preparing coal or other minerals, . . . " 30 U.S.C. 802(3).

The Senate Committee, which was largely responsible for drafting the final mine safety legislation, elaborated as follows:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.
>
> See S. Rep. No. 181, 95th Congress., 1st Sess. 14 (1977), reprinted in Senate Sub-Committee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 "Legis. Hist."

Court and Commission decisions further support the view that sand and gravel operations are subject to the Act. Compare: Marshall v. Standt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979); Marshall v. Sink, 614 F.2d 37 (6th Cir. 1980); Marshall v. Texoline Co., 612 F.2d 935 (5th Cir. 1980); Marshall v. Nolichuckey Sand Co., Inc., 606 F.2d 693 (6th Cir. 1979), cert denied ____ U.S. ____, 100 S. Ct. 1835; Arizona Crushing Co., 2 FMSHRC 3736 (1980).

It is clear that sand and gravel operations are subject to the Mine Act. Accordingly, respondent's threshold argument is denied.

Citation No. 2867636

This citation charges respondent with violating 30 C.F.R. 56.9087, which provides as follows:

56.9087 Audible warning devices and back-up alarms.

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Citation No. 2867636 reads as follows:

The 988 CAT loader has an inoperative back-up alarm.

THE EVIDENCE

WILLIAM TANNER, JR., a federal MSHA inspector and person experienced in mining, has conducted about 1500 inspections (Tr. 6-8).

On February 4, 1988, he inspected Central Concrete at its Santa Fe River Pit. When he entered the site he conferred with Harold Martinez, the foreman and crusher operator (Tr. 8).

The company was crushing and screening river gravel (Tr. 9, 10, 26).

The inspector issued a citation because a 988 CAT loader had a disconnected back-up alarm (Tr. 10, 12, 17). The loader was being used to load trucks in the river bed (Tr. 13). The loader has blind sports. If the operator turns to his left and looks back he has a blind spot to his right. Conversely, if he turns right and looks back, he has a blind spot to his left. The blind spots are 25 to 30 feet and even further back (Tr. 14, Ex. P-5)

In the inspector's opinion it was unlikely that an injury would occur due to this condition (Tr. 17, 18). Further, he did not consider the violation to be significant and substantial.

Mr. Donnelly advised the inspector that he had personally disconnected the alarm. The inspector charged the company with moderate negligence because someone should have noticed the alarm was not working (Tr. 18). Upon re-inspection he found the back-up alarm had been re-hooked (Tr. 19).

Citation No. 2867637

This citation charges respondent with violating 30 C.F.R. 56.11001, which provides as follows:

> 56.11001 Safe access.
>
> Safe means of access shall be provided and maintained to all working places.

The citation reads as follows:

> A safe means of access was not provided to the primary screen work area.

MSHA Inspector WILLIAM TANNER, JR. observed that two boards used for a walkway were broken at one end. This condition was caused by large rocks falling off the screen and breaking the boards.

Exhibit P-6 shows the main screen from the hopper. At the time of the inspection the ladder (shown in Exhibit P-6) was broken in the middle on the right-hand side. Mr. Martinez said workers climb to the top of the screen to perform weekly maintenance (Tr. 21, 22, 27). The two broken boards were used for a walkway (Tr. 22).

Foreman Martinez only shrugged his shoulders when the witness asked him about the handrails (Tr. 19, Ex. P-6, P-7, P-8).

The inspector considered that an injury was unlikely. He further considered the violation was not significant and substantial. The negligence was moderate because the company could have gotten a better ladder, repaired the two boards and put up handrails (Tr. 23).

At a re-inspection on February 10, 1988, the inspector issued a 104(b) order because the condition had not been abated (Tr. 24).

In cross-examination the inspector agreed the front-end loader was removing river gravel and loading it onto large trucks (Tr. 26).

Mr. Tanner indicated the 988 loader had an obstructed view to the rear (Tr. 28).

WILLIAM L. DONNELLY, testifying for the company, agreed the back-up alarm was not working (Tr. 30). However, Mr. Donnelly's view is that after a time workers will disregard and "tune out" an alarm. Also an alarm can disturb the equipment operator (Tr. 30).

Mr. Donnelly also indicated, regarding the safe access issue, that some boards had been broken. However, Mr. Donnelly didn't think a guard rail was needed (Tr. 31).

TOD AGENBROAD was present during the inspection. However, the inspector used his book (regulations) as a "Bible" instead of as a guideline (Tr. 32).

Mr. Agenbroad agrees there were some broken boards. But he didn't remember if the ladder was broken. Mr. Agenbroad didn't consider the access unsafe. But they corrected the problem by adding a guardrail to the outside. He felt this caused maintenance to be a lot more difficult (Tr. 33, 34).

The witness didn't feel anyone in the area could hear the back-up alarm unless he was real close to it. In addition, there would be no one on the ground in danger of being struck by the loader.

The company did not keep a flagman to watch behind the loader (Tr. 34, 35).

Discussion

Concerning the failure to have a backup alarm: the inspector indicated the alarm was inoperative and the view to the rear was obstructed. Respondent's President, Mr. Donnelly, admits this condition existed.

Citation No. 2867636 should be affirmed since it is clear that respondent violated the regulation.

The failure to provide safe access to the primary screenwork area is established by the uncontroverted evidence. Specifically, everyone agrees that two boards and the side of the ladder used for access were broken.

During the bench decision Mr. Donnelly stated the company did not admit the broken ladder was unsafe (Tr. 41). However, the contrary opinions of witnesses Donnelly and Agenbroad are rejected. Broken boards and broken side rails do not provide safe access as contemplated by the regulation.

Both citations herein should be affirmed.

Civil Penalties

Section 110(i) of the Act sets forth the criteria to be followed in assessing civil penalties.

The operator should be considered small. The proposed assessment form indicates respondent produces 7,160 tons per year.

There was no evidence indicating how a penalty might affect this operator's ability to continue in business.

The operator's prior history is favorable since the company was only assessed three violations in the two previous years.

The operator was moderately negligent since the conditions as to both violative conditions were open and obvious. These conditions should have been observed and remedied.

The gravity of each violative condition was moderate. It appears there was minimal exposure to the company's workers.

The company is entitled to the statutory credit for abating the violative conditions alleged in Citation No. 2867636.

On balance, I deem the penalties hereafter set forth in the order of this decision are appropriate.

ORDER

Based on the foregoing conclusions of law I enter the following order:

1. Citation No. 2867636 is affirmed and a penalty of $20 is assessed.

2. Citation No. 2867637 is affirmed and a penalty of $50 is assessed.

John J. Morris
Administrative Law Judge