

CCASE:  
SOL (MSHA) V. TARGET CONSTRUCTION  
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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 89-72-M  
A.C. No. 04-04791-05510 F2M

v.

Morning Star Mine

TARGET CONSTRUCTION, INC.,  
RESPONDENT

DECISION

Appearances: Patricia Jeanne Howze, Esq., Office of the  
Solicitor, U.S. Department of Labor, San Francisco,  
California, for the Secretary of Labor (Secretary);  
Stephan G. Saleson, Esq., Gresham, Varner, Savage,  
Nolan and Tilden, San Bernardino, California, for  
Target Construction, Inc. (Target).

Before: Judge Broderick

STATEMENT OF THE CASE

Following an investigation of an accident resulting in a serious injury to a miner, MSHA issued two imminent danger withdrawal orders, each alleging a violation of a mandatory safety standard (30 C.F.R. 56.9054 and 56.9055). In this proceeding, the Secretary seeks civil penalties for the violations. Target denies that the alleged violations occurred. Pursuant to notice, the case was called for hearing in Ontario, California, on October 11, 1989. Vaughan Duane Cowley and Rodric Breland testified on behalf of the Secretary. Daryl Rogers, Daniel Ruminski, and Jeffery Fegert testified on behalf of Target. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

At all times pertinent to this proceeding, Target was the contract operator of an open pit multiple bench gold and silver mine in San Bernardino County, California, known as the Morning Star Mine. Target operated the mine under contract with Heavy Metals Development Company, a wholly owned subsidiary of Vanderbuilt Gold Corporation. In 1989, the mine employed an

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average of 24 employees; approximately 120,000 man-hours per year were worked at the mine. Target operated other facilities, but the record does not disclose their size or extent.

At about 8:00 a.m., April 12, 1988, MSHA was notified by Target of an accident at the mine which was thought to have resulted in a fatal injury to a miner. It was later reported that the injury, though serious, was not fatal. Federal Mine Inspector Vaughan Cowley and supervisory inspector Rodric Breland went to the mine and at about 11:00 a.m. inspected the dump area where the accident occurred, accompanied by Target officials. They discovered that a large, 65 to 70 ton truck had gone over the dump bank approximately 250 feet to the bottom of the dump. The berm and other ground material for a distance of approximately 84 feet in width had gone over the bank with the truck. The inspectors saw several cracks in the ground in the dump area, one of which extended about 200 feet, crossing almost the entire dump area. Another crack was seen 30 feet from the perimeter. The inspector measured one of the cracks and found it to be 1 inch wide and 2 inches deep. I find that these cracks in the ground were as described by the inspectors. The cracks were obvious to visual inspection. The ground of the bank sloped down toward the perimeter. The downslope was determined to be a 2.8% grade. Loads were being dumped at the edge of the bank. The evidence, and especially the photographs of the bank, do not establish that the ground subsided beneath Billingsley's truck to the extent that it caused the vehicle to go over the bank.

The berm was measured and varied from 22 inches to 38 inches high. There was no support on the back side of the berm. Target employed haulage trucks and dozers on the bank. The mid-axle height of Target's largest truck was approximately 48 inches. It was (and is) the common understanding in the industry that berms should be at least as high as the mid-axle height of the largest vehicle being operated on a bank.

The truck in question was at the bottom of the bank, its front wheels and diesel fuel tank having been separated from the truck. The fuel tank was badly damaged and lay beside the truck. The front wheel assembly with the wheels facing the bank, was found below the truck (Ex. R-9 and 10). Diesel spills were seen at two areas on the slope (Ex. R-5 and 6). Head phones were found on the slope about 15 to 25 feet from the crest to the left of the truck tire marks. The truck gear box showed the transmission was between neutral and first gear. The truck driver, Bill Billingsley, was rescued from the slope, at a point about 200 feet from the crest of the dump.

Billingsley sustained severe crushing injuries which resulted in the amputation of both legs. The inspector

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interviewed him in the hospital. He stated that he backed up to the dump area, put the gear shift in neutral and "revved" the motor to dump his load when he heard and saw the ground subsiding behind him. He shifted to first gear before going over the slope backwards. Billingsley stated that the gear shift linkage on the truck was defective. Two other truck drivers told the inspector that the gear shift linkage was troublesome; that the truck would appear to be in neutral when it was actually in reverse. Neither Billingsley nor either of the other employees was called as a witness. Billingsley is no longer employed by Target. Cliff Morrison, the night shift supervisor, had been at the scene when the accident occurred, but was not interviewed by the inspector and was not called as a witness. The bulldozer operator who was responsible for the berm told the inspector that there was an adequate berm when he was at the dump shortly before the accident. He was not called as a witness. A mechanic was working on a disabled truck in the area. He told a Heavy Metals engineer, Daniel Ruminski, that he did not hear a back-up alarm on Billingsley's truck, nor did he hear a revving noise such as occurs when a truck is dumping. However, neither did he hear Billingsley's truck go over the side, nor another truck which dumped after Billingsley. The mechanic was not called as a witness.

In September 1987, Target was cited by MSHA for a berm violation which resulted in a fatal accident. At the close-out conference following that citation Target was told that a berm should as a minimum be as high as the mid-axle height of the largest piece of equipment on the mine property. Sometime in 1985 a Target truck went over a dump. The driver jumped out and sustained broken bones. On another occasion, a truck was reported to have gone over with no injuries resulting. In March 1987, an imminent danger withdrawal order was issued to Target for lack of an adequate berm in the dump.

On April 12, 1988, at about 2:30 p.m., Inspector Cowley issued two section 107(a) orders of withdrawal citing a violation of 30 C.F.R. 56.9055 because of unstable ground at the dump site, insufficient to support the weight of the 65 ton haulage trucks; and a violation of 30 C.F.R. 56.9054 because adequate berms were not provided at the waste dump. The berm violation was abated when Target established 48 inch berms completely around the perimeter of the dump with two to one slopes on the front and back sides. The ground violation was abated by compacting the ground in the dump area and reversing the slope from a 2.8 percent downslope to a 2 percent up-slope. Both orders were terminated on April 14, 1988, at 4:45 p.m.

There was considerable testimony addressed to the question of what caused the accident to Billingsley, and how the accident

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occurred. This evidence does not bear necessarily or directly on the primary issues before me: did the alleged violations occur? It may be important, however, in determining the gravity or negligence if the violations or either of them are established.

Respondent contends that Billingsley drove forward over the bank either intentionally or inadvertently. It suggests that he may have been listening to the radio (hence the reference to the headset), and that he was tired and inattentive after working a long shift. Target's production manager at the Moringstar Mine, Clarence Darrell Rogers, testified that Billingsley was an experienced truck driver and an excellent employee.

Daniel Ruminski, a mining engineer for Heavy Metals, supervised the contract with Target. Ruminski testified that he initiated the first safety program at the mine. In his opinion, Target was very safety conscious following the September 1987, fatal accident. In Ruminski's opinion, the ground in the dump area was stable before the April 1988 accident and the berm was adequate. He admitted that he did not measure the berm, but criticized the way MSHA measured it. He agreed that the industry standard required a berm to be mid-axle height of the largest vehicle in use. He disagreed with MSHA's position that the industry standard required a berm to be twice as wide as it was high.

Ruminski took a number of photographs after the accident (Exhibits R-5 through 15) in an attempt to determine how and why the accident happened. He concluded that Billingsley drove the truck forward through the berm and over the bank. He based his conclusion on an analysis of the photographs and of the physical conditions at the dump after the accident.

Clarence Darrell Rogers, Target's production manager, was of the opinion that the berm was adequate prior to the accident, and that the ground was stable. Like Ruminski, he believed that Billingsley had gone over the slope forward.

I am unpersuaded by Ruminski's analysis and find on the basis of the evidence before me that Billingsley's truck went over the bank backward. Although he did not testify, Billingsley told Inspector Cowley and his ultimate supervisor Rogers, that he backed over the edge of the dump. I find it significant that Billingsley was described by his superior as an experienced driver and an excellent employee. He told the inspector that he was having trouble with the gear shift linkage, and this was corroborated by other drivers. Ruminski's opinion is based in part on the statement of the mechanic that he did not hear a back up alarm or the revving of the motor on Billingsley's truck. I discount this, because the mechanic also did not hear the truck

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go over the dump, nor did he hear another truck unload subsequently. Ruminski is not an accident reconstruction expert, but a mining engineer. The extraordinary trauma involved in a loaded 65 to 70 ton truck going over an embankment and coming to rest 250 feet below can result in too many twists and turns and revolutions to put much reliance on Ruminski's over-simplified analysis. I place greater reliance on the statements of Billingsley. Obviously, it would be more satisfactory to have had his testimony, as well as that of the foreman, mechanic and other truck drivers, but for various reasons these men were not called as witnesses. Based on the statements of Billingsley and his co-workers to the inspector, I find that the gear shift linkage on the truck was defective. I find that the ground in the dump area was unstable, as evidenced by the cracks in the surface. However, the evidence does not establish that the unstable ground by itself caused the truck to go over the bank.

#### REGULATIONS

30 C.F.R. 56.9054 provided, as of April 12, 1988, as follows:

Berms, bumper blocks, safety hooks or similar means shall be provided to prevent overtravel and overturning at dumping grounds.

30 C.F.R. 56.9055 provided, as of April 12, 1988, as follows:

Where there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped back from the edge of the bank.

#### ISSUES

1. Whether the evidence establishes that Target failed to provide berms at the waste dump sufficient to prevent trucks from overtravelling the dump edge?

2. Whether the evidence establishes that the ground at the Morning Star Mine dumping place was such that it might fail to support the weight of a 65 to 75 ton truck?

3. If either or both of the above questions are answered affirmatively, what is the appropriate penalty for the violation considering the statutory penalty criteria?

CONCLUSIONS OF LAW

I

Respondent Target was at all times pertinent to this proceeding subject to the provisions of the Mine Act in the operation of the subject mine. I have jurisdiction over the parties and the subject matter of this proceeding.

II

There is direct and convincing evidence in the record that the berm at Target's dump was not as high as the mid-axle height of Target's largest vehicle. Although the standard in effect on March 12, 1988, did not in terms require that it be at least of mid-axle height (the standard adopted effective in September 1988, did specifically require that), the evidence is very clear that such was a recognized industry standard, and that a berm of that height is necessary to prevent overtravel. I reject the conclusions of Target's witnesses that the berm was adequate when the citations were issued. I conclude that the berm provided at Target's dump, which was from 10 to 26 inches lower than mid-axle height, was not sufficient to prevent overtravel and overturning. I conclude that a violation of 30 C.F.R. 56.9054 has been established.

III

There is a dispute as to the existence and significance of cracks in the ground in the dump area. I accept the testimony of the federal inspectors as to the existence and extent of the cracks (see findings of fact, page 2). I also accept their conclusions that these extensive cracks constituted evidence of unstable ground, evidence that the ground might fail to support the weight of a vehicle. Therefore, I conclude that the evidence establishes a violation of 30 C.F.R. 56.9055.

IV

Target is a relatively small operator, employing approximately 24 persons. There is no evidence in the record as to its general history of prior violations, but there is evidence of prior inadequate berm and unstable ground violations. This history is significant, and will result in increased penalties for the violations found herein. There is no evidence that the imposition of penalties in these proceedings will affect Target's ability to continue in business. The violations were abated promptly in good faith.

The inadequate berm violation was very serious. It contributed directly to the accident and to the serious injury suffered by Billingsley. The unstable ground condition in itself did not contribute to the injury, but, combined with the downslope, it constituted a very hazardous condition. It, too, was a very serious violation.

Target was certainly on notice of the critical importance of providing adequate berms and stable ground in its dumping area. It had experienced a number of accidents including a recent fatal accident as an apparent result of violations of the two standards involved herein. On the other hand, there is evidence in the record that the berms were adequate some hours prior to the accident which occurred on April 12, 1988. The location of both the bank and the berm change of course as dumping continues. Nevertheless, I conclude that Target was negligent in permitting the inadequate berm here, and in permitting the unstable ground.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the berm violation is \$8000, and an appropriate penalty for the unstable ground violation is \$5000.

ORDER

Based on the above findings of fact and conclusions of law, Orders/Citations 3286977 and 3286978 are AFFIRMED. Respondent is ORDERED to pay within 30 days of the date of this decision the following civil penalties for the violations found herein.

ORDER/CITATION	PENALTY
3286977	\$ 5000
3286978	8000
	\$13000

James A. Broderick  
Administrataive Law Judge