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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 90-26-M
A.C. No. 54-00240-05511

v.

Cantera Can

PUERTO RICAN CEMENT COMPANY,
RESPONDENT

DECISION

Appearances: James A. Magenheimer, Esq., Office of the
Solicitor, U.S. Department of Labor, New York,
for Petitioner;
Daniel R. Dominguez, Esq., Dominguez & Totti,
Hato Rey, Puerto Rico, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging Puerto Rican Cement Company, Inc., (Puerto Rican Cement) with one violation of the regulatory standard at 30 C.F.R. 56.14200 and proposing a civil penalty of \$1,500 for the alleged violation. The general issue before me is whether Puerto Rican Cement violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3250616 issued August 10, 1989, pursuant to section 104(a) of the Act alleges a "significant and substantial" violation of the noted mandatory standard and charges as follows:

A fatal accident occurred at this operation on 08-08-89 when the Euclid No. 245 hauling truck rolled over a person who was in [sic] foot. The truck did not sound the horn before start [sic] moving the truck.

The evidence is not disputed that Francis Gonzales a 19 year old independent truck driver was fatally injured at about 7:40 a.m. on August 8, 1989, when he was run over by a truck at the Puerto Rican Cement Cantera Can Mine in Ponce, Puerto Rico. Eyewitness Angel Torres, a truck driver for

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Puerto Rican Cement, testified at hearing that he was in the control room completing a report when he saw Gonzalez crossing as the haul truck began moving out from the crusher. He saw the victim walk over to a faucet then turn back as the truck began moving from the crusher. The truck had moved about 40 feet when it struck Gonzalez. Torres acknowledged that he told the MSHA investigator that he did not hear the truck driver blow his horn as he exited from the crusher and that he was standing within 5 to 6 feet of the truck while he was in the control room.

Torres estimated that the truck was travelling at about 5 to 7 miles an hour and was not in an area where it could pick up speed. He also testified that the type of truck that struck the victim has a blind spot directly in front and to the right side so that you cannot see people up to about 43 feet. This was because of the 7 to 8-foot-high truck structure. Torres also testified that he signed a paper following a February 23, 1989, safety meeting indicating that he was aware of a requirement to blow the horn before moving the truck. Torres admitted however that he in fact did not make it a practice to blow his truck horn or use any other signal before pulling away from the crushers if there were no persons present. He acknowledged that he had never been disciplined for failing to blow his horn before pulling out.

Alejandro Batista, a supervisory MSHA Inspector conducted an investigation at the accident scene on August 10, 1989. Batista observed that there was indeed a blind spot in the front area of the subject trucks. He also concluded that the truck driver did not blow his horn before moving from the crusher area and that this constituted a "serious and substantial" violation of the cited standard. In reading his conclusion Batista was aware that the employees, including the subject truck driver, had signed a statement acknowledging the requirement of blowing their horn before moving their vehicles, but Batista found that this procedure was not enforced at the plant.

MSHA Inspector Roberto Torres testified that he met with Puerto Rican Cement officials in February 1989, to discuss new MSHA regulations including the requirement for truck drivers to blow their horns before moving their trucks.

Julio Salugo, an engineer for Puerto Rican Cement acknowledged that although they have a disciplinary procedure for safety violations none of the truck drivers had been disciplined before the accident at issue for failure to blow their horns before moving their trucks. He testified that subsequent to the accident there has been some disciplinary action taken.

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Former Puerto Rican Cement employee, Freddie Irizarry, testified that while he was employed with the company there was indeed a disciplinary procedure in effect. He explained that on the first notice of a violation the employees was told how to correct the violative act. The second time a warning was issued and the employee could be suspended or "other appropriate action" could be taken by management.

Within this framework of evidence it is clear that the violation is proven as charged. The testimony of eyewitness Angel Torres is not disputed that as the subject truck left the crusher its horn was not blown nor was "other effective means [used] to warn all persons who could be exposed to a hazard from the equipment". Clearly the violation was also "significant and substantial". A violation is "significant and substantial" if there is an underlying violation of a mandatory standard, the existence of a discrete hazard contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Company, 6 FMSHRC 1 (1984). The failure to give an audible or other effective warning upon leaving the crusher area in the vicinity of pedestrian traffic clearly meets this criteria. The violation was particularly serious because of the blind area from the cabs of the subject trucks.

Puerto Rican Cement argues that it should not be chargeable with significant negligence because it had trained and disciplined its employees in the requirements of the cited standard. Indeed the evidence does show that at a training class held in February 1989 the specific subject matter of an audible warning prior to trucks moving was covered. Moreover following that class the truck drivers signed a statement acknowledging that requirement. The evidence shows however that the truck drivers thereafter regularly ignored that requirement without discipline before the accident here at issue.

According to truck driver Angel Torres he did not in fact issue any audible or other alarm before moving his truck so long as he did not see anyone in front. He has acknowledged moreover that he had never been disciplined for this practice. In light of the evidence that there is an obstructed view from these trucks of approximately 43 feet to the front and to the right of the driver's position it is clear that the procedure followed by Mr. Torres was particularly dangerous. The evidence also shows that no driver had been disciplined prior to this accident for failing to issue an audible or other warning prior to moving their trucks. Indeed the persuasive evidence is that there was not in effect at this mine an effective means of enforcing the alleged rule for an audible warning prior to

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moving the trucks. Accordingly the operator is chargeable with negligence.

In assessing a civil penalty in this case I have also considered the operator's size, history of violations and good faith abatement of the violation. Under the circumstances I find that a civil penalty of \$1,500 is indeed appropriate.

ORDER

The Puerto Rican Cement Company, Incorporated, is directed to pay a civil penalty \$1,500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge