

CCASE:
SOL (MSHA) v. WARREN STEEN CONSTRUCTION
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING
Docket No. LAKE 89-68-M
A.C. No. 21-02942-05504

v.

WARREN STEEN CONSTRUCTION, INC.,
RESPONDENT

Steens Pit Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING
Docket No. LAKE 89-93-M
A.C. No. 21-02942-05505-A

v.

WARREN STEEN, EMPLOYED BY
WARREN STEEN CONSTRUCTION, INC.,
RESPONDENT

Steens Pit Mine

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor (Secretary);
Robert E. Mathias, Esq., Duluth, Minnesota for
Warren Steen Construction, Inc. (Steen
Construction) and for Warren Steen, individually.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties from Steen Construction for two alleged violations of the mandatory standard in 30 C.F.R. 56.12071. In a separate proceeding, the Secretary seeks penalty under section 110(c) of the Mine Act from Warren Steen individually on the ground that as the agent of a corporate operator, he knowingly authorized, ordered or carried out the violations committed by Steen Construction. The cases were consolidated for the purposes of hearing and decision. Pursuant to notice, the cases were called for hearing in Duluth, Minnesota on November 14, 1990. James King, Jack Hufford, Mark Belich and Larry Aubuchon testified on behalf of the Secretary. Warren

Steen and Tom Duesler testified on behalf of Steen Construction and Warren Steen. Counsel for the Secretary and for the respondents have filed post-hearing briefs. I have considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Steen Construction was the owner and operator of a sand and gravel pit in Carlton County, Minnesota known as Steen's Pit. Respondents stipulate that the mine produces products which enter interstate commerce or its operations effect interstate commerce. The business was sold on May 1, 1989, but is still operated under the name Steen's Pit.

2. Steen's Pit actually included three pits. The main pit covered a total area of about 54 acres. It produced wash gravel. It included a crushing operation and a washing plant. Steen Construction had operated the pit for about 20 years.

3. There was a drive-in theater adjacent to the pit, and Steen Construction's three phase power came through the theater property. Steen Construction purchased the property in about May 1988.

4. In July 1988, approximately nine persons were employed at Steen's Pit, including truck drivers. Three or four persons worked on the pit. Steen Construction is a small operator.

5. Between July 6, 1986 and July 5, 1988, Steen Construction was cited for one violation of a mandatory health or safety standard. This history is not such that a penalty otherwise appropriate should be increased because of it.

6. Power was supplied to Steen's Pit by the Minnesota Power and Light (MPL). It constructed a 12,000 volt line on to the Steen Pit property.

7. Some months prior to July 1, 1988, MPL representatives observed that there were piles of gravel encroaching on the right of way of the power line. The pit was not being operated at the time. MPL cautioned Steen that he was working too close to the power wire. Steen replied that he needed some time to relocate the pile. There also was some discussion about relocating the power line.

8. On July 1, 1988, Gary Jobe, 23 years of age, was employed by Steen Construction as a crusher helper. He had worked for Steen for about 2 months. He was not given any formal safety training.

9. At about 9:30 a.m., on July 1, 1988, Jack Hufford, front-end loader operator, began making a new row of gravel piles. The loader was hooked by a chain to the 80 foot Nordberg stacker-conveyor. Hufford pulled the conveyor to the area where a new row was to be made. Jobe walked alongside the conveyor and signalled Hufford to stop. Jobe then threw a plank on the ground to stop the conveyor. However the conveyor rolled over the plank and continued for about 5 feet. Jobe pushed against the frame of the conveyor in an attempt to stop it when the conveyor came in contact with the overhead 12,000 volt power line. Job was jolted, ran and fell to the ground. CPR was administered; he was taken to the hospital by ambulance. He was pronounced dead by electrocution at 10:20 a.m., July 1, 1988.

10. On July 6, 1988, Federal Mine Inspector James King conducted an investigation of the July 1 fatal accident. The plant started up while King was on the premises and the stacker conveyor was still below the energized 12,000 volt power line. It was approximately 8 feet directly below the line.

11. On July 6, 1988, at about 10:00 a.m., Inspector King told Mr. Steen that he was issuing a 104(d)(1) citation for the violation of 30 C.F.R. 56.12071 which occurred on July 1.

12. When Inspector King discovered that the plant was starting up with the conveyor still under the power line, he obtained permission to conduct a regular inspection (he had been authorized only to conduct an investigation of the fatality). He told Warren Steen that the equipment would have to be moved. Steen asked to be allowed to operate for two or three weeks before moving the conveyor. The top of the head pulley of the conveyor was approximately 8 to 8-1/2 feet from the energized main conductor lines. The ground line was about 3 feet from the head pulley.

13. Inspector King issued a 104(d)(1) withdrawal order at about 10:30 a.m., forbidding operation of the conveyor in the location where it was placed. The order alleged a violation of 30 C.F.R. 56.12071 on July 6, 1988.

14. The citation and order were terminated the same day when the equipment was shut down and the conveyor moved away from the power line.

15. Warren Steen Construction, Inc., is a Minnesota Corporation. It was formed on April 9, 1976. Its president and incorporator was Warren Steen.

16. Warren Steen operated at Steen's pit for almost 20 years.

17. Warren Steen personally directed the operation at Steen's pit. When he was away "I guess everybody--like Jack Hufford has worked two years, he was probably more in charge than the other fellow." (Tr. 72.) At the time of the fatal injury to Mr. Jobe, Steen was not on the property but was getting fuel. He returned just after the accident occurred.

18. Steen stated that he was not aware of a federal regulation requiring machinery to be 10 feet or more from an overhead power line. He also testified that the stacker-conveyor was in the same location in September 1987, and no citation or order was issued during an MSHA inspection.

19. Steen Construction had been inspected by federal inspectors, most recently in September 1987. Steen had requested a book of safety regulations, but had not received one.

20. The stacker conveyor had chock blocks on them which were designed to stop the conveyor when it is moving and to keep it secure. They were not used on July 1, 1988.

STATUTORY PROVISION

Section 110(c) of the Act provides in part as follows:

Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a)

REGULATORY PROVISION

30 C.F.R. 56.12071 provides as follows:
When equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than ten feet, the lines shall be deenergized or other precautionary measures shall be taken.

ISSUES

1. Whether Steen Construction violated 30 C.F.R. 56.12071 on July 1 and on July 6, 1988?

2. If so, whether the violations were significant and substantial and resulted from Steen Construction's unwarrantable failure to comply with the mandatory standard?

3. If so, what are the appropriate penalties therefor?

4. If a violation or violations are established for Steen Construction, whether Warren Steen knowingly authorized, ordered or carried out such violation?

5. If so, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. Steen Construction was subject to the provisions of the Mine Act in the operation of Steen's Pit. Warren Steen was an officer and agent of Steen Construction. I have jurisdiction over the parties and subject matter of these proceedings.

2. On July 1, 1988, Steen Construction operated an 80 foot Nordberg Stacker conveyor within 10 feet of an energized high voltage power line, so that the conveyor came in contact with the power line. The line was not deenergized and other precautionary measures were not taken. This is a violation of 30 C.F.R. 56.12071.

3. A miner who was in contact with the conveyor was electrocuted. The electrocution resulted from the violation referred to in Conclusion 2. The violation was extremely serious. It was properly designated as significant and substantial.

4. Steen Construction had been cautioned by MPL about working too close to the power line prior to the fatal accident. The operation of a large metal machine under a high voltage line is inherently dangerous, and should be recognized as such by a mine operator. The violation resulted from the operator's reckless disregard for the safety of the miners. It was properly designated as an unwarrantable failure to comply with the safety standard involved.

5. Based on the criteria in section 110(i) of the Act, I conclude that a penalty of \$8000 is appropriate for the violation on July 1, 1988 (Citation 3262564).

6. On July 6, 1988, Steen Construction commenced operation with the conveyor being between 8 and 8-1/2 feet directly below the energized high voltage line. This is a second discrete violation of 30 C.F.R. 56.12071 (Citation 3262565).

7. The violation was extremely serious and was likely to result in serious injury if mining had been allowed to continue. It was properly designated as significant and substantial.

8. The operator had experienced a fatal accident five days previously as a result of the same condition. This violation

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(July 5, 1988) resulted from the operator's reckless disregard for the safety of the miners, and was therefore an unwarrantable failure violation.

9. Based on the criteria in section 110(e) of the Act, I conclude that a penalty of \$8000 is appropriate for the violation on July 5, 1988 (Order 3262565).

10. Warren Steen was an experienced operator of a sand and gravel mine. He knew that his company was subject to the Mine Act and its regulations. As the 10th Circuit Court of Appeals stated in *Emery Mining Corp. v. Secretary of Labor* (a case under section 110(a)) 744 F.2d 1411, (10th Cir. 1984) at 1416:

. . . as a general rule those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law . . .

* * *

Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act's provisions and has a duty to comply with those provisions.

In any event, whether Mr. Steen knew of the specific regulation regarding the minimum clearance between metallic equipment and high voltage lines, he certainly knew or had reason to know that operating such equipment close to high voltage line was unsafe. Cf. *Kenny Richardson*, 3 FMSHRC 8 (1981); *Roy Glenn*, 6 FMSHRC 1583 (1984). I conclude that Warren Steen knowingly authorized, ordered or carried out the violations of the corporate operator. Warren Steen's violation was serious and resulted from reckless disregard for safety. I conclude that an appropriate penalty for the violation is \$5000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation 3262564 and order 3262565 are AFFIRMED.
2. Steen Construction shall, within 30 days of the date of this decision, pay to the Secretary \$16,000 for the violations found herein.

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3. Warren Steen shall, within 30 days of the date of this decision, pay to the Secretary \$5000 for the violation found herein.

James A. Broderick
Administrative Law Judge