CCASE:
SOL (MSHA) v. MAR-LAND INDUSTRIAL CONTRACTOR
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Lessburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v. MAR-LAND INDUSTRIAL CONTRACTOR, INCORPORATED, RESPONDENT	CIVIL PENALTY PROCEEDING Docket No. SE 90-117-M A. C. No. 54-00001-05503 BOY Ponce Cement or Ponce Cement Plant

DECISION

Appearances: Jane S. Brunner, Esq., U. S. Department of Labor, Office of the Solicitor, New York, New York, for the Secretary;
Daniel Dominguez, Esq., Miguel A. Maza, Esq., Dominguez and Totti, Hato Rey, Puerto Rico, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Proposal for Assessment of Civil Penalty in which the Secretary (Petitioner) alleged that the Operator (Respondent) violated 30 C.F.R. 56.15005. Pursuant to notice, the case was heard in Hato Rey, Puerto Rico on December 3, 1990. Anibal Colon Deffendini, Johnny Torres Garcia, German Matos Hernandez, and Roberto Torres-Aponte testified for Petitioner. Jose Luis Ortiz Gonzalez, Miguel A. Garcia, and Sidney Kaye testified for Respondent. Petitioner filed Proposed Findings of Fact and a Memorandum of Law on January 13, 1991. Respondent filed a Legal Memorandum and Proposed Findings of Fact on February 22, 1991.

Findings of Fact and Discussion

I.

On February 19, 1990, Cecilio Caraballo, a rigger employed by Respondent, was performing construction work in the conversion area of Respondent's work site at Puerto Rican Cement. Caraballo, who was working approximately 50 feet off the ground, was wearing a safety belt to which a rope was attached. He

wrapped another rope around a beam to which he attached the rope portion of the belt that he was wearing. He either leaned back or attempted to descend, and then fell to the ground, and was killed. Roberto Torres-Aponte, an inspector employed by MSHA, was the only witness who testified that he actually had examined the safety belt and ropes used by Caraballo. He described the condition of the belt and ropes tied to it as "good" (Tr. 84, 85) Thus, taking into account the fact that there is no evidence that there was anything wrong with the condition of either the belt or ropes, and considering the fact that Anibal Colon Deffendini, Johnny Torres Garcia, and German Matos Hernandez, all of whom witnessed the accident, indicated that the belt and the ropes fell to the ground along with Caraballo, I conclude that the belt was not properly secured to the beam. Hence, the belt was not being worn and used in a safe fashion. Accordingly, I find that Respondent herein did violate Section 56.15005 as alleged in the Citation issued to Respondent by MSHA Inspector Roberto-Torres Aponte.

II.

Clearly the violation herein contributed to the risk of falling. Further, inasmuch as the violation herein led to the death of Caraballo, I conclude that the violation was significant and substantial. (See, Mathies Coal Co., 6 FMSHRC 1 (January 1984)).

III.

Inasmuch as the violation herein resulted in a fatality, I conclude that the violation was of a high level of gravity. IV. Essentially it is Respondent's position that it was not negligent with regard to the violation at issue. For the reasons that follow, I disagree.

According to the testimony of three of Respondent's riggers, Deffendini, Hernandez, and Jose Luis Ortiz Gonzalez, Respondent's supervisors conducted weekly meetings, at which time the use of safety belts was discussed. These employees did not testify to any specific instructions or information that was provided at these meetings. No testimony was adduced from any of Respondent's supervisors as to the specific content of the weekly safety meetings pertaining to the use of the belts. Hence, the record before me fails to establish specifically what Respondent told his employees with regard to the use of safety belts, and more importantly, the specific manner in which they were to be

properly secured. Footnote 1) According to Gonzalez, Victor Vega, Respondent's supervisor, conducted a safety meeting on the morning of February 19, the date of the accident at issue, and talked about how to use safety belts, and the use of other equipment. However, neither Gonzalez nor any other witness testified with regard to the specific instructions or information that was imparted. Thus, the record does not support a finding that any specific instructions were provided by Respondent on February 19, with regard to the need to secure the safety belts and the correct manner to do so. (Footnote 2)

There is no evidence that Respondent provided Caraballo or its other employees with any written instructions on the usage of safety belts. Indeed, Respondent's only written safety policy does not mention the use of safety belts (Joint Exhibit A). Additionally, there is no evidence that supervisors were present to observe or supervise the manner in which Caraballo wrapped the rope around the beam, and attached his belt to it. In this connection, I find the testimony of Gonzalez that Vega conducted a safety meeting on February 19, 1990, by itself, insufficient to rebut the testimony of Deffendini, Hernandez, and Johnny Torres Garcia, that, in essence, when Caraballo attached or attempted to attach his belt to the beam there were no supervisors present.

Also, Respondent had notice that its employees were not securing their belts, as it had been served with two imminent danger orders for violations of Section 56.15005, supra, on the ground that employees wearing belts had not tied them off. (Footnote 3)

There is no evidence that Respondent took any action in response to such notice to ensure that employees properly secure their safety belts.(Footnote 4)

Considering all of the above, I conclude that Respondent was highly negligent in not adequately instructing and supervising its employees in proper methods to be used in securing safety belts.

A toxicological analysis of Caraballo's urine indicated the presence of .30 mcg/ml benzoylecgonine, a substance the liver metabolizes from cocaine, evidencing the fact that Caraballo had ingested cocaine at some time before his death. (The report indicated that the examination of the nasal passages was negative for cocaine and there was no cocaine detected in Caraballo's blood). As explained by Sidney Kaye, an eminent toxicologist, in essence, once ingested cocaine has been metabolized to benzoylecgonine, as was the case with Caraballo, it would cause depression which could be "deep" (Tr. 129). The depression can produce confusion, tiredness, muscle spasm, anxiety, restlessness, and a lessened ability to concentrate and remember. However, Kaye indicated that he had no way of knowing how much cocaine Caraballo had taken and how long he had taken it prior to the accident. Also, no evidence was adduced with regard to a correlation between the level of benzoylecgonine present in the urine and the degree of impairment in concentration. Thus there is nothing in the record to indicate that the level of benzoylecgonine in Callaballo's urine was of a sufficient amount to have caused a significant deterioration in his concentration and memory so as to have significantly impaired his ability to properly perform the task of securing his safety belt. Thus, I find that although Caraballo's concentration and memory might have been impaired due to the ingestion of cocaine, the record is insufficient to predicate a finding as to the degree of impairment in these functions as a consequence of the ingestion of cocaine. Hence, the presence of .30 mcg/ml of benzoylecgonine

in Caraballo's urine does not, per se, diminish Respondent's negligence to any significant degree. Accordingly, I conclude that the violation herein was as a result of Respondent's high level of negligence. (Footnote 5)

Taking into account the remaining statutory factors as stipulated to by the Parties, I conclude that a penalty of $5000 is appropriate for the violation found herein.

ORDER

It is ORDERED that, within 30 days of this Decision, Respondent pay $5000 as a Civil Penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

Footnotes start here:-

1. Indeed, according to Johnny Torres Garcia, he had been working for Respondent for approximately a month prior to February 19, 1990, and had not received any instructions from Respondent concerning the use of safety belts.

2. Respondent relies on Colon's testimony that, when Caraballo was hired, he (Colon) informed him of the need to wear a belt and instructed him in the manner in which it was to be used. This testimony does not establish that Respondent discharged its obligation to instruct on the usage of safety belts, as there is no evidence that Colon, when he instructed Caraballo, was acting pursuant to directions from management rather than on his own initiative.

3. The most recent such order was issued February 18, 1989.

4. Miguel A. Garcia, Respondent's President and Project Manager at the subject site, testified that Respondent, in general, had a policy of issuing warnings for safety infractions. Also, Gonzales testified that Respondent had reprimanded him for failing to tie off his belt. I find this evidence is insufficient to establish that Respondent had either provided specific instruction in the requirement and manner of securing a belt or taken any supervisory action to monitor that belts were being secured properly.

5. Respondent has cited North American Coal Corp., 3 IBMA 93 (April 1974), and Peabody Coal Corp.,, not officially reported, 1 MSHC 1676 (Judge Koutras, August 30, 1978) for the principle that an employer can not be held responsible for insubordinate acts of its employees, where the former has a policy promoting safety which it consistently applies. I do not find these cases to relevant to the instant proceeding. In North American, supra, the Operator was cited for violating 30 C.F.R. 75.1720(a), which mandated that miners are required to wear safety goggles. Accordingly, the Commission held that a violation did not occur where the failure to wear goggles is entirely the result of the employees' negligence or disobedience. In contrast, in the case at bar, the evidence does not establish that the violation was entirely the result of Caraballo's negligence or misconduct. The Commission in North American, supra, in essence, held that an Operator is in compliance with the mandate of requiring miners to wear goggles when it establishes a safety system to assure the wearing of such equipment.

In Peabody Coal Corp., supra, the Operator was cited for a violation of 30 C.F.R. 77.1710 which mandates that miners shall be required to use safety belts and lines where there is a danger of falling. In holding that a violation did not occur, Judge Koutras noted that a miner who was not wearing a belt, was acting contrary to posted and published instructions. In the case at bar, the evidence fails to establish posted and published instructions with regard to the need to secure a safety belt and the proper manner to do so. Davis Mechanical Construction, Inc., 5 OSHC 1789 (June 2, 1977), and Constructora Maza, Inc., 2 OSHC 3079 (July 8, 1974), involve alleged violation of safety standards set forth in Title 29 of the Code of Federal Regulations, and hence are not binding in the present proceeding which involves a violation of a differently worded regulation set forth in Title 30 of the Code of Federal Regulations.