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SOL (MSHA) v. IDEAL CEMENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-202-M

v.

IDEAL CEMENT COMPANY,
RESPONDENT

DECISION AFTER REMAND

Before: Judge Morris

On November 27, 1990, the Commission reversed in part the Judge's decision and remanded this case for further consideration.

In its order of remand the Commission ruled that the absence of side screens on the operator's uni-loader constituted an equipment defect within the meaning of 30 C.F.R. 56.9002. Specifically, the Commission ruled that:

Although Allied Chemical Corp. [6 FMSHRC 1854, August 1984] focused on a relatively common type of equipment defect--one affecting the functioning of the equipment--we have no difficulty in concluding that the term "equipment defect" can also extend to a defective or missing component that does not affect the operation of the equipment. (Slip Opinion at 6).

The Commission further remanded the case for findings of fact and conclusions thereon as specified in the order of remand.

At the hearing the following individuals testified for the Secretary:

Robert E. Stinson, metal and non-metal Inspector for the State of Montana.

Vincent J. Schafer, Ideal maintenance man.

Stephen M. Carey, Ideal heavy equipment operator.

Steven L. Livingood, Ideal control chemist.

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Archie Huenergardt, control room operator and lab technician at the time of the accident, now an Ideal electrician.

Marvin Doornbos, Ideal maintenance man.

Stanley Veltkamp, Ideal maintenance man.

Eric Shanholtz, mine safety and health inspector for MSHA.

Darrell Woodbeck, metal and non-metal inspector for MSHA.

The following individuals testified for respondent:

Bert Todd, Ideal yard foreman.

Gary Huls, Ideal production supervisor.

William Fairhurst, Ideal mill supervisor.

Arlene Sherman, Ideal Personnel and Industrial Relations Administrator responsible for plant safety.

Based on a preponderance of the substantial, reliable and probative evidence I enter the following:

FINDINGS OF FACT

1. The side guards on the uni-loader are especially designed in the ROPS to prevent contact with the lifting arms. Mr. Bertagnolli would not have been killed if the side screens had been in place. (Stinson, 254, 257).

2. There were no eyewitnesses to the accident but Inspector Woodbeck concluded Mr. Bertagnolli's head and part of his torso were outside of the uni-loader when the arms raised and pinned him against the top of the ROPS. Side screens would have prevented him from being in this position. (Woodbeck, 357, 375).

3. The purpose of the side screens is to keep your arms out from underneath the loader while you are operating it. (Todd, 404).

4. When the operator sits in the uni-loader everything is "pretty close". (Doornbus, 171).

5. The overall width of the uni-loader was 54 inches. The width between the lifting arms was 45.4 inches. (Specifications pamphlet, Exhibit P-24, third page).

6. Prior to the accident Ideal modified its 1835 Case Uni-loader in the following manner:

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a) the ROPS were lowered four inches (Stinson, 320; Sherman, 455).

b) the tires, originally 10 to 11 inches wide, were replaced with 6 to 7 inch wide tires (Schafer, 38; Sherman 445).

c) the company also manufactured a jack hammer attachment. This was not standard equipment from the Case company (Todd, 406).

d) a piece of plywood was attached to the front of the uni-loader (Schafer, 42, 43).

7. Screens on the uni-loader have a tendency to interfere with the operator's side vision, especially to the left. An equipment operator testified he had to see the rear tires to back the equipment out of the kiln. The ramp is only so wide. Side screens prevented him from seeing the rear tire (Livingood, 138, 139).

8. The air hammer itself was attached to a backing plate. The inspector found that with the jack hammer raised he could not see the drill point (Stinson, 254).

9. During the kiln job some workers wanted the side screens on the uni-loader; others did not (Carey, 111; Fairhurst, 426-429).

10. The decision to use or not use side screens was left to the equipment operators (Carey, 111; Fairhurst, 429).

11. The side screens were either on and off from time to time, both for yard and kiln work (Huenergardt, 147, 148; Schafer, 41; Woodbeck, 356, 373).

12. Supervisors did not require or prevent the use of side screens (Carey, 103-104).

13. Ideal's plant manager told Inspector Stinson that the side screens had been removed for some time (Stinson, 247).

14. The company's safety manual contains the following provision:

Machine guards and other safety devices are provided for your protection. Guards shall not be removed except for making repairs, cleaning, dressing, oiling or adjusting and then only by authorized persons when machines are stopped. Replace guards when work is completed and before lock outs are removed.

(Fairhurst, 432; Exhibit P-29, page 9, paragraph 5).

DISCUSSION AND FURTHER FINDINGS

The evidence is essentially uncontroverted: prior to acquiring the Case uni-loader in 1981 or 1982 it was necessary to remove the cage on Ideal's loader to get it inside the kiln (Tr. 455). Due to width and height restrictions the 1835 Case Uni-loader was modified by lowering the ROPS and installing smaller tires (Tr. 455).

In the cylindrical kiln the lights were not too good. The kiln itself is 300 feet long and 10 to 12 feet wide. The uni-loader was estimated at 12 feet long and 3-1/2 to 4 feet wide (Tr. 39, 125, 141).

In the kiln area the operator of the uni-loader uses the jack hammer attachment to knock out the overhead bricks (Tr. 91). After a sufficient number of worn out bricks are removed the kiln is then rotated and the top becomes the bottom (Tr. 63).

In knocking down the 4 inch by 8 inch bricks the operator maneuvers the loader over the fallen brick to reach more bricks (Tr. 34, 75).

Immediately before the accident it appeared to witness Veltkamp that Mr. Bertagnolli could not get the machine in position (Tr. 175). It seemed to witness Doornbos that Mr. Bertagnolli was having trouble knocking the brick down. He testified bricks are hard to get out, especially the first brick (Tr. 161).

Given the above scenario it appears that the lack of side screens affected safety since Mr. Bertagnolli was crushed by the lifting arms while he was operating the uni-loader. Given the lighting conditions, his work, the difficulty of seeing what he was trying to accomplish and the lack of side screens I conclude that Mr. Bertagnolli leaned outside the confines of the uni-loader at the same time the lifting arms were being raised (or lowered). The presence of side screens would have prevented this accident.

The presence of side screens also prevent any bricks from striking the operator. As heavy equipment operator Carey aptly stated "when you're knocking brick out, you always had a chance of catching a brick coming into your lap or whatnot" (Tr. 88). Carey was one of the workers who would go to the garage for the screens and put them on; however, there were times, other than the kiln job, when he operated the uni-loader without side screens (Tr. 88).

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There is no evidence of the precise measurements of the distance between the side arms and the operator's cab. However, the photographs indicate and confirm witness Doornbus' testimony that when the operator sits in the cab everything is "pretty close" (See and Compare Exhibits P-9, P-16, P-17, R-2 and the drawings in Exhibit P-24).

The specifications do not indicate the distance from the arms to the operator's cab. But the total distance between the lifting arms, at mid-point, is shown as 45.4 inches.

One of the three principal uni-loader operators who testified complained that the side screens interfered with his view of the rear tires when backing the equipment out of the kiln. In view of the obvious width restrictions in the kiln I find Mr. Livingood's testimony to be credible. However, at the time of the accident Mr. Bertognolli was attempting to remove brick. He was not backing out the uni-loader.

Any problem that exists in connection with backing up the equipment may be solved by constructing a wider entrance ramp to the kiln. (Exhibit P-2 shows present ramp.)

Ideal's safety policies did not prevent the removal of the side screens (Facts 9-14).

The witnesses essentially all testified the placement or removal of side screens was left to the individual equipment operators.

If Ideal had a policy requiring the use of side screens it was not enforced.

The record contains no evidence of any industry or manufacturer's policy regarding the removal of the side screens and the circumstances under which the side screens could be removed without impairing safety.

In its order of remand the Commission noted that in interpreting and applying broadly worded standards, the appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing Canon Coal Co., 9 FMSHRC 667, 668 (April 1987), Quinland Coal, Inc., 9 FMSHRC 1614, 1617-18 (September 1987).

The Commission further emphasized that the reasonably prudent person test contemplates an objective--not subjective--analysis of all the surrounding circumstances and factors bearing on the inquiry in issue, Great Western Electric Company, 5 FMSHRC 840, 841-42 (May 1983); U.S. Steel Corp., 5 FMSHRC 3, 5 (January

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1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982).

From the total record I conclude that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized its requirements. In particular, the removal of worn-out brick from a kiln takes place three to four times per year (Tr. 35). Each clean-out takes two to three days (Tr. 35).

A reasonably prudent operator would recognize the requirements since, in the work process, the company would observe two areas that would affect the safety of the operator.

The initial area involves the bricks themselves as they are chipped from overhead. Some bricks can end up in the lap of the operator. Side screens, which came as standard equipment on the Case Uni-loader, would have prevented the operator from being struck by any falling bricks.

The second area involved the lifting arms and the hydraulic ram. An operator might not necessarily be leaning outside of the uni-loader but with the lifting arms and ram in close proximity, an operator's arms could be caught or pinched by the lifting arms and ram. See Exhibits P6, P9, P10, P11, P12, P13, P16, P17, R2 and compare with P18 (with screens attached).

The presence of side screens would have prevented Mr. Bertagnolli from leaning out of the uni-loader. Side screens would also have prevented any lesser injuries to an operator.

Some evidence establishes that the presence of the side screens adversely affected safety. This occurred when the uni-loader operator was backing the equipment out of the kiln and down the ramp. As previously stated this problem might well be handled by the construction of a wider ramp, (See Exhibit P-3, Entrance to ramp). In any event, backing the equipment down the ramp was not the work being done when Mr. Bertagnolli was crushed.

The Commission has ruled the missing screens constituted an equipment defect within the meaning of the regulation. Since I conclude the defect affected safety and since I further find the regulation was applicable to Ideal it follows that the citation should be affirmed.

CIVIL PENALTY

Inasmuch as the citation is to be affirmed it is appropriate to assess a civil penalty.

The statutory criteria to assess such penalties are contained in 110(i) of the Act, 30 U.S.C. 820(i).

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The operator's history, as evidenced by Exhibit P-27, indicates Ideal received 35 citations between January 1986 and April 1987. I consider this an average adverse history. Under the broad scope of prior favorable history I note the plant received safety awards. One was in 1982 for 3000 consecutive days without an accident (Tr. 443, Exhibit R7). Further, since the 1950s the Trident plant has, on two occasions, worked over 4000 days without an accident (Tr. 442).

Ideal appears to be a medium sized operator. Its 80 employees at the Trident plant annually produce 300,000 tons of cement.

The Trident plant is one of nine plants nationwide (Tr. 23, 440). In view of its size it appears the penalty hereafter assessed is appropriate.

Ideal was negligent. The uni-loader received an exceptional amount of attention due to its many modifications. The company should have known of the probability that the equipment operator could be struck by falling brick or pinched by the arms or ram of the equipment. These factors cause me to conclude that the operator's negligence was high since it took no remedial action.

The record indicates Ideal was in debt and close to bankruptcy three years ago (Tr. 439). However, Ideal did not present any information concerning its financial condition at the time of the hearing. Therefore, in the absence of any facts to the contrary, I find that the payment of penalties will not cause Ideal to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974).

Mr. Bertagnolli died when he was crushed by the lifting arm. In view of this the gravity of the violation is apparent.

Ideal demonstrated its statutory good faith by abating the violative condition.

Considering all of the statutory criteria I deem that a civil penalty of \$8000 is appropriate.

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For the foregoing reasons, I enter the following:

ORDER

Citation No. 2649413 is AFFIRMED and a civil penalty of \$8000 is ASSESSED.

John J. Morris
Administrative Law Judge