

CCASE:
SOL (MSHA) v. CARL STRATING & JINKS COLEMAN
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TTEXT:

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

v.

CARL STRATING, EMPLOYED BY
SOUTH TEXAS AGGREGATES
INCORPORATED,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 90-147-M
A.C. No. 41-02976-05525 A

Helotes Mine

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

v.

JINKS COLEMAN, EMPLOYED BY
SOUTH TEXAS AGGREGATES
INCORPORATED,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 90-148-M
A.C. No. 41-02976-05524 A

Helotes Mine

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia
for the Petitioner;
Carl Strating, South Texas Aggregates, Inc.,
Knippa, Texas, Pro se, and on behalf of
Jinks Coleman.

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalties filed by the Secretary pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging Carl Strating and Jinks Coleman as officers and agents of a corporate mine operator, South Texas Aggregates, Inc., (South Texas) with knowingly authorizing, ordering, or carrying out two violations

by the named mine operator. (Footnote 1)

Neither Strating nor Coleman dispute that they were both officers and agents of the cited corporate mine operator however they both dispute that they "knowingly authorized, ordered, or carried out" the cited violations of the corporate mine operator. The issues before me therefore are whether indeed there were violations as alleged and, if so, whether either Coleman or Strating, or both, acting as officers or agents of the corporate mine operator "knowingly authorized, ordered, or carried out" such violations. If it is determined that either Strating or Coleman, or both, acted in such manner then a civil penalty must also be assessed considering the appropriate criteria under section 110(i) of the Act.

Strating and Coleman, are first charged in Dockets No. CENT 90-147-M and CENT 90-148-M respectively with knowingly authorizing, ordering or carrying out the alleged violation of the corporate mine operator as charged in Citation No. 3278307. That citation reads in relevant part as follows:

Excessive hydraulic [sic] leaks due to chaffing [sic] high pressure, (2500 psi) lines in the engine compartment of the 275B Michigan front loader and the subsequent rupture of one of these lines caused the unit to explode in flames on December 14th, 1988. Flames rapidly engulfed the operator's cab due in part to missing protective panels. The operator jumped 7 1/2 feet to escape the flames breaking both ankles. The hydraulic [sic] leaks had been reported repeatedly on pre-shift inspection reports. This is an unwarrantable failure.

Since Section 110(c) of the Act predicates individual liability of a corporate agent or officer upon the finding of a violation of a mandatory health or safety standard by the corporate operator I am strictly limited in determining whether there indeed was individual liability under section 110(c) of the

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Act to evaluation of only the precise allegations in the citations themselves and not allegations or charges of other violations that may have been stated elsewhere in the petitions for civil penalty.

The essence of the charge in the citation is "excessive hydraulic [sic] leaks due to chaffing [sic] high pressure, (2500 psi) lines in the engine compartment of the 275B Michigan frontloader and the subsequent rupture of one of these lines causing the unit to explode in flames on December 14, 1988".

At hearings, however, the Secretary conceded that, despite thorough investigation of the explosion/fire on the cited loader, she was unable to determine the cause of the accident. Indeed she further conceded at trial that the one chafed hydraulic hose discovered after the fire was not in itself a safety defect for which the operator was chargeable--apparently because of its nearly inaccessible location on the loader. In light of these concessions it is clear that the Secretary has not proven the essential allegations in Citation No. 3278307. The charges herein against Strating and Coleman, based upon those allegations, must accordingly be vacated.

In any event even if the Secretary had proven the existence of the cited violation, there is insufficient evidence that either of the Respondents had the requisite knowledge of such conditions before the accident at issue. The Commission defined the term "knowingly," in *Kenny Richardson v. Secretary of Labor*, 3 FMSHRC 8 (1981), 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

"Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

While there is credible evidence that some management personnel including the victim's father, Billy Tucker, were apprised of some hydraulic oil leakage on almost a daily basis (and most certainly on December 12, 1988, two days before the

accident) there is no direct and insufficient circumstantial evidence that either Respondent herein was aware of uncorrected unsafe hydraulic oil leakage on the cited loader on the morning of the accident. While there is indeed credible evidence that both had been apprised from time-to-time of hydraulic oil leakage from the cited Michigan loader, the evidence does not show that they had been recently apprised of this problem or that previous efforts had not been made to correct this problem. Indeed even the loader operator himself acknowledged that the last and only time he reported such leakage directly to Mr. Strating was 1 or 2 months before the accident and to Mr. Coleman some 3 or 4 weeks before the accident. In addition, while the service person responsible for replacing the lost hydraulic oil, Fred VanWinkle, reported in a statement to investigators that he had complained to Carl (Strating) and Jinks (Coleman) about the so-called excessive leakage of hydraulic oil, the statement is ambiguous as to when VanWinkel complained specifically to the Respondents. (Footnote 2) VanWinkle also reported in that statement that the first line manager responsible for repairing the loader was Frank Bluemel, the mine superintendent.

The evidence also shows that the Michigan loader was frequently undergoing repairs to correct hydraulic oil leakage problems and was worked on as recently as the Saturday before the accident. It is also clear that it was in the economic self interest of the Respondents, because of the high cost of hydraulic oil, to remedy any excessive hydraulic oil leakage.

The service records in evidence (Exhibit S-10, reproduced herein as Appendix A) for the cited Michigan loader do not, moreover, support the Secretary's position that there was such excessive daily oil leakage and such an absence of repairs that the Respondents should have had knowledge of uncorrected leakage in close proximity to the time of the accident. Indeed, the records show that on the day of accident, December 14, no hydraulic oil was added before the loader was operated and that on the day before only five gallons was added. While ten gallons had been added on December 12, the records show that none was added over the four preceding days. Thus, according to the Secretary's own evidence the average daily consumption of hydraulic oil over that seven day period was only 2.1 gallons--well within the limits of expected normal consumption. Even if the loader had not been used over that preceding weekend, and therefore eliminating those two days from the calculations, the average consumption of hydraulic oil over the preceding week was only three gallons per day--still within the normal range of expected consumption. In addition, mechanic Mo Garcia testified credibly that he had repaired a hydraulic leak on the loader only the Saturday before the accident.

While several of the Secretary's witnesses also suggested that the consumption of hydraulic oil on the Michigan loader was about 25 gallons per day, the service records introduced by the Secretary (covering the period from November 2, 1988 to December 14, 1988) show that on only one day was as much as 25 gallons of hydraulic oil added to the cited Michigan loader--and that for the following two days none was added.

This documentary evidence is important for several reasons. One, it sheds doubt on the credibility of several of the Secretary's key witnesses and suggests that they may have been exaggerating the consumption of hydraulic oil on the Michigan loader, and, two, that the consumption over the week prior to the accident was within the accepted normal range for such equipment. Accordingly, it cannot reasonably be inferred that the Respondents herein should have been on notice of any significant hydraulic oil leakage around the time of the accident for the simple reason that the records produced by the Secretary show that indeed there was not significant consumption of such oil during that time. Thus I cannot find that the Secretary has, in any event, met her burden of proving that either Respondent Coleman or Strating "knowingly authorized, ordered, or carried out" the cited violation even assuming that there was a violation. Accordingly the charges that Strating and Coleman "knowingly authorized, ordered, or carried out" a violation as charged in Citation No. 3278307 must for this additional reason be vacated and dismissed.

In each of these cases (Dockets No. CENT 90-147-M and CENT 90-148-M) Mssrs. Strating and Coleman were also charged with having "knowingly authorized, ordered, or carried out" the violation of the corporate mine operator charged in Order No. 3063887. That Order, as modified, reads in pertinent part as follows:

Defects on the Hough 560 front end loader were not corrected prior to continued operation which were hazardous to persons. The equipment was taken out of service for repairs to be completed but put back into service prior to completion. Defects are: Leaks in Hydraulic system, leaks in bucket cylinder-right side, leak in steering cylinder, hydraulic tank leaking, oil filter leaking, fuel system leak, brake fluid storage tank both left and right rear wheel cylinders leaking, inspection plates missing, both left and right hoist cylinder pressure hoses rubbed threw [sic] to inside metal covering, fuel/stop linkage disabled which required operator to dismount loader, walk to opposite side of machine and manually cut off engine.

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The Secretary's evidence regarding these allegations against Strating and Coleman is again insufficient. Whether or not there was a violation as charged, the evidence does not show that either of the Respondents had any knowledge or reason to know that the cited loader was placed in service on January 5, 1989, after having been taken out of service and parked for repairs. Indeed the fact that the cited loader had been taken out of service in the first place shows recognition by someone that defects indeed needed correction. The credible evidence shows that the pit foreman, Billy Tucker, approached mine superintendent Frank Bluemel that day advising him that a "shovel" had broken down and that he needed the cited Hough loader. The credible record shows that, without consulting anyone, Bluemel authorized Tucker to use the cited loader. Under these circumstances the fact that both Respondents may have previously been aware of hydraulic oil leakage and other problems with the Hough loader is immaterial. The credible evidence shows that it was Bluemel alone, or Bluemel and Billy Tucker together, who authorized the use of the Hough loader. Therefore, whether or not there was a violation of the mandatory standard charged in Order No. 3063887, there is insufficient evidence that either Respondent Coleman or Strating, "knowingly authorized, ordered, or carried out" any such violation. The charges in the captioned cases relating thereto must accordingly be dismissed.

ORDER

Civil Penalty Proceedings Docket Nos. CENT 90-147-M and CENT 90-148-M are hereby dismissed.

Gary Melick
Administrative Law Judge

Footnotes start here:

1. Section 110(c) of the Act reads as follows:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d).

2. VanWinkle did not appear or testify at trial.

APPENDIX A

Date
and Day of Week

Gallons of Hydraulic Oil Added

	LR-5 Hough 560 Loader	(Z230) 175B Michigan Loader
W 12/14	15	0
T 12/13	5	5
M 12/12	0	10
S 12/11	20	0
Sa 12/10	0	0
F 12/9	20	0
Th 12/8	15	0
W 12/7	15	20
T 12/6	10	15
M 12/5	0	5
S 12/4	- no record -	- no record -
Sa 12/3	0	5
F 12/2	- no record -	- no record -
Th 12/1	- no record -	- no record -
W 11/30	- illegible -	- illegible -
T 11/29	10	0 ("OK")
M 11/28	20	7
S 11/27	- no record or illegible -	
Sa 11/26	- no record or illegible -	
F 11/25	- no record or illegible -	
Th 11/24	- no record or illegible -	
W 11/23	- no record or illegible -	
T 11/22	0	15
M 11/21	5	10
S 11/20	- no record -	- no record -
Sa 11/19	0	0
F 11/18	- illegible -	0
Th 11/17	10	25
W 11/16	15	- illegible -
T 11/15	10	0
M 11/14	- no record or illegible -	
S 11/13	- no record or illegible -	
Sa 11/12	- illegible -	- illegible -
F 11/11	20	0
Th 11/10	- illegible -	- illegible -
W 11/9	- illegible -	- illegible -
T 11/8	7	0 ("OK")
M 11/7	- no record or illegible -	
S 11/6	- no record or illegible -	
Sa 11/5	- no record or illegible -	
F 11/4	5	20
Th 11/3	- illegible -	- illegible
W 11/2	- illegible -	10