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SOL (MSHA) v. SUMMIT CO.  
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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

v.

SUMMIT INCORPORATED,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 90-112-M  
A.C. No. 39-01363-05502 X52

Docket No. CENT 91-49-M  
A.C. No. 39-01363-00503 X52

Richmond Hill Mine

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
John J. Delaney, Esq., DELANEY, BANKS, JOHNSON,  
JOHNSON, COLBATH & HUFFMAN, Rapid City, South  
Dakota,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of Mine Safety and Health Administration (MSHA), charges Respondent Summit, Incorporated ("Summit"), with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (the "Act").

A hearing on the merits was held in Rapid City, South Dakota, on May 29, 1991. The parties filed post-trial briefs.

STIPULATION

At the hearing the parties stipulated as follows:

1. Summit is engaged in the mining of gold, lode, and placer, in the United States, and its mining operations affect interstate commerce.

2. Summit is an operator at the Richmond Hill Mine, MSHA I.D. No. 39-01363-X52.

3. Summit is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

4. The Administrative Law Judge has jurisdiction in this matter.

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5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect Respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

10. The operator is a medium-sized operator with 144,452 hours worked in 1990.

In CENT 91-49-M Summit is charged with violating 30 C.F.R. 56.11002. (Footnote 1)

Citation No. 3452409 reads as follows:

The walkway along the right side of the Keohring back-hoe with a rock knocker attached on it was not equiped [sic] with handrails or midrails to eliminate a person from falling off walkway and being injured. The walkway was approximately 4 1/2 feet up off the ground. Person uses walkway for maintenance and repair, which is probably not often. The Koehring back-hoe was located at the ore stockpile at the crushing area.

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GUY CARSTEN, an MSHA inspector experienced in mining, inspected the Richmond Hill Mine where Summit was performing work. (Tr. 10-12). The inspection took place on March 8, 1990. The inspector observed that the walkway on the right side of the backhoe lacked a handrail and a midrail. The walkway was approximately 18 inches wide and about 12 feet long. It was about 4.5 feet above the ground. (Tr. 13-14). (See Exs. R-1, R-2, and R-3 showing backhoe with rail installed.)

Inspector Carsten considered the walkway to be a travelway because a fire extinguisher was located about halfway to the cab. In addition, maintenance and pre-inspection workers use the walkway to check the engine (Tr. 14). Summit's representative Mr. Ross told the inspector that workers travel the area approximately twice a week. (Tr. 14).

The cab was located on the front part of the backhoe. You can step out of the cab onto the walkway and walk down the walkway to the motor compartment. (Tr. 15).

There were no handrails or midrails on the outside edge. (Tr. 15). The inspector considers this condition to constitute a violation of Section 56.11002 since the standard requires handrails on the outside edge of an elevated walkway. (Tr. 17). Inspector Carsten has cited other operators under Subpart J.

In a CAV inspection, the operator (not Summit) was required to change the original structure of the machine. (Tr. 18).

The inspector did not consider this to be an S&S violation because the walkway was seldom used. (Tr. 19).

MSHA inspectors are required to write a citation if they observe a violation. The hazard involved any worker who might fall off a walkway and be injured. (Tr. 20).

The operator abated the citation by placing handrails, as well as midrails, on the walkway.

The South Dakota Cement Plant and Pete Lien & Company have similar equipment (backhoes) equipped with handrails and guardrails. (Tr. 24).

The inspector did not have an MSHA policy memorandum stating the side of a backhoe constitutes a travelway. (Tr. 29, 30).

In the inspector's opinion, a walkway is regularly used if it is used once weekly or monthly. (Tr. 31). If it is used once a year, that would be sufficient to make the passageway "regularly used." (Tr. 31).

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Whoever starts the backhoe should pre-inspect it. The person doing such inspections must walk down the passageway. If no person ever uses the walkway, then it is not a travelway. (Tr. 32, 33).

The handrails, as presently located, prevent the engine compartment doors from opening fully. The doors could either be put on a slide or be hinged on each side. (Tr. 37).

The inspector did not know if this equipment had been previously cited. (Tr. 41).

CHUCK ROUNDS, testifying for Summit, advised MSHA in a letter that the walkway was used a couple of times a week. (Tr. 43). A worker boosts himself to a standing position on the platform by using a grab rail on the back corner of the machine. (Tr. 44). The mechanics usually visually check components of the machine. (Tr. 45).

The operator of the machine does not do any maintenance work on it. The operator does his walk-around inspection on the ground before he climbs on the machine. (Tr. 46).

Before this citation was received, no one suggested that handrails were required. (Tr. 47, 48). MSHA inspections occur twice a year. (Tr. 48).

The company is challenging the citation because extending the rails would modify the swing radius of the backhoe. Also, handrails can be knocked off while the equipment is being operated.

Supervisory employees, both mechanical and production, would see this equipment on a daily basis. The platform, located 54 inches off the ground, is wide enough to accommodate a worker traveling between the cab and the engine. (Tr. 52).

GUY CARSTEN, recalled, testified that Summit was the first operator cited "in recent history." (Tr. 55).

JOHN ROSS, safety director for Summit, indicated the company had never been previously cited for this condition.

The machines have platforms along the side and are inspected by MSHA twice a year. (Tr. 56). The company was never previously cited for this condition.

The backhoe operator has no duties that require him to travel to the rear of the machine. (Tr. 57). The maintenance

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people check the oil, fuel, and do such repairs as are necessary; maintenance is done from the counterweight; and the side door is used to remove interior parts. (Tr. 58). The operator does his walk-around from the ground. (Tr. 59).

Mr. Ross agreed that he told the inspector that the maintenance people travel that area. If a pump goes out, it would have to be replaced. (Tr. 60).

MARTY DELP, equipment manager for Summit, worked for CATERPILLAR dealers for 23 years. He is familiar with backhoes of similar size and nature as the one involved here.

In the industry, backhoes of this size have a platform along the side. They have no guardrails. In his 23 years, Mr. Delp was never aware of being cited for such a travelway lacking a guardrail. (Tr. 62, 63).

Mr. Delp's department is responsible for maintenance which includes daily maintenance and repairs. The equipment operators have no maintenance responsibilities for this equipment. On very rare occasions, a backhoe operator will start the machinery.

The backhoes are operated two to three times per week. (Tr. 63, 64). A maintenance person would cross the track onto the platform, come back to the counterweight, open the rear doors, and check the engine oil and the radiator. (Tr. 64). He would then climb down, go up to the cab, and start the machine. (Tr. 65). He would go in through the side door when there was a radiator or a heating problem. A visual inspection is made through the door to check for radiator leaks. (Tr. 65).

The platform on the side of the backhoe, to the witness's knowledge, was not used as a walkway by the maintenance workers. (Tr. 66).

If the radiator must be removed, it would be necessary to unbolt the handrail, which is held by three bolts. The handrail has restricted access to the back of the counterweight and to the grab rail. (Tr. 67).

The company has other backhoes without guards. They have not been cited for such equipment. (Tr. 68, 69).

Exhibits R-4, R-5, R-6, and R-7 show similar equipment, which also lack handrails. (Tr. 71).

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DARRYL GALT has been the Operations Manager for Butler Machinery Company in Rapid City since March 1989. Butler machinery is the authorized dealer for hydraulic excavators, including CATERPILLAR. (Tr. 78).

In contacting major mining companies, the CATERPILLAR company, other manufacturers, and competitors, it was established that any backhoes manufactured in the 50,000-pound class and above come equipped with platforms on the service access areas. (Tr. 80-82). Such suppliers are expected to build equipment complying with applicable safety regulations. There are no guardrails on any of Summit's other equipment nor have they been cited by MSHA. (Tr. 84, 85).

All of the CATERPILLAR equipment is manufactured in accordance with the SAE 185 Safety Standards. (Tr. 85). The backhoe falls under Subpart M which makes it a mobile machine and, as a result, guardrails are not required. (Tr. 85). The SAE standards are developed by the Society of Automotive Engineers. (Tr. 85). The existing SAE standards do not have any requirements for guardrails. The SAE regulations come up for modification every five years. (Tr. 86).

The witness identified two exhibits (R-8, R-9), showing two pieces of equipment with access platforms but without guardrails. (Tr. 87).

Mr. Galt described a handrail or handgrab as something taken a hold of to help lift yourself onto a machine. On the other hand, a guardrail is to prevent an individual from falling over an open side. (Tr. 89, 90).

The rotating structure of these backhoes continually moves in a 360 swing. If the machine is made longer or wider, its capability to operate in confined spaces is limited. (Tr. 91, 92).

#### DISCUSSION

The initial issue presented here is whether the facts establish a violation of Section 56.11002.

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The mandatory regulation requires, in its relevant part, that "elevated walkways" shall "be provided with handrails."

This regulation is contained in Part 56 of 30 C.F.R. which regulates surface metal and non-metal mines.

While the term "travelway" is defined in Sections 56.2 and 56.3000, there is no definition of what constitutes a "walkway." It is accordingly proper to construe "walkway" in its ordinary meaning. Webster defines a walkway as "a passage for walking." (Footnote 3 The definition of a "walkway" appears less broad than that of "travelway.")

In the factual scenario presented here, maintenance workers use the walkway to check the motor as well as the radiator. According to Witness Ross, people "travel that area approximately twice a week." (Tr. 14). The walkway is a means of traveling to the motor compartment of each of the backhoes. Further, whoever pre-inspects the equipment would have to travel on the walkway to check the fire extinguisher located near the compartment door. (Tr. 32).

Section 56.11002 is not detailed but rather is the type made "simple and brief in order to be broadly adaptable to myriad circumstances." See, *Kerr McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 5 FMSHRC 2128, 2130 (December 1982). Nevertheless, such a broad standard must afford reasonable notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). The safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); see also, *Phelps Dodge v. FMSHRC*, 682 F.2d 1189, 1192 (9th Cir. 1982).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this test as "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



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the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). "In order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.*, quoting *Alabama By-Products Corp.*, 4 FMSHRC at 2129.

In the instant case there is no evidence of the weight of this backhoe but industry standards require guardrails if the weight of the equipment exceeds 50,000 pounds. This would indicate that a reasonably prudent person would have recognized that handrails were required on its backhoes by Section 56.1102.

The initial issue presented here is whether the facts establish a violation of Section 56.11002.

The regular activities by maintenance workers using the platform establish the platform of the service access area is a walkway. Compare *Homestake Mining Company*, 4 FMSHRC 146 (1982); *Hanna Mining Co.*, 3 FMSHRC 2045 (1981).

Since the platform was about 4.5 feet off the ground, it was elevated. Compare: *United Cement Company*, 2 FMSHRC 133 (1980) (*Cook, J*) (Platform 30 inches above ground without handrails; held to be a violation of 30 C.F.R. 56.11).

It is uncontroverted that the platform lacked guards.

Summit argues the section cited does not apply to backhoes. Specifically, the operator argues that read in its entirety the Subpart is clearly designed for general application to protect workers as they move from place to place. Further, Summit contends the platform is not a travelway.

I conclude the cited section encompasses elevated walkways found on mobile equipment as well as in other locations. Subpart J of Part 56, entitled "Travelways" is a general section relating to travelways found in surface metal and/or non-metal mines. There is no language in Subpart J removing mobile equipment from the application of Section 56.1102. It is true that Subpart M is entitled "Machinery and Equipment." However, there is no language in Subpart M stating that mobile equipment is not covered by Subpart J as well.

A broad interpretation of Section 56.11002 to include elevated walkways on mobile equipment is warranted and consistent with the intent of Part 56. See *Ideal Cement Company*, *supra*.

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This section should not be interpreted narrowly so as to derogate from the safety of miners by removing all mobile equipment from the Subpart J requirements. If an elevated walkway found at a crusher is considered unsafe without handrails, then the elevated walkway found on a piece of mobile equipment is likewise unsafe.

Clearly MSHA knows how to remove equipment from the coverage of a regulation. For example, see Section 56.11025, provides as follows:

Fixed ladders, except on mobile equipment, shall be offset and have substantial railed landings at least every . . . .

It is apparent, as stated by the inspector, that Summit is the only operator cited for this condition "in recent history." However, since the facts establish a violation of the regulation, the citation should be affirmed.

Respondent also asserts, for various reasons, that the plat-form on the backhoe as a "travelway."

As previously noted, Section 56.11002 addresses "elevated walkways." "Travelways," which are otherwise defined, are not involved in this case.

In CENT 91-49-M, the citation should be affirmed.

In CENT 90-112-M, the parties submitted a written settlement motion to settle one citation for \$54, the amount of the penalty originally assessed. Petitioner further modified the citation to indicate the violation was non-S&S.

In support of their settlement motion, the parties have further submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

CIVIL PENALTY

It is necessary to assess a civil penalty for the violation of Citation no. 3452409.

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

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The operator's previous history is very favorable since it was cited for only one violation in the two years prior to March 7, 1990. It had no violations before March 8, 1988.

The operator is medium-sized and the proposed penalty will not affect the company's ability to continue in business. (Stipulation).

The operator was negligent since the lack of guardrails was an open and obvious condition. The gravity was low since the platform was only 4.5 feet off the ground. The operator abated the violation and is entitled to statutory good faith.

I believe that the proposed penalty of \$20 is appropriate. Accordingly, I enter the following:

ORDER

In CENT 91-49-M:

1. Citation No. 3452409 and the proposed penalty of \$20 are AFFIRMED.

In CENT 90-112-M:

2. The settlement agreement is APPROVED.

3. Citation No. 3452408 and the proposed penalty are AFFIRMED.

4. Respondent, if it has not already done so, is ORDERED TO PAY \$54 to the Secretary of Labor within 40 days of the date of this decision for the settlement in CENT 90-112-M.

John J. Morris  
Administrative Law Judge

Footnots start here:-

1. The cited regulation provides as follows:

56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

2. A hydraulic excavator is the same as a backhoe such as involved here. (Tr. 79).

3. Webster, New Collegiate Dictionary, 1979, at 1307.