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SOL (MSHA) V. CARROLL FRANK BLUEMEL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 90-146-M A. C. No. 41-02976-05526-A
v.	Helotes Mine
CARROLL FRANK BLUEMEL, EMPLOYED BY SOUTH TEXAS AGGREGATES, INCORPORATED, RESPONDENT	

DECISION

Appearances: J. Philip Smith, Esq., Arlington,
VA, for Petitioner;
Mr. Carl Strating, San Antonio, TX,
for Respondent.

Before: Judge Fauver

This is a petition for a civil penalty under 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., charging Carroll Frank Bluemel, as an agent of a corporate mine operator, with knowingly authorizing, ordering or carrying out a violation by the mine operator.1

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact

and further findings in the Discussion below:

FINDINGS OF FACT

1. South Texas Aggregates, Inc., a corporation, operates an open pit mine, known as Helotes Mine, where it produces limestone for use and sales substantially affecting interstate commerce. December, 1988, Fire

2. On December 14, 1988, Gary Tucker drove a 275 B Michigan front loader to the South Pit to load haulage trucks. On one load, as he started to hoist the bucket, he noticed a bright glow reflecting in his windshield and heard a swooshing sound. He turned and saw flames erupting from the engine compartment. He opened the left door of the operator's compartment, but flames immediately enveloped the doorway. He shut the door and tried the right door. There were flames on the right side, too, but he pushed the door open and started to exit. As he was trying to get out, the door swung back and struck him, but he grabbed the handrail, pushed himself out and jumped about 7 1/2 feet to the rocky floor of the quarry. He broke both ankles, and lay near the flaming vehicle, unable to escape farther. Someone saw his predicament, and helped him get away from the fire and a possible fuel tank explosion.

3. The fire damage was so extensive that the MSHA accident investigators could not determine the precise cause of the fire, "except that there was an unplanned release of hydraulic oil in the engine compartment due to damaged and leaking hydraulic lines" (Exhibit G-8).

4. On December 20, 1988, MSHA issued Citation No. 3278307, charging South Texas Aggregates, Inc., with a violation of 30 C.F.R. 56.14100(c),2 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 feed to escape the flames breaking both ankles. The hydraulic [sic] leaks had been reported repeatedly on preshift inspection reports. This is an unwarrantable failure.

5. The citation was served on Respondent, Frank Bluemel, as mine superintendent.

Inspection on January 5, 1989

6. MSHA Inspector James S. Smiser inspected the mine on January 5, 1989, and found safety defects in a Hough 560 front-end loader, which was operating in the pit. He issued 104(d)(1) Order No. 3063887, charging a violation of 30 C.F.R. 56.1400(c). The order, as modified, alleges the following condition:

> 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.

7. Shortly after the fire on December 14, 1988, Respondent Bluemel had taken the Hough 560 out of service to have extensive repairs made, including the brakes, back-up alarm, fuel-linkage stopping mechanism, and hydraulic lines.

8. As of January 5, 1989, some of the repairs had been made, but repair work was far from complete. On that date, pit foreman Billy Tucker told Respondent Bluemel that the "shovel" operating in the pit had broken down, and asked for permission to use the Hough 560 loader while the shovel was being repaired. Bluemel asked Tucker whether the brakes and back-up alarm had been repaired, and Tucker said, "Yes." Bluemel authorized him to use the Hough loader. At that time, the loader was still in the repair shop, and Bluemel knew or had reason to know that the fuel-linkage stopping

mechanism was not working and the machine had a number of hydraulic leaks.

9. Before he authorized Tucker to use the Hough 560 loader, Bluemel did not ask the mechanic or anyone else to troubleshoot the machine to be sure that necessary repairs had been made on the fuel-linkage stopping mechanism and the hydraulic system.

10. Citation No. 3278307 and Order No. 3063887 were the bases of 110(c) charges against corporate officers in Secretary of Labor v. Strating and Coleman, 13 FMSHRC 425,430(1991). Judge Melick dismissed the charges for insufficient proof.

DISCUSSION WITH FURTHER FINDINGS

The Commission has defined the term "knowingly," as used in 110(c) of the Act, 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. [Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U. S. 928 (1983).]

Inspector Smiser testified that he alleged oil "leaks" in Order No. 3063887, rather than hazardous "accumulations," because he observed fresh pools of oil in locations where oil would not be expected unless there was a leak. On this basis, he testified that the oil he observed on the bucket cylinder, the steering cylinder, the oil filter, and the rear wheel cylinders was due to leaks and not to possible spillage in filling tanks. He acknowledged that the oil he observed on the hydraulic oil tank and the petroleum fluid he observed on the brake fluid storage tank may have been due to spillage in filling the tanks. He observed diesel fuel dripping from the rear of the equipment, but acknowledged that, since a source of a fuel leak could not be found after issuance of his

order, the dripping fuel may have been due to normal overflow after filling the fuel tank.

Oil leaks presented two main hazards. First, they indicated a risk of leaks that could turn into sprays of misting oil which could be ignited into a fire. Secondly, they created accumulations sufficient to propagate a fire or noxious smoke. Substantial accumulations of petroleum fluids, e. g., lubrication oil, hydraulic oil, brake fluid and transmission fluid, sufficient to propagate a fire or noxious smoke are hazardous conditions within the meaning of 56.14100(c).

I credit the inspector's testimony, and find that there were a number of hazardous hydraulic leaks that required repair before the machine could be operated under 56.14100(c).

The defect in the fuel-linkage stopping mechanism was itself a safety hazard that required repair before the machine could be operated under 56.14100(c). This device, known as a "kill switch," is in the operator's compartment and is used to stop the engine in an emergency. This could save the operator's life or prevent crippling burns or injury from fire or smoke inhalation. For example, if a hydraulic line ruptured, and ignited into fire, unless the "kill switch" was used, the engine would keep pumping hydraulic oil to feed the fire, and the external fan would keep blowing across the engine, to intensify the fire into a likely inferno threatening the operator's life, including the possibility of a fuel tank explosion. Bluemel knew that the "kill switch" was defective when he authorized Tucker to use the Hough loader.

I find that Respondent knowingly authorized the violation of 56.14100(c) alleged in Order No. 3063887

The violation was due to aggravated conduct beyond ordinary negligence because Bluemel had been put on notice of the danger of hydraulic leaks and the importance of an operable "kill switch." It was therefore an unwarrantable violation. The violation presented a "significant and substantial" risk of igniting or propagating a hydraulic oil fire with serious injury to the equipment operator. It was therefore an S&S violation within the meaning of 104(d)(1) of the Act.

Considering the civil penalty assessments previously assessed against the corporation ($700) and the pit foreman, Billy Tucker ($400), for their part in the violation alleged in Order No. 3063887, and the criteria for a civil penalty in 110(i) of the Act, I find that a civil penalty of $500 is appropriate for the violation found in this case.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent, Carroll Frank Bluemel, knowingly authorized the violation of 30 C.F.R. 56.14100(c) alleged in Order No. 3063887.

ORDER

Respondent, Carroll Frank Bluemel, shall pay to the Secretary of Labor a civil penalty of $500 within 30 days of the date of this decision.

William Fauver
Administrative Law Judge

FOOTNOTES START HERE

1. Section 110(c) of the Act provides:

> 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 subsections (a) and (d).

2. Section 56.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.