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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. WEST 90-284-M
A.C. No. 04-04602-05527 A

v.

Docket No. WEST 90-326-M
A.C. No. 04-04602-05539 A

L. KENNETH TEEL, PRESIDENT OF
CALIFORNIA LIGHTWEIGHT
PUMICE, INC.,
RESPONDENT

Docket No. WEST 90-356-M
A.C. No. 04-04602-05536-A

Battle Mountain Mine

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

CIVIL PENALTY PROCEEDING
Docket No. WEST 90-325-M
A.C. No. 04-04602-05526 A

v.

Battle Mountain Mine

GEORGE W. WEINBECK, EMPLOYED
BY CALIFORNIA LIGHTWEIGHT
PUMICE, INC.,
RESPONDENT

DECISION

Appearances: J. Phillip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, VA,
for Petitioner;
L. Kenneth Teel, Pro Se,
for Respondent - Teel.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") alleges Respondents, as employees of California Lightweight Pumice, Inc. ("CLP") violated Section 110(c) of the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq. the ("Act").

A hearing on the merits was held in San Bernardino, California, on October 30, 1991.

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The parties waived closing arguments and the filing of post trial briefs.

Threshold Issues

Prior to the hearing, CLP filed a notice of its filing of a petition under Chapter 11 of the Bankruptcy Code, Title 11, U.S.C. The corporation asserts that under 11 U.S.C. 362, it is entitled to an automatic stay of the instant cases.

As a threshold matter, the motion of CLP for a stay is without merit. CLP is not a party to these cases. The Secretary is proceeding under Section 110(c) of the Act against L. Kenneth Teel as an employee and President of CPL. Further, the Secretary is proceeding against George W. Weinbeck as Production Manager and Supervisor of CPL.

Section 110(c), 30 U.S.C. 820(c) of the Act provides as follows:

(c) 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).

In addition, Section 362(b) of the Bankruptcy Code specifically provides this exception:

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay-
(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

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If CLP had been a party herein, an automatic stay would not have been appropriate since CLP would be within the above exception. *Shippers Interstate Service, Inc. v. National Labor Relations Board*, 618 F.2d 9, (7th Cir. 1980), *Heiney v. Lion Coal Co.*, 4 FMSHRC 572, 574-575 (1982).

A further threshold issue is the proof required in a case arising under Section 110(c) of the Act.

In construing this section, the Commission has stated that the word "knowingly" as used in this portion of 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 knowingly or having reason to know. A person has reason to know when he has such information that would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. *United States v. Sweet Briar, Inc.*, 92 F. Supp. 777, 779 (D.S.C. 1950, quoted approvingly in *Secretary v. Kenny Richardson*, 3 FMSHRC 8 (1981), affirmed, *Richardson v. Secretary of Labor and FMSHRC*, 689 F. 2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

It is accordingly appropriate to analyze the evidence as it relates to whether the individuals herein "knowingly" violated the regulations.

A further predicate for an agent's liability under section 110(c) is a finding that the corporate operator violated the Act. *Kenny Richardson*, supra, 3 FMSHRC at 9.

A final threshold issue, raised by Respondent Teel, is whether these cases should be dismissed because of "double jeopardy". Specifically, Mr. Teel argues the company paid almost \$20,000 in fines and the Secretary should not be permitted to proceed against employees.

I reject Respondent's arguments. In a civil proceeding such as involved here Congress can fashion such remedies it deems necessary and they need only be rationally related to a legitimate governmental interest. *Richardson*, supra, 689 F.2d at 633. Further, double jeopardy (Fifth Amendment) relates to criminal trials. It is not involved in these cases.

In this case, Citation No. 3069893 alleges L. Kenneth Teel violated 30 C.F.R. 56.11001.1

The citation reads as follows:

Safe access was not provided into the parts trailer in that the company was using a pallet for stairs into the trailer. The unsafe access was being used by employees on a daily bases (sic). Management was aware that this condition existed. Photo number 11 shows the violation and the hazard.

ARLE W. BROWN, an MSHA inspector for 16 years, identified the legal identity report submitted by CLP to MSHA (Tr. 19-21; Ex. P-1). The report indicates Kenneth Teel is president of CLP and George Eugene Weinbeck is a supervisor. (Tr. 21).

The Company produces a lightweight aggregate used in building materials. It eventually enters interstate commerce. (Tr. 22).

Mr. Brown issued Citation No. 3069893 under section 104(b)(2) of the Act and served it on Gale Ashley, CPL's manager. (Tr. 23).

During the regular inspection, Mr. Brown went into the back part of the mine where the company stored parts and time cards. Instead of a stairway, they used a leaning unsecured 4 foot X 4 foot pallet to provide access to the trailer. The trailer was a working place as time cards were stored there. (Tr. 24, 26; Ex. P-4). CLP abated the violation by constructing a regular stairway. (Tr. 26). Someone might stumble on the pallet and break an ankle. (Tr. 28). From talking to people, the inspector learned Mr. Teel knew the trailer was there. In addition, Mr. Teel had used the pallet himself to climb into the trailer.

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The inspector did not know who owned the storage trailer. (Tr. 28). He further agreed he didn't see any employee enter, leave or punch a timecard in the trailer. (Tr. 29).

L. KENNETH TEEL, President of CLP, testified. He indicated the trailer was used to store filters and parts. Further, the van was owned by Capistrano Bulk Transport. In addition, only the production manager and Mr. Teel had keys and access to the trailer.

In Mr. Teel's opinion, the use of the pallet to provide access was not unsafe. The trailer was not used to house time cards. (Tr. 31-34). Mr. Teel agreed that he personally had used the parts trailer many times. The company paid a civil penalty in this matter. (Tr. 33).

Discussion

The safe access regulation, 56.11001, has been previously construed to the effect that each means of access to a working place must be safe. The Hanna Mining Company, 3 FMSHRC 2045, 2046 (1981); Homestake Mining Company, 4 FMSHRC 146, 151 (1982).

It is apparent that an unsupported pallet leaning against a trailer for support is not safe. (See photograph Ex. P-4). It is further uncontroverted that both Messrs. Teel and Ashley had access to the trailer.

The evidence establishes that Respondent Teel violated this regulation. Further, Mr. Teel, CPL's president, knew of the violative condition since he used the pallet to enter the trailer.

Accordingly, Citation 3069893 should be affirmed and a civil penalty assessed.

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Docket No. WEST 90-284-M

In this case, Citation No. 3463959 alleges L. Kenneth Teel violated 30 C.F.R. 56.3131.2

The order reads as follows:

The pit wall perimeter had loose and unconsolidated material and rocks that had not been stripped back for a distance of 10 feet nor was it sloped to the angle of repose. Several rocks were directly above a haulage road. (The rocks were about 2 feet in diameter). This is an active pit exposing employees to the hazards of falling rocks and material. The pit wall is about 50 feet high.

ARTHUR L. ELLIS, a MSHA inspector experienced in mining, issued Order No. 3463959 under Section 104(a) and 107(a) of the Mine Act. (Tr. 37, 38).

When the inspector arrived at the mine site, a loader was across the road. A sign stated the mine had been closed. After a short time, George Weinbeck arrived and explained that the BLM3 had closed down the mine. Mr. Ellis advised Gene Ashley that he desired to make a regular inspection. (Tr. 39). Ashley explained they had been working until the afternoon of the day before. At that time BLM had closed it down and locked the gates.

Mr. Ashley stated he would accompany the inspector but he left and did not return. Mr. Ellis again attempted to make his

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inspection and his supervisor advised him to obtain a key from BLM and proceed with the inspection. (Tr. 40, 41).

Mr. Ellis observed the pit and the plant. He issued a 104(a) and a 107(a) order to be sure that no one would work the pit until the hazard was corrected. (Tr. 41). Mr. Ellis talked to Mr. Teel who told him he was aware of the rocks and it would take 5 to 10 minutes to remove them. Mr. Teel also told him to mail the company his enforcement documents. (Tr. 42). The pit wall was about 50 feet high. (Tr. 43). Mr. Ellis issued a termination order on July 6, 1989. The rock and loose material had been removed about 10 feet around the perimeter of the pit walls. (Tr. 44).

Mr. Ellis agreed Mr. Teel was at the office in Capistrano Beach when he talked to him by telephone. (Tr. 45, 46).

L. KENNETH TEEL testified the material in this particular pit was wet and fine. The entire surrounding pit and high wall area was unstable. (Tr. 46, 47). The company had terraced back but the native soil was unstable. He indicated the soil was like "hour-glass." It was a daily thing to attempt to remove and keep the benched area clean. Once a dozer was up there, the rocks would continue to fall down. According to Mr. Teel, when the citation was issued, Mr. Ellis saw some large rocks but an equipment operator in an enclosed cab could not have been injured. (Tr. 47, 48). Mr. Teel did not feel this was an unsafe condition. Further, it was something that was corrected on a daily basis. (Tr. 47). The miners do not have to get out of their trucks when they enter the pit. (Tr. 49). Mr. Teel testified he was only aware of the condition after the citation was issued. Mr. Teel's office is in Orange County and the mine site is in Ingo County (California). According to Mr. Teel it is 200 miles from the mine site to his office in Orange County. He vaguely remembered talking to Mr. Ellis by telephone.

CLP was closed down by BLM because they had not met all the terms of their mining and reclamation plan. (Tr. 50). Mr. Teel indicated the haul truck drivers would normally drive in a circle around the pit and position their trucks to drive forward out of the pit. (Tr. 5).

ARTHUR L. ELLIS (recalled) indicated the company had been working the afternoon before the inspection.

The inspector felt the situation had to be corrected before anyone traveled under the highwall along the highway. A boulder

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could come down and crash through one of the trucks. The hazard here was caused by rocks and unconsolidated material falling on the workers. (Tr. 53). Mr. Ellis had seen a loader operator mingling or walking around underneath the pit area. (Tr. 54). Mr. Ellis agreed this was the only time he had seen an unsafe condition in this pit. However, he had written citations for the same thing at a different pit in this mine. (Tr. 56). When Mr. Ellis talked by telephone with CPL's President, Mr. Teel, he indicated very clearly that he was aware of the condition that had been cited.

After BLM closed the mine, it remained closed when Mr. Ellis issued his termination order. At that time, Mr. Ellis did not observe any employees. However, he saw a loader and a haul truck in the pit area but not in the pit itself. (Tr. 57, 58).

In Mr. Ellis' opinion, the described condition had existed for several days and they would have been working while this condition existed. (Tr 58, 59). Gale Ashley and George Weinbeck said they had worked the pit the previous afternoon. (Tr. 60).

Discussion

The regulation, 56.3131, requires, in effect, that in places where persons work or travel, loose material shall be sloped to the angle of repose or stripped back 10 feet from the top of the pit or quarry wall.

Mr. Teel states he was in his office some 200 miles from the pit and, therefore, did not know of the condition described by Mr. Ellis. I reject Mr. Teel's asserted lack of knowledge of the hazardous condition. Mr. Teel agrees Mr. Ellis saw "a couple of large rocks." Mr. Ellis when recalled as a witness described the hazard as the falling of rocks and loose unconsolidated material on workers below. Further, he stated it would be very possible for these boulders to come down and crash through one of the trucks. (Tr. 53). I further reject Mr. Teel's testimony since he himself describes this pit and high wall as being more or less in a continuing state of flux. He described it as "wet," "awfully fine," "unstable," "hour-glass sand." (Tr. 47). In short, the record establishes that the violation 56.3131 was "knowingly" authorized by Mr. Teel.

The mine was closed before the 107(a) order was issued. However, Mr. Ellis issued the 107(a) order in order to be sure no one would work in the pit until the hazard was corrected. (Tr. 41). His actions properly addressed the hazardous conditions.

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WEST 90-356-M

In this case, Citation No. 3463076 alleges L. Kenneth Teel, an employee of CPL, violated 30 C.F.R. 56.32004

The citation, issued under 104(a) and 107(a) of the Act, provides as follows:

A hazardous condition has developed in the Phase I pit in that a bench failure has created an approximate 80' highwall with loose unconsolidated material along the face. Additionally numerous large boulders were along the outer edge of the crestline. Employees were working and traveling near the bottom of the highwall.

RODRIC M. BRELAND, a MSHA Assistant District Manager, is experienced in mine safety.

On August 28, 1989, Mr. Breland issued a 107(a) imminent danger order alleging a violation of 30 C.F.R. 56.3200. The order, served on Gene Ashley, alleges a bench failure existed on an 80-foot high wall. There was loose unconsolidated material along the face. Also, numerous large boulders were along the outer edge of the crestline. Employees were working and traveling near the bottom of the high wall. (Tr. 61-63).

On August 28, Mr. Breland received a call from BLM representatives. They were concerned about hazardous activity at the site. They were particularly concerned about equipment and material going over the edge. MSHA has a history of problems at this operation with the maintenance of high walls. (Tr. 64).

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The order described this as a Phase I pit, which is the same one described by Mr. Ellis in his previous testimony.

Mr. Breland was 250 miles from the pit and in a telephone call Mr. Ashley acknowledged that the conditions existed. Namely, they were working on a high wall 80 to 100 feet high. Also, there was equipment above and below the high wall. (Tr. 65). Mr. Breland then issued a 107(a) order over the telephone and drove to the site, arriving the morning of August 29.

When Mr. Breland arrived, he found a good-looking face in the pumice area but the alluvium above it was very "sandy like." (Tr. 66-67). The material had sloughed in several areas to the edge of the pumice wall. Also there were large unconsolidated boulders all along the face. You could see where a loader had been operated directly beneath it. You could also see where a cat had worked that area on the edge of the upper part of the wall. (Tr. 67, Ex. P-8, P-9).

It is not uncommon for operators to get out of their vehicles.

The boulders, by their size, could do substantial damage to a piece of equipment below or a fatality could result if a boulder struck a miner. (Tr. 70).

A termination order was issued on August 20, 1989. The pit had been benched down from the top and no hazard existed at that time. (Tr. 71, Ex. P-10).

Mr. Breland was sure that Mr. Teel was aware of the condition. There had probably been at least three violations of the same standard. MSHA's Denver Tech Support had looked at the property and made some recommendations.

The company was advised that benches were required.

In Mr. Breland's opinion, a condition of imminent danger with a high degree of negligence existed. There was also aggravated conduct. (Tr. 72).

The order was not terminated until August 20, 1991, two years later, because it took that long to establish a bench face that was safe. (Tr. 80).

L. KENNETH TEEL indicated that nearly every day they clean off the bench areas with a dozer. Later the loader operator

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would come in at the bottom of the pit and remove any of the material that had fallen into it. At that point the pumice would be removed. (Tr. 83).

In Mr. Teel's opinion, the pit was not in an unsafe condition. (Tr. 84). This pit was the only one approved for mining at the time.

The company paid a civil penalty for this violation. (Tr. 84).

Mr. Teel became aware of the condition of this pit when Mr. Ellis issued his citation.

In Mr. Teel's view, the inspections by MSHA and BLM came about because of an argument in Bankruptcy Court over CPL's mineral lease. (Tr. 86). Further, the pumice is stable once the overburden is removed. (Tr. 87). The loose unconsolidated material in Phase I pit was caused by earthquake faults. The bench failure was caused by nature.

RODRIC BRELAND (recalled) the bench in this particular high/wall had not been properly constructed. The angle of repose discussed by Mr. Teel had nothing to do with the sandy material. (Tr. 87).

Discussion

The hazardous condition described by Mr. Breland is virtually uncontroverted. Workers were exposed to the described hazardous conditions.

Mr. Teel testified he knew of the condition of the Phase I pit when Mr. Ellis issued his order in the prior case. The evidence shows the order by Mr. Ellis was issued July 6, 1989. (Ex. P-5). The order by Mr. Breland was issued more than a month later on August 28, 1989.

The foregoing evidence establishes Mr. Teel "knowingly" authorized the violation.

Citation No. 3463076 should be affirmed and a penalty assessed.

This citation, issued under Section 104(d)(2) of the Act, alleged a violation of 30 C.F.R. 56.3130.5

The citation reads as follows:

The pit walls were not being mined in a manner to maintain the walls and bench stability. The walls were about 80 to 100 feet high with no benches except at the crest line. The bench at the crest line on the east wall had sloughed and filled with loose material. The entire pit must have benches that are maintained. This pit is known as the Phase I pit. This is an unwarrantable violation.

ARTHUR L. ELLIS, a previous witness, observed the bench failure on the crest line on the east wall. The bench had filled with material and was slipping over down into the bottom of the pit. The pit was 80-100 feet deep. Mr. Ellis also noticed loader tracks down at the bottom of the pit. There were no other benches in the pit. (Tr. 96).

The hazard here involved the fall of loose, unconsolidated material on the people below. The citation was modified to permit benches to be developed. (Tr. 97). The citation was terminated on August 20, 1991. (Tr. 100).

The witness indicated Mr. Teel was aware of the need for benching. (Tr. 100, 101). This was a serious violation which Mr. Teel disregarded. Possible injury or death could occur. (Tr. 101).

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Mr. Ellis agreed Mr. Ashley is the manager of the mine and makes all of the decisions regarding employees, type of equipment and type of mining. He was hired to manage the mine in a safe condition. However, Mr. Teel, as President of CPL, was totally in charge. (Tr. 102, 103).

The parties stipulated that the company paid a civil penalty in connection with this violation. (Tr. 104).

Mr. Teel offered a list of the amount of fines it paid. (Ex. R-1). Mr. Teel indicated that he had not had a salary from the company for six months. (Tr. 106, 107).

Discussion

The evidence establishes the corporate operator violated the contested citation. Further, the evidence is uncontroverted that Mr. Teel, President of the company, was aware of the need for benching.

Citation No. 3463783 should be affirmed and a civil penalty should be assessed.

WEST 90-325-M

In this case the Secretary of Labor is proceeding on Order No. 3069865 against George W. Weinbeck. The Secretary alleged that at all times involved herein Respondent Weinbeck was acting as Production Manager and Supervisor of CPL.

Respondent Weinbeck was advised by certified mail of the hearing scheduled in San Bernardino, California. The return receipt is attached to the notice of hearing in Docket No. WEST 90-284-M.

Respondent Weinbeck failed to appear at the hearing and a default was entered against him for failure to prosecute his contest. (Tr. 92, 93).

Accordingly, MSHA Order No. 3069865 and the proposed penalty therefor should be affirmed.

Civil Penalties

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

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The initial criterion is the operator's history of previous violations. CPL has an excessive prior adverse history but this proceeding is against Kenneth Teel. It is not shown that, as an individual, Mr. Teel has a prior history.

All of the citations and orders herein indicate Mr. Teel knew of the violative conditions. He was accordingly negligent in failing to remedy the condition.

The record indicates Mr. Teel has not received any salary from the bankrupt corporation for the last six months. CPL is his sole source of income. However, there is no showing of the precise effect the assessment of penalties will have on Mr. Teel.

The gravity concerning Citation No. 3069893 was low. The pallet was only minimally used.

The remaining citations involve high gravity. The circumstances were such that a fatality could have occurred. With the exception of Citation No. 3463076, Mr. Teel rapidly abated the violative condition and has thereby demonstrated good faith.

The Judge believes the penalties set forth in the order of this decision are appropriate for Mr. Teel as President of CPL.

For the foregoing reasons I enter the following:

ORDER

1. WEST 90-326-M (L. Kenneth Teel): Citation No. 3069893 is AFFIRMED and a civil penalty of \$75 is ASSESSED.

2. WEST 90-284-M (L. Kenneth Teel): Citation No. 3463959 is AFFIRMED and a civil penalty of \$150 is ASSESSED.

3. WEST 90-356-M (L. Kenneth Teel): Citation No. 3463076 is AFFIRMED and a civil penalty of \$150 is ASSESSED.

Citation No. 3463783 is AFFIRMED and a civil penalty of \$150 is ASSESSED.

4. WEST 90-325 (George E. Weinbeck): Citation No. 3069865 and the proposed penalty of \$400 are AFFIRMED.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

1. 56.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

2. 56.3131 Pit or quarry wall perimeter.

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

3. Bureau of Land Management manages the property for the U.S. Government. The land is leased by CPL.

4. 56.3200 Correction of hazardous conditions.

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

5. 56.3130 Wall, bank, and slope stability.

Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.