

CCASE:
SOL (MSHA) V. DOLESE BROTHERS
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-110-M
Petitioner : A.C. No. 34-00015-05509
 :
v. : Hartshorne Rock Quarry
 :
DOLESE BROTHERS COMPANY, :
AKA DOLESE BROS., A :
CORPORATION, :
Respondent :

DECISION

Appearances: Ernest A. Burford, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
Peter T. Van Dyke, Esq., Lytle, Soule & Curlee,
Oklahoma City, Oklahoma, for the Respondent

Before: Judge Fauver

This is a civil penalty action under 105(d) of the Federal
Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. At
the hearing the caption was amended to add to Respondent's name:
"AKA Dolese Bros., a Corporation."

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. On January 12, 1991, employee Terry Allen was stringing
cable above an overhead conveyor at Dolese's Hartshorne Rock
Quarry, which is subject to the Act.

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2. To hang the cable, Mr. Allen was hoisted in a manbasket connected to the load line of an 18 ton Lorain crane. It was not otherwise connected to the boom or crane. The crane was equipped with check valves and flow-restrictors, so that the boom would not fall if the hydraulic system failed. However, the crane was not equipped with a safety device, such as an anti-two-block device, that would prevent the load line from breaking in a "two block" (Footnote 1) predicament. Without such a device, if the load line block were pulled up to the boom block ("two-blocking"), the load line could break in two, causing the manbasket to fall to the ground.

3. The boom was telescopic and could extend to 72 feet. When Mr. Allen finished one part of the conveyor and the boom was being extended, the hook block on the load line was pulled up against the boom block, creating a "two block" predicament. The pressure on the load line snapped the load line in two. Mr. Allen and the manbasket immediately fell about 19 feet to the ground. He sustained serious injuries involving multiple broken bones in both feet and a broken rib. The line would not have broken had the crane been equipped with an anti-two-block safety device.

4. Mr. Allen, a regular truck driver, was assigned for the day to help the plant electrician install cables above an overhead conveyor. Cable was to be strung from a two-story crusher building to a screening tower, about 23 feet above the ground.

5. Mr. Allen was wearing a safety belt secured to the manbasket. He also wore a hard hat and safety protective footwear.

6. The crane's load line was a 1/2 inch steel cable break-tested to 25,200 pounds.

7. The crane operator had an unobstructed line of sight to the manbasket and was in a position to see whether the load line was approaching a two-block predicament.

8. When the line holding the manbasket "two-blocked," Mr. Allen felt the basket rise a few inches, heard loud squeaking noises, looked up, and saw the line break. He immediately fell with the basket.

1 A "two-block" predicament occurs when the load line block is pulled against the boom block. With an anti-two-block device, pressure on the load line is stopped immediately. Without such a device, continued pressure on the line can snap it in two.

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9. MSHA investigated the accident and issued Citation No. 3628634, charging a violation of 30 C.F.R. 56.14211(d) as follows:

A serious accident occurred on January 12, 1991. There was no anti-two block device with automatic shutdown capabilities to prevent breaking the load line on the company No. 122071, Lorain LRT-18U hydraulic crane. The load hook and block was drawn into the boom-block, when the boom was extended, breaking the load line. An employee was working (standing) in a work basket attached to the load block. He and the basket fell about 19 feet to the ground causing severe injuries to both feet and his rib cage. MSHA Policy Letter No. P90-IV-4 explains that the aforementioned anti-two block device is necessary to achieve compliance with 30 C.F.R. 56.14211(d).

DISCUSSION WITH FURTHER FINDINGS

This was a serious accident, involving serious injuries. Also, the accident could have resulted in death, grave neck or spinal injuries causing paralysis, or other permanent disability. The manbasket was suspended from the load line by a hook, and was not otherwise attached to the boom or crane. As the boom was extended, the load line block was pulled into the boom block and the pressure snapped the load line. The manbasket and Mr. Allen fell nearly twenty feet to the ground.

The Secretary has cited Respondent with a violation of 30 C.F.R. 56.14211(d), which explains a requirement provided in subsection 56.14211(a) and other parts of 56.14211. The applicable standard here is subsection 56.14211(a) as qualified by subsection 56.14211(d). Section 56.14211 provides:

Blocking equipment in a raised position.

56.14211

(a) Persons shall not work on top of, under, or work from mobile equipment in a raised position until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidentally.

(b) Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering. The equipment must also be blocked or secured to prevent rolling.

(c) A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.

(d) Under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent.

(e) Blocking or mechanical securing of the raised component is required during repair or maintenance of elevated mobile work platforms.

MSHA Program Policy Letter No. P90-IV-2 (June 4, 1990), provided that a "work platform shall not be suspended from the load line or whip line when a crane is used to hoist, lower, or suspend persons." A few months later, this policy was changed by MSHA Policy Letter P90-IV-4 (September 5, 1990), superseding Policy Letter P90-IV-2. The new policy permits the practice of suspending a work basket from the load line of a crane if the equipment has a safety device such as an "anti-two-block device" to prevent the load line from breaking in a "two block" situation. The policy letter also recognizes an alternative compliance method: attaching the work basket directly to the boom (not the load line or whip line) provided the crane has "flow restrictions or check valves . . . [that] will prevent a free and uncontrolled descent of the boom and attached work platform"

I

Respondent contends that 56.14211 does not give clear and sufficient notice that supporting a manbasket solely by a load line requires an anti-two-block device, and that Policy Letter P90-IV-4 leaves "the clear impression that compliance could be achieved if a hydraulic crane was being used and the crane had flow restrictors or check valves."

Respondent thus argues that there was no violation of 30 C.F.R. 56.14211 because the boom was protected against "free and uncontrolled descent" and 56.14211(d) and MSHA Policy Letter P90-IV-4 do not specify how a manbasket is to be attached to the boom or crane.

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I find that a manbasket is reasonably and logically a "raised component of mobile equipment" within the meaning of 56.14211(d)(Footnote 2) and "mobile equipment in a raise position" as used in 56.14211(a). It therefore must be protected against accidental falling. Policy Letter No. IV-4-2 is a reasonable application of 56.14211(d) in prescribing alternative methods of protecting a manbasket from free and uncontrolled descent, i.e., (1) attach the manbasket directly to the boom (which is required to have flow restrictions or check valves to prevent the boom from falling accidentally) or (2) if the manbasket is attached to the load line or a whip line, and not attached directly to the boom, equip the system with a safety device, such as an anti-two-block device, that will prevent breaking the load line in a two-block situation.

The Policy Letter is therefore a reasonable interpretation and application of the combined provisions of 56.14211(a) and (d) and, being published by the promulgating agency, is entitled to deference.

Respondent violated 56.14211(a) as qualified by 56.14211(d) by suspending a manbasket solely from a load line without providing a safety device to prevent the line from breaking in a "two block" situation.

II

Respondent contends that 56.14211(d) and Policy Letter P90-IV-4 are unconstitutional as being "sufficiently vague to allow for official arbitrariness and discrimination in their enforcement." I find that 56.14211(a) and (d) are a reasonable and clear safety standard requiring raised platforms, including manbaskets, to be protected against free and uncontrolled descent (accidental falling). Policy Letter P90-IV-4 is a reasonable interpretation and application of 56.14211(d), showing alternative ways in which an operator may comply with 56.14211 when using a crane to hoist a manbasket. Neither the regulation nor the Policy Letter is unconstitutionally vague.

III

Respondent contends that the Secretary did not comply with his own regulations in proposing a special assessment against Respondent.

² Under 56.14211(d), a "raised component of mobile equipment" is considered in compliance with 56.14211 if protected by a "load-locking device or a device which prevents free and uncontrolled descent."

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The Act establishes a two-step civil penalty system. The Secretary proposes and the Commission assesses all civil penalties under the Act. 30 U.S.C. 815(a) and (3) and 820(a) and (i). When the Secretary issues a citation withdrawal order to a mine operator, the Secretary must notify the operator of a proposed civil penalty for the violation cited. If the operator does not contest the proposed penalty, it becomes a final order of the Commission, not subject to review by any court or agency. Id.

If the operator contests the proposed penalty, the Secretary must file a petition for assessment of penalty with the Commission. The Commission then affords an opportunity for a hearing, subject to the due process requirements of the Administrative Procedure Act, and thereafter issues an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty or "directing other appropriate relief." Id.

Section 110(i) of the Act provides: "The Commission shall have authority to assess all civil penalties provided in this [Act]." 30 U.S.C. 820(i). Penalty cases are de novo before the Commission, which is governed only by the criteria in 110(i) of the Act. It may assess a penalty higher or lower than the penalty proposed by the Secretary. Once filed before the Commission, a penalty case may not be settled without approval of the Commission or presiding judge.

The Secretary, through MSHA, has promulgated regulations for calculating regular proposed penalties on the basis of a formula derived from the six criteria in 110(i) of the Act. See: 30 C.F.R. Part 100.

Under 100.5, MSHA may waive its regular assessment formula (100.3) if it "determines that conditions surrounding the violation warrant a special assessment."

In Drummond Company, Inc. ("Drummond I"), 14 FMSHRC 661 (1992), the Commission held that it has jurisdiction in a civil penalty case to review the question whether the Secretary has complied with the Part 100 regulations in proposing a civil penalty. If it finds that a proposed civil penalty is inconsistent with the Part 100 regulations, it may remand the proposed penalty to the Secretary for recalculation.

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In this case, after reinvestigating the accident MSHA elected to waive the regular formula in 100.3 and to propose a special assessment under 100.5. In its Narrative Findings for a Special Assessment, MSHA found that there was a violation of the cited safety standard, that the gravity of the violation was serious, and that the employee suffered severe injuries because of the safety violation. It proposes a civil penalty of \$5,000.00.

Section 100.5 provides that certain categories of violation may be considered for special assessment in MSHA's proposal of a civil penalty. One of these is: "Violations involving fatalities and serious injuries." 100.5(a). Respondent contends that MSHA's special assessment is not appropriate because "the accident did not involve a fatality, nor did it involve a serious injury likely to result in a fatality." I find that MSHA met the requirements of 100.5(a). The employee was in a metal work basket that suddenly fell 19 feet to the ground, causing multiple fractures in both feet and a broken rib. These were serious injuries. Also, mental anguish should be considered when an employee is jerked by a manbasket, hears threatening sounds, looks up, and sees his one support (the cable) snap in two, and then immediately crashes to the ground. It is clear from the nature of this accident that the employee could have been killed or suffered grave neck or spinal injuries causing permanent disabilities. Finally, I observe that it was only the height of the particular job that limited the fall to about 20 feet. The working height could have been 50 or 60 feet, depending on the job. Respondent's practice of suspending a manbasket solely from a load line without anti-two-block protection subjected workers to a risk of death or severe disabilities.

Respondent further contends that a special assessment is not warranted because Respondent reasonably believed that it was complying with 56.14211, and did not know that MSHA interpreted that section as requiring an anti-two-block device when a manbasket is suspended on a load line. However, Policy Letter P90-IV-4 puts operators on notice that MSHA interpreted 56.14211 as requiring a safety device, such as an anti-two block device, to prevent the load line from breaking in a case such as the instant case. I find that Respondent had actual or constructive knowledge of Policy Letter P90-IV-4. Apart from such knowledge, Respondent was put on notice by 56.14211(a) and (d) that it must provide a load-locking device or other safety device to prevent "free and uncontrolled" descent (accidental falling) of any "raised component of mobile equipment." This reasonably and clearly applied to manbaskets supported solely by a load line on a crane.

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Considering all of the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of \$8,000.00 is appropriate for this violation. In assessing a penalty higher than the Secretary's proposal, I have considered the high gravity of this violation. "Two blocking" predicaments are highly hazardous, foreseeable, and can be observed by the crane operator. They are also mechanically preventable, by installing an effective safety device to prevent the line from breaking. Respondent's position that it was permitted by law to suspend a manbasket solely on a load line without a safety device to prevent the line from snapping in two, reflects a serious disregard for employee safety and the purpose of 56.14211, which requires that "equipment in a raised position . . . [must be] . . . mechanically secured to prevent it from . . . falling accidentally." 56.14211(a). The Secretary also put Respondent on notice of this requirement in Policy Letter P90-IV-4, which plainly states that compliance can be achieved by: "[U]se of an anti-two-block device with automatic shutdown capabilities that will prevent breaking of the load or whip line in a two-block condition. * * *"

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent violated 30 C.F.R. 56.14211(a), as qualified by 56.14211(d), by suspending a manbasket solely from the load line of a crane without a safety device to prevent the line from breaking in a "two-block" predicament.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3628634 is AFFIRMED.
2. Respondent shall pay a civil penalty of \$8,000.00 within 30 days of the date of this Decision.

William Fauver
Administrative Law Judge

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