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SOL (MSHA) V. ARENAS MATILDE INCORPORATED
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 92-419-M
	:	A.C. No. 54-00333-05504
v.	:	Arenas Matilde
ARENAS MATILDE INCORPORATED, Respondent	:	

DECISION

Appearances: Jane Snell Brunner, Esq., Office of Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Adrian Mercado, Esq., Law Office Mercado & Soto, Santurce, Puerto Rico, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this civil penalty proceeding, brought by the Secretary of Labor ("Secretary") against Arenas Matilde Incorporated ("Arenas Matilde"), pursuant to section 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 815(d), 820(a), the Secretary charges the company with three violations of mandatory safety standards for metal and nonmetal mines found in Part 56, Title 30, Code of Federal Regulations ("C.F.R."). The Secretary further alleges that two of the violations constituted significant and substantial contributions to mine safety hazards ("S&S" violations). Arenas Matilde denies the Secretary's jurisdiction to cite the alleged violations. The company asserts that its product does not enter into interstate commerce nor do its operations affect interstate commerce.

MOTION TO DISMISS AND MOTION FOR RECONSIDERATION

Prior to the date of the scheduled hearing, Arenas Matilde moved to dismiss for lack of jurisdiction. I denied the motion, stating the issues could best be resolved through the hearing process, where sworn testimony, subject to cross-examination would be placed on the record. Arenas Matilde moved for reconsideration of the denial. Because the motion for reconsideration was filed shortly before the hearing, counsel for the Secretary did not have time to respond in writing. Accordingly, I afforded the parties the opportunity to argue the

motion at the commencement of the hearing.

Arenas Matilde's counsel made clear that the essence of the company's request for reconsideration was that its product does not enter interstate commerce in that there is "an express law forbidding the exportation of sand in Puerto Rico." Tr. 9. Counsel for the Secretary responded that even if Puerto Rico prohibits the exportation of sand, the company's operations affect commerce . She stated, "MSHA jurisdiction is very broad" and that with respect to establishing jurisdiction "[i]t's not only products which enter commerce, it's also any operations or products which affect commerce[,] [a]nd that's about as broad as you can get." Tr. 10. Counsel for Arenas Matilde countered that the company can hardly affect interstate commerce if its sand can not be sold outside of Puerto Rico. Id.

I denied the motion for reconsideration. Tr. 10-11.

SECRETARY'S WITNESS

Roberto Torres Aponte

Roberto Torres Aponte, an inspector for the Secretary's Mining Enforcement and Safety Administration ("MSHA") was the Secretary's sole witness. He testified he had been an inspector for the past seventeen years and as such had inspected non-metal mines in Puerto Rico and the Virgin Islands. Prior to joining MSHA he had worked for eight years as a supervisor for a Puerto Rican cement plant. Tr. 13-14.

Torres stated that he went to Arenas Matilde's operation on June 24, 1992, in order to conduct a regular health and safety inspection of the facility. He described the activities at the facility: "[T]hey were extracting sand from a pond with a crane and they were processing sand with a portable [screening] plant." Tr. 17.

Torres testified the equipment used to conduct the extraction and screening activities included in addition to the crane and portable screening plant, two front-end loaders. Torres was asked whether the equipment was manufactured in the Commonwealth of Puerto Rico and he responded that he did not believe so, because there were no factories on the island to make such equipment. Id., Tr. 58. He was of the opinion the manufacturer of the front-end loaders was Caterpillar and the manufacturer of the crane or dragline was Bucyrus Erie. Tr. 57. (He did not know who manufactured the screening plant. Id.)

A dirt road led onto the operation. There were customers' trucks (trailers) parked on the operation and they were used to transport the sand Arenas Matilde extracted. The ground at the operation was generally flat but there were some banks and holes. Tr. 44-45, 56-57. In addition, there was a trailer (presumably a

house-type trailer) that was used as an office. It was on the property but was located some distance from the area where employees were working. Tr. 57.

Torres further related that the person in charge of the sand operation was Adrian Mercado, Jr., the same person who served as counsel for Arenas Matilde. Tr. 28. Torres maintained that after he issued the subject citations on June 24, Mercado arrived at the operation. Torres stated that he explained the alleged violations to Mercado and that Mercado had no comment. Tr. 28, 50.

In addition to describing Arenas Matilde's operation, Torres testified concerning conditions he observed that he believed violated mandatory safety standards. Torres stated he saw a front-end loader in operation and that the operator of the front-end loader was not wearing a seat belt. Torres believed the front-end loader operator worked for Arenas Matilde because that is what the operator told Torres. Tr. 21. The operator was feeding the portable screening plant. In addition, the front-end loader operator also was in charge of the screening plant and was selling tickets to customers who came onto the property to buy sand. Tr. 25, 28-29. In Torres' opinion, the failure to wear a seat belt constituted a violation of section 56.14130(g). Tr. 20.

Torres was asked if there was any hazard associated with the failure of the operator to wear a seat belt while operating the loader. He responded that the loader was used on irregular terrain adjacent to a pond and that the loader operator could be injured if the loader overturned. Tr. 21. Torres saw the loader's tracks close of the edge of the pond. Id. Torres agreed, however, that when he observed the alleged violation of section 56.14130(g) the front-end loader was being operated on flat terrain. Tr. 58. Nonetheless, Torres found the violation to be S&S because "there was a hazard and there was a possibility that an accident [could] occur there, and it could be of a serious nature." Tr. 22.

Torres believed the fact the loader operator was not using a seatbelt was visually obvious and could have been observed by Arenas Matilde's management personnel. Tr. 21.

Torres, issued to the company a citation alleging a S&S violation of section 56.14130(g). Tr. 20; Exh. P-3. Torres cited the alleged violation at 8:00 a.m., but he set the abatement time for the alleged violation at 7:00 a.m. the following morning. He agreed the front-end loader operator could have waited until that time to buckle his seatbelt. Tr. 34-35. In fact, however, the alleged violation was abated when the loader operator immediately fastened his seat belt. Tr. 31.

Torres further testified he observed that the front-end loader operator was working alone. This, according to Torres, was a violation of section 56.18020. Although there was another employee in the same general area, the other employee was about 300 to 400 feet from the loader operator -- or, as Torres described it "far away on the other side of the operation." Tr. 29. Torres believed the employees had no means of communication. Tr. 26. (The other employee was operating the dragline, extracting sand from the pond. Tr. 29.)

If the front-end loader operator (the same person who was not wearing a seat belt) was involved in an accident, Torres feared no one would help or treat him because no one would see him. Thus, the lack of observation by another person could have resulted in a fatality. Tr. 26. (However, on cross-examination, when Torres was asked how he knew that the front-end loader operator could not be seen by the dragline operator.) He responded, "I'm not sure, I don't know." Tr. 49. Torres admitted there was nothing to obstruct the employees' vision of one another and added that "[p]robably once in a while they could look at each other, but not as frequently as they should." Tr. 55. He explained, "they [were] . . . concentrating on the work they [were] doing . . . they [were] operating large pieces of equipment[.]" Tr. 55.) Torres stated he found the alleged violation to be S&S because "it is a probability that an accident occur [sic] and could be of a serious nature." Tr. 27.

In Torres' view, Arenas Matilde's management could have known the front-end loader operator was working alone simply by observing the situation. Tr. 26.

Torres also stated he observed that no potable water nor water cups were provided in the work area and that as a result he issued a citation for a violation of section 56.20002(a). Tr. 22; Exh P-4. Torres was asked whether or not he knew if running water was in the trailer on the job site and Torres responded that he had not inspected the trailer. Tr. 49. He further stated that even if there was water in the trailer, the water would not obviate the violation because the trailer was more than 500 feet away and the water "should be in an area where everybody can go . . . and drink." Tr. 54.

According to Torres, the front-end loader operator and the dragline operator were working in the area. Tr. 23. Torres did not believe the lack of potable water could cause an accident, but he noted that without water the weather in Pureto Rico could lead to heat stroke "or something like that." Tr. 24.

ARENAS MATILDE'S WITNESS

Adrian Mercado

Adrian Mercado was sworn as a witness and presented evidence on the company's behalf. Mercado testified that he was the sole owner of Arenas Matilde, which Mercado described as a sand extraction company. The company is located on the Mercado farm, near Ponce. Mercado described the operation:

> A dragline . . . takes the sand out and places it beside itself. A loader comes and has to wait until the sand dries a little bit and takes it to the telescreen which cleans the sand and there the loader picks it up and puts it in the trucks which continually are at the plant . . . .
>
> There is a continuous movement of trucks in and out of the plant.
>
> [T]here is not a plant in the sense that there is a building. There is no building there it is open. And there is a loader, a dragline and the telescreen -- which . . . I believe was manufactured in Ireland. [(Mercado stated that he did not know where the dragline was manufactured. Further, he "guessed" the front-end loader was manufactured in "the States." Tr. 66.)]
>
> There is a . . . trailer near the sand extraction operation . . . connected to the Puerto Rico Aqueduct and Sewer Authority line. The trailer is open when the first work[er] arrives and it has running water, it has a faucet.

Tr. 63.

The sand extracted at the operation, according to Mercado, can only be used for asphalt. Id. By law it cannot be exported from Puerto Rico. In addition, the equipment at the operation is insured by Puerto Rico American Insurance Company. Mercado stated that as far as he knew the insurance company did business solely in Puerto Rico. Further, Arenas Matilde carries no insurance on or for its employees other than Puerto Rican workman's compensation insurance. Tr. 65.

ISSUES

The issues are:

1. Whether the Secretary had jurisdiction under the Mine Act to cite Arenas Matilde.

2. If so, whether the Secretary proved the alleged violations existed.

3. If so, what are appropriate civil penalties for the violations in light of the statutory civil penalty criteria.

JURISDICTION

Parties' Arguments

Section 4 of the Mine Act states:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this [Act].

30 U.S.C. 803. As both parties agree, their jurisdictional arguments revolve around the question of whether the products or operations of Arenas Matilde "enter commerce" and/or "affect commerce."

"Commerce" is defined in part as: "trade, traffic, commerce, transportation or communication among the several States" and "State" is defined as including, inter alia, "a State of the United States . . . [and] the Commonwealth of Puerto Rico." 30 U.S.C. 802(b), 802(c).

Such "commerce" among the several States is interstate commerce and it is the Secretary's position that Arenas Matilde's operations affect interstate commerce in that the record establishes the company is using equipment manufactured outside the Commonwealth of Puerto Rico. Moreover, juridiction vests even if the sand produced at the operation is used locally and cannot be exported -- that is, even if the company's product enters into commerce on an intrastate basis.

Arenas Matilde asserts the Secretary has not established his contention that if machinery was purchased outside Puerto Rico interstate commerce is affected. Moreover, the fact remains

that the exportation of sand from the Commonwealth of Puerto Rico is prohibited by law and thus Arenas Matilde cannot possibly engage in interstate commerce when it sells its product. A.M. Br. 3-6.

Whether the Secretary had jurisdiction under the Mine Act to cite Arenas Matilde?

I conclude that in citing Arenas Matilde the Secretary properly exercised his jurisdiction. It is clear that in enacting the Mine Act Congress determined that mining related accidents and occupationally related diseases unduly burdened interstate commerce. Section 2(f) of the Act states as much, 30 U.S.C. 801(f), and as the Supreme Court has recognized:

> [I]t is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the [Mine Act] Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

Donovan v. Dewey, 452 U.S. 594, 602 (1981).

In its motion for reconsideration, Arenas Matilde appeared to argue that the Commerce Clause of the Constitution -- the very clause that Congress exercised in seeking to cure the deleterious effects of the mining industry upon commerce -- is not applicable necessarily to the Commonwealth of Puerto Rico. If so, it would come as a great surprise to the legislators who subjected to the Act "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce", who defined "commerce" as "trade, traffic, commerce, transportation or communication among the several States, or between a place in a State and any place outside thereof" and who specifically included Puerto Rico in the Act's definition of "State". 30 U.S.C. 802(b), 802(c). Further, it would come as an even greater surprise, I expect, to the courts, which long have held or assumed that Congress has the power under the Commerce Clause to regulate commerce with the Commonwealth. Trailer Transport Corp. v. Rivera Vazquez, 977 F.2d 1, 7 n3. (1st Cir. 1992). Thus, the question is not whether Congress has the power to include Puerto Rico within the scope of the Act, but whether it has exercised that power. As the above quoted definitional sections of the Act make clear, the answer is, "yes."

As noted, Arenas Matilde goes on the argue that even if the Mine Act applies to Puerto Rico, a jurisdictional basis for the Secretary's case is lacking because Arenas Matilde does not, and indeed pursuant to Commonwealth law cannot, export the sand it extracts outside Puerto Rico. While I accept as fact that all of the sand mined by Arenas Matilde remains on the island and that the company is barred by law from exporting its product, I nonetheless conclude the company's operations affect interstate commerce. Torres testified that he believed the heavy equipment owned by the company -- the drag line, front-end loaders and portable screening plant -- were manufactured outside the Commonwealth in that there are no facilities on the island for producing such equipment. Tr. 58. Mercado did not know the origin of the dragline, but he "believed" the screening plant was manufactured in Ireland and he "guessed" the Caterpillar front-end loaders were manufactured in "the States". Tr. 66. It is black letter law that a company's ownership and use of equipment vital to its operations that has been manufactured and moved in interstate commerce, as at least the front-end loaders have been, "affects commerce." See United States v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975); Secretary of the Interior, United States Department of the Interior v. Shingara, et al., 418 F. Supp 693 (D.C., M.D. Pa. 1976); Sanger Rock & Sand, 11 FMSHRC 403, 405 (March 1989) (ALJ Cetti).

Whether the Secretary has proved the alleged violations?

Citation	Date	30 C.F.R.
3611121	6/24/92	56.14130(g)

Torres testified that he saw the cited front-end loader in operation and that the operator was not wearing a seat belt. Mercado did not dispute his testimony. The violation was cited at 8:00 a.m.. It is true, as Arenas Matilde points out, that Torres gave the front-end loader operator until 7:00 a.m. the following morning to abate and that the operator complied much faster by buckling the seat belt immediately. However, it does not follow that "if [Arenas Matilde] was given time to comply and there was compliance before the time provided had expired a violation could not have taken place." A.M. Br. 7. The structure of section 104(a), 30 U.S.C. 814(a), makes clear that the citation of a violation during an inspection is separate and distinct from the fixing of a reasonable time for its abatement. The extent of the time fixed for abatement may reflect the inspector's assessment of the violation's gravity, but it has no bearing upon his or her finding of the violation's existence.

Section 56.14130(g) requires the wearing of seat belts on self-propelled mobile equipment, except when the equipment operator is operating a grader from a standing position, an exception not applicable here. Therefore, I conclude the violation existed as charged.

Torres testified that he found the violation to be of a significant and substantial nature because of the possibility that a serious accident could occur. He further testified that although, when he observed the violation, the front-end loader was operating on flat terrain, he noticed its tracks next to the pond and that the land was of an irregular grade adjacent to the pond. Torres believed that operating the front-end loader on the irregular ground with a full loaded bucket enhanced the possibility of an accident. Tr. 58-59.

Among those elements necessary for the Secretary to prove in order to establish the S&S nature of a violation is that the violation presented a reasonable likelihood of injury. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). If, as the Commission recently has emphasized, a reasonable likelihood of injury is not equivalent to a "substantial possibility" of injury the same must be true for the mere "possibility" of injury. Energy West Mining Co., 15 FMSHRC ___, Docket No. WEST 91-251 (September 27, 1993) slip op. 4. Torres' testimony was restricted to the possibility of the front-end loader overturning. Because there was no testimony regarding the frequency with which the front-end loader operated near the pond during the course of a shift, the frequency with which its bucket was loaded during the course of a shift, the number of instances in which front-end loaders overturned at that location, the number of instances when they overturned while operating under similar conditions at other locations, or the number of miners who have been injured under such circumstances, I cannot gauge from the record whether the failure of the front-end loader operator to buckle his seat belt presented a reasonable likelihood of injury and I must conclude the Secretary has not established that the violation was of a S&S nature.

Turning to the gravity of the violation, the inspector believed if the loader overturned it was likely the operator would have suffered a fatal injury as a result of failing to buckle the seat belt. The gravity of a violation constitutes both the potential injury to the miner and the possibility of its occurrence. I accept Torres testimony that there was a possibility the front-end loader could have overturned. It is common knowledge that when such equipment overturns and the equipment operator is not secured to his or her seat the operator can be pinned under the equipment or thrown from it and can be seriously injured or killed. Moreover, I accept Torres testimony that he observed the loader's tracks adjacent to the pond. The danger of the equipment operator being thrown into the water or pinned under it adds yet another dimension to the hazard, this was a serious violation.

The fact that the equipment operator was not wearing the seat belt was visually obvious. In failing to ensure that its employees complied with the standard, Arenas Matilde failed to exhibit the care required of it. I conclude the company was negligent.

Citation	Date	30 C.F.R.
3611123	6/24/92	56.18020

Section 56.18020 states:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard or can be seen.

To establish a violation of section 56.18020, the Secretary must prove first that the person working alone is working in an area where hazardous conditions exist that would endanger his or her safety. The employee referenced in the citation was the front-end loader operator. As I have found, he was working at a job where there was a danger of suffering death or injury should the front-end loader have overturned. Thus, he was working in an area where hazardous conditions existed that would endanger his safety.

However, the Secretary also must prove that the employee could not communicate with others, or heard by others or be seen by others, and this the Secretary has failed to do. Torres testified that the dragline operator was working 300 to 400 feet from the front-end loader operator. He also stated the employees could see one another. Tr. 55. What really concerned Torres was that because of the nature of their jobs they might not look at one another as frequently as he felt was necessary for safety. Id. Torres concern, while commendable, is outside the requirements of the standard.

The Secretary asserts that although the employees may have had visual contact they could not hear one another and their being outside each other's hearing violated the standard's intent. Sec. Br. I do not agree. While, there may be an instance in which employees are so far apart the fact they can only see one another does not constitute the type of "communication" contemplated by the standard, at the approximate length of a football field, I believe this is not such a case.

I conclude therefore, that the Secretary has not established the alleged violation.

Citation	Date	30 C.F.R.
3611122	6/24/92	56.20002(a)

Torres testified that he issued the citation because there was no potable water nor were cups provided in the work area of the front-end loader operator and the dragline operator. Tr. 22. He admitted that he did not know if such water was available at the job site trailer. Tr. 49. Mercado, stated that the trailer had a faucet with running water and was open to the workers. Tr. 62.

Section 56.20002(a) requires that "[a]n adequate supply of potable drinking water shall be provided at all active working areas." Interestingly, the standard does not specifically require drinking cups. Rather it prohibits "common drinking cup[s] and containers from which drinking water must be dipped or poured" (section 56.20002(b)) and requires a sanitary container for single service cups where they are provided and a receptacle for such used cups (section 56.20002(c)).

I conclude the Secretary has not establish the violation. I accept Mercado's testimony that water, which I infer was potable since he also stated that it came from the Puerto Rico Aqueduct and Sewer Authority line, was available at the trailer. Tr. 62. This means that an adequate supply of potable water was provided.

Torres believed that if there was potable water in the trailer, the trailer was outside the work area and thus there was still noncompliance with the standard. Tr. 54. He described the trailer as being approximately 500 feet from the work area. Id. I have no way to judge whether this was outside the "active working area." The regulations do not define "work area," nor do the Secretary's enforcement guidelines for section 56.20002, which are set forth in the Secretary's Program Policy Manual ("Manual"). Department of Labor, Mine Safety and Health Administration, Program Policy Manual, Vol. IV (July 1, 1988) 67. Further, the Secretary offered no testimony regarding his interpretion of the term and the criteria by which his inspectors determine what constitutes such an area. I can only observe that if, as the Manual states, the purpose of the standard is "to ensure that potable drinking water is supplied and made available to all workers . . . to prevent water-deficiency related illness and to prevent workers from drinking ground water," 500 feet does not seem too far to travel to meet these goals. Id.

The Secretary further argues that Arenas Matilde did not prove that the employees were told ever that the water in the trailer was available for their use, or that they were permitted

to go into the trailer. Sec. Br. 9-10. However, these concerns were not alleged as violations of the standard and are not relevant to Arenas Matilde's defense of the Secreatry's allegation.

CIVIL PENALTY

I have found Arenas Matilde in violation of section 56.14130(g) as alleged in Citation No. 3611121. Further, I have found the violation was serious and that Arenas Matilde was negligent in allowing it to exist. The violation was abated immediately. Arenas Matilde is small in size and has a small history of previous violations. Exh. P-2. There is no indication that any penalty assessed will affect the company's ability to continue in business.

The Secretary has proposed assessment of a civil penalty of five-hundred six dollars ($506), which I find to be excessive. Given the statutory civil penalty criteria, I assess a penalty of one hundred dollars ($100).

ORDER

Arenas Matilde is ORDERED to pay a civil penalty in the amount of one-hundred dollars ($100) for the violation of section 56.14130(g) as cited in Citation No. 3611121. The Secretary is ORDERED to vacate Citation No. 3611122 and Citation No. 3611123. In addition, the Secretary is ORDERED to modify Citation No. 3611121 by deleting the S&S finding. Payment of the penalty is to be made to MSHA within thirty (30 days of this proceeding. The citations are to be vacated within thirty (30) days of this proceeding. Upon receipt of payment and vacation of the citations, this matter is DISMISSED.

David F. Barbour
Administrative Law Judge

Distribution:

Jane Snell Brunner, Esq., Office of the Solicitor, U.S. Department of Labor, 201 Varick Street, Room 707, New York, NY 10014 (Certified Mail)

Adrian Mercado, Esq., Mercado & Soto, Caso Building Penthouse, 1225 Ponce De Leon Ave., Santurce, PR 00907 (Certified Mail)

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