

CCASE:
SOL (MSHA) V. BENEVENTO SAND AND GRAVEL
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December 21, 1993

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 93-138-M
Petitioner	:	A. C. No. 19-00288-05507
	:	
v.	:	Docket No. YORK 93-143-M
	:	A. C. No. 19-00288-05508
BENEVENTO SAND AND GRAVEL,	:	
Respondent	:	North Wilmington
	:	Quarry & Mill

DECISION

Appearances: Gail E. Glick, Esq., Office of the Solicitor, U. S. Department of Labor, Boston, Massachusetts, for Petitioner;

Joseph H. Murphy, Esq., Benevento Sand & Gravel, Andover, Massachusetts, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against Benevento Sand and Gravel under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820.

A hearing was held on December 1, 1993. Prior to going on the record, there was a pre-hearing conference between counsel and the undersigned. As a result of the off the record conference, counsel for both parties agreed to submit the alleged violations on stipulated facts and findings (Tr. 6-7).

The parties also agreed to several general stipulations as follows (Tr. 6):

- (1) the operator is the owner and operator of the subject mine;
- (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;
- (3) I have jurisdiction of these cases;
- (4) the inspector who issued the subject citations and orders was a duly authorized representative of the Secretary of Labor;
- (5) true and correct copies of the subject citations and orders were properly served upon the operator;

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With respect to size, good faith abatement, prior history of violations and the effect payment would have on the operator's ability to continue in business, the Solicitor stated the following:

* * * The operator, in this case, is a small operator. It is a family business of sole proprietorship. There are a total of 11 employees in the operation. The history with respect to violations under the Federal Mine Safety and Health Act, there have been penalties and violations that have been assessed. And in fact there have been violations of the very same items and regulations that are currently cited in these two cases. However, the violations both previously and in this particular case have always been promptly abated and none of these violations have resulted in any disabling injuries or any fatalities.

* * *

In fact, they have demonstrated an excellent record in terms of accidents and injuries. Moreover, the operator has always made an honest attempt to comply with the standards in general. The payment of the amounts, in the view of the Secretary of Labor, is that it would affect the employer's ability to do business (Tr. 7-8).

With respect to the effect payment would have on the operator's business, operator's counsel made this representation:

If it may please the court, with regard to the original sums set out in the original special assessments, those would have created a great burden on the ongoing operations of Benevento Sand & Gravel. As the Solicitor has stated, they are a small family-owned company. They do approximately \$1.5 million dollars in annual sales. And they have approximately annual profit of \$100,000. Both Mr. Charles Benevento and Mr. John Benevento have significant personal financial problems arising from different business dealings and Mr. John Benevento has extensive property tax that he is unable to pay for the land he cannot develop and Mr. Charles Benevento has suffered from the general economic downturn with regard to the business and construction in this area. It is unlikely that the business could have continued in the manner it is now, if the original sums were so enforced (Tr. 8-9).

The Solicitor accepted the foregoing representations by operator's counsel (Tr. 9).

The stipulations and representations of the Solicitor and operator's counsel are ACCEPTED.

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Six alleged violations are involved in this docket number. Five of these were issued pursuant to section 104(d)(1) of the Act, allegedly resulting from unwarrantable failure on the part of operator.

Citation No. 4079716 was issued under section 104(d)(1) for a violation of 30 C.F.R. 56.14132(a) because the automatic reverse activated signal alarm provided for the CAT 769 haul truck, Company number E-3, did not function when tested. The violation was designated significant and substantial and negligence was assessed as high. The Solicitor advised that injury was reasonably likely because of vehicular traffic on the roadway and the fact that the view to the rear of the truck was obstructed approximately 75 to 80 feet (Tr. 13-14). The Solicitor's representations were agreed to by operator's counsel (Tr. 14).

On the record I held as follows with respect to this citation:

Based upon the Solicitor's representations agreed to by operator's counsel, I affirm the 104(d)(1) citation and find the violation was significant and substantial and resulted from unwarrantable failure on the part of the operator. Penalty proceedings before the Commission are de novo. [Sellersburg Stone Co., 5 FMSHRC 287, 290-93 (March 1983), aff'd, 736 F.2d 1147, 151-52 (7th Cir. 1984).] I am not bound by the proposed penalty assessments of the Mine Safety and Health Administration. I am obliged to take into account the six criteria set forth in Section 110(i) of the Act. And I now do so. In affirming the 104(d)(1) citation, I find there was a high degree of negligence and that the violation attained the degree of gravity required by the Commission for the significant and substantial designation.

In addition, I take into account the operator's financial condition and I note the representation of operator's counsel that payment of the originally assessed penalties would affect the operator's ability to continue in business. I further note the representation of the Solicitor to the effect that the operator has a prior history which in its entirety is good and that it has no fatalities or serious injuries. I note,

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too, that this is the first occasion where this operator has been before the Commission. Taking into account all of the criteria of Section 110(i) of the Act, I assess a penalty of \$1,500 for this violation

(Tr. 14-15).

I adhere to the foregoing findings, conclusions and assessment.

Order No. 4079717 was issued under section 104(d)(1) for a violation of 30 C.F.R. 56.14132(a) because the automatic reverse activated signal alarm (back-up alarm) provided for the CAT haul truck 769B, Company number E-2, did not function when tested. The violation was designated significant and substantial and negligence was assessed as high. According to the Solicitor injury was reasonably likely because of traffic in the area, the steep grade on the roadway and the fact that the haul truck had an obstructed view to the rear. The basis for the negligence evaluation was that two violations for the same standard had been issued (Tr. 16-18). Operator's counsel noted the rapid abatement after the citation was issued (Tr. 17-18).

I affirmed this 104(d)(1) order on the record and found the violation was significant and substantial and resulted from unwarrantable failure on the part of the operator (Tr. 18-19).

In addition, on the record I held as follows with respect to the order:

As I previously stated, taking into account all of the factors mandated under Section 110(i), including the ability to continue in business, size, and overall prior history, I determine that the appropriate penalty assessed for this order is \$1,500 (Tr. 19).

I adhere to the foregoing findings, conclusions and assessment.

Order No. 4230581 was issued under section 104(d)(1) for a violation of 30 C.F.R. 56.14131(a) because the operator of the CAT 769 haul truck company No. E-2 was observed operating this piece of mobile equipment without wearing the seat belt that was provided. The order was designated significant and substantial and negligence was assessed as high. The Solicitor stated that there was a reasonable likelihood of injury because of the road conditions, the steepness of the road grade with two-way traffic, the size of the truck involved, and the fact the operator has to negotiate a 90 degree turn in a short space. The Solicitor further stated that the evaluation of negligence was justified because the operator had no seat belt policy and the employees admitted they received no training with respect to seat belts

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(Tr. 19-21). The Solicitor's representations were agreed to by operator's counsel (Tr. 21).

On the record I held as follows with respect to this order:

This of course is a very serious violation and based upon the representations, the order undoubtedly was properly issued because the violation was significant and substantial. There was an unwarrantable failure on the operator's part. The operator has a duty to see that the policies, the requirements of the Act are put into effect and seat belts are one of those requirements. It doesn't matter what the state law, says. Federal law takes precedence over state law unless there is some direction in the law to the contrary. So that is the way it is. The operator has to understand it. But again, I take into account all of the factors I mentioned before and most particularly, the fact that this operator has not been before the Commission previously. Again, I take note of the fact that high penalty assessments originally proposed by the Secretary might well impair the operator's ability to continue in business. Therefore, I determine as appropriate and assess a penalty for this violation the sum of \$3,000, which although it represents a 50 percent reduction from the Secretary's proposal, nevertheless remains a substantial sum (Tr. 21-22).

I adhere to the foregoing findings, conclusions and assessment.

Order No. 4280582 was issued as a 104(d)(1) order for a violation of 30 C.F.R. 56.9200(d) because an employee was observed riding on top of the fuel tank on the Trojan 5500 loader between the operator station and the ladder. The employee was being transported from the salvage yard to the Quarry shop. The violation was designated significant and substantial and negligence was assessed as high. The Solicitor advised that injury was reasonably likely because the employee could fall off the loader (Tr. 22-24). Operator's counsel stated that the individual riding on the tank was a mechanic who was checking for an equipment defect. Also counsel advised that the road being traveled was wide and level with very limited traffic and that the machine was going very slowly, but he admitted the violation was dangerous (Tr. 24-25).

On the record, I held the following with respect to this order:

Based upon the representations of both counsel I find that the order was properly issued because the

violation was significant and substantial and, therefore, that it presented the reasonable likelihood of serious injury from the hazard. The individual could have fallen off and suffered a very serious injury. So although I take note of the operator's counsel's representations, the violation remains significant and substantial. I also find that it was the result of an unwarrantable failure. The loader was being operated by the operator himself. I again take note of all of the factors set forth in Section 110(i) of the Act, i.e., the violation was undoubtedly serious and resulted from high negligence. However, I also take into account the operator's financial situation, its size, and its overall history. Since I have previously set forth these items in detail, I will not again repeat them. Based thereon I determine as appropriate and assess a penalty of \$3,500 for this violation. Although this assessment represents a substantial reduction from the proposed assessment, it remains a significant amount and is, I believe, consistent with the purposes of the statute (Tr. 25-26).

I adhere to the foregoing findings, conclusions and assessment.

Order No. 4280583 was issued as a 104(d)(1) order for a violation of 30 C.F.R. 56.14130(g) because the operator of the Trojan 5500 front end loader was observed operating it without using the seat belt provided. The violation was designated significant and substantial and negligence was assessed as high. Operator's counsel advised that the terrain where the loader was operated was flat, the loader was not operating for a long period of time and the machine was going slowly (Tr. 28). Based upon these factors, the Solicitor agreed to modify the order by deleting the significant and substantial designation (Tr. 28).

On the record I held as follows with respect to this order:

I accept that proposed modification. It seems to me it is appropriate in light of the fact that the piece of equipment was operating on level ground and that it was going at a slow rate of speed. The circumstances under which this violation occurred, are plainly different from those under which the prior Order 4230581 was issued for seat belt violation. The terrain there was steep and had sharp turns. I do find, however, that the violation remains a serious one. Although the circumstances do not rise to the level required by the Commission for the existence of significant and substantial, in particular the reasonable likelihood requirement identified by the Solicitor, the

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violation nevertheless was serious. There was a possibility of serious injury which supports a finding of gravity. I further find that the operator was guilty of unwarrantable failure for the reasons set forth by the Solicitor. I, therefore, find appropriate and assess a penalty of \$2,500 for this citation in light of all of the factors in Section 110(i) I discussed previously (Tr. 28-29).

I adhere to the foregoing findings, conclusions and assessment.

Citation No. 4079713 was issued for a violation of 30 C.F.R. 56.14130(i) because the seat belt provided for the Trojan 550 was not maintained in a functional condition. The violation was designated significant and substantial and negligence was assessed as moderate. The Solicitor agreed to modify this citation by deleting the significant and substantial designation. The reason for the modification was that the vehicle in question was parked at the time of the inspection and the defective belt could easily be replaced or repaired (Tr. 10-11).

On the record I held as follows with respect to this citation, "In view of the deletion of the significant and substantial designation I find appropriate and I assess a penalty of \$167." (Tr. 12).

I adhere to the foregoing determination and assessment.

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Citation No. 4079712 was issued under section 104(a) for a violation of 30 C.F.R. 56.14132(a) because the automatic reverse activated signal alarm provided for the Trojan 5500 was not maintained in a functional condition. The violation was designated significant and substantial and negligence was assessed as moderate. Operator's counsel advised that at the time of the inspection the vehicle was not in operation and was set aside to be repaired (Tr. 32). The Solicitor agreed based upon operator's counsel representation to modify the citation by deleting the significant and substantial designation (Tr. 32).

On the record I held as follows with respect to this citation:

Based upon the representation I accept that proposal. The S & S designation is deleted. In light of all of the factors to be considered under Section 110(i) I find a penalty of \$250 is appropriate. I hereby assess that penalty for this violation (Tr. 32).

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I adhere to the foregoing findings, conclusions and assessment.

Citation No. 4079715 was issued for a violation of 30 C.F.R. 56.14107(a) because the head pulley guard provided for the No. 3 conveyor was not adequate. The violation was designated significant and substantial and negligence was assessed as moderate. According to the Solicitor, injury was reasonably likely because the head pulley is openly accessible to any person who walks on the walkway which abuts this pulley. The walkway was available for the purpose of accessing the pulley for maintenance (Tr. 34-35). Operator's counsel advised that at the time of the inspection, the pulley guard was in the process of being made and the violation was quickly abated. Based upon these representations the Solicitor agreed to modify the citation by reducing negligence from moderate to low (Tr. 35).

On the record I held as follows with respect to this citation:

I accept that modification. I believe it is appropriate. In light of the representations, the violation remains, however, significant and substantial. In light of these negligence and gravity findings and in light of the other factors set forth in Section 110(i) of the Act, as discussed previously, I find appropriate and assess a penalty of \$250 for this violation (Tr. 35-36).

I adhere to the foregoing findings, conclusions and assessment.

ORDERS

It is ORDERED that the fact of the violation for Citation and Order Nos. 4079716, 4079717, 4280581, 4280582, 4280583 and 4079713 in Docket No. YORK 93-138-M and Citation Nos. 4079712 and 4079715 in Docket No. YORK 93-143-M be AFFIRMED.

It is further ORDERED that the significant and substantial designations for Citation and Order Nos. 4079716, 4079717, 4280581, and 4280582 in Docket No. YORK 93-138-M and Citation No. 4079715 in YORK 93-143-M be AFFIRMED.

It is further ORDERED that the unwarrantable failure finding for Citation and Order Nos. 4079716, 4079717, 4280581, 4280582, and 4280583 in Docket No. YORK 93-138-M be AFFIRMED.

It is further ORDERED that Order and Citation Nos. 4280583 and 4079713 in Docket No. YORK 93-138-M and Citation No. 4079712 in YORK 93-143-M be MODIFIED by deleting the significant and substantial designations.

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It is further ORDERED that Citation No. 4079715 in Docket No. YORK 93-143-M be MODIFIED by reducing negligence from moderate to low.

It is further ORDERED that the penalty assessments for the violations in Docket Nos. YORK 93-138-M and YORK 93-143-M be as follows:

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Citation/Order No.	Penalty Assessment
4079716	\$1,500
4079717	\$1,500
4280581	\$3,000
4280582	\$3,500
4280583	\$2,500
4079713	\$ 167

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Citation/Order No.	Penalty Assessment
4079712	\$ 250
4079715	\$ 250

It is further ORDERED that the operator PAY the above assessed penalties within 30 days of the date of this decision.

It is further ORDERED that these cases be and are hereby DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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