

CCASE:
SOL (MSHA) V. W. A. SCHEMMER LIMESTONE QUARRY
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-206-M
Petitioner	:	A.C. No. 13-00203-05521
v.	:	
	:	
W. A. SCHEMMER LIMESTONE QUARRY:	:	Docket No. CENT 92-255-M
INCORPORATED,	:	A.C. No. 13-00203-05522
Respondent	:	
	:	W. A. Schemmer Limestone
	:	Quarry

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Carman Schemmer, Pro Se, W. A. Schemmer Limestone
Quarry, Incorporated, Logan, Iowa, for Respondent.

Before: Judge Barbour:

These civil penalty proceedings were initiated by the Secretary of Labor (Secretary) on behalf of his Mining Enforcement and Safety Administration (MSHA) against W. A. Schemmer Limestone Quarry, Incorporated (Schemmer Limestone), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. 815 and 820. The Secretary alleges that Schemmer Limestone was responsible for five violations of mandatory safety standards for metal and nonmetal mines found in Part 56 of the Code of Federal Regulations. The proceedings were consolidated and a duly noticed hearing was convened in Logan, Iowa, at which Robert J. Murphy represented the Secretary and the company's president, Carman A. Schemmer, represented Schemmer Limestone.

STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

1. [Schemmer Limestone] is engaged in mining and selling limestone in the United States, and its mining operations affect interstate commerce.

2. [Schemmer Limestone] is the owner and operator of W.A. Schemmer Limestone Quarry Mine, MSHA I.D. No. 13-00203.

3. [Schemmer Limestone] is subject to the jurisdiction of the [Mine Act].

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations and orders were properly served by duly authorized representatives of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are ... authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

[7.] The operator demonstrated good faith in abating the violation[s].

[8.] [Schemmer Limestone] is a medium [sized] mine operator with 28,975 hours of work in 1991.

[9.] The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation. [(Footnote 1)]

Tr. 6-7; Joint Exh. 1.

1The Secretary offered into evidence an exhibit representing the company's history of assessed and paid violations for the two years proceeding the first violation at issue in these matters. It revealed eight assessed and paid violations during those years, which counsel for the Secretary characterized as a "low" history. Tr. 8.

SETTLEMENTS

DOCKET NO. CENT 92-206-M

Citation No.	Date	30 C.F.R.	Assessment	Settlement
3886105	4/7/92	56.16005	\$506	\$50
3886106	4/7/92	56.16006	\$506	\$50

DOCKET NO. CENT 92-255-M

Citation No.	Date	30 C.F.R.	Assessment	Settlement
3886107	4/7/92	56.20003(a)	\$235	\$50

Prior to the taking of testimony, counsel for the Secretary stated the parties agreed to settle the referenced citations. Counsel noted that Citations No. 3886105 and 3886106 were issued for Schemmer Limestone's failure to secure properly a compressed gas cylinder and to protect its valve with a safety cap. Counsel further noted that Citation No. 3886107 was issued for the company's failure to keep clean and orderly the floor of the shop. In all three instances the inspector found the violations were not significant and substantial contributions to mine safety hazards (S&S violations), and were due to moderate negligence on Schemmer Limestone's part and were unlikely to cause injuries. Nonetheless, MSHA's Assessment Office inexplicably proposed civil penalties far in excess of those usually proposed for violations with such findings. Counsel stated the settlements reflected the amounts normally proposed for non-S&S violations caused by ordinary negligence and presenting little likelihood of injury. Tr. 9-11.

I approved the settlements on the record and in view of the inspector's findings, Schemmer Limestone's size and its small history of previous violations, I hereby affirm that approval. Tr. 12. I will order payment of the settlement amounts at the close of this decision.

THE CONTESTS

DOCKET NO. CENT 92-255-M

Order/Citation No.	Date	30 C.F.R.	Assessment
3885143	4/7/92	56.14101(a)(1)	\$5,000
3885146	4/7/92	56.14101(a)(1)	\$5,000

Section 56.14101(a)(1) requires self-propelled mobile equipment to be "equipped with a service brake system capable of holding the equipment with its typical load on the maximum grade that it travels." The section 107(a), 30 U.S.C. 817(a), orders of withdrawal and associated section 104(a), 30 U.S.C. 814(a), citations were issued during an inspection of the quarry when MSHA Inspector Ken Harris found two haulage trucks whose service

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brakes were not capable of holding the equipment with their typical loads on the maximum grades they traveled. Indeed, the brakes were not capable of stopping or holding the trucks if empty on level ground. Harris also found the alleged violations S&S and were caused by high negligence on the company's part and were highly likely to cause fatalities. In its answer and again at the hearing, Schemmer Limestone did not deny that the conditions of the brakes constituted violations of the cited standards, but rather noted the violations were corrected immediately and argued the financial distress of the company warranted reduced civil penalties. Tr. 13.

THE SECRETARY'S WITNESS

Ken Harris

Harris, a MSHA inspector assigned to the Fort Dodge, Iowa, field office was the Secretary's sole witness. On April 7, 1992, Harris conducted an inspection of Schemmer Limestone's surface quarry facility located in Harrison County, Iowa. Harris was accompanied by MSHA Inspector Clarence Thilen. Tr. 17.

Harris stated that at the quarry stockpile he and Thilen observed two trucks that were used to haul limestone from the quarry pit to the stockpile. Not one of the brakes on the trucks worked, including the emergency brakes. Harris stated that in order to drive down into the quarry pit the trucks had to descend for 275 feet on a grade of 5 to 8 percent. In addition, they had to negotiate a switchback at the bottom of the descent. There was no runaway ramp at the bottom of the grade and if a truck had gone out of control the only way for it to stop would have been to hit the quarry wall. Tr. 19. In addition, each truck hauled approximately 15 tons of rock when fully loaded. If either stalled on the grade on the way out of the pit there would have been no way to prevent it from rolling back into the wall except to try to downshift, and Harris stated he later discovered that both trucks had bad clutches. Tr. 20.

Because of the lack of functioning brakes and the route and grade the trucks had to travel, Harris believed an accident was reasonably likely. Tr. 22. Further, he believed if either one of the trucks hit the quarry highwall its driver would have been severely injured or killed. Tr. 21-22, 30.

Harris issued orders and citations for both conditions. The brakes of the first cited truck were repaired in less than 24 hours. The brakes of the second were repaired two days later. Tr. 23-24.

SCHEMMER LIMESTONE'S WITNESS

Carman Schemmer

The company's sole witness was its president and representative, Carman Schemmer. Schemmer agreed the trucks' brakes did not function -- "[t]he brakes were not operable, plain and simple." Tr. 35. In abating the violation it was discovered that one of the trucks simply needed to have its brakes adjusted, while the other one needed to have fluid added and a brake diaphragm repaired. Tr. 36.

Schemmer maintained the negligence, if any, was his. He inferred he could not rely on company personnel to make the kinds of repairs necessary to keep the trucks safe. ("Even though I have people working for me and I may instruct them to do certain things, if I don't follow up it doesn't get done." Tr. 37.) Schemmer testified that since the issuance of the orders and citations he has changed procedures at the quarry so that he is solely responsible for safety. Under the new procedures he questions the employees about the condition of specific pieces of equipment and if the employees have safety complaints, corrections are made at once. Tr. 38, 58-59.

Turning to the fiscal condition of the company, Schemmer produced a copy of a company financial statement. The statement, dated October 5, 1992, reflects the company's balance sheet as of June 30, 1992. Resp. Exh. 1. Schemmer testified the company's fiscal year always ends on June 30, and that he could not have a statement for 1993 ready in time for the hearing. He noted, however, that in 1992, the company showed a retained earnings balance of \$128,000 and he stated that 1993 had been a worse year than 1992. Tr. 40, Resp. Exh. 1 at 5. Schemmer also stated that the company had considerable liabilities, chief among them being notes payable in the amount of \$451,448 to the First National Bank of Missouri Valley. Schemmer was uncertain if the bank would renew the notes. Tr. 42, 44; Resp. Exh. 1 at 3.

On cross examination, Schemmer was asked about the statement of the CPA who prepared the financial report and who wrote in a cover letter to the report:

Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

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Resp. Exh. 1. Schemmer explained that he understood the statement to be a standard one included by CPA firms in all financial statements and that Schemmer Limestone had not failed to give its accountant all information necessary for a complete accounting. Tr. 43.

Schemmer confirmed that Schemmer Limestone is a corporation. The stockholders include Schemmer, his father, and his wife. Tr. 59. Schemmer is paid \$850 per week. Tr. 44. The company employs approximately 13 persons at the quarry. Tr. 60. The company has limestone reserves of approximately 1,500,000 tons. If the area it is leasing currently were mined totally the area would yield 1,000,000 tons. Tr. 49-50. The average price of limestone is \$6 per ton and it is mostly sold to county highway departments for road surfacing. Tr. 50.

Schemmer also offered into evidence a copy of the corporation's tax return for 1991, which showed a loss of \$606,572, as well as an accountant's statement for the first quarter of 1993, which showed a net loss of \$41,612. Resp. Exh. 2 and 3.

DISCUSSION

The Violations

There is no disagreement about the facts. It is agreed that the trucks were used at the quarry to haul rock from the pit to the stockpile. As such, I find that both trucks had to travel in and out of the pit, descending and ascending a road approximately 278 feet long and with a grade of approximately 5 percent to 8 percent. I credit the Inspector's unrefuted testimony that near the bottom of the road the trucks had to negotiate a switchback and that a highwall was at the bottom of the road. I further credit his testimony that when loaded the trucks each carried up to 15 tons of rock.

It is further agreed that both trucks did not have functioning brakes. Harris feared if the drivers lost control of the trucks either on entering or exiting the pit, the trucks would roll down the grade and crash into the highwall, killing or severely injuring their drivers. This was not an unreasonable fear given the grade, and the position of the highwall and the total inability of the trucks to slow except by downshifting.

Obviously, the braking system of the trucks was not capable of holding them with their typical load on the maximum grade they traveled and I conclude the violations existed as charged.

S&S

I also conclude that Harris properly found the violations to be S&S. As is now well known, a violation is properly designed S&S if based upon the particular facts surrounding it there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth a four-part formula for determining whether a particular violation meets the National Gypsum definition of S&S. In the instance of both of the violations at issue here the formula has been satisfied.

As I have found, the violations existed. They posed the hazard of a serious, even fatal crash. Given the constant use of the road into and out of the pit, the grade of the road, the position of the highwall and the lack of any breaking system, it was reasonably likely such a crash would have occurred had mining operations continued.

CIVIL PENALTY CRITERIA

Gravity and Negligence

Further, in view of the gravity of the injury that could have been expected and the likelihood of the injury occurring, I conclude the violations were very serious.

In addition, the operator was highly negligent. I infer from Schemmer's testimony that prior to the citation of the violations no effective procedure existed at the quarry to ensure mobile equipment complied with the mandatory standards. Schemmer's description of the company's inspection and reporting procedures initiated post-violation confirmed as much.

Previous Violations, Size and Rapid Abatement

MSHA's computer generated history of previous violations indicates that in the 24 months prior to citation of the violations in question a total of eight violations were assessed for the quarry. As counsel agrees, this is a small history of previous violations. It should not increase any civil penalties otherwise assessed. Joint. Exh. 1. The parties have stipulated that Schemmer Limestone is a medium size operator. Also, they have stipulated that the company demonstrated good faith in attempting to achieve rapid compliance after being cited for the violations. Stipulations 7-8.

However, there is more than the stipulation to be noted about Schemmer Limestone's good faith in achieving rapid compliance, for I credit Schemmer's testimony that the company

went further than simply abating the violations at issue. Following issuance of the citations and orders Schemmer instituted a new system for checking equipment to make certain there was compliance with the mandatory standards and Schemmer assumed personal responsibility for safety at the quarry. Under this new system, Schemmer questions his employees about the condition of equipment and whether it is safe. He personally orders defects repaired and he makes certain the repairs are made. I admire Schemmer's candid willingness to assume responsibility for past mistakes, but I am even more impressed by his initiatives to prevent their recurrence. His positive attitude toward compliance is one that should be encouraged.

Ability To Continue In Business

The effect of assessed penalties on the ability of the operator to continue in business is a matter to be proved by the operator. Considering both Schemmer's testimony and the documents the company offered into evidence, I conclude that full imposition of the proposed penalties will adversely effect Schemmer Limestone's ongoing operations. Both the company's income tax return for the last year available and the company's financial statement for the same year reveal a company in potentially precarious fiscal straits. While it is true the company has significant limestone reserves upon which to rely, it must have available adequate financial resources to continue in the industry. To a large extent its financial resources are dependent upon the status of its short term obligations. In this regard, I observe that the company's notes to First National Bank of Missouri Valley are subject to call on a yearly basis despite the company's efforts to negotiate longer terms. There is no question if they are called, the company will find it difficult if not impossible to survive. Although the company is not yet on the financial ropes, its large negative ratio of current liabilities to current assets signals that the pecuniary ice upon which it skates is thin indeed. In such a situation, every added liability is important.

CIVIL PENALTIES

While I recognize that both violations of section 56.14101(a)(1) were very serious and the result of high negligence on the company's part, I believe that the company's financial condition and Schemmer's post-violation attitude toward safety and compliance fully warrant a reduction in the penalties proposed by the Secretary. I therefore assess a civil penalty of \$1,000 for each violation and, as ordered below, I permit Schemmer Limestone to pay the assessments on a structured basis. I make the assessment in the expectation that Schemmer Limestone and its president will persevere in their determination to assure safe working conditions for all miners in their employ.

ORDER

Schemmer Limestone is ORDERED to pay a civil penalties of \$50 each for the violation of section 56.16005 cited in Citation No. 3886105, 4/7/92, the violation of section 56.16006 cited in Citation No. 3886106, 4/7/92, and the violation of 56.20003(a) cited in Citation No. 3886107, 4/7/92. The penalties shall be paid within thirty (30) days of the date of this decision.

Schemmer Limestone IS ORDERED also to pay a civil penalty of \$1,000 for the violation of section 56.14101(a)(1) cited in Order/Citation No. 3885143, 4/7/92 and a civil penalty of \$1,000 for the violation of section 56.14101(a)(1) cited in Order/Citation No. 3885146, 4/7/92. Payment shall be made to MSHA in quarterly installments as follows:

1. \$500 due and payable on or before April 1, 1994;
2. \$500 due and payable on or before July 1, 1994;
3. \$500 due and payable on or before October 1, 1994;
4. \$500 due and payable on or before January 1, 1995.

Upon receipt of full payment this proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge

Distribution:

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