

CCASE:
SOL (MSHA) V. ARIZONA PORTLAND CEMENT
DDATE:
19940509
TTEXT:

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. WEST 93-627-M
Petitioner	:	A.C. No. 02-01138-05529
v.	:	
	:	Rillito Mill
	:	
ARIZONA PORTLAND CEMENT	:	
Respondent	:	

DECISION

Appearances: Susanne Lewald, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California, for Petitioner;
William S. Jameson, Esq., O'Melveny & Myers, Los Angeles, California, for Respondent.

Before: Judge Amchan

Factual Background

On April 29, 1993, Michael Pritchard, a welder-repairman employed by Respondent fell through the roof of the old mill building at the company's Rillito, Arizona concrete plant (Jt. Exh-1, Stipulation # 6, Tr. 69). A small section of the roof, which had rusted, gave way when Pritchard stepped on it (Tr. 26, Exh. R-1, G-4). He landed on a catwalk 20 feet below and sustained a concussion and broken elbow (Tr. 9).

Pritchard and his partner, Charles Doty, went to the roof to repair an exhaust fan in accordance with the instructions from their supervisor, Joe Vigil (Tr. 69, Exh. R-1). Mr. Vigil did not check the integrity of the roof, on which employees rarely worked, before assigning Pritchard and Doty to their task (Tr. 28).

The roof, which apparently was the original one installed on the building in 1969, had last been inspected in May, 1992, by David Carrekner, a mechanical engineer employed by Respondent (Exh R-1, R-2, Tr. 102-106). At that time Mr. Carrekner found nothing wrong with the roof (Exh. R-2, Tr. 104). Sections of this roof had been replaced in June, 1991 (Exh. R-2) Prior to the accident, an inspection of the roof had been scheduled for May, 1993 (Tr. 106).

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The roof was made of corrugated steel supported by steel beams running perpendicular to the corrugations in the steel at four foot intervals (Tr. 47, 107). It was approximately 28 feet long, 39 feet wide and 72 feet above the ground (Exh. R-1)(Footnote 1). At no time on April 29, did Mr. Pritchard and Mr. Doty approach the edge of the roof (Tr. 73).(Footnote 2)

The accident was immediately reported to MSHA (Tr. 109). The next day inspector Benito Orozco came to Respondent's Rillito plant to conduct an investigation (Tr. 9). As a result of that investigation he issued citation number 4124227 to Respondent. This citation alleged a "significant and substantial" violation of section 104(a) of the Act and the regulation found at 30 C.F.R. 56.15005. The regulation provides:

Safety belts and lines shall be worn when persons work where there is a danger of falling...

Subsequently, a \$1,800 civil penalty was proposed for the violation.

Analysis

In deciding whether an operator has violated MSHA's regulations pertaining to the use of safety belts, the Commission determines whether a reasonably prudent person familiar with the mining industry would recognize a danger of falling warranting the wearing of safety belts and lines. Great Western Electric Company, 5 FMSHRC 840, 842 (May 1983); Lanham Coal Company, 13 FMSHRC 1341 (September, 1991).(Footnote 3)

A threshold issue in the instant case is whether you evaluate Respondent's conduct in light of what it knew or should have known prior to the accident, or in light of what it knew after Mr. Pritchard fell through the roof. I find that Respondent's conduct is to be judged in the context of what it

1The dimensions of the roof of the old mill building given at hearing by inspector Orozco appear to be those of the adjacent structure (Tr. 12, Exh. R-1).

2Mr. Pritchard testified that he was never closer to the edge than 15 feet (Tr. 73). Exhibit R-1, however, indicates that the fan on which he was working was only 8 feet from the North end of the building.

3The cited cases involve standards with identical wording to section 56.15006, which are found at 30 C.F.R. 57.15-5 and 77.1710.

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knew or reasonably should have known prior to sending Mr. Pritchard to repair the fan on the roof of the old mill building.

One can speculate that the fact that the April 29, 1993 accident occurred establishes that either that Respondent's May, 1992 inspection of the roof was inadequate or that the roof, given its age, needed to be inspected more frequently than once a year to assure employee safety. However, nothing in the record of this proceeding provides any basis for converting such speculation into a finding of fact.

Inspector Orozco, the Secretary's only witness, opined that a prudent employer cannot rely on a roof inspection made 11 months earlier (Tr. 41). However, he does not have a background in chemical or structural engineering and has had no training with regard to how frequently roofs should be inspected (Tr. 42-43).

So far as this record shows, Respondent conducted a roof inspection in May, 1992, that was adequate. Further, there is nothing in this record to suggest that a prudent employer would have inspected the roof of the old mill building more frequently. Finally, the evidence suggests that the appearance of the roof from above and below provided no basis for suspecting that any part of it would not support the weight of the employees working on it.

Mr. Pritchard testified that the roof looked fine to him before he fell (Tr. 71-72). Employee safety representative Frank Obregon testified that examination of the roof from below, after the accident, revealed no obvious signs of deterioration (Tr. 92-93).

An employer may be obligated to require the use of safety belts if it has an inadequate basis for assuming that the roof will support an employee's weight. However, the record in this case allows only an inquiry as to whether a reasonably prudent operator would require his employees to wear a safety belt, tied off to a safety line, when he is going on a roof which the operator can reasonably assume will not collapse, and the employees will not approach the edge of the roof.

There is nothing in this record to indicate that a reasonably prudent operator would require his employees to use safety belts such a situation. While Inspector Orozco may be very capable at other aspects of his job, nothing in the record indicates that he has any experience which would qualify him to determine whether a reasonably prudent operator would have required the use of safety belts on April 29.

Respondent was unaware of any other instance in which a

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person had fallen through a corrugated steel roof (Tr. 110-111). Given this fact and the fact that on this record there was no reason to believe that the roof might not support the weight of the employees, the company safety rule requiring the use of safety belts only when employees were working near the edge of the roof fulfills Respondent's obligations under the cited standard.

Since the Secretary has failed to prove that a reasonably prudent operator would have required the use of safety belts by the employees working on the roof of the old mill building on April 29, 1993, citation 4124227 is VACATED.

ORDER

Citation 4124227 is hereby VACATED and this case is DISMISSED.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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