CCASE:
SOL (MSHA) V.DOLESE BROTHERS
DDATE:
19940602
TTEXT:

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. CENT 92-110-M
	:	A.C. No. 34-00015-05509
v.	:	Hartshorne Rock Quarry
DOLESE BROTHERS COMPANY, Respondent	:	

DECISION ON REMAND

Before: Judge Fauver

On April 11, 1994, the Commission affirmed my decision finding a violation but remanded for further analysis as to the civil penalty. The Commission directed the judge to enter findings for each of the statutory penalty criteria and, based upon such findings, to assess an appropriate penalty.

Section 110(i) of the Act provides six criteria for civil penalties: (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. 820(i).

Based upon the hearing evidence and the record as a whole, I make the following findings as to the statutory penalty criteria:

1. History of Previous Violations

In the 2-year period before the violation, Respondent had 20 violations of mine safety standards. Of these, 11 were significant and substantial violations. Assessed Violation History Report -- Detailed Violation Listings. Exhibit G-11; Tr. 6.

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

1 Failure of an operator to contest a citation equates to a finding that the violation was committed as alleged.

2. Size of Business

Respondent is a small size operator, as indicated by MSHA's Base Penalty Calculation for Special Assessment Violations (Exhibit R-3) and the tables in 30 C.F.R. 100.3 for company size and mine size.

3. Negligence

I find that the violation was due to a high degree of negligence. Section 56.14211(a) (30 C.F.R.) provides that "equipment in a raised position . . . [must be] . . . mechanically secured to prevent it from . . . falling accidentally." 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 Letter provided that a work basket may be attached to the load line of a crane only if the equipment had a safety device to prevent the load line from breaking in a "two block" situation. Mine operators were given clear notice that it was forbidden by law to attach a work basket to the load line of a crane unless they provided an anti-two-block device to prevent the line from breaking. Respondent contends that it received the Policy Letters when issued but did not read them until after the accident (January 1991). This is not a defense. Respondent is accountable for actual or constructive knowledge of the regulation and Policy Letters.

In light of the high gravity involved (see Gravity, below), I find that Respondent was highly negligent in failing to exercise reasonable care to ensure that its use of a work basket complied with the applicable law. Respondent's practice of suspending a work basket from the load line of a crane 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. This constitutes high negligence

4. The Effect of the Penalty on the Operator's Ability to Continue in Business

The parties stipulated that the Secretary's proposed penalty of $5,000 would not affect the operator's ability to continue in business. There being no claim of financial hardship, I find that the penalty assessed below would similarly not affect the operator's ability to continue in business.

5. Gravity of the Violation

The violation involved a high degree of gravity. The employee was in a metal work basket that suddenly fell 19 feet to the ground when the load line snapped in two. He suffered multiple fractures in both feet and a broken rib. It is clear from the nature of the accident that the employee could have been killed or suffered grave neck or spinal injuries causing permanent, severe disabilities. Also, it was only the height of this particular job that limited the fall to about 20 feet. The height of the work basket could have been 50 or 60 feet, depending on the job. Respondent's practice of suspending a work basket solely from a load line without anti-two-block protection subjected workers to a risk of death or permanent, severe disabilities.

6. Good Faith Abatement of the Violation

The parties stipulated that the operator demonstrated good faith in abating the violation.

Assessment of a Penalty

Considering all of the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of $8,000 i appropriate for this violation. In assessing a penalty higher than the Secretary's proposal, I have considered the high gravity and high negligence 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 conduct in attaching a work basket solely to the load line of a crane without the required safety device to prevent the line from snapping in two reflects a serious disregard for employee safety and the applicable safety standard.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of $8,000 within 30 days of the date of this Decision.

William Fauver
Administrative Law Judge

~1250
Distribution:

Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin St., Suite 501, Dallas, TX 75202 (Certified Mail)

Peter T. Van Dyke, Esq., Lyttle Soule & Curlee, 1200 Robinson Renaissance, 119 N. Robinson, Suite 1200, Oklahoma City, OK 73102 (Certified Mail)

/lt