

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 10 2015

SECRETARY OF LABOR,)	CIVIL PENALTY PROCEEDING
UNITED STATES DEPARTMENT)	
OF LABOR, MINE SAFETY AND)	Docket No. SE 2015-0137
HEALTH ADMINISTRATION (MSHA))	A.C. No. 40-00048-371150
Petitioner,)	
)	
v.)	
)	
TRI COUNTY STONE COMPANY, INC.)	Mine ID: 40-00048
Respondent)	Mine: Tri County Stone Company

DECISION

Appearances: Laura I. Pearson, Office of the Solicitor, U.S. Department of Labor, Denver, CO, for the Petitioner;

 Stanley Hitchcock, Tri County Stone Company, Inc., Morrison, TN, for the Respondent.

Before: Judge L. Zane Gill

This case is before me on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* On April 2, 2015, Chief Judge Lesnick signed a Notice of Designation For Simplified Proceedings under 29 C.F.R. Part 2700 for this docket, and assigned the docket to me. The parties presented testimony during a simplified proceedings hearing on October 6, 2015, in Nashville, TN.

On the second day of his E01 inspection, November 4, 2014, (Tr.46) MSHA inspector Kevin Dycus issued two 104(a) citations (Nos. 8614883 and 8614884)¹ to Tri County Stone (TCS) for alleged violations of 30 CFR 56.14100(b), a mandatory safety standard. (Tr.28-29; 52) Both citations allege excess slack in the steering linkage components on two Euclid 35-ton haul trucks used at TCS’s quarry. Tri County abated the citations by immediately replacing the ball joints in the steering linkage on one truck and tagging the other truck out of service.²

Each steering assembly consisted of a hydraulic piston whose rod was connected to a ball joint unit, which was in turn connected to a bell cam or idler arm. Dycus testified that he observed between 3/4" and 1" of play in all seven of the steering linkage elements on the two trucks. Dycus did not specify what TCS had to do to abate the citations. TCS replaced all seven ball joints (three on one truck and four on the other), which Dycus approved. (Tr.176-77; 187)

¹ The citations were written as S&S, but not as unwarrantable failure. (Tr.22) The S&S designation is supported by the fact that portions of the haul road have some grade, and the haul road crosses a public highway at one point. (Tr.44-45; 48)

² The ball joints on the second truck were eventually replaced as well.

TCS's witnesses testified that they checked for play in each of the assemblies before removing them for replacement, and other than the rotary movement necessary for a ball joint to function, found no demonstrable slack at all.

After reviewing all the evidence in the record and giving appropriate weight to each witness's testimony, I give more weight to the testimony of the Respondent's witnesses and find that the Secretary failed to prove by a preponderance of evidence that there was enough slack in the linkage assemblies to constitute a violation. Because I am unable to find an underlying defect by the preponderance standard, I am also unable to identify a hazard to support the citations. As a result, I VACATE both citations. I do not reach the issue of whether Dycus' appropriately characterized these alleged violations as S&S.

Summary of Facts and Discussion

The standard, 30 C.F.R. 56.14100(b),³ does not specify a specific amount of play necessary to trigger a violation. The "reasonably prudent person" test is appropriate to determine if a condition or practice violates a broadly worded mine safety standard, such as the "equipment defects" prohibition at issue here. *See Lafarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); 30 C.F.R. 56.14100(b). Under the reasonably prudent person test, "the violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (emphasis added); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992).

Here, the reasonably prudent person test must be applied to determine "whether a reasonably prudent person familiar with the hazards of movement in a ball joint and the use of surface equipment in the mining industry would have recognized a defect requiring corrective action" under 30 C.F.R. § 56.14100(b). *Lafarge North America*, 35 FMSHRC at 3502; *See Alabama By-Products*, 4 FMSHRC at 2131.

Inspector Dycus took guidance from a Commercial Vehicle Safety Alliance document (Ex. S-10) which establishes a slack limit of 1/8" between a linkage member and its point of attachment. However the CVSA reference has only advisory value and is not binding on MSHA or TCS. (Tr.81-84) TCS in turn referred to Part 399 of the Federal Motor Carrier Safety Administration regulations (Ex. R-1) which sets a 1/4" limit on steering mechanism slack. (Tr.84-87) Although the standard does not require anything more than a showing of a equipment defect that, in the inspector's judgment poses a hazard (Tr.75-76), there must be a preponderant quantum of sufficiently specific and relevant evidence to support the inspector's judgment. In this case, the Secretary's evidence did not reach preponderance.

³ 30 C.F.R. 56.14100(b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

The Secretary's case pivoted entirely around Inspector Dycus' testimony. He stated that all seven of the linkage points had between three-quarters and one inch of play, which if accepted as true could constitute a violation of the standard. However, the supporting exhibits and testimony fall short of corroborating this blanket allegation. In fact, the lack of individualized evidence of slack in the seven linkage elements greatly diminishes the weight of Dycus' testimony (Tr.59-60). This and the weight and consistency of the Respondent's evidence, make it impossible to find that any of the linkage points exhibited enough slack to violate the standard.⁴

When Dycus inspected the two 35-ton Euclid haul trucks on November 4, 2014, (Tr.31) he tested the steering mechanisms by having a driver turn the steering wheel while he observed the action from the ground. (Tr.161) He did not move the linkage elements with his hands – he only observed them from a distance. (Tr.193) Later, he used a tape measure to quantify the slack he observed and made photos showing linkage components with the superimposed tape measure. (Tr.31-32; Ex. S-8) In describing the slack, Dycus used somewhat confusing terminology, referring to, *inter alia*, slack in the “bearing” (Tr.32; 50; 56; 72) and the “tie rod end,” among others (Tr.30; 33). Nonetheless, he described observing at least three-quarters of an inch of back-and-forth movement of the ball joint only (Tr.56-57), using a non-moving part of the linkage assembly as a point of comparison. (Tr. 32-33)

Dycus used the same method to check “multiple” ball joint components on both sides of both trucks. (Tr.36) He initially testified about excess slack in three components on the first truck and three on the second. This was ultimately shown to be erroneous and not consistent with the text of the citations themselves. (Ex. S-2; S-5; Tr.34; 37; 53; 192) After hearing testimony from Hitchcock and Gambill (Tr.71), on rebuttal Dycus allowed that the trucks might have had seven linkage elements, three on one and four on the other. (Tr.192-193) Still, Dycus failed to clarify which of the elements his observation pertained to or whether the slack was side-to-side or radial. Dycus supplemented his testimony on rebuttal to claim that he had observed slack in the linkage assemblies and not just in the ball joints (Tr.191-92), and that he observed back-and-forth, not radial, movement. However he never told the court which of the seven linkage elements exhibited the slack he claimed.

The photos offered by the Secretary (Ex. S-4, S-7, and S-8), which purport to show the amount of prohibited slack, are not self-evident. It is unclear looking at them what, if anything, they prove. There is a tape measure in some of them as mentioned above, but without testimony to establish a reliable inspection methodology or an identifiable point of comparison, the photos do not show evidence of slack in the linkages. (Tr.69;71)

Another problem in assessing Dycus' evidence involves determining what type of movement he observed. It became clear during the hearing that radial movement in the ball joints, i.e., rotational movement around the ball joint spindle, is necessary for the steering linkage to function properly. (Tr.86-87;160;139-140) However, the quantum, weight, and

⁴ To complicate fact finding even more, Dycus stated on cross examination that he measured the slack in “most” of the seven ball joints, which begs further question about the reliability of his methods and their adjudicatory weight. (Tr.67-68)

credibility of the Respondent's evidence created a significant question whether, contrary to his testimony (Tr.70-71), what Dycus saw and reacted to was this radial movement and not back-and-forth or up-and-down movement in the linkages, which would indicate wear.

TCS brought the actual ball joints into the court room as demonstrative exhibits. (Ex. S-12) None of the witnesses who handled them was able to demonstrate more than one-eighth inch of movement, which would be within the Federal Motor Carrier Safety regulation guidelines Dycus had in mind when he wrote the citations. (Tr.71-75;78;118-119) In the ball joint with the most movement, it was almost indiscernible by observation in the court room. (Tr.197-200) This is consistent with TCS witness John Gambill's testimony that he tested the joints in a vice and could not get more than 1/8" movement from any of them. (Tr.119) It is also dramatically inconsistent with Dycus' testimony about observing several times more slack than that in all seven linkages.

Dycus testified that the truck driver manipulated one of the linkage elements with his hand⁵ (Tr.75), and Dycus saw nearly an inch of up-and-down movement. (Tr.187; 194) Dycus also told Hitchcock during their close-out meeting that the ball joints were in danger of coming apart. (Tr.196) After the ball joints were removed, Hitchcock tried to cut one of them apart to test Dycus' claim. (Tr.134) Further testimony and observation of the ball joints in the court room made it clear that, given the size of the ball joint parts, that much up-and-down movement would have been impossible without the ball joint coming apart. (Tr.194-195)

The evidence is clear and consistent that all seven of the ball joints had to, and did in fact, rotate properly around their spindles. (Tr.158-159) But, the Secretary's evidence about non-radial movement was non-specific and at times unclear, confusing, and unconvincing. (Tr.129) TCS' evidence about the integrity of the seven ball joints and their inability to recreate the three-quarters to one inch of non-radial movement Dycus testified about was helpful, but only to a limited extent. It created a possible alternate explanation for Dycus' sweeping claim that all seven ball joints exhibited excess movement. But, it did not deal thoroughly with the possibility that what Dycus saw was slack in the entire steering linkage assembly, not just in the ball joints.

TCS' witnesses presented evidence consistent and convincing enough to cast a significant doubt shadow on all of the Secretary's evidence. Not all of TCS' evidence was relevant, helpful, or convincing, but the combined testimony of Stanley Hitchcock, John Gambill, and Dan McInnis was significantly more convincing both as to their methodology of checking the linkage elements for slack and to their assessment of the improbability of the amount of slack claimed by Dycus.

John Gambill testified that he advised Hitchcock not to immediately repair both trucks, *viz.* he should fix one and leave the other one as it was so they could figure out how to develop the evidence they would need to challenge the citations. (Tr.181-82) Gambill then made

⁵ Dycus offered the court a hearsay confirmation of his observations in the form of an alleged comment by the driver who turned the steering wheel to help him inspect the trucks. Dycus said the driver exclaimed, "Oh, my!" when Dycus showed him how much slack there was. (Tr.34-35; 68)

evidence videos of the steering linkages and ball joints within days after the citations were issued. (Tr.182-83)⁶ The truck in the video had been tagged out and sat idle until the videos were shot, but it had not yet been repaired. (Tr.183) The two video clips of the intact steering linkage still on the truck show no lateral slack, only rotary movement around the ball joint spindle, which is necessary for proper operation. (Ex. R-3; Tr.91-92; 115; 117) In Gambill's opinion, neither truck was unsafe to operate. (Tr.119-20)

Charles Layne testified on behalf of TCS that neither truck was unsafe because of the steering linkages. (Tr.133) He examined the ball joints at the request of Hitchcock. (Tr.131) However, he did not inspect the linkages on the trucks. The ball joints had already been removed. (Tr.139) Layne suggested that someone with little experience (meaning Dycus) might think that the necessary rotary movement around the ball spindle was unsafe slack. (Tr.137-38)

In response to some of TCS' evidence, the court expressed concern that testing the ball joints in a vice might miss the point. The standard, as understood and applied by Dycus, focuses on the slack between the linkage members and their attachment points. (Tr.123-24) There was no testimony that Dycus saw play in the ball joints themselves. (He claimed that the play was in the linkage.) (Tr.124-25) Gambill's testimony only addressed the integrity of the ball joints, not the linkages. *Id.* Gambill's conclusions were made with both ends of the linkages fixed which produced no movement. (Tr.126)

Dan McInnis' testimony was key to showing that Dycus' generalized testimony about excess movement deserved little credence. Whereas most of TCS's evidence focused on the integrity of the ball joints after they were removed from the trucks, McInnis' testimony was based in large part on his observing the intact steering linkages on one of the trucks before and after they were removed for replacement. (Tr.164;167)

McInnis examined the steering linkages on both trucks within two days of Dycus' inspection (Tr.165), before they were removed. Importantly, he felt for play with his hands and inspected them visually. (Tr.148-49; 160) The only movement McInnis could induce was rotary movement in the ball joints. (Tr.149-151) He found nothing wrong with the ball joints from either truck. (Tr.144-45; 147; 151-52) There was no noticeable wear in the tie rods or where the ball cams attached to the ball joint assemblies. (Tr.148) There was no movement at the pin at the back of the hydraulic cylinders. (Tr.152)⁷ He watched as mechanics removed the ball joints from the trucks and saw no slack or anything that needed to be repaired. (Tr.146; 157-160; 169) In his view, there was no way to measure slack; it was too small to measure.⁸ (Tr.146-47) He found no change in the steering linkages after the parts were replaced. (Tr.166) In his opinion, neither truck was dangerous. (Tr.146) He did not see any justification for the citations. (Tr.168)

⁶ Of the five video clips comprising Exhibit R-3, three show ball joints being tested after being removed from the truck. The other two clips show the steering linkage, intact and still on the truck. (Tr.180) Only the latter were admitted into the record.

⁷ The issue of whether the standard speaks of one-eighth inch or one-quarter inch of slack was irrelevant; McInnis observed no play at all. (Tr.168-169)

⁸ The ball joints on both trucks had been replaced only a month before this inspection. (Tr.23-24).

If there had been as much as three-quarters of an inch of slack, as Dycus claimed, McInnis stated he would have seen it, and a driver would have felt it. (Tr.170)

The Secretary attempted to bolster Dycus' testimony by offering evidence that TCS did not protest the issuance of these citations at the time of the close-out meeting. (Tr.58-59; 175-76) TCS responded by showing that Hitchcock attempted later to talk to Dycus' supervisor (Tr.185-187) and to Dycus himself (Tr.188-189) to argue that the citations should be abandoned. According to Hitchcock, when the two finally spoke, Dycus equivocated and said that it might have been a loose shaft that caused the slack he saw. Hitchcock challenged Dycus, saying as the inspector, he had to be specific. He shouldn't be guessing about such things. (Tr.189)

The court gives due credit to Inspector Dycus' testimony that he believed there was enough slack in the seven steering assemblies to constitute a hazard and a violation of the standard. However, given the summary nature of the Secretary's evidence, the lack of specificity linking Dycus' conclusion to individual ball joint assemblies, and the questionable reliability of his observation and measurement, in order to sustain these citations, I would have to simply take the inspector's word and give it more weight than it deserves. On the basis of the Secretary's evidence, I am unable to find a hazardous slack condition in any of the seven assemblies. Further, I am unable to find even in the aggregate that there was sufficient slack to constitute a citable hazard, regardless of which linkage or ball joint was involved. Moreover, when weighed against the contrary evidence from TCS, which is much more specific and probative, it is all the more clear how thin and lacking the Secretary's evidence was. Therefore, I find that a reasonably prudent person familiar with the hazards of movement in haul truck steering linkages and the use of surface equipment in the mining industry would not have recognized a defect requiring corrective action.

The Secretary's evidence is too vague and conclusory to enable the court to conclude with any confidence or specificity that there was slack in any of the steering linkages. As such, the Secretary has failed to carry his burden of proof as to the existence of a hazardous condition that would violate the standard.

WHEREFORE, it is **ORDERED** that both Citation No. 8614883 and Citation No. 8614884 be **VACATED**.



L. Zane Gill
Administrative Law Judge

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