

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 23, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

CON-AGG OF MO, LLC,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2014-444-M  
A.C. No. 23-02004-353548

Mine: Huntsville Quarry

**ORDER AFFIRMING BENCH DECISION  
ON RESPONDENT’S MOTION FOR DIRECTED VERDICT**

Appearances: Leigh Burleson, Esq., and Alan Kelly, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner

Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, for the Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d).

At issue is a single citation, Citation Number 6566854, issued to mine operator Con-Agg of MO, LLC (“Con-Agg” or “the operator”) under section 104(a) of the Mine Act following a fatal accident that took place at the operator’s facility in September 2013. Docket CENT 2014-66 and two other citations contained in CENT 2014-444 were initially at issue in this proceeding but were settled prior to hearing.

A hearing was held in St. Louis, Missouri on October 14, 2015, at which time the Secretary offered testimony. At the close of the Secretary’s presentation of his case, I granted Con-Agg’s motion for directed verdict for the reasons discussed herein.

**Undisputed Facts**

Con-Agg operates the Huntsville Quarry, a small to medium size stone quarry located in Randolph County, Missouri. The quarry has multiple benches, or ledges, that were being mined

in addition to an abandoned underground mine from which the operator was taking rock to make a pit. The rock from the old mine was transported to the primary crusher via haul trucks which were loaded by front-end loaders in the pit. Once the rock was brought to the crusher plant, it was resized for various uses. The trucks used a haul road that leads from the pit up a steep incline past the benches where it intersected with an upper two-lane-wide haul road that led to the crusher. Tr. 21-22. Located along the side of this 52-foot-wide road abutting the highwall are boulders measuring 10 feet long by 6 feet deep by 4.5 feet high and weighing sixteen tons set three to four feet apart from one another which serve as the berm. Tr. 50, 55, 58, 74, 75, 133. The boulder berm has been in place as it was in September 2013 for approximately twelve years without modification. Tr. 54, 136. As many as thirteen inspectors from MSHA had inspected the berm and had found it adequate to meet the mandatory standard cited herein. Tr. 88-89. Steven Thompson was among those inspectors who had inspected this haul road at least ten to twelve times in the past and never issued a citation for an inadequate berm. Tr. 91, 127.

On September 16, 2013, haul truck driver David. A. Gully was traveling from the pit up on the haul road to the upper portion of the road where he made a 90-degree left-hand turn heading uphill towards the crusher. However, rather than straightening out onto the right-hand side of the road as would be expected, he continued to drive in an arc-like direction across the opposite side of the road and went through the berm at a 20-degree angle dragging a boulder along with his truck. While the haul truck continued down the slope towards the pit, eventually toppling over, the unrestrained driver was thrown to his death from the truck. The vehicle came to rest on top of the driver at the bottom of the pit eighty feet below where it had left the upper haul road. Tr. 26 -27, 41, 125.

An investigation ensued following the tragic events of September 16. When tested, the brakes on the truck were determined to be fully functional, as was all other equipment on it. Tr. 72; Ex. S-8. The results of the study also revealed that the truck was operating at full speed of eleven to fifteen miles per hour with the gas pedal depressed at the time it went through the berm. The operator did not engage the brake at any time. Tr. 93, 95-96. Further, upon testing it was found that not only would applying the brake have prevented the accident but had the driver released the gas pedal he would have safely coasted to a stop before impacting the berm. Tr. 72; Ex. S-8.

In the aftermath of the accident, MSHA Inspector Robert D. Seelke issued a citation to Con-Agg for a violation of mandatory standard 30 C.F.R. § 56.9300. As Inspector Seelke stated, he found the berm was inadequate specifically because the boulders were spaced too far apart and the gaps were greater than necessary for roadway drainage or other permitted purposes. Tr. 51.

Of significance here is that MSHA specifically approves of the use of boulders as berm material. Their inspection handbook states that boulders are to be placed at a distance from the edge of the highwall to offer adequate resistance. The handbook also goes on to say that berms are not designed to give an equipment operator a “false sense of security.” They are designed to “give the driver a visual indication of the location of the roadway edge; provide a sensation of contact to the driver if they accidentally contact the berm; [and] provide restraint to the vehicle to give the operator the opportunity to regain control and keep the vehicle from leaving the

roadway.” Ex. S-6, Chapter 8, Tr. 67-69. A berm is not intended to be a barrier that prevents a vehicle from traveling past or through it. Tr. 67. The National Mine Health and Safety Academy training materials dated September 20, 2013 provide that boulder berms are adequate if they are of mid-axle height and the boulders are spaced sufficiently close so that a vehicle cannot run between them but they may be set sufficiently apart to allow for drainage or for other purposes. Tr. 78; Ex. R-9. The training document goes on to say that a berm “is by no means meant to stop a runaway vehicle. It is only there to be used like a curb on a street. It’s just to let you know when you’re on the edge of the road, not to prevent you from going over the edge.” Tr. 83-84; Ex. S-9. Inspectors Seelke and Thompson testified that they are in agreement with the training literature and the boulders were sufficient to meet all of the requirements set forth herein as stated in both of these training sources. Tr. 73, 84, 111, 133, 135, 136, 139.

Seelke further testified, however, that because an accident occurred, he determined that the operator was liable for an inadequate berm. This is the point at which the testimony for the two government witnesses diverged significantly leading to my granting of a directed verdict made by the Respondent.

#### Robert Seelke’s Testimony

Despite being of the opinion that the berm met all of the requirements as stated above, Seelke was of the opinion that the boulders were too far apart. He could not state, however, how a different placement of the boulders would have offered greater resistance. He admitted that MSHA has no information on what distance between boulders is acceptable and merely speculated that the boulder in question did not offer sufficient resistance. Tr. 61. Neither he nor anyone else measured the distance at which the boulders were placed from the edge of the highwall and he had no idea how much resistance was offered. Tr. 74. He further acknowledged that he has no experience constructing boulder berms and has no educational expertise in the area. Tr. 62. He was aware that the smallest vehicle to operate at the mine was sufficiently wide that it could not pass between the boulders and he never inquired of anyone at the mine whether the distance at which the boulders were placed from one another was necessary for drainage of rain or clearing of snow and ice from the haul road. Tr. 63-66, 80-82.

Seelke readily confirmed that as many as thirteen inspectors over the course of ten to twelve years had inspected this berm and found it adequate. He further expressed his confidence in each of these inspectors and felt they had not been negligent in their opinions concerning this berm. Tr. 88-89, 91. He stated that thirteen inspectors could have thirteen different opinions but somehow an operator would know what distance gap would be acceptable by perhaps calling an inspector and asking. Tr. 89. When the question was put to him, “Is there any particular thing that we could look to ... we as operators could look to, as to why your opinion is right and the other 12 or 13 inspectors were wrong,” his response was, “Probably nothing. No.” Tr. 89-90.

After confirming that the driver was out of control, had not taken his foot of the accelerator, was driving in third or fourth gear at a top speed of eleven miles per hour and could have easily stopped his vehicle by either taking his foot off the gas or applying the brake, Seelke stated that he believed the operator was conscious at the time and that the gap in the boulders was the direct cause of the accident. Tr. 113. He found the driver’s failure to maintain control of

the truck and his not wearing a seat belt were merely contributing factors. Tr. 113. Although he was of the opinion Gully was conscious, he could not account for how a driver would travel across a roadway at full throttle and not react when impacting a 16-ton boulder. Tr. 70. When asked if he had received information during the course of his accident investigation that Gully had health issues, Seelke was less than forthcoming. He stated “there was some third-hand information, yes.” When pressed as to the nature of that information he responded, “That he – the weekend prior, he was having – he did not want to wear his seat belt because he felt uncomfortable, it was restraining him, in his personal vehicle.” When pressed even further he finally said, “That – that’s – was the – was the part that – that – let’s see. I – there may have been something about maybe some chest – chest pains, but that was – I – I don’t recall anything else.” Tr. 71.

When asked if he made the decision to issue this citation in light of the investigative findings, Seelke was equally evasive claiming it was “MSHA’s idea as an agency.” Tr. 92.<sup>1</sup>

### Steven Thompson’s Testimony

Thompson’s testimony completely contradicts Seelke’s. He disagreed that the boulders were insufficient in height, size or placement to be considered adequate. He felt they were still adequate, in fact, and that no violation was committed. Tr. 133-36, 141. He freely admitted that persons he interviewed at the mine told him that the driver had been complaining of chest pains and indigestion-like symptoms prior to the accident. Tr. 133. It was his opinion that Gully was not conscious when he hit the boulder considering the manner in which the truck veered off the road without slowing or braking and that the driver had suffered some sort of physical event which rendered him unconscious thereby causing the accident. Anyone who was conscious could have avoided the accident easily. Tr. 133-35, 143. He emphatically stated that insufficient berms did not cause the accident. Tr. 142-43. Thompson also added that MSHA does not have any data to suggest what size boulder would withstand being pushed off a highwall when hit by a 50-ton truck. Tr. 139. These boulders were set far enough away from the edge that the truck had to have pushed it nine feet before going over the wall. Tr. 133. There is no set footage on gap measurements provided by MSHA and the only requirements are that the boulders be of mid-axle height and set sufficiently close together to prevent a vehicle from driving between them as this was.

I find it incomprehensible that the Secretary would present a case in which his only two witnesses contradict and impeach one another yet would represent to the court that there is a preponderance of evidence upon which to find the operator subject to liability. Not only does one’s testimony nullify the other’s, but any reasonable interpretation of the facts leads to the conclusion that the operator must prevail on its motion. First, the scenario offered by Thompson of the driver having suffered some medical event leaving him unable to respond is the most reasonable interpretation of the objective facts. Secondly, the operator could not have had fair notice of a violation where the only proponent of the violation admitted that he and all of his

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<sup>1</sup> There was a representation made by the Secretary through my law clerk that a civil suit is pending in this matter. I would sincerely hope that a direction to issue a citation was not given by to the inspector to assist in that civil matter where the facts clearly do not support imposing such liability upon the operator.

esteemed colleagues found the boulder berm sufficient for ten to twelve years until this aberrant occurrence. The Secretary, in closing remarks, stated that drivers have heart attacks while operating equipment which is foreseeable to the operator. I find this a most interesting interpretation of fair notice but not worthy of discussion.

Thompson's and the operator's belief that the berm was sufficient is also supported by MSHA's own literature concerning the use of boulders as a berm stating that the purpose of the berm is not to serve as a physical barrier capable of stopping a vehicle.

Respondent's motion for directed verdict was **GRANTED** at trial and I herein memorialize that ruling. Citation Number 6566854 is hereby **VACATED**.

A handwritten signature in black ink, appearing to read "Priscilla M. Rae". The signature is fluid and cursive, with the first name being the most prominent.

Priscilla M. Rae  
Administrative Law Judge

Distribution:

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