

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 26, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 95-214-M
Petitioner,	:	A.C. No. 23-02072-05512-A
v.	:	
	:	Gallatin Quarry Mine
HAROLD G. MOODY, Employed by	:	
GRAND RIVER QUARRY, INC.	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-215-M
Petitioner	:	A.C. No. 23-02072-05511-A
v.	:	
	:	Gallatin Quarry Mine
ROBERT G. FLINT,	:	
formerly Employed by	:	
GRAND RIVER QUARRY, INC.,	:	
Respondent	:	

DECISION

Appearances: Keith E. Bell, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
Harold L. Moody, Kearney, Missouri, Pro Se;
Robert G. Flint, Sedalia, Missouri, Pro Se.

Before: Judge Amchan

Summary

Before me are two cases alleging that two supervisory employees of Grand River Quarry, Inc. (Grand River Quarry), Harold L. Moody and Robert G. Flint knowingly violated 30 C.F.R. §56.9300(b) in failing to provide a berm of adequate height on the side of an elevated roadway. Pursuant to section 110(c) of the Act, Petitioner has proposed a \$1,000 penalty for Mr. Moody, a general manager of Grand River Quarry and \$750 for Mr. Flint, a foreman. For the reasons stated below, I conclude that the Secretary has failed to establish that Respondent Moody knowingly violated the standard. I therefore assess no civil penalty in

his case. On the other hand, I find that Mr. Flint knowingly violated the standard and assess a civil penalty of \$300.

Findings of Fact

On July 21, 1994, MSHA Inspector Michael Marler was conducting a multi-day inspection of Grand River's Gallatin Quarry in Davies County, Missouri (Tr. 18, 25-26). At about 2:55 that afternoon, a large vehicle slid off an elevated roadway into a drainage ditch, apparently without injury to the driver (Tr. 27, 56, Exh. A). The vehicle, originally a Caterpillar Model 631 scrapper had been modified to serve as a haul truck (Tr. 102).

This "631 haul truck" was normally used to move shot rock from the blasting area to a crusher (Tr. 103). When it did so, it used a different roadway from the one involved in the July 21 accident (Tr. 108-09).

To transport finished product to the stockpiles, Grand River Quarry normally used a stockpile truck. However, approximately once or twice a month the stockpile truck would break down and Grand River Quarry would use the 631 haul truck to carry the finished product to its stockpile. On these occasions only, the 631 would travel the "accident roadway" (Tr. 108-09).

On the morning of July 21, 1994, the stockpile truck broke down. At about 9:00 or 9:30 a.m., Grand River Quarry started using the 631 to move the finished product (Tr. 108). The front tires of the 631 are 84" high. The rear tires are 76" tall (Tr. 31-32). The berm on the side of the roadway from the plant to the stockpile, the "accident roadway," was about 24" in height (Tr. 31).

After determining the size of the tires and height of the berm, Inspector Marler issued Citation No. 4322450 to Grand River Quarry. It was handed to Robert G. Flint, the foreman in charge

of the Gallatin Quarry on a daily basis. The citation alleged a violation of 30 C.F.R. §56.9300(b) in that the berm was not at least half the height of the 631 haul truck's front tires.

Afterwards, Dale St. Laurent conducted an MSHA special investigation of the circumstances surrounding the citation. Based on his report, penalties were proposed for Harold Moody, the General Manager of Grand River Quarry, and Mr. Flint, the on-site foreman, in the amounts of \$1,000 and \$750, respectively.

Petitioner has established that Respondent Flint knowingly violated the Act, but has not established a knowing violation on the part of Mr. Moody.

Section 110(c) of the Federal Mine Safety and Health Act provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

Section 110(a) referred to above provides that civil penalties of up to \$50,000 may be imposed for violations of the Act. Section 110(d) provides for criminal penalties in certain situations. Penalties, if contested, are assessed by the Commission after considering a mine operator's history of previous violations, the size of the operator's business, the negligence of the operator, the effect of the penalty on the operator's ability to stay in business, the gravity of the violation and the good faith of the operator in abating the violation.

The Commission has held that a corporate officer or agent knowingly violates an MSHA standard if he or she knew or had reason to know of the violative condition, Prabhu Deshetty,

16 FMSHRC 1046 (May 1994). To establish a knowing violation, the Secretary need not prove that the agent knew he or she was violating the law, Warren Steen, 14 FMSHRC 1125 (July 1992).

Applying these principles to Mr. Moody's case, I find that the Secretary has not established that he knew or had reason to know that a violative condition existed on July 21, 1994, prior to the issuance of the citation. Section 56.9300(b) provides that:

Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment **which usually travels the roadway** (emphasis added).

The Secretary failed to show that Moody knew or had reason to know that the 631 haul truck would be driven on the accident roadway at times when the berms were less than 42 inches high. Moody was not on-site on July 21. Normally, the 631 haul truck was not used on this roadway. The evidence does not establish that Moody knew, or had reason to know, that it would be used on July 21. The record indicates that the berm was sufficient for at least some other vehicles (Tr. 53).

Although Moody had reason to know that the 631 would be used on this roadway periodically, there is no basis on which I could conclude that he knew it would be used at times when the berm was not mid-axle height. The berm on this roadway had been higher than 24 inches on occasions prior to July 21, but had been eroded by rainfall (Tr. 67, 73, 76, 104). The record does not show that Moody knew its height on July 21. Indeed, on July 19 the road was not used due to bad weather, and it is quite possible that the berm was substantially smaller on July 21 than it had been the last time Moody had observed it (Tr. 52).

Mr. Flint's situation is distinguishable by the fact that he was on-site on July 21, 1994, and was aware that his miners had started using the 631 haul truck on the accident roadway. Since this vehicle used the roadway repeatedly on July 21, I find that it was the largest piece of self-propelled mobile equipment which usually traveled the roadway.

Foreman Flint knew the 631 was being used on the roadway and knew, or had reason to know, that the berm on the side of the roadway did not approach mid-axle height of either its front or rear tires. Therefore, I find he knowingly violated §56.9300(b) in failing to increase the height of the berm.

A \$300 civil penalty is assessed against Foreman Robert Flint

Applying the criteria set forth in section 110(i), I conclude that \$300 is an appropriate civil penalty for Robert Flint's "knowing" violation of §56.9300(b). My assessment of the criteria is as follows:

Gravity of the Violation: I conclude that the gravity of the violation is high. If a heavy vehicle leaves an elevated roadway, there is a reasonable likelihood that it will flip over killing or injuring the driver. It could also conceivably kill or injure others on the mine site. On the other hand, the slope from the roadway to the drainage ditch was apparently gradual and the 631 appears from photographs to be a very heavy vehicle with a low center of gravity. These factors substantially decrease the likelihood of death or serious injury.

Negligence: Mr. Flint was negligent in not complying with the standard. He not only knew, or had reason to know, of the violative condition, he was familiar with the requirements of the standard (Tr. 114). On the other hand, I have given consideration to the fact that the violation was of fairly short duration and that, so far as this record shows, the berm was sufficient for the vehicles that usually traveled the roadway on other days.

Prior History of Violations: Mr. Flint received a citation on behalf of Grand River Quarry for failure to have a berm on another elevated roadway only two days prior to the instant citation (Exhibit G). Although that citation had nothing to do with the height requirement for berms, it should have made him more attentive to all MSHA requirements in this regard.

Good Faith in Abating the Violation: Blocks 17 and 18 of the citation indicate that the violation was abated within 95 minutes by the construction of a six-foot berm.

Size of the Operator and Effect of the Penalty on its Ability to Stay in Business

These factors are difficult to apply in assessing a penalty against an individual. By analogy, I have considered the fact that Mr. Flint was a foreman earning approximately \$23,000 a year

when he worked for Grand River Quarry (Tr. 20, 116). A substantially lower penalty is generally appropriate for a low level supervisor than for a higher and better paid agent of an operator.

ORDER

The petition for assessment of a civil penalty against Harold L. Moody is **DISMISSED**.

A \$300 civil penalty is assessed against Robert G. Flint. This penalty shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Keith E. Bell, Esq., Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Blvd., Suite 400,
Arlington, VA 22203 (Certified Mail)

Robert G. Flint, 235 E. Howard St., Sedalia, MO 65301
(Certified Mail)

Harold L. Moody, 702 Feldpar, Kearney, MO 64060
(Certified Mail)

/lh