FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 14, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-263-M
Petitioner	:	A. C. No. 41-03278-05520
v.	:	
	:	South Quarry
JOBE CONCRETE PRODUCTS, INC.,	:	
Respondent	:	

DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Jobe Concrete Products, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $80,000.00. For the reasons set forth below, I modify and affirm the citations and assess a civil penalty of $6,000.00.

The parties filed a motion for partial settlement of the case. In the partial settlement, the parties agreed that the Secretary would modify Citation No. 7925871 from a 104(d)(1) citation, 30 U.S.C. § 814(d)(1), to a 104(a) citation, 30 U.S.C. § 814(a), by reducing the level of negligence alleged from "high" to "moderate" and deleting the "unwarrantable failure" designation. The parties also agreed that they would submit the case based on joint exhibits and a stipulation of facts, including a stipulation on all of the penalty criteria, with the exception of "negligence," and that they would file briefs addressing the level of negligence and an appropriate penalty. I issued an order granting the motion for partial settlement on March 3, 1999.

Background

The South Quarry is an open pit limestone mine owned and operated by Jobe Concrete Products, Inc., in El Paso County, Texas. Limestone is extracted by drilling and blasting. The mined limestone is hauled by front-end loader and trucks to the plant where it is crushed, sized and stored in stockpiles. The finished products are sold for general industry and road construction. The mine has 12 employees.

At about 1:30 p.m., on January 19, 1998, Valentine Moreno, age 72, was fatally injured when the cargo box on the Terex Model 2766C, 27.5 ton capacity, all-wheel drive, articulated dump truck that he was driving overturned. When the cargo box turned onto it's right side, the truck came to a sudden stop and Moreno was apparently ejected from the cab. No one saw the accident. The first person on the scene found Moreno lying across the engine, face down on top of the windshield. The motor was still running. Moreno was pronounced dead at the scene.

The MSHA investigation of the accident determined that:

> The truck was normally used to haul broken limestone from the quarry to a primary crusher located in the plant yard, a distance of approximately one thousand feet.
>
> Th[e] road [from the quarry to the crusher] declined at approximately 10 degrees or 17 percent. It was graded smooth and was bermed properly from top to bottom. The road wound slightly down the hill to a switchback curve located approximately 300 feet from the crusher. Traffic on the road was one way only.
>
> Tire tracks found on the roadway identified the path of the truck. The tracks, identified as the left side tire tracks, veered off the left side of the roadway approximately 250 feet uphill from the switchback curve. They followed the left shoulder for about one hundred feet to a bump in the shoulder and then crossed at a forty-five degree angle to the right shoulder of the roadway. The tracks then made a straight line down the right shoulder, across the switchback to a berm constructed of large rocks. Paint marks as well as scrape marks were imprinted on the large boulders constructing the berm.
>
> The truck came to rest with the cab upright and the cargo box laying [*sic*] on it's right side approximately thirty feet from where the markings were found on the rocks. There were no skid marks on the roadway to suggest that the brakes had been applied.

(Jt. Ex. 1.)

The investigation resulted in the issuance of two citations. Both citations state that:

> A fatal accident occurred at this operation on January 19, 1998, when a truck driver lost control of the truck he was driving while en route from the quarry to the crusher. The bed of the articulated truck overturned when the vehicle struck a rock berm at the bottom of the quarry

> access ramp. The cab remained upright, but the victim was thrown through the windshield.

Citation No. 7925870 alleges a violation of section 56.9101, 30 C.F.R. § 56.9101, in that: "An examination of the vehicle and roadway did not reveal defects affecting safety or unsafe conditions." Citation No. 7925871 charges a violation of section 56.14131(a), 30 C.F.R. § 56.14131(a), because: "The victim was not wearing a seatbelt. No effective effort was made to ensure truck seatbelts were worn. The instructions to wear seatbelts were in English; the victim spoke Spanish. The operator did not establish a practice of following-up to see that seatbelts were being worn."

Findings of Fact and Conclusions of Law

Section 56.9101 requires that: "Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used." Section 56.14131(a) provides that: "Seat belts shall be provided and worn in haulage trucks." The parties have stipulated that the violations occurred and that they were "significant and substantial." (Stips. III.B.2., III.A.5.; II.B.2., II.A.5.) Accordingly, I so conclude.

Civil Penalty Assessment

The Secretary has proposed penalties of $30,000.00 and $50,000.00, respectively, for these two violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

Section 110(i) provides that:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

With regard to these criteria, the parties have stipulated that:

> (1) The operator's history of violations shows only 9 violations during the preceding 24-month period, which is a relatively low history of previous violations.
>
> (2) Respondent is a relatively small operator. The mine employed 12 persons, normally operating one shift a day, five and one-half days per week.
>
> (3) The proposed penalty would probably not affect the operator's ability to continue in business.
>
> (4) The violation[s] w[ere] promptly abated in good faith . . . .
>
> (5) The gravity of the violation[s] was serious, in that the violation[s] w[ere] significant and substantial, as the driver of the vehicle was fatally injured . . . .

(Stips. II.A. & II.B.) Thus, the only issue left for determination is the degree of the operator's negligence with regard to the violations.

The Secretary has alleged that the level of negligence in both citations is "moderate."[1] Determining the level of negligence in this case is complicated by two factors. The first is that no one witnessed the accident, so there is no way to know exactly what happened. The second is that the negligence of a rank-and-file non-supervisory employee cannot be directly imputed to the operator for purposes of penalty assessment. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982).

With regard to the first factor, it is possible to infer from the facts available that some negligence on the part of Moreno was involved. He clearly was not wearing his seat belt when the accident happened and it is evident from the tracks left by the truck that he did not have control of it. While it is possible to speculate on scenarios that do not involve negligence on the part of the driver, *e.g.*, he had a heart attack, there is no evidence in the record to support such speculation. Furthermore, such speculation would not explain his failure to wear a seat belt. Consequently, I conclude that Moreno was negligent in not wearing a seat belt and not maintaining control of his truck.

Turning to the second factor, the Commission has held that although a non-supervisory employee's negligence is not directly imputable to the operator, "where a rank-and-file employee

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[1] Citation No. 7925871 originally alleged that the company's negligence was "high," however, as noted above, the Secretary agreed to modify it to "moderate" in the partial settlement. I am deciding this case on the assumption that she has carried out this part of the agreement.

has violated the act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Id*. (citation omitted). Based on the evidence before me, I conclude that Jobe had taken reasonable steps to prevent the violative conduct.

In connection with this issue, the parties stipulated that:

> [1]. At the time of the accident, Jobe did not have a written seat belt policy, although its employees were trained that they were required to wear seat belts whenever they operated a motor vehicle. Jobe's unwritten policy was communicated in both English and in Spanish at regular safety meetings which supervisors held with their employees, and it required supervisors to check their employees for compliance periodically. Drivers were warned that they would be disciplined if found out of compliance.
>
> [2]. Signs reminding employees of the importance of seat belt use, including MSHA warnings and related safety training materials, were posted at locations where miners would see them, but those signs were only in English.
>
> [3]. Most employees speak only Spanish.
>
> [4]. A July 1997 memorandum from Company President Irene Epperson to supervisors, including Moreno's supervisor, forwarded several MSHA "Fatalgrams," including at least one warning of the importance of maintaining control of one's truck and wearing seat belts, and that memorandum instructed the supervisors to use them in their safety meetings with employees.
>
> [5]. MSHA's field notes from its accident investigation revealed that, when asked by MSHA, miners stated that Jobe had a policy requiring them to wear seat belts and that they complied with it. Other than the fact that Moreno was found not wearing his seat belt after the accident, MSHA has no evidence that seat belts were not worn regularly by Jobe's employees or that Jobe did not properly enforce its seat belt policy.
>
> [6]. Moreno's supervisors had considered him, prior to the accident, to be a safety-conscious employee who conscientiously wore his seat belt; three supervisors have provided sworn affidavits that they personally had observed Moreno wearing his seat belt, and two of those supervisors testified that they personally and

regularly instructed their employees including Moreno, to use seat belts.

[7]. MSHA has no evidence that Moreno was not a conscientious seat belt wearer. The only evidence MSHA has regarding Moreno's seat belt compliance prior to the accident is that: (a) he attended safety meetings conducted by MSHA in which the requirement to wear seat belts was stressed; and (b) when MSHA conducted a spot check during an inspection five months before the accident, MSHA documented the fact that Moreno himself (as well as all others checked) was wearing his seat belt.

[8]. Jobe's records show that, as required by company policy, Moreno regularly checked his vehicle to ensure that his seat belts were operational before operating his truck; those records show that Moreno checked on his seat belt before he began operating his truck on the day of the accident.

[9]. Only one prior citation for a seat belt violation was ever issued to Jobe; it was assessed a $50 civil penalty.

[10]. MSHA is unaware of any evidence that Moreno was speeding or that excessive speed played any role in the accident.

[11]. Moreno was familiar with the road, having previously driven it periodically when filling in for regular truck drivers, as well as having driven it every day for the two weeks he had been serving as truck driver prior to the accident, all without incident. Each day during that two-week period, Moreno drove the same 1,000 foot route each way, back and forth, all day long.

[12]. The speed limit was 15 miles per hour and drivers were trained not to exceed it.

[13]. No speed limit signs were posted on the road down to the rock plant.

[14]. Moreno had been a heavy equipment operator for over 25 years. During the one and one-half years of employment at the mine, he had demonstrated competence operating such equipment, including pit trucks. Although he had been classified as a dozer operator for most of his tenure at the mine, Moreno had periodically filled in as a truck driver when he was not needed as a dozer operator.

> [15]. Supervisors testified in their sworn affidavits that Moreno was a "safe and careful pit truck driver" and was among their "most experienced and careful equipment operators" generally.
>
> [16]. Supervisor Armando Garcia had Moreno trained in the safe operation of such pit trucks by operating them under the supervision of an experienced driver who rode with Moreno on and off for two days, prior to assigning him to perform the task on his own. Such supervised training during production is standard practice before Garcia assigns a new driver to operate those trucks.
>
> [17]. MSHA has no evidence that would suggest that Moreno was anything but a safe, experienced, mature mobile equipment operator without any blemishes on his driving record, at the mine or elsewhere.
>
> [18]. MSHA is unaware of any evidence that Jobe's supervision, training or disciplining of its employees was negligent.

(Stips. II.B. 3-11; III.B. 4-7, 9-13.)

It is hard to understand how the Secretary can argue that Jobe was "moderately" negligent when she has stipulated that "MSHA is unaware of any evidence that Jobe's supervision, training or disciplining of its employees was negligent." Nevertheless, even without the stipulation, the evidence clearly indicates that Jobe was not negligent. The only area where Jobe can be faulted is that its seat belt reminder signs were only in English. Even that fact, however, is not significant in this case. The record is silent as to whether Moreno could read and understand English. But the record is clear that Moreno was instructed in Spanish to wear his seat belt and that he routinely did so.

Accordingly, I find that Jobe exercised diligence with respect to its employees wearing seat belts and maintaining control of mobile equipment and could not have known that Moreno would apparently act otherwise in this instance. Therefore, I conclude that Jobe was not negligent and will modify the citations appropriately.

Taking all of the penalty criteria into consideration, I conclude that a civil penalty of $3,000.00 for each citation is condign.

Order

Citation Nos. 7925870 and 7925871 are **MODIFIED** by reducing the level of negligence from "moderate" to "none" and are **AFFIRMED** as modified. Jobe Concrete Products, Inc. is **ORDERED TO PAY** a civil penalty of **$6,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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