

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 11, 1997

VULCAN MATERIALS COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. LAKE 96-128-RM
: Citation No. 4105681; 5/7/96
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine ID No. 12-00136
Respondent : Francesville Quarry
:
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 97-16-M
Petitioner : A. C. No. 12-00136-05514
22. :
:
VULCAN MATERIALS COMPANY, :
Respondent : Francesville Quarry

DECISIONS

Appearances: Rafael Alvarez, Esq., Office of the
Solicitor, U.S. Department of Labor,
Chicago, Illinois, for the Petitioner/Respondent;
William K. Doran, Esq., Smith, Heenan & Althen,
Washington, D.C.,
for Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). Petitioner seeks a civil penalty assessment of \$220, for an alleged violation of mandatory safety standard 30 C.F.R. 56.11001. The contest proceeding concerns a Notice of Contest filed by the contestant challenging the legality of the citation. A hearing was held in Peru, Indiana, and the parties appeared and participated therein.

The parties filed posthearing briefs and I have considered

their arguments in the course of my adjudication of these matters.

Issues

The issues presented in these proceedings are (1) whether the respondent violated the cited mandatory safety standard, (2) whether the alleged violation is significant and substantial (S&S), and (3) the appropriate civil penalty to be assessed pursuant to the penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 301, et seq.
2. Sections 104(a), 105(d) and 110(a) and (i) of the Act.
3. 30 C.F.R. 56.11001.
4. Commission Rules, 29 C.F.R. ' 2700.1, et seq.

Stipulations

The parties stipulated as follows:

- (1) The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.
- (2) Vulcan's operations affect interstate commerce.
- (3) Vulcan owns and operates the Francesville Quarry which is located in Pulaski County, IN.
- (4) The Francesville quarry crushes limestone.
- (5) The Francesville Quarry worked 43,084 man-hours from October 16, 1995 through October 16, 1996.
- (6) Vulcan worked 7,978,113 man-hours from October 16, 1995 through October 16, 1996 at all of its mines.
- (7) The Francesville Quarry had 18 violations in the preceding 24 months ending on May 7, 1996.
- (8) The payment of \$220.00 will not affect Vulcan's ability to continue in business.
- (9) On May 7, 1996, Inspector Victor W. Chicky of the Federal Mine Safety and Health Administration conducted an inspection of the Francesville Quarry.

(10) During the course of the inspection, Mr. Chicky issued 104(a) Citation No. 4105681 for a violation of 30 C.F.R. ' 56.11001.

(11) Vulcan owns and operates a Euclid 302 LD haulage truck, serial number 72754.

(12) The Francesville Quarry had 25 inspection days in the preceding 24 months ending on May 7, 1996.

Discussion

Section 104(a) AS&S@ Citation No. 4105681, May 7, 1996, alleges a violation of mandatory safety standard 30 C.F.R. 56.11001, and the cited condition or practice states as follows:

A outside handrail (retro-fit) was not provided on the elevated walkway of the Euclid, 302 LD, Ser. # 72754 operating in the quarry. The walkway is 18.5 inches wide, 8 feet long. Access is done on 2 shifts, 2-3 times a day. A fall of 8.5 feet would be possible from here. Conditions range from dry to wet due to weather. Hazard. Fall potential.

MSHA's Testimony and Evidence

MSHA Inspector Victor W. Chicky testified to his experience and training, including 15 years in private industry, and the operation of bob cats, drilling machines, and work as a blaster.

He confirmed that he conducted an inspection of the quarry on May 7, 1996, and that it was his first inspection visit to that mine. He observed two 300 Series 50-ton Euclid haulage trucks in operation, and upon inspecting them he found that they were not equipped with handrails along the walkway adjacent to the operator's cab. He identified photographic Exhibits R-4 (1) and (2), as one of the trucks in question, or one that appears to be similar to the cited truck. He cited both trucks, but the second citation was vacated after the truck was lost in a fire (Tr. 15-21).

Mr. Chicky stated that he took certain measurements and determined that the walkway was 8 feet long and 18 **2** inches wide. The distance from the front of the ladder used to reach the walkway to the edge of the cab door was four to five feet, and the distance from the top of the walkway to the ground below

was 8 **2** feet. The truck operator informed him that he was on and off the truck two or three times a day (Tr. 23-24, 33).

Mr. Chicky stated that he determined that the absence of a handrail along the truck walkway presented a potential fall hazard to the ground below, and he cited a violation of section 56.11001, for a failure to provide a safe means of access to the operator's cab, an area that he considered to be a working place. He also considered the walkway to be a travelway as defined by section 56.2. He concluded that the lack of a handrail presented a slip and fall hazard, particularly under wet or muddy conditions on a rainy day. Although it was not raining when he inspected the truck, there was intermittent rain later in the day (Tr. 25-26).

Mr. Chicky stated that he discussed the citation with plant superintendent Irvin Wilson, and pointed out the hazard to him. Mr. Wilson informed him that he made an inquiry in September 1995, regarding handrail retrofit kits, and found that there was a 8 to 10 week waiting period for the kits. Mr. Chicky had no knowledge that any kits had been ordered by Vulcan. Mr. Chicky confirmed that he based his moderate negligence finding on his conversation with Mr. Wilson. He believed that Vulcan knew that handrails were necessary. Mr. Chicky was of the opinion that no specific retrofit kits were required to comply with the standard and that Vulcan could have constructed its own handrails for the truck (Tr. 30-32).

Mr. Chicky stated that he based his AS&S finding on his belief that it was reasonably likely that under adverse weather and slippery conditions a fall of person hazard 8 **2** feet to the ground below would exist as the operator entered or exited his operator's cab, and if this occurred, the fall would result in relatively serious back, head, or leg injuries. He further indicated that the grated walkway, which he described as a good, would be exposed to slippery conditions due to mud, frost, or snow (Tr. 32-35).

Mr. Chicky stated that the truck operator works alone while operating the truck. He confirmed that he discussed the citation with Mr. Wilson during his inspection closing conference, and Mr. Wilson disagreed with his AS&S finding, and did not believe there was a violation of section 56.11001, because the truck was equipped with handholds. Mr. Chicky stated that prior to his inspection of May 7, 1996, he had never issued any other citations for violations of section 56.11001, at any mine for lack of handrails on any haulage trucks
(Tr. 39-40).

Mr. Chicky identified exhibit P-2, a May 8, 1996, letter to Mr. David Bach, Vulcan's purchasing agent, from the McAllister Equipment Company, Chicago, Illinois, concerning the availability of handrail kits for Euclid Trucks, and stated that his supervisor faxed him a copy. He then acknowledged that he may have been in error regarding this letter, and on cross-examination clarified the matter and explained that the document he received was Exhibit R-2, a March 1, 1996, memorandum from his supervisor Ralph D. Christensen concerning hand railings for Euclid Haul Trucks (Tr. 39-40). Mr. Chicky did not know who made the notations that appear on the exhibit (Tr. 35-37).

On cross-examination, Mr. Chicky confirmed that he was aware of MSHA Program Information Bulletin No. P95-22, dated October 24, 1995 (Exhibit P-1). With regard to the Equipment precautions listed on page two of the bulletin, particularly the one that states Handholds or handrails should be within easy reach at critical locations, he confirmed that the cited truck was equipped with handholds within easy reach on the top of the operator's cab, along the front windows, and along and over the top of the cab door, which opens outward. He also stated that the truck operator walks a distance of 4 or 5 feet from the top of the ladder shown in photographic exhibit R-4 (1), to reach the cab door (Tr. 46-50).

Mr. Chicky reviewed the last paragraph on page 2 of the bulletin, and it was his opinion that it was not necessary to install the handrail retrofit kits mentioned in the bulletin in order to comply with the cited standard. He further stated that he did not know how anyone would know from the information in the bulletin that handrails were required in order to comply with the cited standard. In response to a question as to why previous inspections at Vulcan's quarry did not result in citations for lack of handrails on the Euclid Truck in question, he stated that Some inspectors see things that others don't (Tr. 46-51, 65).

Mr. Chicky confirmed that Mr. Wilson informed him that he had contacted a retrofit kit distributor and was informed that a kit was available but that it would take 8 to 10 weeks for delivery (Tr. 56). He identified Exhibit R-2, as an internal MSHA memorandum dated March 1, 1996, dealing with handrail retrofit kits for Euclid haulage trucks, and he stated as follows at (Tr. 58-61):

Q. This internal memorandum was not distributed to the

industry; is that correct?

A. I really don't know.

Q. This was, in fact, a new policy, a new enforcement effort by MSHA to focus on haul trucks and handrails; isn't that correct?

A. I would say, yes, it was what the memo said.

Q. Now, there are two different series of trucks indicated on this particular memorandum. Could you tell me what it says with respect to the 200 series Euclid haul truck?

A. All 200 series Euclid haul trucks which were discontinued after the >74 model year did not have the retrofit handrail kit available for them.

Q. Okay. Now, with respect to a 200 series haul truck, if you found a 200 series haul truck on mine property without handrails, what would you do in that particular situation?

A. If I felt that walkway was high enough I would cite them for unsafe access.

Q. Now, how would a company with a 200 series haul truck know that they were supposed to have handrails on their truck?

A. I don't know.

Q. Would it be based on a program information bulletin that was sent out to the industry?

A. Quite possible, yes, sir.

Q. Doesn't that program information bulletin say that if there are no retrofit kits available, focus on increased training and proper placement of handholds?

A. Yes.

Q. So in that particular situation, they would not have information that they were supposed to have handrails on their trucks?

A. No.

Q. What would happen --- let me ask you this. In that particular situation, suppose you had a 200 series haul truck working alongside a 300 series haul truck. A 200 series haul truck and a 300 series haul truck are essentially the same configuration; isn't that correct?

A. I don't know.

Q. One's an older truck and one's a newer truck?

A. Yeah.

Q. A similar fall hazard essentially that you identified?

A. Yes.

Q. So under the program information bulletin, you would cite the 300 series haul truck for not having a handrail but not the 200 series haul truck?

A. No. If the heights were reasonable to cause a serious injury I would cite them.

Q. But under the information given to the industry and given to the particular operator, that operator might be inclined to think that his 200 series haul truck didn't need a retrofit kit under the policy under the program information bulletin, but the 300 series would need handrails?

A. I would say, yes, he would think that.

Mr. Chicky further explained that the memorandum states that retrofit kits are available for the 300 series Euclid trucks and that a parts list and diagram is attached. He confirmed that he gave this to Mr. Wilson, and that Mr. Wilson told him that he had called a distributor and was told that kits were not available. Mr. Chicky agreed that if Mr. Wilson was under the impression that no kit was available, he would be in the same situation as a person with a 200 series haul truck and would have to focus on increased training and use of handholds and the other precautions stated in the bulletin (Tr. 61-62). He confirmed that section 56.11001 does not mention retrofit kits, handrails, or mobile equipment (Tr. 66-67). He further confirmed that the October, 1995, MSHA bulletin makes no reference to the cited standard (Tr.

70).

In response to further questions, Mr. Chicky confirmed that the cited truck was equipped with handholds along the operator's cab, but he still believed that a handrail was necessary in the event someone were to slip on the travelway grating. If a belt or lanyard were used by the operator, he would not have cited a violation because this would provide protection from falling (Tr. 87). He denied that he informed Vulcan that it had to use a retrofit kit, and confirmed that it could have constructed its own substantial protective handrails. He was not aware of the March 1, memorandum before he went to the mine to begin his inspection (Tr. 88-91). Mr. Chicky confirmed that he has inspected Euclid trucks prior to his inspection and never cited any of them for lack of fall protection (Tr. 93). Vulcan had not previously been cited for lack of handrails on its Euclid trucks (Tr. 94).

Vulcan's Testimony and Evidence

Randy Logsdon, Vulcan's safety and health manager, midwest division, testified that he receives and reads MSHA program information bulletins, and if applicable to his operations, he sends them to the plant managers. He confirmed that he received MSHA's October 24, 1995, mobile equipment safe access program bulletin, and stated that the recommendations contained therein are things that we do anyway. He further explained at (Tr. 104-105):

A. Well, we would have regular training. We require and enforce a process of accessing on ladders and in the cabs, a three-point contact, which means that the employee has to have either both hands and one foot or two feet and one hand in contact with the ladder or support at any given time. We do periodic safety meetings to reinforce those rules. We inspect our equipment to make sure that all of the safety equipment that is manufactured with the equipment is in good working order.

Mr. Logsdon stated that he sent the bulletin to each of the plant superintendents. Based on the bulletin language, he did not believe that handrails were mandatory. However, since the company had a number of older haul trucks, he instructed the plant superintendents, including Mr. Wilson, to make inquiries with distributors they deal with to determine if handrail kits were available, and if so, to make a determination as to whether they needed to be installed

(Tr. 106-107).

Mr. Logsdon stated that Mr. Wilson called him in May, 1996, and informed him that two of the plant Euclid trucks were cited because the handrail retrofit kit was not available or installed on the trucks. Mr. Wilson advised that he had made an inquiry with the distributor shortly after receiving the bulletin and learned that a kit was not available (Tr. 107). Mr. Wilson also faxed him a copy of an internal MSHA memorandum dated March 1, 1996, regarding handrailings on Euclid haul trucks (Exhibit R-2).

Mr. Logsdon stated that he made an inquiry with company purchasing agent Dave Bach, and asked him to inquire with a large distributor in Chicago about the availability of kits, and learned that the kit was designed for an R50, fifty-ton capacity rear dump truck. The plant also has Mack trucks, and upon inquiry he learned that no kits are available for that model (Tr. 110).

Mr. Logsdon believed that safe truck access is provided with a number of handholds on the vehicle, and did not feel there was a reasonable danger or risk of an operator falling off the vehicle. He acknowledged that MSHA believed there was a problem, but believes he dealt with it and tried to follow MSHA's policy.

If the bulletin had stated that handrails must be or shall be installed on mobile equipment the company would have installed them (Tr. 111).

Mr. Logsdon stated that a handrail retrofit kit was ultimately obtained for the cited truck and it was installed with some difficulty. He was not present when it was installed (Tr. 111-112). It was his understanding that a retrofit kit was specifically required to abate the citation, and Mr. Wilson informed him that the kit was mandatory and if a handrail was fabricated by the company it would need to be approved by a professional engineer (Tr. 112).

On cross-examination, Mr. Logsdon confirmed that he received MSHA's October 24, 1995, bulletin before the citation was issued, and knew that retrofit kits were available for some truck models but had no knowledge that kits were available for the Euclid R-50 (Tr. 113-114). He stated that he was aware of section 56.11001, and he confirmed that the Euclid truck operator's cab is a working place and that the grating that the operator walks on is an access point much like a ladder is an access, and agreed that it was a travelway within the regulatory definition of that term (Tr. 116-117). He agreed that if a driver were to fall from the travelway he could potentially and likely receive

serious injuries (Tr. 118-119).

Mr. Logsdon believed that the existing truck handholds provide a safe means of access, and he has climbed on the truck and used the handholds, and the fact that there was no handrail to his rear did not bother him as long as he had good footing and contact with the handholds. He would not feel as comfortable using only handholds on the unguarded travelway if it were covered with snow and ice, but he would remove the snow and ice before accessing the cab. He further stated that the truck operator is required to perform a pre-operational inspection of the vehicle, including the travelway and handholds (Tr. 122-123).

Irvin Wilson, Francesville Plant Superintendent, for over two years, and 26 years with Vulcan, described the operation of the quarry, and confirmed that it has approximately 17 hourly employees, and two haulage trucks that operator regularly. In May 1996, there were Euclid 302 model R50, 50-ton rear dump trucks operating at the mine. The trucks had no handrails, but did have factory installed handholds along the edge and top of the cab and above the door (Tr. 130).

Mr. Wilson confirmed that he read the MSHA bulletin after receiving it from Mr. Logsdon and explained as follows at (Tr. 130-132):

Q. Did you take any action as a result of reading that bulletin?

A. To the best of my recollection, I called Randy and I said, you know, is this something that we have to rush right out and do, you know. And he said, well, we have got --- you've got handholds on the trucks and as long as we --- you know, as long as we enforce our training and train our employees, you know, the proper way to mount and dismount the equipment, you know, in the presence of a handrail but there being a presence of handholds then were within the guidelines.

Q. Now, did you check --- did you take any action with respect to finding a retrofit kit for this particular truck?

A. I had talked to the distributor, Rudd Equipment Company out of Indianapolis in reference to that, and was told at that time there was no kits available.

Q. When did you call Rudd?

A. It was sometime after getting the bulletin from Randy. I don't recall.

Q. You testified, I believe, that you read this when you received it. Was it your understanding that you were required to put handrails on there, ---

A. No.

Mr. Wilson stated that the Euclid trucks in question are Amid 80's vintage and were at the mine before February, 1995, when he arrived, and they were inspected by MSHA (Tr. 133). He identified a record of a January 23, 1996, safety meeting which included a discussion about slip and fall hazards when mounting and dismounting mobile equipment and the three-point contact method of climbing (Tr. 134).

Mr. Wilson confirmed that he accompanied Inspector Chicky during his inspection of May 7, 1996, and informed him that he had checked on a handrail retrofit kit with a distributor and was told there were none available. Mr. Chicky provided him with a copy of the March 1, 1996, MSHA memorandum and attachments (Exhibit R-2) which indicates that a kit was

available for the 300 series haul trucks, and Mr. Wilson stated that he faxed a copy to Mr. Logsdon. Mr. Wilson stated that his division headquarters confirmed on May 8, 1996, that such a kit was available through a distributor in Chicago (Tr. 135-138).

Mr. Wilson stated that during the inspection closeout conference he informed Mr. Chicky that a kit was being ordered and asked if a kit could be fabricated by the respondent. Mr. Chicky informed him that it could be fabricated but it should be certified by a professional engineer (Tr. 138-139). Mr. Wilson confirmed that the MSHA program information bulletin does not mention company kit fabrications, or certifications by engineers. A kit was ultimately obtained and was received at the end of May or early June, 1996, and it was installed after experiencing several difficulties in mounting it on the truck (Tr. 140-142).

On cross-examination, Mr. Wilson confirmed that he inquired about the availability of a handrail kit for the Euclid truck after receiving the MSHA memorandum and before the citation was issued. He believed it was a good idea to install the kit on the truck if it was available because it could possibly prevent a

slip or a fall@ (Tr. 145-147). However, the distributor informed him that the kit was unavailable and his understanding of that term Ameans there are none available@. He was told the kit was available but out of stock and could be ordered, and it was his understanding that Athere's no availability of receiving that@ (Tr. 147).

Mr. Wilson stated that even though adequate handholds were on the truck, he was concerned about a fall of eight and a half feet by one of his drivers and that Athere is a potential for a slip even though there are adequate handholds@ (Tr. 147). He confirmed that the truck operator's cab is his working place that is accessed by the travelway. As a minimum, a driver enters and exits the cab twice a day depending on the frequency of his breaks (Tr. 148). He agreed the travelway can be slippery in adverse weather conditions (Tr. 150).

In response to further questions, Mr. Wilson confirmed that in inquiring about the availability of a retrofit kit, he was complying with the information in MSHA's program bulletin (Tr. 151). He further confirmed that company training programs specifically focus on operating in bad weather, and he pointed out that the company installed a small ledge on the truck for the operator to place his lunch bucket so his hands can be free while climbing up the truck ladder (Tr. 152).

David Bach, Vulcan's midwest division purchasing agent, confirmed that he checked on the availability of a retrofit kit for a Euclid 300 series haul truck with Euclid distributor McAllister Equipment Company in Elsa, Illinois, and he identified a copy of a letter dated May 8, 1996, that he received in response to his inquiry, and it states in relevant part as follows (Exhibit P-2; Tr. 55):

The R50 handrail kits are available from Euclid. The kits are not in stock at this time. Current schedule lead time is 8-10 weeks upon receipt of an order.

Mr. Bach stated that the respondent also uses Mack model 50 trucks in its operations and he was informed by the distributor that the manufacturer discontinued this particular truck in the late 1970's and that handrail retrofit kits are no longer available, and he was told a piece of pipe or beams could be used as a handrail (Tr. 157).

MSHA's Arguments

MSHA asserts that Vulcan violated section 56.11001, in that it did not provide a safe means of access to the cited haulage

truck operator's compartment. In support of this conclusion, MSHA states that the operator uses a walkway approximately 18.5 inches wide and 4 to 5 feet long, to reach the operator's compartment and does so without any means of protection. MSHA further states that there is no testimony that Vulcan provided fall protection to the miner (citing transcript pages 20-26 and 147-148).

MSHA states that the length of the walkway was 8 feet, but that the measured walkway distance from the access ladder to the compartment door was four to five feet long, and that the distance from the walkway to the ground below was 8 feet. MSHA states that the inspector based the violation on the fact that no handrail was provided on the walkway.

MSHA asserts that on the day of the inspection, the inspector observed that it had rained and the conditions were slippery and muddy on the walkway (Tr. 20-26), and that after interviewing the operator of the truck and observing the working conditions, the inspector determined that a fall from a height of 8 feet to the ground could result in an injury to the miner.

MSHA concludes that the inspector's significant and substantial (S&S) finding is clearly supported and must be upheld. In support of its conclusion, MSHA argues that it is uncontroverted that Vulcan had knowledge that handrails were required at the time of the inspection. MSHA asserts that the testimony and evidence shows that a retrofit kit was available for the truck, and that the inspector testified that MSHA did not require Vulcan to purchase any particular type of retrofit kit and could have built their own handrails (Exhibits R-1 and 2, Tr. 30-31) .

MSHA maintains that a reasonably serious injury could likely follow from an 8-foot fall from the walkway, and that it is clear that the violation contributed to a measure of danger for the individuals exposed to the hazard.

MSHA asserts that it is reasonable to conclude that an injury to the truck operator could have occurred in that the inspector testified that it was wet at the time of the inspection, and that it had rained during the day and there was mud, and that the inspector observed that the conditions could have resulted in slipping and falling from a height of eight feet with no protection from falling to the ground. Under the circumstances, MSHA concludes that the existing hazard could result in a substantial possibility of an injury. MSHA cites the

inspector's determination that a leg, back, or head injury was reasonably likely, depending on how the miner fell, and supports the inspector's conclusion that it was reasonably likely that a serious injury would occur if the hazard remained unabated. Under the circumstances, MSHA requests that the S&S citation and proposed penalty assessment of \$220, be affirmed.

Vulcan's Arguments

Vulcan asserts that it complied with section 56.11001, and provided a safe means of access to the operator's compartment of the cited Euclid haul truck. Vulcan explains that access to the operator's compartment is gained by climbing an eight foot ladder attached to the front of the truck, and then stepping four feet (approximately two steps) to the door of the operator's compartment. Respondent points out that personnel negotiate this route by using the properly located handholds which run horizontally and vertically along the short route to the compartment door, and that they also rely on their training regarding procedures for safely accessing mobile equipment.

Vulcan maintains that until MSHA changed its policy in late 1995, these handhold protections were never deemed to be inadequate to meet the applicable safe access requirements, and they are in fact consistent with the recommendations in MSHA's October 24, 1995, Program Information Bulletin regarding safe access to mobile equipment which instructs that in the absence of a retrofit kit, greater emphasis should be placed on training and proper location of handholds. Vulcan concludes that in establishing a new requirement for handrails on haul trucks, where such a requirement has never before been construed, MSHA has confused the concept of safe means of access with safer means of access.

Conceding that at the hearing it did not deny that the installation of handrails provides an additional level of protection for accessing mobile equipment, Vulcan maintains that it was this very consideration that motivated the Company, even though it was not deemed a mandatory requirement, to follow the handrail retrofit kit recommendation in the Program Information Bulletin and install handrails on all trucks which had available retrofit kits. However, Vulcan maintains out that this additional level of protection does not decrease the adequacy of the protection provided by the handholds as a means of safely accessing the operator's compartment.

Vulcan asserts that MSHA has apparently concluded that because handrails provide an additional level of protection,

anything else, even the handhold protection which has been the sole means of safe access protection on this and other Euclid 300 Series trucks of 1980's vintage, is no longer sufficient to meet the safe access requirement of section 56.11001. Vulcan maintains that this conclusion is inconsistent with the actual facts regarding access to the operator's compartment, and with the fact that its reliance on the properly located handholds and effective training has resulted in no accidents or injuries related to movement between the operator's compartment and the top of the ladder.

Vulcan maintains that MSHA's argument regarding the inadequacy of handholds is also undermined by the fact that it has not raised any issue with respect to the relative safety of the ladder leading up the front of the truck. To the extent any fall hazard exists, Vulcan points out that the ladder clearly presents an even greater fall potential **C** because unlike the platform at the top the ladder, persons on the ladder absolutely must hold onto the ladder at all times to keep from falling **C** yet no requirement for railings or fall protection has been asserted.

Vulcan asserts that the utility and effectiveness of the properly located handholds as a means for safely accessing the operator's compartment is not negated by the fact that handrails provide an additional level of protection. Vulcan suggests that while an airbag in a haul truck operator's compartment would provide more protection than just the seat belts required under section 56.14131, that fact, however, does not suddenly render the seat belts inadequate.

Vulcan maintains that in late 1995 or early 1996, MSHA initiated a new enforcement policy requiring handrails for haul trucks and that the inspector conceded that this was the case. Vulcan states that the new policy is revealed in the March 1, 1996, MSHA internal memorandum from Field Office Supervisor Ralph Christensen to MSHA District Manager Jim Salois, which states in pertinent part:

During an inspection this week, we were required to establish the determination for requirements of hand railings and to apply them as directed recently by Headquarters. (Exhibit R-2).

Vulcan asserts that the memorandum and handrail requirements were never communicated to the respondent, and the fact that this was a new interpretation is bolstered by the fact that the subject haul truck and other similarly configured trucks

like it have been utilized in the mining industry for two decades with handholds as the sole means of safe access. Yet, no citations had been issued on this truck previously under section 56.11001, and the inspector, with 18 years of experience, had never issued a citation under this standard for trucks. Moreover, the inspector was unaware of any citation ever being issued for the lack of handrails on trucks. However, at the time of the inspection, the inspector was fully aware of the October 24, 1995 Program Information Bulletin recommending a retrofit^C the term he used in writing the citation.

With respect to the issue of retrofitting handrails on haul trucks, Vulcan points out that the only information that it was provided with prior to the issuance of the citation, was the October 24, 1995 Program Information Bulletin which contains the following brief comments on the last page of the bulletin:

Many older machines were manufactured with narrow walkways and handholds for access to cabs and maintenance areas. When practicable, these machines should be upgraded to provide adequate fall protection.

For some models, retrofitted handrail kits are available from the manufacturer and should be installed. Where kits are not available, greater emphasis should be placed on training and proper location of handholds. (Exhibit R-1).

Vulcan argues that the bulletin distributed six months before the citation was issued does not adequately notify the mining industry that handrails are mandatory requirements under 30 C.F.R. ' 56.11001, and in fact does just the opposite. Vulcan points out that the bulletin qualifies the recommendation for upgraded fall protection by indicating that this should^C be accomplished when practicable,^C but provides no explanation of the term when practicable.^C To add to the confusion, Vulcan points out that the final two sentences of the quoted bulletin go on to say that handrails should^C be installed when retrofit kits are available from the manufacturer but if they are not available then reliance on increased training and proper location of handholds is appropriate.

Vulcan concludes that the bulletin communication only recommends an upgrade and in no way notifies the mining industry that the handholds provided on haul trucks will no longer be deemed an adequate means of safe access under section 56.11001, and that this was in fact the interpretation of safety manager Logdson and quarry superintendent Wilson upon reading the bulletin handrails reference. Further, Vulcan asserts that the inspector acknowledged that he did not know how an operator could

interpret a mandatory handrail requirement from reading the bulletin and conceded that it instructs operators with trucks that do not have retrofit kits available C like 200 Series Trucks which are similarly configured with similar fall potential C that handrails do not need to be installed. Vulcan concludes that this is far from the across-the-board handrail requirement that the inspector referred to in describing MSHA's enforcement stance.

Citing the Commission's Areasonably prudent person notice test enunciated in Lanham Coal Co., Inc., 13 FMSHRC 1341, 1343 (September 1991), Vulcan concludes that based on the absence of any MSHA enforcement history with respect to requiring handrails under section 56.11001 on haul trucks, the accepted practice of relying on the properly located handholds, and the misleading statements in the information bulletin, a reasonably prudent person could not construe from the language of section 56.11001 a mandatory requirement for handrails on haul trucks.

Vulcan maintains that MSHA's new handrail requirement was a substantive rule requiring APA notice and comment rulemaking before implementation. Conceding that courts accord considerable deference in reviewing agency interpretations, Vulcan concludes that the new handrail rule should be accorded no deference because it is inconsistent with past agency enforcement and policy, citing Morton International, Inc. v. Secretary of Labor, 18 FMSHRC 533, 539-540 (April 24, 1996) rejecting a new MSHA interpretation of methane regulation in absence of either proper rulemaking, a policy letter or bulletin setting forth the new interpretation, or a clear and consistent regulatory history.

Assuming that the lack of handrails constituted a violation, Vulcan nonetheless concludes that it cannot be deemed to be significant and substantial (S&S). Citing several Commission decisions, Vulcan asserts the case law criterion for making an S&S finding must be based on the particular facts surrounding the violation.

Vulcan argues that MSHA's belief that the failure to install a handrail retrofit on the cited truck contributed to its eight foot fall hazard Atheory posed by persons moving from the top of the ladder along the four feet of grating to the operator's compartment specifically ignores the effectiveness of the properly located handholds that run the length of the route to the compartment and provide a means for avoiding and preventing exposure to any fall. Vulcan further believes that MSHA's hazard theory ignores the fact that this means of safe access has been utilized safely and effectively by miners for many years, and

MSHA was unable to present any mine specific evidence of an accident or injury history related to accessing haul trucks. Vulcan contends that such a history simply does not exist.

Vulcan further argues that MSHA's information bulletin also demonstrates the absence of a discrete hazard in that it provides that haul trucks which do not have manufacturer's retrofit kits available can rely instead on increased training and proper location of handholds. Consequently, trucks like the Euclid 200 Series and the Mack, which have virtually identical configurations and access requirements are in compliance if operators do exactly what Vulcan did in this case. If those identical fall potentials are not evaluated as even constituting a violation C much less a hazard C then such evaluation cannot change simply because Vulcan's truck was built by a manufacturer who put a retrofit kit together.

Vulcan maintains that there was no reasonable likelihood of an injury resulting from any contributory hazard in that the handholds have been used safely and effectively due in large part to the fact that Vulcan emphasizes safe access techniques in its training of personnel, and any hazard which could be associated with moving between the ladder and the operator's compartment has been dealt with by focusing on the proper use of handholds, recognizing slip and fall hazards, and maintaining clean surfaces for accessing the cab. Additionally, to assist in the proper use of the handholds and the ladder, a mid-level platform is provided on the truck so that lunch pails or materials can be set down so hands are free to grip the ladder and handholds.

Vulcan further points out that there has not been an injury or accident related to a fall while accessing any haul truck at the mine, or within the respondent's Midwest Division, and that it has followed all five of MSHA's suggested precautions for avoiding slip and fall accidents as set out in its information bulletin. Vulcan maintains that all of these precautions were initiated years before the release of the bulletin and there is no reasonable likelihood that the use of protections other than handholds would cause injury. Under all of these circumstances, Vulcan concludes that there is no basis for the allegation that the alleged violation is significant and substantial.

Finally, Vulcan asserts that it was not negligent in this case and acted diligently in maintaining safety and compliance. In support of this conclusion, it relies on the following:

- 1). In providing fall protection on its haul trucks, Vulcan relied on the properly located handholds which

were provided by the manufacturer.

2). The handholds have been used safely and effectively on the cited haul truck and other haul trucks throughout the 1980's and 1990's, and there have never been any truck access injuries or accidents at the subject Quarry or in Vulcan's Midwest Division.

3). Throughout the 1980's and 1990's, MSHA has inspected the subject truck, and all other haul trucks, none of which have had handrails, and has never issued a safe access citation.

4). MSHA's October 24, 1995 Program Information Bulletin was reviewed in good faith by Safety Manager Logsdon and Quarry Superintendent Wilson and interpreted as confirming that the handholds were proper means of safe access and in compliance with MSHA requirements.

5). Nonetheless, all operations **C** including the Quarry **C** on Mr. Logsdon's recommendation, made a good faith effort to obtain handrails for their trucks pursuant to MSHA's recommendation.

6). Superintendent Wilson contacted Rudd Equipment and, when told that a retrofit kit was not available for the Euclid 300 series, proceeded to follow the next recommendation set out in MSHA's Bulletin **C** increased safe access training. Mr. Wilson conducted a training session on safe access to mobile equipment on January 23, 1996.

Vulcan concludes that its management personnel made a thoroughly good faith effort to address MSHA's concerns even though they were under the specific impression that they were in full compliance with applicable mandatory safety requirements, and MSHA's reference to handrails in the bulletin was simply a recommendation. Given the absence of any enforcement history regarding handrails, the absence of any Company injury or accident experience involving access to haul trucks, and the confusing and actually misleading information disseminated to the mining industry via MSHA's information bulletin, Vulcan maintains that its personnel acted in an appropriate manner in dealing with the situation.

Findings and Conclusions

Fact of Violation

Vulcan is charged with a violation of mandatory safety standard 30 C.F.R. ' 56.11001, for failing to provide an outside retrofitted handrail along the elevated walkway of the cited series 300 Euclid haulage truck. Unlike mandatory safety standard section 56.15005, which requires the wearing of safety belts and lines when persons work where there is a danger of falling, or section 56.11002, which requires handrails on elevated walkways, section 56.11001, provides as follows:

' 56.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

A working place is defined by 30 C.F.R. ' 56.2, as any place in or about a mine where work is being performed.

On the facts of this case, I conclude and find that the operator's compartment of the cited truck is a working place within the definition of that term in section 56.2. It is obvious to me that in accessing his operator's compartment, and operating the truck from that location, the driver is in a working place. Further, although the inspector characterized the grated steel path of travel by the driver in reaching the compartment as a walkway, it is nonetheless also a travelway as that term is defined in section 56.2 (a passage, walk or way regularly used and designated for persons to go from one place to another). The evidence in this case reflects that on any given day, a truck driver walks to the ladder and climbs on and off his truck 2 or 3 times daily. I conclude and find that this constitutes a regular use of the walkway or travelway by the driver to access his operator's compartment working place.

In Summit Incorporated, 13 FMSHRC 1511 (September 1991), former Commission Judge John Morris affirmed a violation of section 56.11002, because of the failure of the mine operator to install handrails along the walkway of a backhoe. The walkway was elevated approximately 4 **2** feet off the ground, and the operator's cab was located on the front part of the backhoe, and one could step out of the cab onto the walkway and walk down the walkway to the motor compartment. The perceived hazard involved any worker who might fall off a walkway and be injured 13 FMSHRC 1513. These facts appear to be similar to the instant case, except for the fact that the inspector here cited the rather general safe means of access section 56.11001, rather than the specific elevated walkway handrail requirement found in section 56.11002, or the danger of falling safety belt and line

requirement of section 56.15005.

In Evansville Materials, Inc., 12 FMSHRC 12 (January 1990), I affirmed a violation of section 56.11001, because the operator failed to provide a safe means of access to a dredge anchored in the middle of a river. Employees reached the dredge by means of a motorized 12 foot ~~A~~john boat~~@~~. The inspector issued the citation after finding that the employees entering or exiting the boat to and from the dredge had to step up three feet ~~A~~with nothing available for a handhold~~@~~. The inspector testified that in the absence of any handholds, or other means of getting out of the boat, a person could fall in to the water or strike their head on the boat. Although the inspector~~s~~ suggestion that a ladder be installed as a means of accessing the dredge from the boat was not adopted because it was impractical, the violation was abated after the operator welded handholds to the dredge deck.

In Mechanicsville Concrete, 16 FMSHRC 1444, 1458 (July 1994), former Commission Judge Arthur Amchan affirmed an ~~AS&S@~~ violation of 56.11001, after finding that a front-end loader that had a build-up of oil grease on the ladders and platform leading to the driver~~s~~ cab exposed the driver to a danger of slipping and falling 6 to 8 feet. The judge concluded that a safe means of access was not provided for the driver, but I find nothing to suggest that protective handrails or other devices were required, and I assume that the violation was abated by cleaning up the cited oil and grease build-up.

MSHA~~s~~ Safe Access to Mobile Equipment Program Information Bulletin

MSHA Program Information Bulletin No. P95-22, October 24, 1995, Safe Access to Mobile Equipment, was issued ~~A~~to inform the mining community about the high number of serious mining accidents associated with slips and falls from mobile equipment~~@~~. The bulletin does not mention any mandatory safety standard, and in particular, makes no mention of section 56.11001. It states in relevant part as follows (Exhibit R-1):

Modern equipment is designed to minimize slip and fall hazards; but large machinery, new or old, can require access at heights with a fall potential that can cause serious injury. These concerns should be addressed by the mine operator, mobile equipment operator, and maintenance personnel. MSHA has compiled the following mobile equipment precautions to reduce the number of slip and fall accident in mining:

Equipment should be inspected for icy, wet, or oily areas at the start of each shift and whenever conditions dictate. Before climbing on, off, or around mobile equipment, footwear should be free of mud or other substances that could cause slipping.

Persons climbing on or off mobile equipment should face the machine. Both hands should be free for gripping the ladder, handrail, or handhold. When necessary, a cord, rope, or other line should be used to lift and lower lunch pails, thermos bottles, or tools.

Walkways should be no less than their original manufactured widths, constructed with slip-resistant surfaces, and securely attached. Unobstructed access should be provided to all areas of the machine where a person might travel.

Handholds or handrails should be within easy reach at critical locations.

Mobile equipment operators and maintenance personnel should be trained to recognize slip and fall hazards to reduce the risk of accidents.

Many older machines were manufactured with narrow walkways and handholds for access to cabs, and maintenance areas. When practicable, these machines should be upgraded to provide adequate fall protection.

For some models, retrofitted handrail kits are available from the manufacturer and should be installed. Where kits are not available, greater emphasis should be placed on training and proper locations of handholds. (Emphasis Added).

MSHA's post-hearing brief has no discussion concerning the bulletin. However, in the course of the hearing, MSHA's counsel took the position that Vulcan was required to have a retrofit kit or something equivalent, some kind of handrail to prevent the employee from falling (Tr. 13), and stated as follows at (Tr. 175-176):

* * * the position of the secretary is as follows is

that the regulation --- you interpret the regulation, safe access, it's clear from the interpretation of that regulation that a handrail was necessary in this instance. Everybody recognized that there was a hazard of someone falling from that platform. And as far as all these interpretive bulletins, no one's testified saying that it was required to buy a retrofit kit. You know, there's nothing in those documents, and that's what we're going to be saying, Judge, in our brief.

JUDGE KOUTRAS: It says here, though, that for some models retrofitted handrail kits are available and should be installed.

ATTORNEY ALVAREZ: Right. Available, Judge. And someone could have called MSHA and said, do we have to buy it? No.

JUDGE KOUTRAS: And should be installed.

ATTORNEY ALVAREZ: Should be installed doesn't mean shall be installed, doesn't mean shall buy it. There's a difference between the shall and the should.

The concluding paragraph of the bulletin states that older machines equipped with handholds for access to cabs be upgraded when practicable to provide adequate fall protection, with no further explanations other than the statements that available retrofitted handrail kits should be installed, and if not available, greater emphasis should be placed on training and proper locations of handholds. In short, the bulletin, on the one hand, seemingly suggests that retrofitted handrail kits, if available, will provide fall protection, but on the other hand, if such kits are not available, equivalent protection may be provided by greater emphasis on training and proper locations of handholds. Inspector Chicky agreed that a mine operator or Mr. Wilson reading the bulletin would conclude that this was the case (Tr. 61-62).

MSHA's assertion that it is uncontroverted that Vulcan had knowledge that handrails were required at the time of the inspection is without merit. Safety director Logsdon and quarry superintendent Wilson testified credibly that based on the language of the bulletin, they had no reason to believe that the installation of handrails as a means of compliance with section 56.11001, was mandatory. Their lack of knowledge in this regard is supported by Inspector Chickey's testimony, which is as follows at (Tr. 51):

Q. Under this particular program information bulletin, how would someone know that handrails are required under that section of part 56?

A. I don't know. I don't know how they would know, but as an inspector handrails to prevent falls are what we recommend in numerous places besides haulage trucks.

Given the fact that the cited truck was equipped with handholds that had obviously been acceptable prior to the issuance of the citation in this case, and coupled with the fact that Vulcan had implemented several precautionary training and preventive measures to address a potential hazard that it has readily acknowledged, I cannot conclude that any reasonably prudent person with that knowledge and reading the MSHA bulletin would recognize or reasonably believe that handholds were no longer acceptable as a means of complying with section 56.11002, and that retrofitted handrails were required.

I find nothing in the bulletin that imposes any mandatory or regulatory obligation on Vulcan to install a retrofitted handrail on the cited truck in question. Further, I cannot conclude that the bulletin is a statement of MSHA's policy interpretation or application of any particular mandatory safety standard. I conclude that the bulletin was published pursuant to MSHA's general authority under the Act to disseminate information concerning a myriad of mine safety and health matters. After careful scrutiny of the bulletin, I conclude and find that its purpose is precisely what is stated on the face of the document, namely, to inform the general mining community about accidents associated with slips and falls from mobile equipment. The bulletin further communicates an MSHA compilation of mobile equipment precautions to reduce such incidents. I further conclude and find that the bulletin is informational and does not constitute a substantive A new handrail rule that requires APA notice and comment rulemaking. Under the circumstances, Vulcan's arguments to the contrary ARE REJECTED. Any suggestion by MSHA that the bulletin imposed an obligation on Vulcan to install retrofitted handrails as a means of complying with section 56.11001, is likewise REJECTED.

The Alleged Violation

The inspector cited the violation out of concern that a potential slip and fall hazard of 8 feet existed from the elevated access travelway to the ground below. He believed such a hazard would exist when the vehicle

operator walks to and from his operator's compartment under wet or muddy working conditions (Tr. 25). Contrary to MSHA's assertion in its brief that "On the day of the inspection the inspector observed that it had rained and the conditions were slippery and muddy on the walkway", the inspector testified that at the time of his inspection "I don't believe it was wet or muddy. It was early in the morning, I don't believe the rain had started yet. It was probably some dampness due to moisture from the night" (Tr. 34). He confirmed that the rain started later in the day (Tr. 35).

The inspector stated that "We look at elevated areas and generally we suggest handrails or some means of prevention" (Tr. 26). He confirmed that although he has cited violations of section 56.11001, in "various other situations, elevated areas", he had never previously cited any trucks for lack of handrails (Tr. 40, 45).

I take note of the fact that on the face of the citation the inspector specifically cited the absence of a retrofitted handrail as the basis for the alleged violation of section 56.11001, and the citation was abated after the handrail was installed. Notwithstanding his denials to the contrary, there is a strong inference that the inspector believed the bulletin mandated the installation of a retrofitted handrail as a means of complying with section 56.11001.

As noted during the hearing, I find the bulletin to be rather confusing and contradictory. The listed "precautions" acknowledge the presence of handholds on mobile equipment, and caution that "both hands should be free for gripping the ladder, handrail, or handhold", and that "Handholds or handrails should be within easy reach at critical locations. Further, the information provided can reasonably be interpreted to permit the use of handholds at proper locations and increased emphasis on training as a means of compliance when handrail retrofit kits are unavailable. In this case, I conclude and find that Vulcan's credible evidence establishes that handrail retrofit kits were not available for the cited truck in question when the violation was cited.

The critical issue in this case is whether or not a safe means of access was provided for the cited truck in question. In this regard, I find nothing in section 56.11001, that mandates handrails as the only means of providing safe access to the operator's compartment of the cited truck in question. If MSHA believes that handrails are mandatory for all haulage truck elevated walkway areas "across-the-board", it is free to

initiate proper notice and comment rulemaking. It may also consider citing section 56.11002, which requires handrails on elevated walkways, or section 56.15005, which requires the use of safety belts and lines where there is a danger of falling.

Neither party in this case produced any of the truck drivers to provide first hand testimony concerning access to the operator's compartment. Safety director Logsdon testified credibly that he has climbed on and off the truck in question and always used the handholds as a means of access. The absence of a handrail to his rear did not bother him, and as long as he had good footing and contact with the handhold, he believed the handhold would prevent a stumble or a fall (Tr. 121-122). Although Mr. Logsdon indicated that he would not feel comfortable using only the handholds if the travelway were covered with ice and snow, he confirmed that he would remove the snow or ice before accessing the operator's cab (Tr. 121-123).

Vulcan's safety director Logsdon testified credibly that Vulcan conducts regular safety training and meetings covering all of the precautions noted in MSHA's bulletin. Quarry superintendent Wilson confirmed that safety meetings concerning slip and fall hazards when mounting and dismounting mobile equipment and methods of climbing are conducted at the mine. He also confirmed that Vulcan installed a small ledge on the truck so that the operator can place his lunch bucket on it and have his hands free while climbing up the access ladder, and that drivers are required to conduct pre-operational inspections of the truck (Tr. 123, 134, 152).

Inspector Chickey acknowledged that handholds were in fact located within easy reach along the access way to the truck operator's compartment as shown in photographic exhibit R-4-1, and that the handholds were proper (Tr. 48, 51). The inspector confirmed that handholds were located directly above the grated travelway along the top of the windshield of the operator's compartment and along the top of the compartment doorway next to the travelway (Tr. 48-50).

The inspector described the walkway as an open grated walkway which is one of the better ones to have (Tr. 35), and there is no evidence that the walkway was obstructed or otherwise not in conformance with MSHA's bulletin suggestions.

Although the travelway was 8 feet long, there is no evidence that the truck operator traveled that distance to access his

compartment, or that his duties required him to walk along the entire travelway. Indeed, the inspector confirmed that no one would walk beyond the compartment door, and he described the potential fall hazard zone as the area between the top of the truck ladder to the entrance of the operator's compartment, a distance of 4 to 5 feet (Tr. 25, 50). Further, the photograph exhibit reflects that the handrail installed to abate the citation does not extend beyond the doorway to the operator's compartment.

I conclude and find that the location of the alleged absence of a safe means of access was the 4 to 5 foot distance that the truck operator would walk to reach his operating compartment after climbing the ladder to board the truck. I further conclude and find that a driver would only need to take two or three steps from the ladder to reach the compartment.

The inspector confirmed that handholds were located within easy reach along the access to the cited truck compartment. A handhold was located directly above the platform at the top of the ladder, along the top of the windshield, and along the top of the compartment door next to the platform (Tr. 48-50). Thus, I conclude and find that at each step of the way, from the top of the truck ladder to the door of the driver's compartment, a driver taking two or three steps to travel the 4 or 5 feet to the compartment door would have handholds readily and easily within reach for his use. Under the circumstances, and notwithstanding the absence of a handrail, I conclude and find that the handholds provided a safe means of access for the truck operator to reach the operating compartment, and that this means of access was in compliance with section 56.11001. Accordingly, I conclude that MSHA has not shown that Vulcan failed to provide a safe means of access in this case, and the contested citation IS VACATED.

ORDER

Based on the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

- 1). Vulcan's contest of the alleged violation cited in section 104(a) AS&S@ Citation No. 4105681, May 7, 1996, 30 C.F.R. ' 56.11001, IS GRANTED.
- 2). Section 104(a) AS&S@ Citation No. 4105681, May 7, 1996, citing an alleged violation of mandatory safety standard 30 C.F.R. ' 56.11001, IS VACATED, and MSHA's proposed civil penalty assessment of \$220, IS DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

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