FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., Room 6003
WASHINGTON, D. C. 20006-3868
Telephone No.: 202-653-5454
Telecopier No.: 202-653-5030

February 28, 2000

NORTHERN ILLINOIS STEEL SUPPLY,	:	CONTEST PROCEEDING
Contestant	:	Docket No. LAKE 99-78-RM
	:	Citation No. 7819416; 1/28/99
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Lemont Quarry & Mill
	:	
	:	Mine ID 11-01546
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. LAKE 99-120-M
Petitioner	:	A. C. No. 11-01546-05501 1 PR
v.	:	
NORTHERN ILLINOIS STEEL SUPPLY,	:	Lemont Quarry & Mill
	:	
Respondent	:	

DECISION

Appearances: Theordore J. Tierney, Esq., Adriana I. Reyes-Villanueva, Esq., Vedder, Price, Kaufman & Kammholz, Chicago, Illinois, for Contestant;
Christine M. Kassak, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois; Gary Cook, Conference and Litigation Representative, U. S. Department of Labor, Duluth, Minnesota, for Respondent.

Before: Judge Barbour

These are contest and civil penalty proceedings arising under section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815 (Mine Act or Act)). They involve one citation issued to Northern Illinois Steel Supply (NIS) at the quarry owned and operated by Vulcan Materials (Vulcan). When the citation was issued, an NIS employee was in the process of unloading steel from the bed of an NIS truck. The employee had delivered the steel to the quarry pursuant to a contract between NIS and Vulcan. The employee was standing on top of the steel. The employee was not tied off or otherwise secured against falling. The Secretary alleges the employee, and therefore NIS, violated 30 C.F.R. § 56.15005, a mandatory safety standard for surface metal and nonmetal mines requiring in part that "[s]afety belts and lines be worn when persons work where there is danger of falling".

NIS contested the citation. NIS argued it was not an "independent contractor" within the meaning of the Act and therefore was not an "operator". In the associated civil penalty proceeding the Secretary proposed the assessment of a civil penalty of $113 for the alleged violation, and NIS again raised its jurisdictional defense. The cases were consolidated for hearing and decision. They were tried in Chicago, Illinois. Counsels have filed helpful briefs.

THE CENTRAL ISSUE

Section 104(a) of the Act (30 U.S.C. § 814(a)) requires that an inspector of the Secretary's Mine Safety and Health Administration (MSHA) issue a citation whenever he or she believes an "operator" has violated the Act or any mandatory safety standard promulgated pursuant to the Act. Section 3(d) of the Act defines "operator" as including "any independent contractor performing services or construction at [a] mine" (30 U.S.C. §802(d)). The cases turn upon the question of whether NIS was an "independent contractor" and thus was an "operator" as a result of its delivery and its unloading of steel at the quarry.

STIPULATIONS

At the hearing the parties stipulated in part as follows:

1. The . . . judge has authority to hear and decide [the] proceeding[s].

2. At all times relevant to [the] proceedings, [NIS's] operations affect[ed] interstate commerce.

3. On January 28, 1999, [NIS] employed a truck driver to drive a flatbed truck with a load of prime domestic steel to Vulcan[']s . . . Lemont Quarry . . . in Romeoville, Illinois.

4. Citation [No.] 7819416 . . . was properly served.

5. From January 1, 1998 through December 31, 1998, [NIS] worked [68] hours (in approximately 20 to 30 minutes of time) for each presence at the mine.

6. [NIS] has no history of previous violations.

7. [NIS] employs 41 people at all of its facilities.

8. [The] Lemont Quarry is a mine under MSHA jurisdiction.

9. The . . . [q]uarry mines limestone.

10. On January 28, 1999, NIS either owned or leased the flatbed truck mentioned in Citation No. 7819416.

11. On January 28, 1999, [NIS] did not engage in construction at the Lemont Quarry.

12. NIS sold prime domestic steel products to the Lemont Quarry.

13. On January 28, 1999, the truck driver identified in Citation No. 781941 drove to the . . . [q]uarry and while there, released the restraints on the flatbed truck holding the steel.

14. The payment of the $113 assessed penalty will not affect [NIS's] ability to continue in business (Tr. 9-11, see Tr. 111-112; see also Joint Exh. 1).

The parties also stipulated that operations at the quarry affected interstate commerce (Tr. 111-112).

THE FACTS

The Quarry And The Delivery Of Steel To The Quarry

At the quarry limestone is extracted, crushed, and stockpiled. The processed stone, which is sold by Vulcan, is trucked away by independent haulers. Much of the stone is used in road construction.

Terry Croxford, who testified on behalf of the Secretary, is an employee of Vulcan. Croxford manages construction projects for the company (Tr. 41). As the manager of construction, he plans and oversees the projects. He orders materials and equipment needed for the projects. He assigns miners to do the work (Tr. 44).

Many of the projects require the use of structural steel in the form of beams, bars, plates, and angles. (Angles are used most often for structural support.) Vulcan purchases the steel from NIS and has done so since either late 1997 or early 1998 (Tr. 126). Depending upon the size of a project, the company may purchase the steel from one to two times a week.

The steel is shipped from the NIS plant to the quarry on flatbed trucks. The trucks are owned or leased by NIS, and the truck drivers are NIS employees. Most of the trucks used by NIS are not equipped with hoists for unloading the steel. Therefore, once the trucks reach the delivery point at the mine, they are unloaded using Vulcan-owned and operated equipment.

At the NIS plant, steel that is put on a delivery truck is secured to the truck bed by wire ropes or metal chains. Before the truck leaves the plant, the ropes or chains are tightened with a winch-like device. Once the load is secured, it is not touched until it is unloaded at the quarry.

The truck leaves the plant and travels on public roads until it reaches the quarry access road. (Vulcan shares this road with some of its contiguous neighbors.) The truck turns onto the

access road. The truck proceeds down the road toward the point where the steel is to be delivered (Tr. 62). It is approximately one half mile from the beginning of mine property to the active areas of the mine (Tr. 63). The delivery point is usually near the project where the steel is to be used, and the truck driver usually backs the truck into the area where the truck is unloaded (Tr. 90). In general, Vulcan employees decide where and when it is safe to unload (Tr. 91).

Most often the equipment used to unload the steel consists of a crane with a hoist, although occasionally a fork lift or a loader is used. When the steel is lifted by a crane, a hook is attached to the crane's metal hoist line. The wire ropes or chains securing the load to the bed of the truck are loosened and removed. The crane operator lowers the hook, and the hook is inserted into a metal sling that surrounds the load. The crane operator raises the hoist line and hook, lifts the load, swings the load away from the flatbed truck, and lowers it to the ground or to a waiting Vulcan vehicle.

Up to and including the time the subject citation was issued, the NIS truck driver usually helped with the loading process by unbinding or "unlocking" the restraints on the load (Tr. 93). On "rare occasions" the driver also guided the hook into the lifting chain that surrounded the load, an act described as "rigging" the load (Tr. 75, 93). Croxford estimated the driver rigged the load approximately 10% to 15% of the time (Tr. 93).[*]

Events Surrounding Citation No. 7819416

On the morning of January 28, 1999, Denis Libertoski, an MSHA inspector, arrived at the quarry to conduct his first regular inspection of the site. Around 8:15 a.m., as he approached the maintenance shop, he saw an NIS truck. It was parked about 100 feet in front of the shop (Tr. 154). A load of steel was on the bed of the truck. The load consisted of H-beams and I-beams. Also, it may have included angles (Tr. 161). The steel was going to be used in building a catwalk and hand rails at the crusher (Tr. 70).

Libertoski noticed that the load was being readied to be lifted from the truck. Libertoski could not recall the equipment that was going to be used to lift the steel, but he remembered that there was a metal sling around the load (Tr. 166-167). In addition, Libertoski remembered seeing a person standing on top of the steel. The person was guiding a hook into the sling so that the steel could be lifted and removed (Tr. 144-145).

As Libertoski walked toward the truck he saw that the person standing on the steel was not wearing a safety belt and line. The person was approximately 5½ feet to 6 feet above the ground (Tr. 170-172). The road below was surfaced with gravel and the ground was frozen (Tr. 150). There was nothing to prevent the person from falling off of the load to the gravel road.

---

[*]Since the citation was issued the unloading practice has changed. After January 28, 1999, upon instructions from NIS officials, NIS drivers have remained at all times in the cabs of their trucks.

At first, Libertoski thought the person was a Vulcan miner. (A Vulcan employee was running the equipment used to unload the steel and two other miners were in the area (Tr. 145-146).) However, when he approached the truck and spoke to the person, the person told Libertoski that he was the truck driver and that he worked for NIS (Tr. 157). The driver also told Libertoski that usually he delivered steel to the quarry twice a week (Tr. 175, 184).

Libertoski touched the steel and found that it was wet, making it "extra slippery" (Tr. 144, 161). He believed the driver reasonably was likely to slip off the steel, fall to the gravel road and be injured seriously. Libertoski acknowledged that the driver might have grabbed the hoist line to regain his stability and that the driver was wearing a hard hat, nonetheless Libertoski thought the driver was in danger (Tr. 149-150, 173-175).

No Vulcan supervisors were present when Libertoski saw the driver, but as he walked toward the truck, a Vulcan management official arrived (Tr. 185). Because of the lack of on-site supervisory personnel, Libertoski speculated that neither Vulcan nor NIS management actually knew the driver was engaging in an unsafe work practice (Tr. 152-153).

Libertoski required the driver to climb down off of the truck bed. Libertoski and the Vulcan supervisor then instructed the driver on the hazards of working without being tied off. Also, Libertoski explained to the driver the requirements of mandatory safety standard section 56.15005 (Tr. 190). The driver agreed that standing on the steel without a safety belt and line was hazardous, and he assured Libertoski that he would not do it again.

Libertoski thought there was a violation of section 56.15005 because the driver was working without a safety belt and line where there was a danger of falling (Tr. 143). Libertoski cited NIS for the violation because the driver was an NIS employee and because NIS was an independent contractor performing a service (the delivery and the rigging of steel). Therefore, Libertoski believed that NIS was an "operator" within the meaning of the Act (Tr. 138, 159, 169).

Libertoski was the last witness to testify for the Secretary. At the close of the Secretary's case, NIS rested. Counsel for NIS maintained that the Secretary had not established that NIS was an operator (Tr. 195-196).

THE STATUS OF NIS

The Mine Act subjects to regulation each coal or other mine affecting commerce and "each operator of such mine" (30 U.S.C. § 803). Section 3(d) of the Act defines "operator" as "any owner, lessee or other person who operates, controls, or supervises a . . . mine or any independent contractor performing services or construction at such mine" (30 U.S.C. § 802(d)).

The phrase "any independent contractor performing services or construction at [a] mine" was not included in the definition of "operator" set forth in the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), the predecessor to the Mine Act. It was added in 1977 when

Congress amended the Coal Act and renamed it the Mine Act. Expansion of the statutory definition was motivated by concern about the authority of the Secretary to regulate independent contractors (See, e.g., National Industrial Sand Association v. Marshall, 601 F.2d 689, 702-703 (3rd Cir. 1979)). The context within which the concern arose involved the Secretary's attempts to assert jurisdiction over independent general contractors performing surface and subsurface construction at mines (See, Bituminous Coal Operator's Association v. Kleppe, 547 F. 2d 240 (4th Cir. 1977)). In discussing the decision to include independent contractors in the revised definition of "operator", the Senate Committee that drafted the Mine Act stated, "[T]he definition of 'operator' is expanded to include 'any independent contractor performing services o[r] construction at such mine.' It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be . . . engaged in the extraction process for the benefit of the owner or lessee of the property" (S. Rep. No. 95-181, 1st Sess., 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Congress, 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 602)).

The courts have emphasized that the statutory definition of "operator" does not include all independent contractors at a mine, but rather is restricted to those that are "performing services or construction at [a] mine" (30 U.S.C. § 802(d)). For example, the 3rd Circuit has stated that:

> The reference made in the statute only to independent contractors who "perform[ ] services or construction" may be understood as indicating . . . that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed. (National Industrial Sand Association, 601 F. 2d 689, 701 (3rd Cir. 1979) (footnote deleted)).

The court's analysis of the legislative history lead it to conclude that the concern of Congress was with the permissive scope of the Secretary's authority not with the mandatory imposition of the Act's requirements (National Industrial Sand, 601 F.2d at 703).

Following this reasoning, the Secretary decided that rather than spell out the parameters of her authority, she would leave to herself the enforcement discretion to determine whether or not a particular regulation applied to a particular independent contractor (45 F.R. 44495, 44497 (July 1, 1980)).

The Secretary's lack of specificity, did not reassure the industry. There was concern — concern that was reiterated at the hearing on these matters — that the Secretary would abuse her discretion by extending jurisdiction to entities that only were connected remotely with mining; for example, that she might attempt cite as "operators" independent contractors delivering food or office supplies to a mine (See Tr. 29-31). Partly in response to such concerns, the Commission set forth two bases it would consider when evaluating the Secretary's exercise of discretion.

The Commission stated that it would look to: (1) the contractor's proximity to the mining process and whether the contractor's work was sufficiently related to that process, and (2) the extent of the presence of the contractor at the mine (see Otis Elevator Company, 11 FMSHRC 1896 (October 1989), 921 F. 2d 1285 (D. C. Cir. 1990); Joy Technologies Inc., 17 FMSHRC 1303, 1307 (August 1995), aff'd, 99 F. 3d 991 (10th Cir. 1996) cert. denied, S. Ct. 1691 (1997)).

The courts have not overturned these bases and the words of the statute and the Commission's guidelines remain relevant to the subject cases. Applying the statutory definition and the Commission's guidelines, I conclude the record fully supports finding that when it was cited, NIS was governed by the Mine Act.

First, NIS was an "independent contractor". Neither the operation of the truck, nor the rigging of the steel was carried out pursuant to Vulcan's supervision. An NIS employee was driving the truck. An NIS employee was "unlocking" and rigging the steel. Vulcan was not supervising the unloading process. In other words, NIS, through its employee, was acting independently of Vulcan. Moreover, NIS was delivering the steel that Vulcan ordered and at no additional cost to Vulcan. In so doing, NIS was acting pursuant to its contract with Vulcan.

Second, NIS was "performing [a] service". It was delivering the steel to the mine, and it was assisting in unloading the steel. As Libertoski properly noted, in so doing, NIS was engaging in work that Vulcan would have had to do if NIS had not acted. Clearly, this was a service to Vulcan.

Third, NIS was engaged in work that was closely related to the mining process. The steel that was delivered on January 28, 1999, was going to be used in building a catwalk and handrails at the crusher. The crusher was vital to the on-site preparation of limestone extracted at the quarry.

Fourth, NIS had a significant presence at the quarry. The delivery of the steel required the NIS driver to traverse a road used by NIS employees and by other contractors, and the steel was unloaded in an area where NIS employees were present and where others might come. Thus, the fact that the NIS driver and the NIS truck were on Vulcan's property had a potential impact on the safety of Vulcan's employees and on the safety of others at the mine.

Because NIS was acting as an independent contractor performing a service, because the delivery of the steel by NIS was closely related to the mining process, and because the presence of the NIS driver and equipment was sufficiently extensive, I find that the Secretary did not abuse her discretion in citing the company, and I conclude that on January 29, 1999, NIS was subject to the Act.

THE VIOLATION

Libertoski's testimony that the NIS driver was on top of the truck's load of steel, that the steel was wet, and that the driver was not tied off with a safety belt and line was not disputed.

Nor was Libertoski challenged when he testified the driver was approximately 5½ to 6 feet above the road surface. The testimony establishes that if the driver slipped, there was nothing to prevent him from falling to the road. Thus, driver was "in danger of falling" and since he was not wearing a safety belt and line, the violation existed as charged.

S & S and GRAVITY

The inspector found the violation was a significant and substantial contribution to a mine safety hazard. A violation is significant and substantial, if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December, 1998)); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998)); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984)), the Commission held that in order to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonable serious nature.

Here, the Secretary met her burden. The failure of the driver to be protected by a safety belt and line contributed to the danger he would tumble from the truck to the road below. The wet steel made it likely he would slip and fall. A fall of up to six feet onto the hard surface of the road certainly was reasonably likely to result in injury to the driver. Had he slipped, the only thing to prevent the driver from falling was for him to grab the hoist line and to use it to stabilize himself. However, rigging the steel required him to move out of reach of the line at times. By wearing a safety belt and line, all element of chance would have been eliminated, and slipping would not have posed a danger of falling unrestrained. Therefore, I conclude that it was reasonably likely the driver would have slipped and that his unrestrained fall would have caused injury. Also, given the distance of the fall and the surface upon which he would have landed, I conclude the injury would have been of a reasonably serious nature.

Finally, the nature of the injury that could have been expected and the present possibility that an accident would have occurred, indicate that, in addition to being S&S, the violation was serious.

NEGLIGENCE

The driver was under the supervision and control of NIS, and NIS failed to ensure compliance with the standard in spite of the fact NIS was aware that its drivers occasionally assisted in rigging steel. (Only after January 29, did the company ordered its drivers to remain in the cab of the truck when delivering steel to the mine.) In failing to make sure its driver complied with section 56.15005, the company failed to exhibit the care required by the circumstances and was negligent.

OTHER CIVIL PENALTY CRITERIA

NIS has no history of previous violations. Given the number of employees and the number of hours NIS employees worked at the mine, counsel for the Secretary characterized the company as small in size (Stips. 5-6; Tr. 13). The parties also stipulated that payment of the assessed civil penalty will not affect the ability of NIS to continue in business (Stip. 14). Finally, the inspector described the violation as have been abated in good faith (Tr. 190).

CIVIL PENALTY

Considering the penalty criteria, and especially in view of the fact that this is the first time NIS has been cited for a violation and that NIS is a small company, I conclude that a civil penalty of $50 is appropriate.

ORDER

NIS is **ORDERED** to pay a civil penalty of $50 within 30 days of the date of this decision and upon payment of the penalty, this proceeding is **DISMISSED.**

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified Mail)

Adriana T. Reyes-Villanueva, Esq., Theodore J. Tierney, Esq., Vedder, Price, Kaufman & Kammholz, 222 North LaSalle Street, Suite 2600, Chicago, IL 60601

Christine M. Kassak, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604

Gary Cook, Conference and Litigation Representative, U. S. Department of Labor, MSHA, 515 West 1st Street, Room 333, Duluth, MN 55802-1302

/gl