FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 24, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 94-126-M
	:	A.C. No. 11-02742-05516
v.	:	
	:	Lacon Plant
MIDWEST MATERIAL CORPORATION, Respondent	:	

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Paul Williams, President, Midwest Materials Company, Naperville, Illinois, Pro Se, for Respondent

Before: Judge Amchan

Summary

On the morning of May 27, 1993, Thomas Reaska, a miner employed by Respondent, Midwest Materials Company, died in an accident in Lacon, Illinois. Part of a crane boom on which he was working dropped on him. The Mine Safety and Health Administration (MSHA) conducted an investigation of the accident and issued Citation No. 4101896, pursuant to section 104(d)(1) of the Act. MSHA proposed a $20,000 civil penalty for the alleged violation. As discussed below, I affirm a section 104(a) citation and assess a $1,500 civil penalty.

Events Leading Up to the Accident

In April, 1993, Respondent, took control of a sand and gravel processing facility next to Route 26 in Lacon, Illinois (Tr. 59, 243-44). Midwest Material processed some material at this plant to have a stockpile available for customers (Tr. 131, 243-44, 285-86). On May 27, 1993, Respondent was preparing to move the plant across Route 26, to a site near the river bed from which it extracted sand and gravel (Tr. 272-73, 280-81).

To disassemble and move the plant, Respondent planned to

use an American 599C mobile crawler crane (Tr. 41). A 20-foot section had to be added to the crane boom to accomplish this task (Tr. 41). Richard Walsh, Respondent's on-site superintendent, instructed Edward Schumacher, a working foreman, and Mr. Reaska to extend the length of the boom (Tr. 280-81, 294-95). Both men had done this job before (Tr. 67-68, 75-77).

Schumacher and Reaska had worked for Respondent only a few weeks (Tr. 38-39). They had previously been employed for many years by Midwest Sand & Gravel Company, a firm unrelated to Respondent (Tr. 39, 70, 75). Midwest Sand & Gravel was owned by Jerry Henry, who sold the sand and gravel plant to Respondent (Tr. 57, 62). After the sale, Henry acted as a consultant to Respondent at the Lacon site (Tr. 57, 111-15, 261-64).

On the morning of May 27, Mr. Schumacher got into the cab of the crane and lowered its boom. The normal procedure for this task is to lower the boom to the ground. However, Reaska signaled Schumacher to stop when the boom was approximately five feet off the ground (Tr. 42).

The suspension lines running from the top of the cab to the end of the boom are normally relaxed and attached to the first section of the boom (the section closest to the cab). A device on the suspension lines, the cradle, secures them to the boom. After that attachment is made the pins connecting the first and second sections of the boom are driven out of their holes and the sections separate. The first section is safely supported by the crane's suspension lines and the crane is backed away from the dismantled sections. Additional sections can then be added (Tr. 43-48, Exh. G-1).

On May 27, 1993, the suspension lines were not relaxed and attached to the first section of the boom. Schumacher went to his truck, nearby the crane, to get a cable come-along. The come-along is normally used to pull the cradle down to the boom.

While Schumacher was at his truck, Reaska started driving the pins out between the first and second sections of the boom (Tr. 49).

Jerry Henry drove up and started talking to Schumacher. It is not clear whether they discussed the crane extension or only other matters (Tr. 49-51). Henry was not present to supervise this operation. His presence at the time of the accident was purely fortuitous (Tr. 106-07, 115, 294-95). After a minute or two Schumacher and Henry approached the crane. Reaska knocked a pin out of its hole and the boom pivoted and dropped on top of him. Henry was knocked down by the boom but was not seriously injured. Reaska died at the scene (Tr. 51-54).

The citation

This accident was investigated by MSHA Inspector Jerry Spruell, who issued Citation No. 4101896 on May 28, 1993. The citation alleged a violation of 30 C.F.R. ' 56.14211(a). This standard provides that persons shall not work on top of, under, or from mobile equipment in a raised position until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidently[1].

There is no dispute that Mr. Reaska worked under a section of the American crane boom when it was in a raised position and neither blocked nor mechanically secured. Furthermore, Respondent concedes that this was not the proper way to perform the boom extension (Tr. 298-99). I conclude that a violation of the regulation occurred. The issue in this case is the extent to which Respondent should be held responsible for this violation.

Spruell concluded that Respondent's negligence was "high" and that the violation was due to its "unwarrantable failure" to comply with the regulation because Mr. Schumacher, a working

[1]Section 56.14211(b) prohibits working under raised **components** of mobile equipment. Although this subsection appears to fit the instant situation better than subsection (a), I regard the distinction as unimportant in deciding this case.

foreman, was present when the violation occurred (Tr. 146-150). Respondent challenges Schumacher's status as a supervisor because he was an hourly, rather than a salaried employee (Tr. 56).

I conclude this fact is irrelevant because Superintendent Walsh designated Schumacher to be the foreman in charge of the pit and the boom extension process (Tr. 284). Since Respondent had entrusted supervisory responsibilities to Schumacher, his negligence is imputed to Respondent both for purposes of determining whether the violation was due to Respondent's "unwarrantable failure" to comply with the Act, and for determining an appropriate civil penalty, Rochester-Pittsburgh Coal Co., 13 FMSHRC 189 (February 1991).

MSHA's determination that Respondent was highly negligent and that its violation was an "unwarrantable failure" was based on its assessment of Schumacher's negligence only. The agency does not regard the conduct of Superintendent Walsh or any other company supervisor negligent (Tr. 204). I concur in that conclusion.

Schumacher and Reaska had both worked in the sand and gravel business for 15-20 years, primarily for Jerry Henry and Midwest Sand and Gravel Company (Tr. 70, 75). Both had extended crane booms in their employment with Mr. Henry and were knowledgeable about this procedure (Tr. 75-77, 286-88).

Walsh did not review with Schumacher and Reaska the proper procedures for extending a boom (Tr. 291). He relied completely on their experience and expertise in getting this task done properly and safely.

I am unable to conclude that Superintendent Walsh had an obligation to review boom extension procedures with Schumacher and Reaska. It is not clear that extending the boom was inherently hazardous. The boom should have been lowered to the ground before separation of the sections commenced and it was not unreasonable for Walsh to assume this would be done.

Furthermore, Respondent was not cited for failure to comply with MSHA's regulations regarding the training of newly employed experienced miners, or miners assigned to a task in which they have no previous experience, 30 C.F.R. '' 48.26 and 48.27. The record does not indicate that these regulations were violated in the instant matter.

Mr. Schumacher's negligence is imputable to Respondent, but I cannot conclude that his conduct was sufficiently aggravated to

rise to the level of "unwarrantable failure," Emery Mining Corp., 9 FMSHRC 1991, 2001 (December 1987); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991).

Schumacher knew the boom had not been lowered to the ground and he was aware that the suspension lines had not been hooked to the first section of the boom. However, his conduct is better described as "thoughtless" or "inattentive," rather than "inexcusable or aggravated," Emery, supra, at page 2001. In so finding, I note that although the hazard is obvious in retrospect, it existed only briefly before the accident. This case is thus distinguishable from situations in which an operator allows an obvious hazard to persist for a significant period of time.

There is nothing that suggests that Reaska and Schumacher erred because they were under pressure to dismantle the crane quickly, or that Respondent gained any sort of production advantage from doing this task improperly. Rather, the evidence indicates that two competent, experienced miners who knew how to do this job properly did it improperly for inexplicable reasons (Tr. 74-75, 299). I, therefore, find that this record does not establish that Respondent's violation of the regulation was due to an unwarrantable failure and I affirm Citation No. 4101896 as a violation of section 104(a) of the Act.

Other contentions of Respondent

Respondent contends that it is not properly charged with the instant violation because the site of the accident was not on its property and because the crane was 750 to 1,000 feet from the sand and gravel wash plant (Tr. 243-44). I reject both these arguments.

Sand and gravel had been washed and graded at a location contiguous to the accident site a week to ten days earlier (Tr. 243). The accident site did not cease to be a mine as that term is defined in section 3(h)(1) of the Act simply because processing had not taken place for few days. Moreover, the crane itself was part of the mine because the statutory definition includes equipment used in, or to be used in, the milling of minerals, 30 U.S.C. ' 802(h)(1).

In section 3(h) of the Act, Congress delegated to the Secretary of Labor some degree of discretion in making determinations of whether worksites are subject to the Mine Safety Act or the Occupational Safety and Health Act. All worksites in the private sector are subject to one statute or

the other.

The Secretary exercised his discretion in a 1983 interagency agreement between MSHA and OSHA, BNA Occupational Safety and Health Reporter, paragraph 21:7071. This agreement is entitled to deference from the Commission, Donovan v. Carolina Stalite Company, 734 F.2d 1547 (D.C. Cir. 1984).

Appendix A of the Interagency Agreement sets forth specific areas of MSHA authority. It provides:

> Following is list with general definitions of milling processes for which MSHA has authority to regulate subject to paragraph B6 of the Agreement. Milling consists of one or more of the following processes: crushing, grinding, pulverizing, **sizing**, concentrating, **washing**, drying...(emphasis added)

As the crane was to be used to move milling equipment, I conclude that it was part of a mine within the meaning of the Act, See, W. J. Bokus Industries, Inc., 16 FMSHRC 704 (April 1994).

The fact that the mine site did not belong to Respondent is also irrelevant. The Act defines an operator as "any owner, lessee, **or other person who operates, controls, or supervises** a coal or other mine or any independent contractor performing services or construction at such mine (emphasis added)." 30 U.S.C. ' 802(c)(d). As the site was clearly under the control of Respondent, it was an operator within the meaning of the Act, and subject to citation for violations at this location.

Civil Penalty Assessment

Applying the criteria for assessing civil penalties set forth in section 110(i) of the Act, I conclude that $1,500, rather than the proposed $20,000 is appropriate for this violation. Obviously, the gravity of the violation was quite high in that it resulted in Mr. Reaska's death[2]. While the negligence of both Mr. Reaska and Foreman Schumacher was considerable, it does not warrant a higher penalty than $1,500.

The violation was terminated by the accident, but Respondent apparently acted in good faith in taking steps to prevent a recurrence. There is no indication of a prior history of MSHA violations for Midwest Materials in the record. There is also no indication of the size of the company, and I assume, in the absence of evidence to the contrary, that a $1,500 penalty or even one of $20,000 would not jeopardize Respondent's ability to stay in business.

ORDER

Citation No. 4101896 is affirmed as a significant and substantial violation of section 104(a) of the Act and a $1,500 civil penalty is assessed. This penalty shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

[2]I also conclude that the violation so obviously meets the criteria for a "significant and substantial" violation set forth in Mathies Coal Co., 6 FMSHRC 1 (January 1984) that an extended discussion of this issue is unnecessary.

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