

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W. Suite 9500  
Washington, DC 20001-2021

October 7, 2004

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| SECRETARY OF LABOR,     | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH  | : |                          |
| ADMINISTRATION (MSHA),  | : | Docket No. SE 2004-83-M  |
| Petitioner              | : | A.C. No. 22-00672-16273  |
| v.                      | : |                          |
|                         | : |                          |
| APAC-MISSISSIPPI, INC., | : |                          |
| Respondent.             | : | Robinson Pit             |

## DECISION

Appearances: Gwen Y. Anderson, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, GA; for the Secretary.  
Julie K. Hackworth, Esq., APAC-Mississippi, Inc., 50 E. River Center Blvd., P.O. Box 391, Covington, KY 41012; for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (the Act) alleging violations by APAC Mississippi, Inc., (APAC) of 30 C.F.R. §§ 56.11012 and 56.9300(a). In addition, APAC challenges the issuance of an order under Section 104(b) of the Act, relating to the alleged violation of Section 56.9300, *supra*. Pursuant to notice, this case was scheduled and heard in Jackson, Mississippi on August 31, 2004.

### **I. Citation No. 6101104**

Citation No. 6101104 asserts that a walkway on a floating dredge had not been provided with railings to prevent a person from falling into the water when traversing the walkway to check the dredge cutter head. The citation alleges a violation of 30 C.F.R. §56.11012.

In support of the violation, the Secretary called as a witness, Fred Poss, APAC's Superintendent for three mines, including the operation at issue. He indicated that a metallic horizontal platform (ladder) attached to the dredge pump is in use daily. Poss conceded that employees do walk on the platform to inspect the cutter head. He indicated that this can occur twice a day, but on an average this occurs three to six times a year. According to Poss, in order to perform maintenance on the pump, the platform must be raised, which necessitates moving the dredge from the lake to the shore. He also indicated that maintenance is not performed when the dredge is on the lake.

MSHA Inspector Delilah Tessaro, testified that when she inspected the subject facility on November 5, 2003, she spoke to the dredge operator and he referred to the ladder as a walkway. According to Tessaro, the operator told her that anytime he needed to check the cutter head he would use the ladder. However, she conceded that the operator did not tell her specifically how often he used the walkway to access the cutter heads.

After the Secretary rested, APAC rested, and made a motion for a directed verdict. After hearing argument on the motion, the motion was granted. The bench decision on the motion is set forth below.

Because both parties rested, the entire record must be reviewed to see if the Secretary has met its burden of establishing a violation of Section 56.11012, supra, as alleged in the citation at issue.

Section 56.11012, supra, requires protection by railings, barriers, or covers in areas where there are openings above, below, or near travelways. Travelway is defined in Section 56.2 as “a passage, walk, or way regularly used and designated for persons to go from one place to another.” The key phrase here is “regularly used.”

At best, the hearsay statements that the operator made to the inspector that he goes on the walkway anytime the cable or cutter have to be maintained, raises an inference that the platform at issue is “regularly used.” However, I find this inference, based on hearsay, to be outweighed by Poss’ testimony, based on his personal knowledge, that on an average the ladder is used to access the cutter head four to six times a year. There is not any other evidence in the record as to how often the platform is used to access the cutter heads. If the dredge operator had been called as a witness, perhaps he could have testified in more detail, based on his personal knowledge, as to how often he actually uses the ladder to do maintenance work. However, the Secretary chose not to call him.

Based on the record before me, I find that the Secretary’s evidence falls short of establishing that the cited area was a travelway. The weight of the evidence does not establish that the ladder was regularly used and designated for persons to go from one place to another. Accordingly, it has not been established by the Secretary that APAC violated Section 56.11012, supra. Therefore, APAC’s, motion is granted.

## **II. Citation No. 6101107**

APAC operates a sand and gravel pit. Trucks regularly enter the mine, travel north to the pit on a two-way thoroughfare, and return on the same road to exit the mine. Trucks that are loaded with materials from the pit, leave the pit along this thoroughfare, then divert west to a dirt covered “ramp” that is not elevated, and extends approximately 100 to 120 feet to a scale which

is in a direct line with the ramp.

The scale is a metal surface 10 feet wide, and approximately 60 feet in length.<sup>1</sup> The scale is in direct line of the ramp and 28 to 30 inches above the ramp. On the date cited there was a unguarded edge running along the length of the scale that extended approximately 30 feet. Tire tracks were observed approximately four inches from the edge of the scale.

After trucks stop on the scale and are weighted,<sup>2</sup> they continue to travel in a direct line down a similar ramp 100 to 120 feet in length, until it joins a two way road. The trucks then travel south along the road to exit the mine.<sup>3</sup> The parties stipulated, as pertinent, as follows:

x x x

10. Robinson Pit Mine began operations in October 1993.
11. Regarding Citation No. 6101107, the over the road truck scale had three openings which did not have berms or guardrails.
12. The truck scale had three unguarded openings which were approximately 24", 10' and 30'.
13. At various points on the bank of the truck scale, the unguarded openings had a drop-off ranging from approximately 37" to 42".
14. Inspector Tessaro observed tire prints four inches from the edge of the scale.
15. The scale is used daily.

x x x

APAC was cited for violating Section 56.9300(a), supra, which provides, as pertinent, that berms or guardrails shall be provided "... on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment." (Emphasis added.)

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<sup>1</sup>The trucks that travel on the scale are approximately 50 feet long, and 8 feet wide.

<sup>2</sup>The scale is used by trucks 15 to 20 times a day. At times up to 50 trucks a day travel on the scale to get weighed.

<sup>3</sup>Trucks entering the mine empty for the first time take a similar route so the empty truck can be weighed.

The main issue in this case is whether the cited scale is a roadway. The parties presented argument on this issue and a decision was rendered at the hearing, holding that, based upon the common meaning of a roadway, the scale is considered part of a roadway. That decision, is set forth below, with the exception of corrections of matters not of substance, and the addition of wording that had been inadvertently omitted.

I have not been referred by counsel to any authority, or case law that established a precedent as to whether the scale in this case is to be considered a roadway. I haven't found any cases. Also, Part 56 the Code of Federal Regulations, does not define roadway. Hence, I place reliance on the common meaning of the term "roadway" as set forth in the Webster's Third New International Dictionary, (1993 ed.). Webster's defines roadway as "specif: "[t]he part of a road over which the vehicular traffic travels." (See *Pappy's Sand & Gravel*, 20 FMSHRC 647, 651) (June 1998). Webster's defines "road" as pertinent, as follows: "... 3(c): the part of a thoroughfare over which vehicular traffic moves... ." Webster's goes on to define "thoroughfare" as pertinent as follows: "1: a way or place through which there is passing ... ."

In arguing that the scale is not a roadway, APAC points out that these definitions denote a route going from point A to point B. In this connection, APAC argues that the scale, a piece of equipment used to weigh trucks, is a destination and not part of a route the pit to the mine exit. APAC, in essence, refers to Poss' testimony that trucks have never traveled along the ramp, across the scale, and along the next ramp without stopping to get weighed.

In analyzing the common meaning of the various terms, I find that APAC arguments and interpretations to be too restrictive. There isn't any connotation in any of the definitions that movement must be continuous, or that movement must be without stopping.

To adopt the interpretation urged by APAC would lead to a conclusion that a truck traveling from a ramp to the scale is on a roadway going to the scale. However, the scale which is in a direct line from that ramp would not to be considered a roadway, because it is a piece of equipment and the truck stops there. And then, once the truck continues down the ramp which is in a direct line from the scale, it would be traveling again on a roadway.

I find this interpretation too restrictive. I find that, in harmony with the dictionary definitions, ie., the common meanings of the terms at issue, the entire route traveled by the trucks is to be considered a roadway. The route consists of traveling from the two-way road, along a ramp and scale in the same line, and continuing from the scale in the same direct line down the next portion of the ramp back to the road.

After the decision was rendered, the parties discussed settlement and reached an agreement that the operator pay a total civil penalty for this violation of \$250.00. Considering the record, in this case, I find the settlement a fair resolution, and consistent with the Act. Accordingly, I approve it. Also, it was agreed that APAC will no longer contest the 104(b) order (Order No. 6101131).

**ORDER**

It is **Ordered** that (1) Citation No. 6101104 be **Dismissed**, (2) Respondent pay a total civil penalty of **\$250.00** for the violation cited in Citation No. 6101107, and (3) Order No. 6101131 be affirmed.

Avram Weisberger  
Administrative Law Judge

Distribution: (Certified Mail)

Gwen Y. Anderson, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Rm. 7T10, Atlanta, GA 30303

Julie K. Hackworth, Esq., APAC-Mississippi, Inc., 50 E. River Center Blvd., P.O. Box 391, Covington, KY 41012

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