

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Ave., N.W., Suite 9500
Washington, D.C. 20001-2021

July 19, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2005-48-M
Petitioner	:	A.C. No. 01-01138-44059
	:	
v.	:	
	:	Docket No. SE 2005-55-M
	:	A.C. No. 01-01138-46301
ELMORE SAND & GRAVEL, INC.,	:	
Respondent	:	Scott Pitt

DECISION

Appearances: Leslie John Rodriguez, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner
George W. Walker III, Esq., and J. David Martin, Esq., Copeland, Franco, Screws & Gill, P.A., Montgomery, Alabama, on behalf of the Respondent

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”), alleging violations by Elmore Sand & Gravel, Inc. (“Elmore”) of 30 C.F.R. § 56.14100(c) and 56.14211(c). On November 3, 2005, the parties filed a Joint Statement of Agreed and Disputed Facts (“Jt. Statement”). On November 8 and 9, 2005, a hearing was held in Montgomery, Alabama.¹ At the hearing, the parties filed Joint Stipulations. On November 30, 2005, pursuant to their stipulations, the parties filed four joint exhibits (JX 1, JX 2, JX 3, and JX 4). Subsequent to the hearing, the parties each filed Proposed Findings of Fact and either a Legal Argument or Memorandum of Law. On April 24, 2006, the parties each filed objections to the other parties’ findings of fact and legal arguments.

¹At the hearing evidence was adduced only regarding Citation No. 6093107 (violation of Section 56.14100(c)).

Joint Statement of Agreed Facts

The parties, in a Joint Statement of Agreed and Disputed Facts agreed to the following facts:

1. Donnie Zeigler had been a haul truck operator at Elmore Sand & Gravel, Inc. ("ESG") since March of 2003.
2. Prior to the date of the accident, Zeigler had been trained by ESG in compliance with 30 C.F.R. Part 46.
3. Prior to the date of the accident, Zeigler had been trained by ESG to never get under the raised dump bed on the Terex Haul Truck he operated without first employing the safety prop.
4. It was ESG's company policy to require the operators of its haul trucks to perform a daily vehicle inspection both before and after completing their shift and to record their findings on an Operator's Daily Vehicle Inspection Report.
5. From December 15 to December 17, 2003, Zeigler was suspended from work due to his failure to show up for work or call in, on December 13, 2003.
6. During the time that Zeigler was suspended, the Terex Haul Truck which he normally operated was being run by Jonas Lee Hall. During the time that Hall operated the Terex Haul Truck, it overturned.
7. The only problem with the Terex Haul Truck experienced by Hall was that the dump bed was slow coming down.
8. When Zeigler returned to work on December 18th, he immediately took the Terex Haul to the maintenance shop for them to repair wires from the wiring harness that were disconnected.
9. Jack Barnes and Eric Hilyer in the maintenance shop repaired the wiring harness.
10. Zeigler turned in Operator's Vehicle Inspection Reports dated December 18 and December 19, 2003.
11. Between December 18, 2003 and the time Zeigler told Derrell Saunders that he was going to check his brakes on the morning of December 20, 2003, Zeigler did not report any problems with the Terex Haul Truck. At the conclusion of his shift on December 19, 2003, Zeigler specifically told Mark Montgomery that the Terex Haul Truck was running fine.

12. After dumping his second load of the day on the morning of December 20, 2003, Zeigler called fellow operator Saunders on their two-way radio and told him that the brake light on the dashboard of his truck kept coming on and that he was going to check his brakes.

13. Zeigler then pulled his truck forward approximately twenty feet, with the bed fully raised.

14. The dump bed on Zeigler's truck was then seen slowly lowering.

15. While driving around Zeigler's truck, Saunders saw Zeigler pinned under the dump bed and immediately jumped out of his truck and got into the cab of Zeigler's truck to raise the dump bed.

16. Saunders moved the joystick to the raise position and raised the dump bed off Zeigler.

17. Saunders is the only witness who can testify as to the position of the joystick at the time of the accident.

18. Zeigler was found positioned near the brake cylinder and was facing towards the cab of the truck.

19. The Terex Haul Truck was on level ground at the time of the accident.

20. Winds were light and variable on the day of the accident.

21. The emergency workers who responded to the 911 call regarding the accident had to undo some hoses in the process of removing Zeigler from the Terex Haul Truck.

22. Zeigler later died of injuries sustained as a result of the dump bed lowering on him.

23. The dump bed control joystick on the Terex Haul Truck on which Zeigler was killed has four positions, in descending order from the top: Float, Lower, Hold and Raise. The joystick will not remain in either the Raise or Lower positions unless the operator physically holds it there. The joystick will spring back to, and remain in the Hold position when released from the Lower and Raised positions. The Float is a detented position and the joystick will remain in that position if released. In the Float position, the weight of the dump bed causes it to lower. In the Raise and Lower positions, hydraulic pressure powers the dump bed up and down.

24. The dump bed control joystick operated the dump bed irrespective of whether the wiring harness was disconnected from the truck tractor to the truck trailer.

25. During the investigation, the Mine Safety and Health Administration (“MSHA”) tested the safety prop on the Terex Haul Truck and found that it was functional in that it prevented the free and uncontrolled descent of the dump bed by stopping it from coming down. The MSHA investigators concluded that the safety prop on the Terex Haul Truck would have protected Zeigler from injury and prevented his death had it been used by him.

26. On December 22, 2003, MSHA investigators Eugene Hennen, Walter Turner and Harold Wilkes performed two sets of tests on the Terex Haul Truck before the wiring harness was replaced on the Terex Haul Truck.

27. On December 23, 2003, MSHA investigator Hennen performed a set of tests on the Terex Haul Truck before and after the wiring harness was replaced on the Terex Haul Truck.

28. During the course of the MSHA investigation, on December 23, 2003, MSHA investigator Hennen conducted tests to determine if the repair of the wiring harness before the accident resulted in shortened wires that pulled loose when the truck articulated. These tests were inconclusive.

29. On December 23, 2003, during the course of the investigation and after the wiring harness was repaired, MSHA investigator Hennen took connectors plus wires that were left over from the tractor side of the wiring harness to his hotel. With no representatives from ESG present, Hennen performed destructive testing on the connectors and wires. On December 24, 2003, Hennen returned the connectors to ESG.

30. In the course of its investigation, MSHA investigator Hennen sent requests for information to the manufacturer of the haul truck, Terex, on January 14, 15 and 16, 2004. Terex responded to these requests on January 22, 2004.

31. The final MSHA Report of Investigation indicated that MSHA could not determine when the wires on the tractor side of the Terex Haul Truck were cut.

I. Citation No. 6093107 (Violation of Section 56.14100(c), supra)

A. The Secretary’s Case

1. Derrell Sanders

Derrell Sanders worked on the same shift as Donnie Zeigler, and operated the same model Terex dump truck as the one in issue operated by Zeigler. According to Sanders, he drove the truck one day during the period that Zeigler had been suspended from December 15, through December 17. Sanders indicated that when he operated the lever² in the truck which controls the position of the bed, “. . . you tried to power it down. It would never go down. You got to keep clicking it back and forth in order for it to go down. [sic] (Tr. 27). According to Sanders, on December 20, once he saw that the truck bed on Zeigler’s truck was down and Ziegler was pinned under it, he jumped in the cab of the truck. Sanders testified that “. . . [t]he lever was in the hold position. And I pulled it back to get it off.” (Tr. 33).

2. Eric Hilyer and Jack Barnes

Eric Hilyer, a maintenance mechanic employed by Elmore, was responsible for repairing the wire harness that electronically connects the cab unit (cab) and the dump bed. According to Hilyer, if the harness is damaged, it is his normal procedure to strip the outer layer of installation and each individual wire that has been broken, and then reconnect the ends of any exposed wires. The reconnected wires are each placed in a separate butt splicer, and crimped to make a secure connection.

On December 13, the dump bed had overturned. According to Hilyer, the wires were “mashe” (Tr. 84). He repaired all eleven wires within the harness by way of butt splicing.

According to Hilyer, he worked on the truck on December 15, because the body was not going up, and a fuse had blown. He indicated that when he put in a second fuse, “it blew”. (Tr. 149). He then started to look for electrical problems “. . . and found the wiring harness pinched” *Id.*

Jack Barnes, a mechanic to whom Hilyer reports, testified that on December 18, “first thing” in the morning after Ziegler inspected the truck (Tr. 210), the latter brought him (Barnes) the harness and “. . . about three or four wires . . . had mashed.” [sic] (Tr. 212). Although not all of the wires were damaged, Barnes repaired six of the wires, and the remainder was repaired by Hilyer. All damaged wires were repaired with butt connectors.

According to Hilyer, after the accident at issue, the harness that ran from the cab to the dump bed was examined. The end that was connected to the cab appeared to have been severed, and the end attached to the dump bed ended in butt connectors. A piece of the harness, of indeterminate length, was missing between the severed portion of the harness connected to the cab, and the butt connectors at the end of the harness connected to the dump bed.

²Control joystick (joystick)

According to Hilyer, he performed various tests relating to the operation of the joystick and the dump bed. On December 22 and 23, tests were conducted while the harness was unconnected. In addition, on December 23, tests were performed after the harness had been repaired and reconnected. On one test when he raised the dump bed to the fully upright position and released the joystick, the dump bed held. On another test “it drifted down.” (Tr. 114). When he was directed to lower the dump bed, it did not “come down.” (Tr. 115). He then placed the joystick in the float position, and the dump bed did not come down. Hilyer raised the dump bed again, and the dump bed “didn’t go up or didn’t come down.” (Tr. 115). He testified further as follows: “We went back to the hold position and it held again. Had to go back and forth between down and hold, down and hold, to make the body move. [sic] And then it started coming down. At one time it held; the next time it didn’t hold.” *Id.*

3. Mark Montgomery

Mark Montgomery testified that in his capacity as Elmore’s Safety Director, every day at the end of the shift, he reviews all vehicle inspection reports. According to Montgomery, Elmore requires its employees to complete pre-shift vehicle reports at the start of the workday, and post-shift reports at the end of the workday. On December 20, the pre-shift vehicle inspection report for December 20, was not located. A blank vehicle inspection report was found in Zeigler’s truck.

4. Eugene Hennen

According to Hennen, he inspected the severed harness subsequent to the accident, but prior to its replacement. He indicated that he could not determine how the harness had been severed. He agreed that he did not believe this condition “. . . existed at the time of the accident.” (Tr. 443).

On December 22, before the severed harness had been replaced, Hennen asked Hilyer, who was then in the cab, to perform various tests with the joystick. He indicated that when the truck bed was raised and he told Hilyer to “. . . let loose of the joystick” . . . and the latter complied, “. . . the bed would come down.” (Tr. 249). Hennen was asked to describe what occurred when he requested Hilyer to “. . . raise the bed up points in between the frame of the dump bed unit and its maximum height.” He answered as follows: “Well, when he would take it all the way up, it would stay there. And he would have to power it to start it down before it would come down. When he would start powering it down and let loose of the control, it would come all the way to the frame.” *Id.*

Later on that day, Hennen asked Hilyer to raise the bed all the way and put the joystick in the hold position. According to Hennen, the bed appeared to go all of the way up. He indicated that the bed came down and “. . . that was the first time that the bed had come down from the totally up position.”[sic] (Tr. 253). Hennen said he repeated the test, “. . . we waited at least a minute”, and the bed stayed up. *Id.* He further testified that he then tested “. . . to start the bed

down. And it came all the way to the frame.” (Tr. 253). Hennen indicated that on December 22, when he tested the joystick in the hold position the bed came down “... one out of three times... .” (Tr. 429). According to his testimony the bed “. . . came down twice ... [f]rom all the way up” (emphasis added) (Tr. 464), and it came down two other times when the bed was not in a fully raised position.

Hennen testified that on December 23, in the presence of the representative of the manufacturer of the Terex truck at issue, he repeated the same tests that had been performed the previous day. He indicated that, in the hold position, “. . . the bed would not hold when you would let loose the control when you are raising or lowering the bed.” (Tr. 257). He also indicated that in testing on December 23, the bed came down when the joystick was in the float position. When he repeated the test the bed initially stayed up, but it started to come down after thirty-five seconds. Hennen repeated the test again, and the bed stayed up. He asked the Terex representative to explain why that happened “[a]nd he told me that it was because . . . the wire to the warning light was broke because all the wires were severed. And that would cause it to do that.” [sic] (Tr. 259).

On December 23, after Hilyer repaired and reconnected the wiring harness, Hennen had him then repeat the same tests, with the exception of putting the joystick in the float position. According to Hennen, the bed was raised and put in the hold position. He indicated that this test was performed “several times” and “. . . it would hold every time.” (Tr. 266).

According to Hennen, in essence, the operation of the hydraulic system that raises and lowers the truck bed is controlled by a joystick, located in the cab. When the joystick is placed in the up or down position, respectively, an electrical connection is made between the control stick and a hydraulic valve located in the cab, which in turn, hydraulically raises or lowers the dump bed. When the truck bed is in a raised position, electricity is transmitted through a wire in the harness that extends from the dump bed to the cab and activates a warning light located in the cab. If the bed is lowered, it makes contact with a proximity switch located on the frame of the bed. As a result, the electrical circuit to the warning light is broken, and the light is turned off.

Hennen opined that when the bed is raised and the joystick is released, if there is a break in either of the wires that electrically connect the warning light in the cab and the proximity switch on the dump bed, then the system will remain in the float position, even if the joystick is in the hold position. Hennen opined that this is what caused the bed to come down at the time of the accident.

On January 12, 2004, the Secretary issued a citation to Elmore alleging a violation of 30 C.F.R. § 56.14100(c). Section 8 of the citation alleges in the “condition or practice” the following:

A fatal accident occurred at this operation on December 20, 2003, when a truck driver was pinned between the frame of the truck and

the dump bed of a Terex TA25 haul truck. The wiring harness from the tractor to the dump bed trailer was damaged causing a short in the electrical system that prevented the dump bed control switch from working properly. Due to the electrical short when the control lever was released after raising the bed, the hydraulic control valve would not return to the hold position allowing the bed to come down.

B. Discussion

Section 56.14100(c), supra, provides as follows:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

Thus, to establish a violation herein, the Secretary must establish (1) the existence of a defect, that (2) makes a continued operation hazardous to persons, and (3) that the defective items be taken out of service.

1. The existence of a defect

The Secretary asserts that the truck was defective “. . . in that before the accident, the wiring harness came loose thereby creating an open circuit that disabled the joystick, the body-up switch and the warning light.” (emphasis added) (Proposed Finding of Fact and Memorandum of Law, at 32).

a. Whether the wiring harness “came loose” before the accident

i. evidence relied on by the Secretary

In support of its position that the harness had come loose prior to the accident, the Secretary relies on the testimony of Hilyer and Barnes, that on December 13, and December 18, they repaired damaged wires within the harness. They indicated that on each occasion the wires were reconnected by placing them in butt connectors, which were then crimped. The Secretary also relies on an MSHA taped interview of Jonas Hall on December 23, 2003,³ wherein the latter indicated that he operated the truck in question during Ziegler’s absence on December 13, 15, 16

³ This taped interview was transcribed by the parties after the hearing and offered as a Joint Exhibit (JX 4), and is admitted into the record.

and 17, and the bed turned over. Hall stated that he noticed that the wires running from the bed to the cab “. . . had come loose.”[sic] (JX 4, at 2). On another occasion when the truck had turned over, he noticed that these wires had come loose, and they were subsequently repaired.

According to Hall, when he operated the truck, he noted that the wires were loose and that the “. . . little light wouldn't come on the truck.” (JX 4, at 9). Hall also indicated that the truck bed was slow coming down.

In addition, the Secretary refers to an MSHA taped interview of Tommy Finley on December 23, 2003, in which the latter indicated that on December 20, he was working on the same site as Zeigler and that “[h]e had said something that morning about the wiring on the truck. He had said the wiring was messed up and (inaudible) fix it.” [sic] (JX 3, at 1)⁴. In the same fashion, MSHA Inspector, Harold Wilkes' general field notes, dated December 23, 2003, relating to an interview of Ennatt Anthony Findley, state as follows: “Zeigler told me something was wrong with the wiring and someone was due today to make repairs.” (R-10, at 6)⁵

ii. discussion

_____ The record is clear that, after the accident, the harness was not intact; the end that was connected to the cab appeared to have been severed; the end attached to the dump bed ended in butt connectors; and a piece of the harness of indeterminate length was missing between the severed end, and the butt connectors. Also, on two occasions within a week prior to the accident, the harness wires had become damaged, and had to be stripped and reconnected. However, the record does not contain any evidence that these repairs were not done according to accepted standards, that the butt connectors were not properly crimped, or that the reconnected ends were not secure.⁶ Further, there was not any evidence adduced that, on December 18, when the last repairs were performed, any of the previous connections had come loose. The only evidence of damage to the harness subsequent to the repairs on December 18, consists of an unsworn statement by Findley that on December 20, Zeigler told him the wiring was “messed up”. (JX 3, at 1). Not much weight is placed upon the statement inasmuch as it is not clear as to what

⁴Subsequent to the hearing, the tape of the interview was transcribed and offered by the parties as a Joint Exhibit (JX 3) and is admitted into the record.

⁵In the Secretary's Memoranda of Law, the Secretary cites this statement as exhibit P-5, at 6. However, exhibit P-5, which is the same as exhibit R-10, was not admitted at the trial.

⁶I take cognizance of Hall's recorded statement that, when he operated the truck on December 13, 15, 16, and 17, wires running from the bed to the cab “had come loose” [sic] (JX 4, at 2). and that “wires were loose... and the little light wouldn't come on in the truck.” (JX 4, at 9). However, he was not called to testify, and he did not specify the wires he was referring to. Further, there is not any evidence that all the loose wires in the harness that had existed on December 18, were not repaired, reconnected, and secured on that date.

specific wiring Zeigler was referring to. Also, it is significant to note that the Secretary did not call Findley as a witness, which would have allowed also for cross-examination. Further, I note that Sanders was the only miner to testify who had a conversation with Zeigler on December 20. Sanders did not indicate either in his testimony or in statements that he gave to the police, and MSHA Investigators that Zeigler had said anything to him about the wiring in the harness being “messed up.” Also, it is significant to note that Ziegler did not report any problems with the truck on his inspection reports for December 18 and 19. In this connection, it was stipulated to by the parties that “[a]t the conclusion of his shift on December 19, 2003, Zeigler specifically told Mark Montgomery that the Terex Hall Truck was running fine.” (Jt. Statement, para. 11). Importantly, it also was agreed to by the parties that “[b]etween December 18, 2003 and the time Ziegler told Sanders that he was going to check his brakes on the morning of December 20, 2003, Ziegler did not report any problems with the Terex Haul Truck”. *Id.*

Moreover, although the condition of the harness was noticed to have been not intact after the accident on December 20, it is significant to note that Sanders, who was the first person to arrive at the truck immediately after the accident was asked as follows in a MSHA taped interview only three days after the accident: “Whenever you all were at the accident scene, . . . did you notice though, there’s a set of wires that runs from the back to the front, . . . that . . . had been either ripped or torn into or” (JX 2, at 9)⁷. He answered as follows “Everything was connected good.” *Id.* This statement was not contradicted by any other witness. Indeed, no other witness testified based on personal observation as to the condition of the harness wires immediately after the accident. In this connection, the parties stipulated that MSHA could not determine when the wires on the tractor side of the Terex Haul Truck were cut. Similarly, as stipulated by the parties, test results were “inconclusive” regarding whether “... repair of the wiring harness before the accident resulted in shortened wires that pulled loose when the truck articulated” (Jt. Statement, para. 28).

For all the above reasons, I conclude that the Secretary failed to establish, by a preponderance of the evidence that the harness wires had come loose prior to the accident on December, 20.

⁷The taped interview was transcribed by the parties after the hearing and offered as a joint exhibit (JX 2). and is admitted into the record.

b. Whether loose wiring disabled the joystick, the body- up switch, and the warning light prior to the accident.

In this connection, it appears to be the Secretary's argument that, in essence, the harness had become loose prior to the accident, which resulted in the disabling of the joystick, the body-up switch, and the warning light. In support of her argument, the Secretary relies on the testimony of Hennen regarding the relationship between a severed harness wire, and the failure of the dump bed to operate properly in the hold position.

i. Heenen's testimony

In order to evaluate the weight to be accorded Hennen's analysis, his testimony in this regard relating to the truck's electrical system is set forth in its entirety as follows:

- Q You said it's an electrical -- the joystick is an electrical component of some kind.
- A Yes, the joystick is an electrical component. It sends a signal to the solenoid valves on the hydraulic control valves to control it through the power pressure it lets into it. So to make it simple, to simplify, the body hydraulic joystick sends an electrical signal into the hydraulic system to control the hydraulic control valve.
- ADMIN. JUDGE WEISBERGER: The signal that's sent to the hydraulic system, is that what makes the bed, dump bed, go up and down?
- THE WITNESS: Yes.
- ADMIN. JUDGE WEISBERGER: That signal is sent through a wire?
- THE WITNESS: Yes.
- ADMIN. JUDGE WEISBERGER: Is that wire in the harness in question?
- THE WITNESS: No, Your Honor.
- ADMIN. JUDGE WEISBERGER: Mr. Rodriguez.
- BY MR. RODRIGUEZ:
- Q In response to the Judge's question, the Judge said if that signal in the harness -- how do you explain the electrical signal that we're discussing for this body down circuit and the electrical signal you just discussed about the hydraulic joystick? Is there a difference?
- A Could you repeat the question, please?
- Q You described that there's a different electrical signal that goes through the hydraulics.
- A Yes. One of the signals comes from pushing the joystick and the other comes from this circuit that we're talking about. So this

particular circuit, the one is related to our -- what we say was the cause of the bed coming down.

Q Are we moving to 12 and 13? Or where are we moving?

A We're going to go back to the other page here in just a little bit. But there's one other thing that I wanted to point out. Also, H-2 --

Q Is this on Page 1?

A One. Which is Item 14, which is the light inside of the cab of the cab unit. This is the light that warns the operator that the bed -- when the bed is up.

But now we're talking when the bed is down so this light is out. It's actually totally isolated from the electrical circuit in that both the ground side of the light between B-12 and B-15 is disconnected. So it doesn't have a ground.

And also up on K-35, Item 7, it's disconnected there also so that it doesn't have power or ground. So it's totally isolated from the circuit and it goes out when the body's down, indicating that the body is down, so the operator knows this.

Q Are we finished then with Page 1?

A Yeah. We can go to Page 2. On Page 2, I made an X. This is to indicate what happens when there is a broken wire.

ADMIN. JUDGE WEISBERGER: Is that X --

THE WITNESS: It's on Item 3, on Page 2, wire R0.

ADMIN. JUDGE WEISBERGER: Okay.

THE WITNESS: The broken wire might be there, or it could be in 6. It would be the same thing as what I'm referring to. I'm not saying that it was in this exact place, but we're alleging that it was someplace in the wiring harness where it was damaged at, was the broken wire. So with this wire broken --

ADMIN. JUDGE WEISBERGER: With "this," you mean either 3 or 6?

THE WITNESS: Yeah, either 3 or 6. If either one wires is broken -- normally when you raise the bed, this circuit closes. So when you raise the bed -- now the circuit I'm talking about S-22, which is called the -- in the -- as it's called on this exhibit, it's called the body up switch. It would normally close. And it does even if the wire's broken.

But with the wire broken, it is the same as the switch being closed. It acts the same as a switch. So normally when the body goes up, this switch closes, and then it reverses everything that we just went through.

I don't think we need to go through a step-by-step again, but we can just go over to Page 1 and summarize what that means.

Everything's reversed, so we go down to K-36. So at that point, K-

36, everything reverses there.

This is a double-pole relay. And now B-12 is connected to B-15. Since everything's reversed, there's now power coming to H-2, which is Item 15. It's grounded at K-36, and it has power coming through at K-35. So the light comes on. This is normally when you raise the bed.

And then the B-12 -- as I said, B-12 is connected to B-15, which has a ground for the light. But B-12, US-13 are disconnected. Then the float -- at that point, the float no longer works. The float that this part of the signal that sends, that goes into the electrical circuit and causes the float to operate is no longer grounded. So it's not sending any signal. So now the float is no longer operational. But if we go back to Page 2. If the wire is broken --

ADMIN. JUDGE WEISBERGER: That's either 3 or 6?

THE WITNESS: Yeah, either 3 or 6. If that wire's broken, it's the same as when the circuit was open because the body was down. So as you raise the bed, the float is still open.

When you let loose of the joystick and it goes into the hold position, this float is still energized because of the broken wire, and that causes the bed to come down. When you let loose of the joystick and let it go back into the hold position, it doesn't read the hold position because this circuit has kept the control, the hydraulic control, in the float position.

So that's what we allege was the reason that the bed came down at the time of the accident.

ADMIN. JUDGE WEISBERGER: Thank you.

BY MR. RODRIGUEZ:

- Q So connect this then, this body down circuit that we discussed to the mended Citation. We're now talking about an open circuit.
- A Yes. The open circuit is the broken wire, either RO, Item-3, or PG, Item 6. That is the open circuit. Which because of that open circuit, it would remain into the float position even when you released the control and let it go back to the hold position.
- Q Reading from the Citation, it says, "As a result of the amended, the result of the open circuit, it concludes the hydraulic control valve would not return to the hold position, allowing the bed to come down."
- A How do you explain that in light of P-18?
- A Well, the Citation says that when the control went into the hold position --
- Q It says, "The hydraulic control valve would not return to the hold position, allowing the bed to come down."
- A Yes, well, it wouldn't allow the hydraulic control itself to go into

the hold position. The joystick was in the hold position, but the hydraulic control valve itself would not go into the hold position.

Q I want you to look at Exhibit P-13, Page 7.

A Okay.

Q Look at the second note from the bottom of that page. It starts with, "If the body warning light..." See that?

A Yeah.

Q Take a moment to look at it, and then I'll ask you a question.

A Okay.

Q How do you connect the representation made in that note with this body down -- note in P-13, Page 7. With the body down circuit and the Citation, the body down circuit in P-18.

How do you connect all of that?

A This says that if the light goes out to -- if the light goes out, then the body control valve will automatically float to -- or will default to the D-10 float. Which is what we said happens, when the wire breaks, the light goes out. (Tr. 318-326)

I find Hennen's testimony to be confusing and lacking in clarity. I thus find it lacking in probative value.

ii. Heenen's theory, assumptions, and tests

Hennen agreed on cross-examination that his theory of this case is as follows: "... the wiring harness, and specifically the proximity switch wire, was severed, was disconnected, causing the dump bed to not operate properly when the joystick was in the hold position." (Tr. 361). He indicated that his theory is based upon the following assumptions: 1) that the harness was disconnected at the time of the accident, and 2) that the joystick was in the hold position. Hennen also relied on results of tests relating to the operation of the control stick and the dump bed.⁸

The harness was disconnected at the time of the accident

____ As discussed above, (I(B)(1)(a) infra), the record fails to establish that the harness wires had come loose prior to the accident. Accordingly, I find that there is not any evidentiary support for one of the two assumptions made by Hennen.

⁸ Hennen testified that another assumption that he made supporting his theory was that the blinking headlights on Ziegler's truck a day or two before the accident indicate the harness wiring was damaged before the accident. This assumption is not addressed in the decision since the Secretary abandoned this theory during the trial.

The joystick in the hold position at the time of the accident

In support of Hennen's assumption that the stick was in the hold position at the time of the accident, the Secretary relies on the testimony of Sanders, the first person to enter the cab immediately after the accident. According to Sanders, when he entered the cab he used the joystick to raise the bed and it was in the "hold" position. (Tr. 33, 51). However, the weight to be accorded Sanders' testimony with regard to his observation of the joystick immediately after the accident, is diluted by his admission on cross-examination that when he saw Zeigler or some part of his body under the truck bed, it was "a very traumatic moment" for him. (Tr. 48). Also Sanders agreed that when he jumped in Ziegler's cab "the only thing that was on [his] mind . . . was just get the bed started up." [sic] (Tr. 48-49). Importantly, when asked ". . . you weren't really paying attention what position . . . the joystick was in; were you?" He answered, "Right". (Tr. 49).

Further, I note that Sanders' testimony at the trial was adduced almost two years after the accident. In contrast, on the day of the accident he signed a statement that when he got into the cab and "... let up his bed the dump lever was not all the way down I pulled it down" [sic] (Ex. P-28, at 2) Additionally, in a taped interview with a MSHA Investigator the day after the accident, Sanders indicated that when he got in the cab the dump switch was not in the float position ". . . It was in the neutral position. It wasn't up, it wasn't back but it was right there in the middle." (JX 2, at 3). To further obfuscate matters, Sanders responded in the affirmative in response to a leading question from the Secretary's attorney as to whether he ever used the term the "hold" position as being the same as the "neutral" position.

Further, Sanders testified as follows with regard to the various positions of the joystick, as indicated on Exhibit P-9, and their function: "... on the very top, that's showing to raise the bed, the middle one is suppose to be float-no, power down. And the third one is suppose to be float. And the last one is suppose to be powered down." (Tr. 37). In contrast the uncontested facts indicate, as stipulated to by the parties, that the joystick "... has four positions, in descending order from the top: Float, Lower, Hold and Raise." (Ex. P-9, Ex. P-13, at 7, and Jt. Statement, para. 23). In the same fashion, Sanders testified that in either powering up or powering down, if he would let go of the joystick it would go into the float position. (Tr. 41). In contrast, the parties stipulated that if the joystick is released from the "lower" and "raise" positions it will "spring back to, and remain in, the Hold position" (Jt. Statement, para. 23).

Therefore, for all of the above reasons, I assign very little probative weight to the testimony of Sanders regarding the position of the joystick immediately after the accident. Thus, I find that the evidence adduced by the Secretary, consisting solely of the testimony of Sanders, is not sufficiently clear to establish, by a preponderance of evidence, that immediately prior to the accident, the joystick was in the hold position. Thus, it is concluded that the record does not establish the existence of one of the two assumptions made by Heenen.⁹

⁹The significance of this assumption to Hennen's theory is indicated by his testimony that he considered it as "conclusive" support for his theory, in connection with the fact that the bed did

Hennen's tests

In general, the Secretary asserts that in the testing performed on December 23, when the harness was still disconnected, the bed came down in the following situations: when the joystick was released to the hold position, when the bed was powered down, when the bed was powered up, but before it was fully raised, and when the bed was fully raised. The Secretary alleges that in the latter test, the bed came down twice. However, for the reasons set forth below, I find that the weight of the evidences regarding the particulars of the testing does not support these assertions.

Hilyer's testimony

According to Heenen, in testing on December 22 and 23, he instructed Hilyer to operate the truck and place the joystick in various positions.¹⁰ Hilyer indicated that he recalled that when the bed was raised and the joystick was let go to spring back to the hold position, "On one test it held right where it was at." [sic] (emphasis added) (Tr. 114). On another test when he let go of the joystick and it sprang back to the hold position, the bed came down.

However, further testimony regarding Hilyer's recollection diminishes the weight to be accorded his testimony. He was asked whether "... the dump bed it went up and it went down" [sic] on December 22, when only Hennen was present. He answered "I ... Yes." (Tr. 108). However, Hilyer was next asked what he remembered, and he answered as follows: "Well, I don't remember exactly what the dump body done at that time." [sic] (emphasis added) (Tr. 108-109). Further, when he was asked whether he raised the dump bed after the harness had been repaired and reconnected, he indicated as follows: "... we did a lot of tests on that thing at that time. And I don't remember every test we done or exactly when I done it or how I done it. But I don't remember that part. I don't remember if we did it then or not." [sic] (Tr. 102).

Additionally, Hilyer's following testimony further evidences a lack of reliability regarding his memory of various tests:

Q Did you raise the body all the way up, part way up?

A I don't remember exactly at what time. I done exactly what the inspectors told me to do. If they told me to stop it halfway, I did. If they told me to raise it all the way up, I did. So I don't exactly remember that particular test at that particular time where we stopped the body at, if it was all the way up, in the middle, or where.

Q But when you raised the dump bed -- and the inspector told you to raise the

not come down when the joystick was put in the hold position on December 23, after the harness was reconnected.

¹⁰Two sets of tests were conducted on December 22, before the harness was replaced. On December 23, a set of tests was performed before and after the harness was replaced.

dump bed, I just heard you say -- did the dump bed hold after this splice was -- the truck and the trailer were reconnected? Did it stay up?

A I can't remember.

Q Let me ask you this. Is your habit to, when you raise the dump bed, to release the joystick?

A When you raise it?

Q Uh-huh (affirmative).

A If you release it, it stops.

Q Okay.

A It goes back to the hold mode automatically.

Q Okay. So before the repair was made and you raised the dump bed and you released it, did the dump bed hold?

A Raising it up?

Q Uh-huh (affirmative).

A I can't -- if I answer these -- if I answer that yes, I can't be a hundred percent sure. This has been two years ago. And we done a lot of tests in those three days, and I don't remember exactly what we done on each test during those three days." (Tr. 103-105)

inconsistencies in the record

Moreover, the balance of the record contains a number of significant inconsistencies which further diminish the weight to be accorded the tests. According to Hennen, the first series of tests on December 22, indicated a defect that he described as follows: "... when you let loose of the joystick control while the bed was in the raised position the bed would not hold as it should. The joystick would remain in the hold position, but the bed would come down." (emphasis added) (Tr. 248). However, on cross-examination he agreed that on December 22, in the testing in the hold position before the inspectors arrived the dump bed "had never come down." [sic] (Tr. 432).

Hennen testified, in essence, that he repeated the first tests to show MSHA Inspectors, Walter Turner, and Harold Wilkes, the defect that he observed when the joystick was in the hold position. He said the bed "appeared to go all the way up . . . [and then] came down without me giving any other directions." (Tr. 252). In contrast, in a draft of a report prepared by Hennen, entitled EQUIPMENT RELATED PHYSICAL FACTORS FOR A FATAL ACCIDENT AT SCOTT PITT AT ELMORE SAND & GRAVEL, INC., he indicated as follows: "The truck manufacturer was contacted to determine why the bed did not stay in the fully upright position when the control was in the float position during the first test conducted after the accident, but stayed in place in all of the subsequent identical tests." (emphasis added) (Ex. P-12, at 4)

Moreover, contemporaneous notes taken by Turner and Wilkes, do not appear to be consistent with Heenen's testimony regarding the position of the joystick in tests conducted in their presence. Turner's notes contain the following entry: "ON ONE ATTEMPT THE BED LOWERED ON ITS ON-FLOAT POSITION THE SECOND AND THIRD ATTEMPT IT STAYED." [sic] (emphasis added) (Ex. P-4, at 4) To add to the confusion, Turner did not observe the tests, but wrote what Heenen told him. On direct-examination, he was asked to state Heenen's exact words to him and he testified as follows: "To the best of my recollection, he said, 'It bypassed the hold position and went into the float position'." (Tr. 479). He was then asked to what he meant in his notes, and he testified as follows: "That's whenever Eric had raised the bed and the bed come down, [sic] and he said it's bypassing the hold position going into the float position... ." (Tr. 478). In contrast, contemporaneous notes taken by Wilkes, who wrote what Turner told him, contain the following entry: "When truck bed was lowered in the float position it took 55 seconds to lower." [sic] (emphasis added) (Ex. P-5, at 4). Turner's notes contain the following statement relating to the second attempt to lower the bed: "In the float position it did not lower its self," [sic] (emphasis added) *Id.* Lastly, Wilkes wrote as follows relating to the third attempt to lower the bed: "It did not lower its self [sic], the lever was then placed in the lower position for a moment then placed in the float position. It did not lower its self." [sic] (emphasis added) *Id.*

Hennen supervised a third series of tests on December 23. According to Hilyer's direct testimony, "... the bed would not hold when you would let loose the control when you were raising or lowering the bed." (Tr. 257). Hennen's contemporaneous notes for December 23, state as follows: "[h]old position on machine bed lift would not hold." (Ex. P-6, at 5) However, on cross-examination he indicated that on December 23, in testing before the harness was repaired, the bed did not come down when the control stick was in the hold position; it came down when it was in the float position. (Tr. 428-429).

discussion

Due to the various inconsistencies in the record, I place considerable weight on Heenen's clear admissions on cross-examination, that in the approximate 12 tests that he conducted, the bed came down only once when the joystick was in the hold position. (Tr. 411-412, 425-426). It's significant to note that subsequent re-direct-examination did not elicit any further testimony from Heenen concerning the number of times the bed came down with the joystick in the hold position. I thus find that the preponderance of the evidence fails to establish that the bed came down more than once when the joystick was in the hold position. I thus find that the tests are insufficient to support Heenen's opinion that a break in the harness causes the bed to come down when the joystick is in the hold position.

Moreover, it is critical to Hennen's theory that in testing on December 23, after the harness had been repaired and replaced, the bed did not come down in the three times it was tested when the bed was fully raised and the joystick was put into the hold position. However, conflicting testimony adduced by Elmore diminishes the probative value of these results. I note that Billy Stanley, Elmore's President testified that, approximately four to five months after the

accident, he unplugged the harness wiring and instructed Hilyer to raise the bed “ ... all the way up.” (Tr. 570). According to Stanley, he observed Hilyer take his hand off the joystick, which put it in the hold position, and the bed did not come down. He indicated that he did this test “... 10, 15 times over a period of time... .” (Tr. 572). In addition, he had Hilyer raise the bed all the way, release the joystick, and “slam” on the brakes. *Id.* Stanley indicated that the bed did not come down.

In addition, Stanley instructed Hilyer to put the joystick in the float position and raise the bed all the way up, and it did not come down. He then had Hilyer drive forward approximately fifty feet and the bed came down. It is significant to note that Stanley’s testimony was not impeached or contradicted. I thus find that Elmore’s evidence diminishes the weight to be accorded Heenen’s tests on December 23, after the harness had been reconnected.

Accordingly, for all of the above reasons, I find that the Secretary has failed to meet its burden of proof of establishing that, prior to the accident, the harness wire running between the dump bed and the truck had become loose, and would have caused the truck bed to come down after it was raised and the joystick placed in the hold position. I thus find that the Secretary has failed to establish, that prior to the accident, a defect existed that made continued operation of the truck at issue, hazardous to persons. Accordingly, I find that the Secretary has not established a violation under Section 56.14100(c), supra. Therefore it is **Ordered** that Citation No. 6093107 be **DISMISSED**.

II. Citation No. 6093106 (Violation of 30 C.F.R. § 56.14211(c))

On January 12, 2004, the Secretary issued a citation to Elmore alleging the following condition constituted a violation of Section 56.14211(c), supra: “A fatal accident occurred at this operation on December 20, 2003, when a truck driver was pinned between the frame of the truck and the dump bed of a Terex TA-25 Haul Truck. The truck driver was on the frame of the truck with the bed in a raised position when the bed of the truck unexpectedly lowered. The safety bar had not been utilized to prevent the bed from lowering.”

Section 56.14211(c), supra, requires, as pertinent, that “[a] raised component ... be secured to prevent accidental lowering when persons are working on or around mobile equipment an are exposed to the hazard of accidental lowering of the component.”

The record clearly establishes that the Terex truck at issue was mobile equipment with a raised component i.e. the dump bed. Also, the record indicates that, just prior to the accident at issue, Ziegler told Sanders that he was going to check his brakes. Ziegler than pulled his truck forward and Sanders observed him getting out of the cab. The dump bed started to come down and Ziegler was found pinned under the dump bed, positioned near the brake cylinder. Within the above framework, and given the absence of any evidence to the contrary, it may reasonably be inferred that Ziegler exited the truck intending to check the brakes, and became exposed to the hazard of the dump bed lowering. I thus find that it has been established that Ziegler was working on or around the truck, and was exposed to the hazard of accidental lowering.

The sole issue remaining for resolution is whether the raised truck bed was “secured” as provided in Section 56.14211(c), supra. The parties stipulated that the safety prop on the truck was tested and it “... prevented the free and uncontrolled descent of the dump bed by stopping it from coming down, [and] MSHA investigators concluded that ... [it] ... would have protected Ziegler from injury and prevented his death had it been used by him.” (emphasis added) (Jt. Statement, para. 25). Based on these stipulations and the fact that the truck bed did come down, I find that the prop was not used by Ziegler when the bed was in a raised position. Accordingly, I conclude that the bed was not “secured”, as use of the prop would have stopped the bed from coming down.

It is Elmore’s position, as a defense, that Section 56.14211(c), supra, alone, is not controlling, but that it must be read “conjunctively” with subsection (d) (30 C.F.R. § 14211(d)), which provides that “[u]nder this section a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent.” Elmore asserts that subsection(d), supra, only requires that mobile equipment be provided with a device which prevents free and uncontrolled descent. As such, it is argued by Elmore that subsection(d), supra, does not require the actual use of the device.

I find that the limited construction urged by Elmore fails to achieve the protection explicitly required by the clear language of Section 56.14211(c) i.e., the securing of a raised component to prevent accidental lowering. Further, I note that the regulatory history of Section 56.14211(d), supra, clearly evidences an intent that any device preventing free descent must be used to comply with the requirement of Section 56.14211(c), supra. In this connection, I note the Discussion and Summary of the Final Rule, set forth in the preamble to Subpart M, 30 C.F.R., states as follows with regard to a discussion of Section 56.14211(d), supra: “. . . [t]he final standard also permits use of any other device that prevents free and uncontrolled descent, should there be a sudden failure of the system that is holding up the raised component.” (emphasis added) 53 Fed. Reg. 32,516 (1988). I thus find that to achieve the explicit protection required in Section 56.14211(c), supra, a safety prop must be used; it is insufficient if a truck is merely provided with a device.

Therefore, for all of the above reasons, I find that the Secretary has established that Elmore violated Section 56.14211(c).

Penalty

The parties stipulated that the imposition of a penalty will not effect Elmore’s ability to remain in business. The parties also stipulated as follows “MSHA appropriately considered the statutory factors regarding history, operator size, gravity and good faith abatement regarding the proposed penalty and ESG does not contest the size of the proposed penalties assessed against ESG.” (Jt. Stip. para. 10) In this connection, the record established that the gravity of the violation was relatively high inasmuch as a fatality resulted. However, I find that a significant

mitigating factor regarding the level of the company's negligence is the stipulation by the parties that "... Ziegler had been trained by ESG to never get under the raised dump bed on the Terex Haul Truck he operated without first employing the safety prop." (Jt. Statement, para. 3). Although Ziegler's negligence in failing to use the safety prop may be imputed to the company, there is not any evidence that Elmore knew or reasonably should have known that Ziegler was not going to use the safety prop, or that Ziegler's failure to use the safety prop should reasonably have been anticipated or expected by Elmore. Nor is there any evidence that Elmore was negligent in failing to have properly trained or supervised Ziegler. For all the above reasons, I conclude that the level of Elmore's negligence was low.

Taking into account all of the above factors set forth in Section 110(i) of the Act, I find that a penalty of \$350.00 is appropriate for this violation.

ORDER

_____ It is **Ordered** that Citation No. 6093107 be **DISMISSED**. It is further **Ordered** that, within thirty days of this decision, Elmore pay a total civil penalty of **\$350.00** for the violation of Section 56.14211(c), found herein.

Avram Weisberger
Administrative Law Judge

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