FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 5, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 93-401-M A.C. No. 48-01459-05511
v.	:	
LARAMIE COUNTY ROAD AND BRIDGE, Respondent	:	Laramie County Crusher

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Roberta A. Coates, Esq., Laramie County Attorney, Cheyenne, Wyoming, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Laramie County Road and Bridge ("Laramie County"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815 and 820. The petition alleges a single violation of the Secretary's safety standards. For the reasons set forth below, I affirm the citation and assess a civil penalty in the amount of $250.00.

A hearing was held in this case before Administrative Law Judge John J. Morris, in Cheyenne, Wyoming. The parties presented testimony and documentary evidence, but waived post-hearing briefs. This case was reassigned to me on April 24, 1995, for an appropriate resolution.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Laramie County Crusher is operated by the government of Laramie County, Wyoming. The crusher supplies gravel for use on county roads. The citation that is the subject of this proceeding was issued at the cone crusher (the "crusher") by MSHA Inspector Arthur L. Ellis on March 24, 1993.

Inspector Ellis observed an employee of Laramie County standing on the lip of the crusher. (Tr. 13). He believed that a falling hazard was presented and issued a combination section 107(a) imminent danger order and section 104(a) citation (the "citation"). The citation states:

> An employee was observed standing on a narrow lip of cone crusher, exposing himself to the possibility of falling approximately (12') 260 cm to the ground below. The employee was not wearing a safety belt and line. The employee was removing rocks from the cone crusher, which was bound up with rocks and would not operate.

The inspector stated on the citation that the violation was highly likely to cause a permanently disabling injury and was of a significant and substantial nature. He determined that Laramie County was moderately negligent. The citation was immediately abated when the foreman removed the employee from the lip of the crusher.

The citation charges Laramie County with a violation of 30 C.F.R. ' 56.15005, which provides, in pertinent part, that "safety belts and lines shall be worn when persons work where there is a danger of falling... . The inspector believed that it was highly likely that the employee would fall because he was using both hands to lift rocks off the screen that covered the crusher and throw them over the side of the crusher. (Tr. 19). He testified that "it would be easy for him" to lose his balance while performing that task and fall off the crusher. Id. Based on MSHA reports on falling hazards, the inspector concluded that the employee could have sustained serious back, neck, or head injuries. (Tr. 21-22). Inspector Ellis determined that the employee was not using a safety belt and line, and issued the citation on that basis.

The issue of whether the cited condition presented an imminent danger was not contested by Laramie County or litigated in this proceeding. Accordingly, I make no findings in that regard.

The crusher is a portable trailer-mounted cone crusher that is fed by a conveyor belt. (Tr. 12). The inspector measured the distance between the lip of the crusher and the ground at 12 feet. (Tr. 13). The lip is near the top of the crusher. Id.

The configuration of the crusher and the position of the employee when he was leaning over the crusher is depicted on Ex. 2, which is a photograph taken by Inspector Ellis at the time he issued the citation. (Tr. 14). Inspector Ellis testified that he also observed the employee standing with both feet on the lip of the crusher. (Tr. 18, 36).

Laramie County does not dispute that its employee was at the lip of the crusher, leaning over the crusher, and throwing rocks out. It maintains that the ground was only eight feet below this lip, based on measurements taken by Donald R. Beard, Laramie County Public Works Director, a few days after the citation was issued. (Tr. 49). It also maintains that the cited safety standard is so vague as to be unreasonable, arbitrary, and capricious and, therefore, contends that the standard is unenforceable as applied to the facts of this case. Laramie County contends that Inspector Ellis overstated the hazard presented, the degree of any injuries that might be sustained, and the negligence of the operator. In addition, it argues that the use of a safety belt and line would increase the danger of a serious injury because an employee would be snapped into the side of the heavy metal crusher if he fell. Without a safety belt, an employee could jump clear of the metal equipment and avoid serious injury if he lost his balance. Finally, Laramie County maintains that the citation should not have been specially assessed under 30 C.F.R. ' 100.5.

The safety standard at section 56.15005 is, by necessity, broadly worded so that it can be applied to a wide range of circumstances. The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982)(citation omitted). The Commission has determined that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990); Lanham Coal Co., 13 FMSHRC 1341, 1343 (September 1991).

In Great Western Electric Company, 5 FMSHRC 840 (May 1983), the Commission affirmed a violation of this safety standard where an employee was installing a light fixture while standing

on a ladder about 18 feet above the ground. In its decision, the Commission stated that the reasonably prudent person test for this standard is "whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." 5 FMSHRC at 842.

In Lanham Coal Co. , a dump truck driver was injured when he fell ten feet from the top of his truck while trying to place a tarp over the load. Following an investigation, MSHA cited the mine operator under section 77.1710, which is similar to section 56.15005, because the truck driver was not using a safety belt and line. (13 FMSHRC at 1342). The mine operator argued that it did not consider the cited safety standard to be applicable to the tarping of trucks and was not given any notice that it would be applied in such a manner. The Commission held that a safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." 13 FMSHRC at 1343 [quoting Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)]. Because the administrative law judge affirmed the citation without considering this issue, the Commission remanded the proceeding to the judge for application of these principles.

The record establishes that the employee in the present case was standing and leaning over the top of the crusher approximately eight to twelve feet above the ground. He was reaching in the crusher to pick up rocks and was throwing the rocks on the ground behind him. Thus, he was not stationary but was moving about as he worked. The employee was not wearing a safety belt or line, nor was he tied off in any manner. Safety belts and lines were not available at the job site. Inspector Ellis was concerned that the employee could fall and sustain a serious injury if he should lose his balance while throwing rocks or moving around. I credit his testimony in this regard.

Based on the evidence, I find that a reasonably prudent person would have recognized that the employee was in danger of falling and that use of a safety line was warranted. The position of the employee on the lip of the crusher while he cleared loose rock supports a reasonable conclusion that he was in a precarious location which exposed him to a falling hazard. Such falls are usually unexpected and may occur at any time while an employee is preoccupied with his work. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall." Great Western Electric, 5 FMSHRC at 842. A safety line or other means of protection helps prevent injury in the event of a fall.

I also find that a reasonably prudent person would have

recognized that the safety standard applied in this instance. On remand in Lanham Coal Co., the administrative law judge vacated the citation because the undisputed evidence established that MSHA had never applied the safety line standard to the tarping of dump trucks. (13 FMSHRC 1710, 1712 (October 1991)). The safety standard is frequently applied to employees working on crushers and other similar equipment, however. See, for example, Adams Stone Corp., 15 FMSHRC 1080 (June 1993)(ALJ). One of the purposes of the safety standard is the prevention of dangerous falls from mining equipment.

Laramie County's argument that a safety belt and line could increase the likelihood of a serious injury is not well founded. The argument is based on the use of a six-foot safety line to protect against a eight-foot fall. Inspector Ellis testified that other mine operators use safety lines in similar situations, so there is no reason why Laramie County cannot devise a safety line that protects miners without creating other hazards or interfering with their work.

Based on the above, I conclude that the Secretary established a violation of 30 C.F.R. ' 56.15005. I also conclude that the violation was S&S. I find that the evidence establishes that there was a reasonable likelihood that the hazard contrib-uted to would result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). As Inspector Ellis stated at the hearing, miners have been seriously injured and killed as a result of falling from heights of eight to twelve feet.

II. Civil Penalty Assessment

Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. Based on the criteria in section 110(i) of the

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In its answer to the petition for assessment of penalty, Laramie County argued that because the product from the crusher is used exclusively on the roads of Laramie County, Wyoming, the crusher does not affect interstate commerce. Accordingly, it maintained that MSHA does not have jurisdiction over the crusher under 30 U.S.C. ' 803. It did not raise this issue at the hearing. The Commission and the courts have consistently held that Congress intended to exercise its authority to the maximum extent feasible when it enacted the Mine Act. See, for example, Jerry Ike Harless Towing, Inc., 16 FMSHRC 683, 686 (April 1994); United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993).

Mine Act, 30 U.S.C. ' 820(i), I assess a penalty of $250.00 for the violation. As stated above, Laramie County maintains that the citation should not have been specially assessed under 30 C.F.R. ' 100.5. Because the penalty I have assessed in this proceeding is based on the evidence developed at the hearing, the Secretary's penalty regulations at 30 C.F.R. ' Part 100 are not relevant. Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, 736 F.2d 1147, 1151-1152 (7th Cir. 1984). I have not considered those regulations in assessing a penalty in this case.

I find that Laramie County was issued four citations in the 24 months preceding the inspection in this case. (Ex. 1). I also find that Laramie County is a very small operator with about 5,000 man-hours worked in 1992. (Tr. 6). I find that the civil penalty assessed in this decision would not affect Laramie County's ability to continue in business. The conditions cited by the inspector were all timely abated. I find that Laramie County made good faith efforts to comply with MSHA's safety standards.

I also find that Laramie County's negligence was low to moderate with respect to the violation. The Mine Act is a strict liability statute. Asarco, Inc. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). A citation issued by MSHA for a violation of a safety standard must be affirmed if the facts show that the standard was violated, even if the mine operator was not negligent. The degree of the mine operator's negligence, however, is an important factor in determining the civil penalty.

Laramie County received a combination citation/imminent danger order on April 17, 1990, from a different MSHA inspector when he observed an employee on the crusher removing rock in a similar manner while the crusher was operating. (Ex. A). The inspector charged Laramie County with a violation of 30 C.F.R. ' 56.14105, because the equipment was operating while the task was preformed. Mr. Beard testified that during abatement discussions between Laramie County's foreman and the inspector, Laramie County was led to believe that if it installed a screen across the top of the crusher and deenergized the crusher whenever rock was removed by hand, it would be complying with MSHA's requirements. (Tr. 44, 56-57). Mr. Beard stated that the MSHA inspector did not mention the need for safety belts and lines. Id.

The Secretary contends that because a different safety standard was cited, a discussion of safety lines by the inspector was not necessary. He also points to the "Action to Terminate" section of the previous citation where it states that Laramie County's foreman agreed that "no one would try to [remove rock

from the crusher] until the power was off or until safe access was provided and there is a secure covering [for the crusher] ... ." (Ex. A). He maintains that Laramie County should have known that "safe access" referred to the use of safety lines. As stated above, Mr. Beard stated that Laramie County did not interpret the citation or the discussions to require the use of safety lines. (Tr. 57). I credit his testimony in this regard. I find that, even if Laramie County incorrectly interpreted the prior inspector's actions, it believed, in good faith, that it was complying with MSHA's requirements as a result of these discussions. Accordingly, I find that Laramie County was not as negligent as MSHA determined.

III. ORDER

Accordingly, Citation No. 4124092 is **AFFIRMED**, and Laramie County Road & Bridge is **ORDERED TO PAY** the Secretary of Labor the sum of $250.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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