

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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September 12, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-537-M
Petitioner	:	A.C. No. 26-00015-05534
v.	:	
	:	Mine: Nevada Cement Co.
NEVADA CEMENT COMPANY,	:	
Respondent	:	

## DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Nevada Cement Company pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$10,000.00. For the reasons set forth below, I affirm the citations and assess a penalty of \$7,500.00

Prior to hearing, the parties agreed to stipulate to the facts in the case and to submit the case in writing. The stipulated facts and briefs have been filed by both parties.

## Background

After reporting for work on the morning of May 22, 1995, Preston Niemeyer was directed by his supervisor to replace the muffler on a 1972 International flat bed service truck. The truck was equipped with a five-speed manual transmission. The truck was in the central bay of Nevada Cement's truck shop. It was in first gear, but the parking brake had not been set or placed in the "on" position and the wheels had not been chocked or blocked.

While lying under the truck and removing the exhaust pipe from the exhaust manifold, Niemeyer apparently touched part of the exhaust pipe's heat shield to the starter solenoid. As a result, the engine started and the truck rolled over him, causing fatal injuries. The truck traveled about 32 feet before it

stopped when it struck another parked vehicle. The accident occurred at about 6:50 a.m.

MSHA's investigation of the accident resulted in the issuance of Citation Nos. 4140701 and 4140702. Both citations state that: "On May 22, 1995, a fatal powered haulage accident occurred at the plant's truck shop. A mechanic was working on a service truck when the engine accidentally started and rolled over the victim who was under the truck working on the exhaust system." Citation No. 4140401 alleges a violation of section 56.14207, 30 C.F.R. § 56.14207,<sup>1</sup> because "the truck's parking brake had not been set to prevent unintentional movement." Citation No. 4140702 alleges a violation of section 56.14105, 30 C.F.R. § 56.14105,<sup>2</sup> because "the truck had not been blocked/chocked to prevent accidental movement."

### **Findings of Fact and Conclusions of Law**

The parties have agreed to settle Citation No. 4140702. A reduction in penalty from \$4,000.00 to \$3,000.00 is proposed. In addition, they have agreed that if Citation No. 4140701 is affirmed, the penalty should be reduced from \$6,000.00 to \$4,500.00. They disagree, however, as to whether the Respondent violated section 56.14207.

The Respondent argues that Citation No. 4140701 should be dismissed because it does not apply in this situation. According to Nevada Cement, section 56.14207 applies only to vehicles that have been parked and left unattended, *i.e.* "without a person in proximity," not vehicles that have been parked for the purpose of performing repairs and/or maintenance on them. (Resp. Br. at 4-5.) The company further argues that the two violations at issue arise from same incident and, therefore, amount to overcharging. (Resp. Br. at 9.) I find that section 56.14207 was applicable to this accident and that both sections were properly cited in this case.

There do not appear to be any Commission decisions dealing with either of these sections as cited in this case. Nevertheless, if there is a question as to whether a regulation

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<sup>1</sup> Section 56.14207 provides, in pertinent part, that "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set."

<sup>2</sup> Section 56.14105 requires, in pertinent part, that "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion."

applies to a specific incident, the Commission has directed that the question be answered by using the "reasonably prudent person test." That is, "whether 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).

In essence, the Respondent argues that the truck in this case was not "unattended" because the mechanic was present, albeit underneath the truck. However, it is obvious that the purpose of the regulation is to prevent mobile equipment from moving when someone is not in a position to stop it. Thus, "unattended," as used in the regulation, means more than someone not being in proximity to the vehicle. I find that mobile equipment is "unattended" when no one is present who can prevent it from moving. This is consistent with the first definition found in *Webster's Third International Dictionary 2482 (1986)* that "unattended" means "not attended: **a**: lacking a guard, escort, caretaker, or other watcher."

Clearly, Niemeyer was not in a position, lying underneath the truck, to prevent it from rolling forward. Consequently, the truck was unattended while he was working on it. Accordingly, I conclude that a reasonably prudent person familiar with the mining industry and with the requirements of section 56.14207 would have recognized that in such a situation the regulation requires that the parking brake be set.

Contrary to the Respondent's argument, I do not find that the two regulations are mutually exclusive. It is not a matter of either setting the parking brake when the equipment is parked or blocking the wheels when the parked vehicle is being repaired. Because a person performing repairs or maintenance on a vehicle is often in an exposed position if the vehicle were to move, just as Niemeyer was in this case, it is completely logical that the regulations would require both that the parking brake be engaged and that the wheels be blocked. This makes sure, as best as possible, that the vehicle cannot move.

As the Commission has observed: "The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard." *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981). Here, although the two violations arose from the same event, "the citations are not duplicative because the two standards impose separate and distinct duties upon the operator." *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993).

Therefore, I conclude that Nevada Cement was properly cited for a violation of section 56.14207. I further conclude that the company violated the regulation when the parking brake was not set while Niemeyer was working underneath it.

### Civil Penalty Assessment

The parties settlement agreement provides for a penalty of \$4,500.00 for Citation No. 4140701 and \$3,000.00 for Citation No. 4140702, for a total penalty of \$7,500.00. Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i).

### ORDER

Accordingly, the motion for approval of settlement is **GRANTED**, Citation Nos. 4140701 and 4140702 are **AFFIRMED** and Nevada Cement Company is **ORDERED TO PAY** a civil penalty of **\$7,500.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon  
Administrative Law Judge

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