

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 21, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-55-M
Petitioner	:	A.C. No. 04-00099-05526
	:	
v.	:	Lime Mountain
	:	
LIME MOUNTAIN COMPANY,	:	
Respondent	:	

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Byron M. Ishkanian, Professional Safety Engineer, Santa Barbara, California, for Respondent.*

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (AMSHA@), against Lime Mountain Company (ALime Mountain@), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' ' 815 and 820 (the AMine Act@). The petition alleges one violation of 30 C.F.R. ' 56.15005. The parties presented testimony and exhibits at an evidentiary hearing.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lime Mountain operates a limestone quarry (the Aquarry@) in San Luis Obispo County, California. On October 8, 1997, MSHA Inspector Herbert Bilbrey was at the quarry. As the inspector was leaving, he looked over at the load-out facility and saw a man on top of a pneumatic bulk trailer (the Abulk trailer@) holding a compressed air hose. The man was using the hose to clean off the top of the trailer. Part of the hose was coiled behind him on the trailer. Inspector Bilbrey estimated that the man was about 11 feet above the ground. He was not using a safety belt or line and the inspector believed that he was in danger of falling. Inspector Bilbrey

* I permitted Mr. Ishkanian, who is not an attorney, to represent Lime Mountain Company at the hearing, under the authority of 29 C.F.R. ' 2700.3(b)(4).

ordered the man off the truck and issued a combination section 104(a) citation and 107(a) imminent danger order (the Citation) to Lime Mountain.

Citation No. 4523948 alleges a violation of 30 C.F.R. § 56.15005, as follows:

A contract truck driver for Royal Trucking was observed on top of his pneumatic trailer using a compressed air hose to blow the top of his trailer off and [was] not using any fall protection, located at the load-out bins. The company did not provide an area to open and close lids on top of truck where the contractors could do this safely.... The superintendent was not aware of this requirement....

Inspector Bilbrey determined that the violation was of a significant and substantial nature (AS&S) and was the result of the mine operator's moderate negligence. Section 56.15005 provides that Safety belts and lines shall be worn when persons work where there is a danger of falling.... The citation was terminated when the contractor truck driver was removed from the truck and instructions were given on the use of the fall protection that was installed in the area. The Secretary filed a petition for assessment of civil penalty for this citation charging Lime Mountain with a violation of section 56.15005 and proposing a penalty of \$240.

A. Fact of Violation

1. Summary of the Testimony

The basic facts in this case are not in dispute. The load-out facility consists of about four storage bins that are supported by a metal structure made of I-beams. Lime from the quarry is loaded into the bins. Various trucking companies dispatch trucks with drivers to the quarry to load product into the bulk trailers. One tractor generally pulls two bulk trailers. Lime Mountain does not own or operate trucks or trailers used to transport lime to customers. Independent trucking companies transport the lime to customers. The bulk trailers have rounded bodies and are loaded from the top. At least one hatch is located at the top of each trailer. Upon arrival at the quarry, the driver of a rig proceeds to the scale house. At the time the citation was issued, the driver pulled up to the load-out facility, climbed up the ladder on the back of each trailer and opened the hatches. He then pulled the truck forward under the bins, went up the adjacent stairs, and loaded material into the trailers. After he was finished loading, he closed the hatches and drove the rig back to the scale house.

In this instance, the driver of the rig pulled out of the load-out facility and parked his rig along the side of this facility where there was a compressed air hose. He used this hose to clean dust and dirt off the trailers. He was not directed to do this by Lime Mountain, but it was not an unusual activity for a driver to clean off his rig after loading. (Tr. 93).

The trailers used to transport lime from the quarry are standard trailers used to transport bulk material on highways. They are loaded from the top through hatches, as described above, and unloaded from the bottom. They have ladders on the back and two handrails along the top that are about four inches high. William Wahl, president of Lime Mountain, testified that a little over a million and a half tons of material has been shipped out of the quarry since 1984. (Tr. 84). He estimates that drivers have opened hatches on top of the trailers in the manner described above about 200,000 times since that date and he testified that no driver has fallen from a truck or has been injured while opening hatches during that period. *Id.*

Inspector Bilbrey testified that he issued the citation because there was a danger that the driver could fall off the trailer. He was not using a safety line and there were no handrails that would protect him from falling. The inspector believed that the presence of lime dust on the top of the trailer as well as the compressed air hose made a fall highly likely. He believed that an imminent danger was present because the man was using the compressed air hose to clean off the top of the trailer and he could have easily slipped or tripped on the hose. The inspector ordered the driver off the truck as soon as he could get his attention.

Inspector Bilbrey also testified that the violation was S&S. He based his S&S determination on his belief that a fatal accident was highly likely. He relied, in part, on fatal accident reports that he had reviewed involving similar circumstances. The inspector testified that a fall of 11 feet onto hard-packed soil can easily be fatal. Inspector Bilbrey determined that Lime Mountain's negligence was moderate because the foreman testified that the company had safety lines available but that he was not aware that safety lines were required for truck drivers when they were on the tops of trailers.

Paul Belanger, a supervisory special investigator for MSHA, testified that falls from the top of trucks, trailers, and rigs often result in serious or fatal injuries. He cited a number of examples in which drivers of trucks were killed when they fell from the top of their rigs. (*See for example* Ex. P-4).

Lime Mountain does not dispute the basic facts described above. It maintains that MSHA should have cited the independent contractor who employed the driver, that the violation was not S&S, and that it was not negligent. Mr. Wahl testified that MSHA has inspected the quarry 37 times since 1984 and never advised him or his employees that safety lines are required when truck drivers open hatches on trailers or when they clean the tops of the trailers. He stated that the load-out facility is directly visible and any inspector would have been able to see that safety lines were not being used. Mr. Wahl also testified that the truck drivers were free to use Lime Mountain's safety lines or to bring their own, but that Lime Mountain did not have supervisory control over the drivers and it was not responsible for training the drivers on safety matters. He stated that Lime Mountain's employees do use safety lines where there is a danger of falling.

Based on the history at the quarry, Mr. Wahl testified that it was unlikely that the driver would have been seriously injured. As stated above, drivers have climbed onto trailers about 200,000 times at the quarry and there have been no injuries. He believes that the citation should

have been designated non-S&S and he introduced a citation issued at a different quarry in which a similar violation was designated non-S&S. (Ex. R-3). He contends that MSHA's enforcement of this standard is inconsistent.

2. Discussion and Analysis

I find that the Secretary established a violation of section 56.15005. The driver of the rig was on top of the trailer holding a compressed air hose. There was a danger of falling off the trailer. The driver was not using a safety line and suitable handrails were not present. Although Lime Mountain had not been given specific notice that the safety standard applied to bulk trailers, I find that MSHA has consistently enforced the standard to require fall protection in this and in other similar situations. MSHA issues citations under this standard when it becomes aware that truck drivers are standing on the tops of bulk trailers without adequate fall protection.

The Mine Act imposes strict liability on a mine operator. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). In this case, the driver was in danger of falling and he was not using a safety belt and line.

B. Significant and Substantial Nature of the Violation

I also find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard. A violation is properly designated S&S if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed

to by the violation will result in an injury. I find that the Secretary established that an injury was reasonably likely in this instance and that such an injury would be of a reasonably serious nature.

The driver was on top of a metal surface 11 feet above the ground that was covered with lime dust in at least some areas. He was holding a compressed air hose and the hose was coiled behind him. I find that it was reasonably likely that he would fall. The dust created a slipping hazard and the hose presented a tripping hazard. In one of the examples submitted by the Secretary, a truck driver was blown off a trailer by a gust of wind as he was closing a hatch. (Tr. 58; Ex. P-8). Thus, a driver can fall in the absence of dust or an air hose. The fact that no truck driver has been injured at the quarry while on top of a trailer does not mean that an injury would never occur if this practice continued at the quarry. I credit the testimony of the Secretary's witnesses that if a driver fell from a trailer, the injury would likely be very serious or fatal. The fact that a different inspector determined that a similar violation at another mine should be designated as non-S&S is not controlling. There may have been mitigating circumstances in that case that led the inspector to determine that an injury was not reasonably likely. (Tr. 61-62).

I also find that the presence of the driver on top of the trailer in this instance created an imminent danger because this condition could reasonably be expected to cause death or serious physical harm before the condition could be abated. (30 U.S.C. ' 802(j); *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996)). This condition had a reasonable potential to cause death or serious injury within a short period of time. *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991).

C. Other Issues

Lime Mountain contends that it should not be held responsible for this violation because the independent contractor, Royal Trucking, employed the driver and was responsible for his unsafe actions. Inspector Bilbrey testified that he cited Lime Mountain rather than the independent contractor because Lime Mountain did not provide a place for a driver to tie off when using the compressed air hose. He stated that if there had been a place to attach a lanyard at the compressed air hose, he would have cited Royal Trucking instead of or in addition to Lime Mountain. (Tr. 32). In this case he only cited Lime Mountain because there was no place for the driver to attach a safety line if he wanted to tie off.

The Commission and courts have held that under the Mine Act's strict liability provisions, a mine operator, although faultless itself, may be held liable for the acts of its independent contractors. (*Extra Energy, Inc.*, 20 FMSHRC 1, 5 (January 1998)(citations omitted); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981)). The Secretary has wide enforcement discretion and may proceed against a mine operator, independent contractor, or both. The Commission has determined that a mine operator seeking to establish an abuse of that discretion bears the heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on an improper understanding of the law. (*Extra Energy*, 20 FMSHRC at 5).

In this case I find that the evidence supports the Secretary's decision to cite Lime Mountain. While the Secretary may have had the authority to cite the independent contractor as well, its decision not to do so has no bearing on my findings in this case. The inspector stated that he cited Lime Mountain because it did not provide a place for drivers to attach a safety line at the compressed air hose. The citation was abated when Lime Mountain attached two bars to the structure supporting the storage bins. One of these bars is adjacent to the air hose. Safety lines can now be attached to this bar and drivers can use the compressed air hose without a danger of falling. They can also use the bars to attach a safety line when they open and close the hatches on the top of the trailers. I hold that the Secretary did not abuse her discretion when it cited Lime Mountain for this violation.

Lime Mountain also contends that its negligence was low in this case. I agree. The Secretary is under no legal obligation to provide each mine operator with notice of the requirements of all of her safety standards. Nevertheless, I credit the testimony of Mr. Wahl that the quarry has been inspected 37 times and that it has never been cited for violations of this standard with respect to trucks at the load-out facility. The load-out facility is centrally located at the quarry and the fall protection issue should have been obvious to MSHA inspectors. In addition, I credit the testimony of Mr. Wahl that Lime Mountain's employees use safety lines where there is a danger of falling in or around the bins at the load-out facility. Finally, Lime Mountain has less control over the actions of drivers employed by independent contractors that it has over its own employees. Lime Mountain did not direct or supervise this truck driver's activities at the load-out facility. Accordingly, I find that Lime Mountain's negligence was low.

Mr. Wahl testified that he stresses safety at Lime Mountain and that he would never do anything to put his employees in jeopardy. (Tr. 88-90). I credit his testimony in this regard. It must be stated, however, that quarry operators who operate in a safe manner are issued citations by MSHA from time to time. The fact that Lime Mountain was issued the subject citation does not mean that it does not emphasize safety. The citation simply indicates that the conditions described in this citation presented a safety hazard to truck drivers.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The parties stipulated to many of the criteria. I find that six citations were issued at the quarry in the 24 months preceding October 8, 1997. The quarry worked about 15,880 man-hours per year at that time. The violation was rapidly abated. The penalty assessed in this decision will not have an adverse effect on Lime Mountain's ability to continue in business. The violation was S&S and it created a serious safety hazard. Lime Mountain's negligence was low. I find that a penalty of \$150 is appropriate for this violation.

III. ORDER

Accordingly, Citation No. 4523948 is **AFFIRMED** and Lime Mountain Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$150.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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