FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 12, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-112 A.C. No. 46-03335-03501 KI3
v.	:	
	:	Wylo Mine
NELSON BROTHERS INC., Respondent	:	

DECISION

Appearances: Tina C. Mullins, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Hilary K. Johnson, Esq., Boucher, Hutton & Kelly, Abingdon, Virginia, for Respondent.

Before: Judge Fauver

This is a civil penalty proceeding under ' 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 **et seq**.

Two citations were included in the petition. The operator has withdrawn its contest of Citation No. 3973749 and has agreed to pay the proposed penalty of $63.00. The case went to hearing on Citation No. 3973746. Evidence was also heard as to an imminent danger withdrawal order (No. 3973745, dated October 5, 1994) although there is a dispute whether Respondent waived its right to contest the order by failing to file an application for review with the Commission within 30 days of its issuance.

Citation No. 3973746 was issued in conjunction with the imminent danger order. I find that Respondent=s efforts to contest the citation in its meetings with MSHA officials was also in conjunction with its efforts to contest the order. There appears to have been some confusion based on MSHA=s statements to the operator about the time requirements for contesting the citation and order. I conclude that for the purpose of defending against a petition for civil penalties, the operator should be permitted to contest the imminent danger order in conjunction with its contest of the citation. Accordingly, I conclude that the judge has jurisdiction to decide the merits of both the citation and the order.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent is an independent contractor that supplies blasting agents and technical assistance to mining companies and other businesses. MSHA=s records of registered contractors show that Respondent performed contract services at 11 coal mines for 29,132 hours in 1994 and for 10,584 hours from January 1 through August 8, 1995. The 11 coal mines are subject to that Act.

2. Respondent has a number of tractor-trailer tanker trucks that transport emulsion to the mines.

3. On October 5, 1994, MSHA Inspector Douglas M. Smith inspected the Wylo Mine in West Virginia, operated by Arch Minerals Company, which produces coal for sales in or substantially affecting interstate commerce.

4. Inspector Smith observed one of Respondent=s tanker trucks unloading emulsion. The driver was standing on top of the emulsion tank without wearing a safety belt and line. There was an anchor line to which a safety belt could be attached. There were no guard rails on top of the tank.

5. The emulsion tank was an oval-shaped cylinder made of aluminum or stainless steel, approximately 9 feet high. On top of the tank were several portholes centered along the length of the tank. Sections of grated metal platform ran between the portholes. The parties are in dispute as to the number of portholes. This issue is addressed in the Discussion, below. I find here that the truck in question had three or five portholes. The grated metal sections were about 28 inches wide.

6. The grated metal sections did not cross over the portholes, but ended at the edge of a rectangular area around each porthole. The oval-shaped tank surface was bare around each porthole within the rectangular area. The rectangular area around each porthole was about 26 inches long. Each hatch lid contained a number of latches and hinges higher than the hatch surface. When the hatch was open, it swung out to rest horizontally. Within each rectangular area, there was sufficient ungrated tank surface for a person to step.

7. As part of his normal duties, the truck driver climbed a

ladder on the side of the tank. Once the driver was on the grated surface, he opened one or more portholes to release pressure of the emulsion so that it would discharge through the outlet hose. The driver then climbed down from the tank and waited for the emulsion to pump out. Once all the material that could be pumped out was removed from the tank, the driver again climbed to the top of the tank and opened all portholes to Asqueegee@ out emulsion that remained on the inner lining of the tank. The rubber squeegee was about one foot wide and attached to a pole about 10 feet long. One driver might perform the squeegee operation or two drivers might perform it. It would take about 10 to 15 minutes for two drivers, twice that for one driver.

8. To move from one porthole to another to open or close portholes or to squeegee through the portholes, the driver would step over portholes a number of times. This required him to either step on the oval-shaped tank surface to step over a porthole or to take a larger step of about two and half feet to clear the rectangular area around the porthole. In either case, the portholes and the latches attached to the hatch lids presented tripping hazards.

9. While squeegeeing, the driver would position himself at different angles to the porthole and might be bending, stooping, squatting or kneeling to reach the material inside.

10. The metal platform sections were grated to provide an anti-skid surface.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Before discussing the controlling issues, this part will discuss the number of portholes.

The inspector testified that the truck he observed had three portholes. The driver testified that there were five portholes. Other witnesses were similarly in conflict as to the number.

Respondent=s Exhibits 1 through 5, which are attached to its Answer and incorporated in the evidentiary record, are photographs of at least two tanker trucks. The Secretary=s witnesses indicate that photographs R-4 and R-5 most accurately represent the truck in question, while Respondent=s witnesses indicate that the truck is shown in R-1, R-2 and R-3. I do not find it necessary to resolve this conflict. I find, instead,

that both trucks represent the kind of configuration of grated walking platforms and portholes that was involved in the imminent danger order and the related citation on October 5, 1994, and that it is not critical to determine whether there were three or five portholes on that date. I find that Respondent operates emulsion tanker trucks that have either three or five portholes on top of the tank. The tank dimensions in the Findings of Fact apply whether a truck has three portholes or five portholes.

Turning now to the key issues, the Secretary charges a violation of 30 C.F.R. ' 77.1710(g), which provides in pertinent part:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> * * *
>
> (g) Safety belts and lines where there is a danger of falling . . . .

The basic issue is whether the truck driver=s activities on top of Respondent=s tanker truck presented a Adanger of falling@ within the meaning of ' 77.7710(g).

The phrase Adanger of falling@ reasonably means a risk of falling from a height sufficient to cause a reasonably serious injury. It does not mean that it is probable that one will fall.

The driver=s activities involved a number of risks of falling, including the following:

1. On a windy day, a sudden strong wind could cause the driver to lose his footing and fall from the truck.

2. Ice or snow could cause the driver to slip and fall.

3. When the driver steps over a porthole, he could have a misstep and fall or could trip on the latches or on the edge of the porthole and fall.

4. When maneuvering the 10-foot squeegee pole, the driver could lose his balance and fall.

5. If the driver steps on the oval surface of smooth metal

around a porthole he could slip and fall.

Respondent contends that its drivers do not work on tank tops during inclement weather. However, no records or other data were presented to support this position. There are many variations between weather forecasts and actual weather developments during the day as well as sudden changes in the wind. A policy that eliminates safety belts and lines on the basis that weather and wind risks will be accurately predicted and avoided fails to meet the safety protection intended by ' 77.1710(g). The controlling question is whether walking, stooping, squatting, standing, squeegeeing, and stepping over tripping hazards on top of a tanker truck involve Adangers of falling@ within the meaning of the safety standard. I find that they do.

Respondent also contends that the safety line installed at Wylo Mine presents a greater hazard than the hazard of working without a line. This position is contrary to the evidence. The driver testified that he would prefer to work on top of the tank without a safety belt and line because the hook Acatches@ at times and might cause him to lose his balance. This may suggest that Respondent check the sliding mechanism on the safety line, but it does justify the notion that adapting to a safety belt and line is a hazard greater than the hazard of a 9-foot fall from a truck top.

Finally, Respondent contends that its record of having no fall from a tank top in its five years experience is proof that there is no Adanger of falling.@ This position is not persuasive. Falls from trucks do occur and cause death or serious injuries. The fact that Respondent=s drivers have been fortunate thus far does not mean that working near the edge of a 9-foot drop from a tank top does not involve a danger of falling.

I find that ' 77.1710(g) applies to Respondent=s tanker truck and requires that the driver wear a safety belt and line when on top of the tank unless there are guard rails. Respondent was therefore in violation of ' 77.1710(g).

The violation was due to moderate negligence. Respondent did not make a reasonable effort to require the driver to wear a safety belt and line at the Wylo Mine.

The ' 104(a) citation alleges a Asignificant and substantial@ violation, which the Commission defines as one presenting a Areasonable 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(1981); Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984). I find that the facts sustain a finding that working on top of the tanker truck without a safety belt and line or guard rails was reasonably likely to result in serious injury.

I now turn to the imminent danger order. AImminent danger@ is defined by the Act as Athe existence of any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.@ 30 U.S.C. ' 802(j).

The inspector observed a driver standing on top of an emulsion tanker truck without guard rails or a safety belt and line, about 9 feet above the ground. The driver indicated that his normal activities involved climbing a ladder on the side of the tank, opening portholes, climbing down and waiting for the emulsion to drain, climbing up again and squeegeeing the remains through the portholes, closing the portholes and climbing down the ladder.

The Commission has held that an inspector must be given considerable discretion because he or she must act quickly to eliminate conditions that create an imminent danger. Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (1992). The focus on review is whether the inspector made a reasonable investigation of the facts under the circumstances and whether the facts known to him or reasonably available to him support the issuance of an imminent danger order. Id. at 1292. The findings of the inspector should be upheld unless the evidence shows an abuse of discretion. Id.; Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F. 2d 25, 31 (7th Cir. 1975).

I find that the facts support the inspector=s finding of imminent danger based upon the facts known to him or reasonably available to him. Observing a driver near the edge of a 9-foot drop on top of a tanker truck, without guard rails or a safety belt and line, and determining the miner=s activities as found above, the inspector exercised reasonable discretion in issuing an imminent danger order.

CIVIL PENALTY

After the citation and order were issued, Respondent promptly complied with the safety standard at the Wylo Mine. However, it made no effort to comply at other coal mines. Its overall approach to the safety standard appears to be that it will not comply with MSHA=s interpretation at any other mine

unless the mine operator insists that Respondent provide a safety belt and line and require its drivers to use them or unless Respondent is caught by MSHA at another mine.

Considering all of the criteria for civil penalties in ' 110(i) of the Act, I find that the penalty of $147.00 proposed by the Secretary for the violation of ' 77.1710(g) is reasonable.

CONCLUSION OF LAW

1. The judge has jurisdiction.

2. Respondent=s contract work at mines producing coal for sales in or substantially affecting interstate is subject to the requirements of the Act. The Act applies to Respondent=s trucks on mine property whether or not the Department of Transportation or any other agency also has jurisdiction over the condition or operation of Respondent=s trucks.

ORDER

WHEREFORE IT IS ORDERED that:

1. Order No. 3973745 and Citation Nos. 3973746 and 3973749 are AFFIRMED.

2. Within 30 days from the date of this Decision, Respondent shall pay civil penalties of $210.00 ($63.00 of which is the settlement of Citation No. 3973749).

William Fauver
Administrative Law Judge

Distribution:

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