FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 30, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. TILCON CONNECTICUT, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. YORK 94-3-M A. C. No. 06-00022-05509 New Britain Quarry & Mill
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. EDWARD SAKL Employed by TILCON CONNECTICUT, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. YORK 95-17-M A. C. No. 06-00022-05512 A New Britain Quarry & Mill
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. JOSEPH DONAROMA Employed by TILCON CONNECTICUT, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. YORK 95-18-M A. C. No. 06-00022-05511 A New Britain Quarry & Mill

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Michael T. Heenan, Esq., Smith, Heenan and Althen,

Washington, D.C. and Carl R. Ficks, Esq., Eisenberg, Anderson, Michalik & Lynch, New Britain, Connecticut, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Tilcon Connecticut, Inc., Edward Sakl and Joseph DonAroma pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated Sections 56.14105 and 56.14201(b), 30 C.F.R. §§ 56.14105 and 56.14201(b), of the Secretary's regulations and that Messrs. Sakl and DonAroma, as agents of the company, knowingly authorized, ordered or carried out the violations. For the reasons set forth below, I find that the company violated Section 56.14201(b), although not as the result of an "unwarrantable failure," and that the two agents did not knowingly authorize, order or carry out the violation.[1] I assess a civil penalty against the company of $400.00.

A hearing was held on August 1 and 2, 1995, in Hartford, Connecticut. Richard Moreno, MSHA Inspector Richard R. Sabourin and MSHA Special Investigator John S. Patterson testified for the Secretary. Joseph P. DonAroma, Edward M. Sakl, Jr., Raymond Petke, Stephen Scarpa, Darrell F. Hotham and Joseph A. Abate gave evidence on behalf of the Respondents. The parties also submitted briefs which I have considered in my disposition of these cases.

FACTUAL SETTING

Tilcon's New Britain Quarry and Mill is a surface rock quarry and crushing plant. It uses a large, multiple belt conveyor system to transport materials within the site property. The system is operated by a switch house operator located in the switch house. Not all of the conveyor belts are visible to the switch house operator. When the entire system is first started in the morning, a siren alarm is activated by the operator before

[1] In the cover letter to his brief, counsel for the Secretary stated that "the Secretary has decided that the evidence does not support a violation of 30 CFR 56.14105 . . . and will vacate Section 104(d)(1) Citation No. 4079378." Therefore, that citation is no longer before me. The civil penalty petitions concerning it will be dismissed in the order at the close of this decision.

starting the belts.

On the morning of June 23, 1993, the No. 18 unit conveyor belt was stopped by Joseph DonAroma, the quarry superintendent, so that the rock chute feeding the belt could be unblocked. DonAroma removed the material blocking the chute and placed it on the catwalk next to the belt where Richard Moreno and Steve Scarpa threw it off onto the ground.

When DonAroma finished unblocking the chute, he stepped onto the catwalk near the ladder leading to the ground and stated "we're all set here." (Tr. 191.) He then told Moreno to put the door back on the chute. At the same time, Edward Sakl, a supervisor at the quarry, signaled with his hands to Raymond Petke, the recrush plant operator, who was located in a building near the top of the conveyor belt, to start the belt. Petke called by telephone to Darrell Hotham, the switch house operator, and told him to start the belt.

In the meantime, Moreno had picked up the chute door and was standing on the conveyor belt to place the door on the chute. The siren alarm was not activated before the belt started. When the belt started, Moreno was thrown off of his feet and carried by the belt into the discharge chute. He suffered a broken shoulder, sprained ankle and multiple abrasions on his back and legs.

Inspector Sabourin was called to investigate the accident. As a result of his investigation, he issued Citation No. 4079379 on June 25, 1993.[2] The citation was issued pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1),[3] and alleges that

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[2] The citation was an order when issued, however, because the citation preceding it has been vacated by the Secretary it becomes a citation. *See infra* n.3 for the chain of 104(d)(1) citations and orders.

[3] Section 104(d)(1) provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be

Section 56.14201(b) of the Regulations was violated because: "A nonfatal accident occured [*sic*] on 6/23/93. An employee was injured when the unit 18 conveyor he was working from was started. The audible warning device to sound startup was not operated. This is an unwarrantable failure." (Govt. Ex. 2.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 56.14201(b) of the Regulations requires that:

> When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

The parties disagree as to what this regulation requires.

In his brief, the Secretary argues that "[t]his language must be read to require some type of automatic or manual device, which has to be operated as part of the belt system and is capable of giving the same identical warning each and every time the belt is started." (Sec. Br. at 6.) On the other hand, the Respondents maintain that the regulation does not require a "device" and submit that "[a]n administrative system can lend itself to the requirements of the standard just as well as might a piece of hardware." (Resp. Br. at 42.)

> caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Although Tilcon has a warning siren which it sounds when first starting all of the belts in the morning, it is undisputed that the siren was not used prior to Moreno's accident and that it is not "company policy or practice . . . to sound the plant wide siren" to restart an individual conveyor belt that has shut down during the day. (Resp. Br. at 40.) However, the Respondents assert that there is a "system installed" at the quarry that complies with the regulation. That system is that an

> individual belt start up is under the specific control of a particular person on scene who personally examines the entire length of the belt for safety and then alerts everyone that the belt will start [by saying "we're all set here" or similar words], at which time the signal is relayed to the switch house and the belt is started immediately.

(Resp. Br. at 41.)

I conclude that a mechanical warning system is required by the regulation. Since the regulation does not specifically state that a mechanical warning system is required, this conclusion is reached by evaluating it "in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (November 1990)(citations omitted).

Clearly, the purpose of the standard is to warn persons on or around the conveyor that the belt is going to be started within 30 seconds. Tilcon's "system" does not carry out this purpose. While the supervisor's statement "we're all set here" may warn those within the sound of his voice, it would not alert anyone on or around the belt, but not within the sound of his voice, that the belt was about to start up. In addition, the rule requires a second warning to be given before start up, if the belt is not started within 30 seconds. Since hand signals, telephone calls and three separate people are involved in the Tilcon "system," there would be no way to comply with this requirement.

Furthermore, the use of the word "installed" implies the use of a mechanical device. "Installed" is not defined in the Regulations, however, *Webster's Third New International Dictionary* 1171 (1986) defines it as:

> "**1a :** to place in possession of an office or dignity by seating in a stall or official seat **b :** to

> place in an office, rank or order **:** INDUCT . . . **2 :** to introduce and establish (oneself or another) in an indicated place, condition or status . . . **3 :** to set up for use or service."

Obviously, only the third definition would apply in this case.[4] As to what that means, the dictionary gives the following examples: "the electrician installed the new fixtures" and "had gas heating installed." *Id.* Plainly, "installed" used in this context applies to inanimate objects rather than people.

Finally, the MSHA *Program Policy Manual,* Vol. IV, Part 56/57, 55d-55e (04/01/92), in discussing the requirements of this section, states that the standard "has been uniformly interpreted by MSHA, and its predecessor organizations, to include both automatic and manual conveyor alarm systems."[5] An automatic system is one "designed to first activate a start-up horn before the start-up system of the conveyor." *Id.* "A manual conveyor alarm system is one which actuates an audible alarm by an independent switch and uses a separate switch to actuate the conveyor." *Id.* Nowhere is a non-mechanical system discussed.

Taking all of these factors into consideration, I conclude that a reasonably prudent person, familiar with the mining industry, would conclude that Section 56.14201(b) requires a mechanical warning system to achieve its purpose. Tilcon did not have such a system. Consequently, I conclude that the company violated the regulation.

Significant and Substantial

The parties stipulated at the hearing that the violation was "significant and substantial." (Tr. 5-6.) Even if they had not, it is evident from the injuries suffered by Mr. Moreno that the

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[4] The Respondents argue that the second definition covers its "system," however, the examples of the second meaning given in the dictionary, "installing himself in the big chair before the fire" and "installed his sister as secretary," refute that suggestion.

[5] The *Program Policy Manual* was not offered at the hearing. Counsel for the Secretary has attached it to his brief and requested that judicial notice be taken of it. The Respondents have not objected, nor does there appear to be any reason why it should not be taken. Accordingly, I will take judicial notice of the manual and consider it.

violation was "significant and substantial." Therefore, I so conclude.

Unwarrantable Failure

The violation was alleged to be an "unwarrantable failure." The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The evidence does not support a finding of "unwarrantable failure" in this case. Tilcon's conduct with regard to this violation was not aggravated. On the contrary, the evidence shows that the quarry and plant had been in existence for almost 30 years and no question had been raised about the alarm system. The company's Assessed Violation History Report for the period January 1, 1982, through May 26, 1994, indicates only 15 violations, including the two involved in this case. (Resp. Ex. R.) None of the remaining violations involve the belt system. This evidence corroborates Joseph Abate's, president of Tilcon, testimony that the company strives to comply with MSHA policy as well as any matter brought to its attention by MSHA inspectors.

When examined in view of Tilcon's excellent prior enforcement history and the fact that its alarm system had apparently not been questioned, I conclude that the company reasonably believed in good faith that its procedure for starting individual belts was the safest method of complying with Section 56.14201(b). There is no evidence that it acted with "reckless disregard," intentionally violated the regulation, was indifferent or exhibited "a serious lack of reasonable care." Accordingly, I conclude that although its belief was in error, Tilcon did not unwarrantably fail to comply with the rule. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994); *Utah Power and Light Co.*, 12 FMSHRC 965, 972 (May 1990); *Florence Mining Co.*, 11 FMSHRC 747, 752-54 (May 1989). In view of this, I also conclude that the degree of negligence for this violation should be reduced from "high" to "moderate."

Joseph DonAroma and Edward Sakl

The Secretary has alleged that DonAroma and Sakl "knowingly" violated Section 56.14201(b) and are personally liable under Section 110(c) of the Act, 30 U.S.C. § 820(c).[6] Based on the evidence, I find that they did not "knowingly" carry out the violation within the meaning of the Act.

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held, however, that to violate Section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

Just as the evidence indicates that Tilcon did not engage in aggravated conduct, I conclude that neither DonAroma nor Sakl engaged in aggravated conduct. They were following a long standing company procedure. There is no evidence that they directed the belt start-up knowing that Moreno was on the belt, or even had reason to believe that he might climb onto the belt to replace the chute door.[7] The two supervisors had a reasonable belief that they were operating in a safe manner in compliance with the regulation. Consequently, I conclude that they did not "knowingly" violate Section 56.14201(b). *Wyoming Fuel, supra*.

CIVIL PENALTY ASSESSMENT

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[6] Section 110(c) provides that "[w]henever a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d)."

[7] Every witness, except Moreno, testified that the chute door was commonly replaced while standing on the catwalk, frequently while the belt was running. In view of this and Moreno's lawsuit against the company for his injuries, I find that his self-serving testimony on this point is not credible.

The Secretary has proposed a civil penalty of $1,200.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

In connection with the six criteria, the parties have stipulated that the company has a low history of previous violations and that the company demonstrated good faith in abating the violation. (Tr. 5-6.) I note from the pleadings that the New Britain Quarry and Mill is a small to medium size operation and that Tilcon is a medium size company. Since no evidence has been presented to show that payment of a civil penalty would adversely affect Tilcon's ability to stay in business, I find that payment of a penalty will not so affect the company. *Id.* at 1153 n.14. Finally, while the violation had serious consequences, the negligence on the part of the company was no more than moderate. Taking all of this into consideration, I conclude that a penalty of $400.00 is appropriate.

ORDER

The civil penalty petition concerning Citation No. 4079378 and the civil penalty petitions against Edward Sakl and Joseph DonAroma are **DISMISSED**. Citation No. 4079379 is **MODIFIED** to a Section 104(a), 30 U.S.C. § 814(a), citation by deleting the "unwarrantable failure" designation and reducing the degree of negligence to "moderate" and is **AFFIRMED** as modified.

Tilcon Connecticut, Inc. is **ORDERED TO PAY** a civil penalty of **$400.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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