

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 24, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. YORK 94-71M
	:	A.C. No. 30-00073-05501 SA 7
	:	
CARL B. THOMAS CONSTRUCTION CORPORATION, Respondent	:	Independent Cement Corp.
	:	
	:	

DECISION

Appearances: Mark Malecki, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, and Roger McClintock, Mine Safety and Health Administration, Cranberry Twp., Pennsylvania, for the Petitioner; David M. Thomas, Vice President, Carl B. Thomas Construction Corporation, Keene, New Hampshire, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Proposal for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging a violation by Carl B. Thomas Construction (Respondent) of 30 C.F.R. § 56.5003. Pursuant to notice the case was heard in Schenectady, New York, on March 1, 1995.

Findings of Fact and Discussion

I. Violation of Section 56.5003. supra

On January 26, 1994, Respondent was involved in drilling holes at the Independent Cement Corporation Mine, a limestone surface operation. Michael Goros Jr., an MSHA Inspector, observed the drilling operation for approximately 15 minutes. He said that one driller was drilling holes on a horizontal surface. The holes were approximately 6 inches in diameter. According to Goros, during the 15 minute time span that he observed the operation, wherever the drill operated, dust "continually" (Tr. 92) came out of the hole for approximately 2 1/2 minutes. He said that there were real dry thick particles around the hole being drilled. Also there was airborne dust and dust on the side of the face of the highwall, and on the ground 30 to 35 feet below the highwall. He also noted a "good quantity of dust" (Tr. 46) on the drill operator's clothing, beard, and mustache. He said that the driller was not wearing any respiratory protection. Further,

According to Goros, the holes that were being drilled were not "collared" or drilled wet. He noted that a water hose in the area was not connected. He did not note the presence of any other dust control measures. Goros termed the material being drilled as nonwater-soluble.

Goros issued a citation alleging a violation of 30 C.F.R. ' 56.5003, which as pertinent, provides as follows: "Holes shall be collared and drilled wet, or other efficient dust control measures shall be used when drilling nonwater-soluble material." ^{1/}

Steven Cristo, who was Respondent's foreman at the site and the driller operator on January 26, 1994, testified that all the water sources were frozen. He said that on January 26, he was using a filter mask. He indicated that when the drill was in operation, he was at the controls which were located at the far side of the driller in relation to the holes being drilled.

Respondent has not impeached or contradicted the testimony of Goros that the material was nonwater-soluble, and that the holes were not collared and drilled wet. Respondent argues that, in essence, because, as testified to by Goros, the drill operator was upwind from the holes being drilled, the dust was removed and diluted by the wind. In this connection, Respondent relies upon the first sentence of 30 C.F.R. section 56.5005 which provides as follows: "Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air."

I find Respondent's position to be without merit. Clearly, with continued mining operations, the wind could have shifted at any time, placing the drill operator downwind of the drilling operation. Further, more importantly, I find that Section 56.5003, supra, is not to be read in conjunction with Section 56.5005, supra. The latter appears intended to control, generally employee exposure to harmful contaminants. In contrast, Section 56.5003, supra, applies specifically to the limited situation of drilling nonwater-soluble material, as in the instant case. The evidence is not controverted that the holes to be drilled were not collared and drilled wet. There is no evidence that there were other efficient dust control measures being used similar in effect to collaring and drilling wet. I also reject Respondent's arguments that there was no violation of Section 56.5003, supra, because there is no evidence of miner exposure to harmful levels of dust. In this connection, I note that the testing of materials mined at the site that were obtained on January 26, 1994, indicated the presence of silica (See Exhibit P-6). More importantly, a violation under Section 56.5003, supra, is not predicated upon exposure

^{1/}Section 56.5003 supra does not appear in the current Code of Federal Regulations, Part 30, but was in effect on January 26, 1994.

to any harmful materials. For all these reasons, I find, that Respondent did violate Section 56.5003, supra.

II. Penalty

According to Goros, when he was at the mine on January 25, 1994, the day prior to the date he issued the citation at issue, two drills were in operation. He observed dust being produced, and drilling taking place without a collar.

Goros met with Cristo and the other driller and explained to them that they were in violation of a mandatory standard, and told them that they needed water for the operation. According to Goros, Cristo explained to him that he had added 6 gallons of antifreeze to the water supply tank, but that the water still remained frozen. Goros said that he explained to him that he could use some other chemical or could add more antifreeze to thaw the water. According to Goros, Cristo told him that he "would take care of it" (Tr. 59). Cristo, who was the foreman at the site, and in charge of drilling operations, did not impeach or contradict Goros' testimony regarding this conversation. Cristo said that he did not see Goros on the site on January 26. However, he did not impeach or contradict Goros' testimony that

drilling was being performed on January 26, without a collar, dust was being produced, and no dust control measures were being used.

The violation of Section 56.5003, supra, resulted from Cristo's drilling on January 26, without the dust control measures specified in Section 56.3003, supra, in spite of having been told by Goros the day before that such an act constitutes a violation. I thus find that there was high negligence on Respondent's part. Although Respondent had not been cited before for a violation of Section 56.5003, supra, and the gravity of the violation does not appear to be high, taking into account the level of Respondent's negligence, I find that a penalty of \$1,000 is appropriate for this violation.

III. Order

It is ORDERED that Respondent pay a penalty of \$1,000 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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