

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 28, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 95-1-M
Petitioner : A.C. No. 28-00539-05519
v. :
 : Mine: Pinewald
NEW JERSEY PULVERIZING COMPANY, :
Respondent :

DECISION

Appearances: James A. Magenheimer, Esq., Office of the
Solicitor, U.S. Department of Labor, New York,
New York for Petitioner;
Martin E. Tanzer, President, New Jersey
Pulverizing Company, Syosset, New York on behalf
of Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act" charging the New Jersey Pulverizing Company (NJ Pulverizing) with one violation of the mandatory standard at 30 C.F.R. ' 56.11001 and seeking a "special assessment" civil penalty of \$8,000 for that violation. The Secretary alleges that the violation was serious, contributed to the cause of a fatal fall-of-person accident and resulted from the operator's high degree of negligence. The general issue is whether NJ Pulverizing violated the mandatory standard as charged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The citation at bar, No. 4087298, issued February 9, 1994, alleges a "significant and substantial" violation and charges as follows:

A fatal accident occurred at this operation on January 11, 1994, in that a laborer fell 8 feet from a flatbed trailer and died January 12, 1994. The victim had finished loading the trailer with pallets of bagged material and was in the process of covering the pallets with a plastic tarp cover

when he apparently slipped or tripped and fell approximately 8 feet to the asphalt. There was no safe means provided to protect the victim from falling from the trailer when he was installing the cover on the pallets. Along with the termination of this citation the company shall institute an effective safety program that will provide and ensure safe access for the employees.

The cited standard, under Subpart J of the Secretary's regulations captioned "Travelways", provides that "[s]afe means of access shall be provided and maintained to all working places."

The alleged practices giving rise to the instant citation were described as the purported acts of the deceased, Robert Rand, in climbing onto a flatbed trailer by utilizing either a forklift or the rear bumper as a means of access and by climbing onto pallets of sand bags loaded on the trailer (Tr. 63).¹ For the following reasons, however, I find that the Secretary has failed to sustain his burden of proving that the deceased actually engaged in such activities at the time alleged or that, even if he had engaged in such activities, that such activities were a causative factor in his death.

According to the undisputed testimony of the Secretary's witness and the deceased's former co-worker, William Stackhouse, III, he had last seen Mr. Rand before his fatal injuries around noon or 12:30 p.m. on January 11, 1994, as Rand was loading a pallet of sand bags with a forklift onto a flatbed trailer at the Bayville, New Jersey plant. Five to ten minutes later, as Stackhouse was taking a pallet outside the plant, he saw Rand's body lying on the ground two to three feet from a different and empty flatbed trailer. This empty trailer was located 15 feet from the trailer which Stackhouse had earlier seen Rand loading with a forklift. As confirmed by Stackhouse, Rand's body was, therefore, actually located 13 feet from the trailer he had been loading with the forklift. Stackhouse also observed that the loaded trailer had been partially covered with a tarpaulin.

Stackhouse testified that it was his own personal practice

¹ According to the Secretary, Rand should have been using a stepladder or portable platform to gain access to the trailer bed and to the top of the sand bags (Tr. 118-119).

-- a practice he had never seen Rand follow -- in placing tarpaulins over loaded trailers to first gain access to the flatbed deck by stepping two feet onto the forklift which he would park adjacent to the trailer and then by stepping another two feet onto the deck of the flatbed itself. Alternatively he would use the rear bumper of the flatbed as a two-foot step onto the flatbed deck. Stackhouse further testified that once on the deck of the flatbed he either stepped or crawled onto the bags of sand product piled on top of the pallets some three to four feet above the flatbed deck in order to pull the tarpaulin over the material. Stackhouse testified that he personally never used a ladder or a raised platform to perform such tasks.

A special investigator for the Mine Safety and Health Administration (MSHA), Larry Brendle, testified that he began his investigation of this incident on January 13, 1994, two days after it had occurred. The scene had by then been completely altered with both trailers removed and apparently neither the location of the trailers at the time of the cited incident nor the position of the deceased's body had been marked. According to Brendle, no autopsy was performed on the deceased and his body was cremated. The Certificate of Death notes the cause of death as "massive subdural hematoma" caused when "patient fell and hit his head".² Brendle understood these injuries were located on the back of the head below the hairline. Brendle acknowledged that he only surmised that Rand had fallen from the top of the bags. When it was noted that the deceased's body had been discovered on the ground 13 feet from the loaded trailer from which Brendle had assumed the victim had fallen, he conceded that, indeed, "we will never know how it happened." Brendle further acknowledged that the injuries to the recessed portion below the hairline on the back of the deceased's head would not be consistent with a falling injury.

² A subdural hematoma is a massive blood clot beneath the dura mater (the outermost membrane of the brain and spinal cord) that causes neurologic symptoms by pressure on the brain. *Dorland's Medical Dictionary*, 21st edition, W.B. Saunders Company.

Under the circumstances, I find that the Secretary has not sustained his burden of proving his theory set forth in his Accident Investigation Report (Government Exhibit C-1) and in the citation that the deceased had fallen from the top of one of the pallets on the loaded trailer thereby causing fatal head injuries.³ While evidence that a tarpaulin had partially covered the pallets on the loaded trailer, suggests that someone may have climbed onto the trailer or climbed on top of the pallets, there is insufficient evidence that the deceased had done this or that it was performed in the manner the Secretary has suggested. Indeed, based on the undisputed evidence presented through the testimony of the Secretary's own witness, William Stackhouse, that the body was found 13 feet from the loaded trailer and the description of the deceased's injuries by Special Investigator Brendle, it is quite possible that the deceased's head injuries were not even sustained as the result of a fall. Accordingly, while it is recognized that the Secretary may establish a violation by inference and circumstantial evidence, any such inference must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Secretary v. Garden Creek Pocahontas* 11 FMSHRC 2148 (1989). In this case the gaps between the existing facts and conclusions to be inferred are too large. The citation must, accordingly, be vacated.

Even assuming, *arguendo*, that the Secretary had met his burden of proving that the deceased had, in fact, fallen while gaining access to the pallets of sand on the loaded trailer, the Secretary has nevertheless failed to demonstrate that the cited standard could be constitutionally applied to the circumstances. In order to pass constitutional muster, a broad standard such as 30 C.F.R. ' 56.11001 must be interpreted in light of a "reasonably prudent person" test so that the adequacy of the means of access at issue must be measured against the standard of whether a reasonably prudent person familiar with this industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard now alleged by the Secretary. *Secretary v. Alabama By-Products Corporation* 4 FMSHRC 2128 (1982); *Secretary v. Dolese Brothers Company* 16 FMSHRC 689 (1994).

In this regard the only Secretarial witness to testify on this issue, Special Investigator Brendle, acknowledged that he

³ I also note that both Stackhouse and Brendle further agree that the drawing purportedly depicting the incident on page two of the Accident Investigation Report was not accurate.

was not familiar with the industry practices in connection with safety measures taken when spreading tarpaulins on trailer beds.

In fact, he knew of no operators in this industry who ever used a tarpaulin to cover its bags of sand or mixed cement-sand product. In his experience, they relied only on plastic blister wrap for protection.

On the other hand, NJ Pulverizing President Martin Tanzer⁴ testified that after conferring with colleagues in the industry he found that the majority loaded their trucks in the same way he did. Some used a platform at the rear of the truck but the sides would still be exposed. It is significant, moreover, that even the Secretary did not require the use of any type of portable platform or stepladder to abate this alleged violation and has not since this incident cited this operator for failure to use such a platform or stepladder even though it has not done so.

Indeed, according to Tanzer, MSHA never told him before or after this incident that "we're doing anything wrong".

The citation was abated on May 9, 1994, in the following manner:

The company has instituted an intensive training program. Two persons are required when loading and men are required to wear helmets while working on the trailers. This citation is terminated as the inspector indicates the company is complying with the District requirement for compliance.

Within the above framework, I find that the Secretary, in any event, has failed to demonstrate how the cited standard could be constitutionally applied to the alleged facts. For this additional reason, the citation must be vacated.

ORDER

Citation No. 4087298 is hereby vacated and this civil penalty proceeding dismissed.

⁴ Tanzer is a well-qualified expert in the industry. He has been in the business since 1958 and he has been active in trade groups, having been President of the National Industrial Sand Association and the International Packaged Concrete Manufacturer's Association and on the Board of Directors of the National Aggregates Association.

Gary Melick
Administrative Law Judge
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