CCASE:
MSHA V. MAR-LAND INDUSTRIAL
DDATE:
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TTEXT:
May 27, 1992
SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. SE 90-117-M

v.

MAR-LAND INDUSTRIAL
CONTRACTOR, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Holen, and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"), presents the issues of whether Mar-Land Industrial Contractor, Inc. ("Mar-Land") violated 30 C.F.R. • 56.15005, a mandatory safety standard requiring the wearing of safety belts and lines when persons work where there is a danger of falling and of whether that violation was caused by Mar-Land's negligence. Following an evidentiary hearing, Commission Administrative Law Judge Avram Weisberger concluded that Mar-Land had violated 30 C.F.R. • 56.15005, that the violation was "significant and substantial" ("S&S") and, further, because a fatality resulted from the violation, that it was of high gravity. 13 FMSHRC 333 (March 1991)(ALJ). The judge also concluded that Mar-Land's conduct involved high negligence, based on his determination that there was insufficient training and supervision of employees as well as previous violations of the same standard. Based on these factors, he assessed a penalty of $5,000. Id. at 337.
Mar-Land's petition for review challenges the judge's finding of a violation of the Mine Act and his determination of high negligence, asserting that the worker involved was under the influence of cocaine and that Mar-Land did, in fact, provide adequate training in the use of safety equipment. Mar-Land does not contest the S&S finding of the judge and, thus, that issue is not before the Commission. 30 U.S.C. • 823(d)(2)(A)(iii).
I.
Factual Background and Procedural History
The facts of this case are essentially undisputed. Mar-Land is a general contractor, who, at the time of the accident, was performing structural steel work at the Ponce Cement Plant, owned by Puerto Rican Cement Company.

On February 19, 1990, Cecilio Caraballo was preparing to attach steel channeling to another steel cross member approximately 52 feet above the plant floor. Co-workers, who were between 8 and 10 feet away, observed Caraballo standing on the third level of the plant engaged in tying off his safety lines. Tr. 26. These co-workers each testified that Caraballo tied one safety rope that had carabiner hooks at both ends around a large vertical steel beam at the edge of the floor. According to these eye-witnesses, he then attached another rope to the rope tied around the beam.

Shortly after Caraballo finished attaching his safety lines, he leaned back on the rope to test it, the lines gave way and he fell 12 feet onto a rotating kiln and then down another forty feet to the concrete floor below. Emergency medical attention was given to him almost immediately but Caraballo was pronounced dead a short time later at a local hospital.

The Mine Safety and Health Administration ("MSHA") conducted an investigation into the cause of the fatal accident. The MSHA inspector found that the belt was properly worn by Caraballo and that the belt and the lines were not defective. Based on the findings of that investigation, Inspector Roberto Torres-Aponte issued a citation pursuant to section 104(a) of the Act, alleging a violation of 30 C.F.R. • 56.15005.(Footnote 1) The citation stated:

> A fatal accident occurred at this operation on 02-19-90, when an employee of a Contractor fell from 52 ft. to the ground, while [he] was working outside the pre-heater third level tower which was under construction. The victim was wearing a safety belt and line at the time the accident occurred, however the line was not secured to prevent him to fall [sic].

The inspector determined that the violation was S&S and the result of high negligence by the operator.

The judge found that Caraballo's belt was worn properly and that he had a rope properly attached to the belt. He found further that Caraballo had wrapped a second rope around a beam to which the first rope, attached to his belt, was also attached and that all items were in good and operable shape immediately after the accident. 13 FMSHRC at 334. However, the judge found that when Caraballo leaned back, he fell because the rope was not properly secured to the beam. Based on this fact, the judge concluded that "the belt was not being worn and used in a safe fashion in violation of Section 56.15005." Id.

The judge found high negligence on four grounds. The first was the degree of training received by the employees in the use of safety belts. The judge found that weekly safety meetings were held, including one on the day of the accident, in which the use of safety belts was discussed. Nonetheless, the judge discounted this training, finding that the record did not establish the "specific

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1 That section provides in relevant part: "Safety belts and lines shall be worn when persons work where there is danger of falling..." 30 C.F.R. •

56.15005.
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content" of the meetings or what "specifically" was told to the employees in the form of "specific instructions or information" regarding the "specific manner" in which the belts should be used. In a footnote, the judge noted the testimony of an employee who stated he had been employed by Mar-Land for about a month prior to the accident and had received no training in the use of safety belts.(Footnote 2) 13 FMSHRC at 334-35.

Second, the judge found that the employees had not received written instructions on the use of safety belts. Third, the judge found no evidence "that supervisors were present to observe or supervise the manner in which Caraballo wrapped the rope around the beam, and attached his belt to it." 13 FMSHRC at 335. He went on to find that, despite evidence of a training session the day of the accident, "when Caraballo attached or attempted to attach his belt to the beam there were no supervisors present." Id.

Finally, the judge found high negligence based on MSHA's determination of the existence of prior notice to the operator. The judge noted that MSHA had previously issued two imminent danger orders to the operator for violations of the same standard because employees were wearing their safety belts but not tying off. The judge found that Mar-Land had not taken corrective action as a result of the imminent danger orders to ensure that employees properly utilized their safety belts and lines to tie off. 13 FMSHRC at 336.

The judge rejected Mar-Land's defense that Caraballo was impaired on the day of his death as a result of his use of cocaine. The judge noted that a toxicological analysis indicated there was no cocaine present in the nasal passages or in the blood and there was no evidence of how much cocaine was ingested or how long prior to the accident it had been ingested. The judge found that, although the analysis indicated .30 mcg/ml benzoylecgonine (the metabolite of cocaine) in the kidneys, there was no evidence in the record that the level of benzoylecgonine was sufficient to significantly impair Caraballo's concentration and ability to properly secure his safety belt. 13 FMSHRC at 336-37.

II.

Disposition of Issues

A. Violation of the Mandatory Standard

Mar-Land does not contend that Caraballo's actions in tying off were in compliance with the regulation's requirements. Rather, Mar-Land's principle argument is that Caraballo was negligently and disobediently under the influence of illegal drugs, that his faculties were impaired, that Mar-Land has strict rules dealing with drug use and that, as a result, it cannot be liable for the consequences of Caraballo's failure to act properly under the circumstances, based on North American Coal Corporation, 3 IBMA 93 (April 1974) and Peabody Coal
Corp., 1 MSHC 1676 (1976).

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2 However, another witness testified, in answer to a question from the judge, that this witness was at the safety meeting on February 19, 1990 in which safety belts and lines were discussed. Tr. 99.

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Mar-Land argues that those cases set forth a defense to a citation "when the failure to follow a safety regulation is entirely the result of the employee's d[i]sobedience or negligence and the operator establishes that it has a system of safety instruction." PDR at 7. Alleging that Caraballo was under the influence of cocaine, Mar-Land argues that the employee was entirely at fault and Mar-Land is not strictly liable for the violation.

In urging affirmance of the judge's finding of violation, the Secretary argues that Mar-Land's violation of the standard is established for two reasons. First, the Secretary asserts that Mar-Land admitted liability in its Petition for Discretionary Review. The second reason is that the standard at issue in North American is different from the standard applicable in this case in that the standard in North American required only that employees be "required to wear" specific equipment and the standard in this case requires that the equipment "be worn." According to the Secretary, the strict liability scheme of the Act imposes liability on the operator for the violation, notwithstanding Mar-Land's attempt to defend based on North American. The Secretary argues that North American has been severely limited by Southwestern Illinois Coal Corp., 5 FMSHRC

1672 (October 1983). We agree.

In Southwestern, the Commission drew a distinction between the wording of the standard in North American and the wording of the standard at issue here. The Commission explained that the health and safety standard at issue in North American provided only that an operator must require that its employees wear safety equipment. The Commission held that, under that standard, an operator could avoid liability if it could demonstrate that it required the wearing of the safety equipment and, indeed, enforced that policy with its workforce.

Here, as in Southwestern, the standard goes beyond an obligation that "employees shall be required to wear...." The standard in this case states that "belts and lines shall be worn..." and the Commission has held that when belts and lines must be worn, they must be worn properly. See Austin Power Inc., 9 FMSHRC 2015 (December 1987), affirmed 861 F.2d 99 (5th Cir. 1988).

Even if an employer could demonstrate that it had a policy requiring the wearing of belts but was unsuccessful, through no fault of its own, in securing employee compliance, the policies themselves are not relevant in determining the fact of violation. This is true even where the failure is the result of employee misconduct. The fact that belts are not worn properly is a violation under this standard for which the operator is liable irrespective of employee misconduct. See United States Steel Corporation, 1 FMSHRC 1306 (September 1979); Mid-Continent Coal and Coke Co., 3 FMSHRC 2502 (November 1981); Allied Products v.

FMSHRC, 2 MSHC 1633 (5th Cir. 1982)(significant employee misconduct no

defense
to liability); and Great Western Electric Company, 5 FMSHRC 840 (May 1983)(subjective condition of miner ignored in determining fact of violation). A defense such as the one proffered by Mar-Land does not eliminate an operator's liability for failing to insure that employees wear belts and lines, and do so properly, when there is a danger of falling. In Southwestern, supra., the Commission held that language found in North American is limited to the standard found in that case "and does not create an employee disobedience or ~758
negligence exception to the liability without fault structure of the Mine Act." Southwestern at 1674-75. Thus, the employee's disobedience is not a relevant consideration for determining the fact of violation under this standard.

We must conclude based on the evidence of record that Caraballo failed to properly use his belt and lines. The inspector testified that the lines were in proper condition and that the belt had been properly worn. Although three other workers testified that Caraballo tied off, they offered no explanation as to how he could have fallen. While we do not suggest that a finding of violation is required, ipso facto, upon the occurrence of an accident, (see Kerr-McGee Corporation, 3 FMSHRC 2496 (November 1981)), in this case, no other reasonable
explanation exists for Caraballo's fall other than his failure to properly tie the second rope to the support beam. Consequently, we affirm the judge's finding of Mar-Land's liability for Caraballo's failure to properly wear the belts and lines as required by section 56.15005.

Based on this determination, we need not reach the second issue raised by the Secretary, i.e., whether counsel for the operator admitted in the Petition for Discretionary Review that a violation had occurred by stating that the belt was not properly tied to the beam.

B. Negligence

The judge found that Mar-Land was highly negligent because: (1) the record did not establish the "specific content" of the safety meetings or what "specifically" was told to the employees regarding the "specific instructions or information" concerning the "specific manner" to use the belts; (2) the employees had not received written instructions; (3) supervisors were not present to observe or supervise the manner in which Caraballo wrapped the rope around the beam or attached his belt; and, (4) the operator had prior notice based on two imminent danger orders for violations of the same standard. 13 FMSHRC at 334-36.

Mar-Land broadly challenges the judge's high negligence finding by pointing to its training programs and the absence of a regulatory requirement to provide written instructions and immediate supervision of employees' use of safety belts and lines. Mar-Land argues that it did in fact have a training program that includes weekly safety instruction on the use of equipment, that witnesses called by the Secretary testified to the existence of the safety meetings and that safety belt use was discussed during those meetings, including one on the day of

the accident. Mar-Land argues that neither the statute nor the regulations require the issuance of written instructions or the presence of supervisors for safety belt use.

The record does not contain substantial evidence supporting the judge's determination that Mar-Land was highly negligent. Although one of the riggers testified that he had not received any training during the month that he had been employed by Mar-Land prior to the accident, the record also contains evidence to the contrary, as well as evidence that, as a general rule, employees did receive instructions on how to use their safety equipment. Witnesses for both the Secretary and the operator testified that talks were given each Monday morning addressing the proper use of safety equipment including belts and lines. No authority has been found, and the judge cites none, suggesting that training in

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addition to that indicated in the record is required to satisfy the obligations of the operator under the 30 C.F.R. Part 48 training rules.

There is no foundation in the law or the regulations for the judge's imposition of a requirement that safety instructions be provided to employees in writing or that supervisors be present each time an employee ties off. A finding of negligence based on the judge's ex post facto imposition of these requirements is erroneous as a matter of law.

The judge found that, based on two prior imminent danger orders issued for violations of the same standard within the previous two years, Mar-Land was on notice "that employees wearing belts had not tied them off." He further found that Mar-Land had not taken proper steps to rectify the problem, but the undisputed evidence in this case indicates that Caraballo was making every attempt to use his safety equipment correctly and to tie off properly.

There is evidence also that training and enforcement of safety policies had improved in response to the second imminent danger order. For example, in January 1990, shortly after the second order, Mar-Land began to break down its company-wide weekly safety meetings into subgroups so that employees could be instructed more specifically according to the work they would be performing. There is also evidence in the record that at the same time, workers were disciplined for not tying off. Substantial evidence does not support the judge's conclusion that, having received notice, Mar-Land had taken no action to remedy the problem.

It must be noted that evidence exists in the record demonstrating some degree of negligence on the part of Mar-Land. As indicated above, the judge noted the testimony of one witness who had been working for the company as a rigger for one month prior to the accident and had received no instructions concerning the use of safety belts. Moreover, this witness was hired after the time Mar-Land contends that improvements were made to the safety training program. Under these circumstances we conclude that Mar-Land was, at least to some degree, negligent. We consider the degree of negligence with respect to the violation in issue to be ordinary.

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III.
Conclusion
Accordingly, we affirm the judge's finding of violation herein but reverse his finding of high negligence and vacate his penalty assessment. We remand to him for reassessment of a civil penalty in light of the considerations set forth above.

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Ford B. Ford, Chairman

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Richard V. Backley, Commissioner

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

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L. Clair Nelson, Commissioner