

CCASE:
MSHA V. WARREN STEEN
DDATE:
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TTEXT:
July 30, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. LAKE 89-68-M
LAKE 89-93-M

WARREN STEEN CONSTRUCTION, INC.,
AND WARREN STEEN, Employed by
Warren Steen Construction, Inc.

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988) ("Mine Act" or "Act"). The issues are: (1) whether Warren Steen Construction, Inc. ("W.S.C.") violated 30 C.F.R. □ 56.12071(Footnote 1) when it operated a stacker-conveyor(Footnote 2) near energized high-voltage power lines and, if so, whether that violation was caused by its unwarrantable failure to comply with the standard; (2) whether Warren Steen ("Steen") is individually liable under section 110(c) of the Mine Act, 30 U.S.C. • 820(c), for authorizing the alleged violation; and, (3) whether the civil penalties assessed against W.S.C. and Mr. Steen are supported by substantial evidence. Following an evidentiary hearing, Commission Administrative Law Judge James A. Broderick concluded that W.S. C.

had violated section 56.12071, that the violation had been caused by its unwarrantable failure, and that Steen was individually liable for the violation. 13 FMSHRC 256 (February 1991)(ALJ). The judge assessed an \$8,000 civil penalty against W.S.C. for the violation

1 30 C.F.R. • 56.12071, a mandatory safety standard applicable to surface metal and nonmetal mines, provides, "[w]hen equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken."

2 A stacker-conveyor is an adjustable piece of equipment that can be raised or lowered with a hydraulic system located on the "stacker"; it was used by

W.S. Construction to convey sand and gravel up to stockpiles. Tr. 13.
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of section 56.12071 involving the stacker-conveyor (Footnote 3) and assessed a civil penalty against Steen in the amount of \$5,000. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

At all times relevant to this case, W.S.C. operated the Steen Pit Mine, a sand and gravel mine located in Moose Lake, Minnesota, and Steen was the president and owner of W.S.C.(Footnote 4) On July 1, 1988, W.S.C. employees, Jack Hufford and Gary Jobe, attempted to move an 80-foot Nordberg stackerconveyor

in order to make a new row of gravel piles. The stacker-conveyor was first attached with a chain to a front-end loader's bucket. Mr. Hufford, who operated the front-end loader, and Mr. Jobe, who walked along beside it in order to give Hufford directions, then began to move the stacker-conveyor by pulling it with the front-end loader. Hufford testified that they "started swinging [the stacker-conveyor] to the side to start a row of piles" and, as the stacker-conveyor swung back and forth, it passed near the power lines. Tr. 49, 50-51.

In an attempt to stop the stacker-conveyor, Jobe threw a plank on the ground at the desired location, pulled the wheel up on it, and then placed a second piece of lumber perpendicular to the plank under the wheel and motioned for Hufford to stop.(Footnote 5) Tr. 20, 49. The stacker-conveyor continued to roll over the wood, gaining momentum. Jobe pushed against the frame in an attempt to stop it, but the stacker-conveyor contacted the overhead power lines. Jobe was electrocuted as a result.

The overhead power lines, owned by Minnesota Power & Light ("MP&L"), ran approximately 12,000 volts of current, and were 19 feet-9 1/2 inches above the ground at their lowest point. Tr. 19, 57. At the point of contact, the power line contacted was approximately 22 feet-1/4 inch above the ground. Tr. 19. The height of the stacker-conveyor at its discharge point was 23 feet. Tr. 18.

On July 5, 1988, the Occupational Safety and Health Administration, which had been informed of the accident, contacted the Department of Labor's Mine Safety and Health Administration ("MSHA") about the matter. Later that day, MSHA Inspector Jim King visited the mine and spoke with Mark Belich, an assistant engineer for MP&L, and with Steen's son, and took photographs. Inspector King testified that Mr. Belich informed him that, prior to the

3 The judge also assessed a separate \$8,000 civil penalty for another violation of the same standard.

4 Steen sold the mine on May 1, 1989.

5 The planks used by Jobe measured 2x4 inches, and approximately four to five feet long, and 4x4 inches, and approximately four feet long, respectively.

Tr. 41, 49. Jobe did not use the chock blocks that came from the manufacturer with the stacker. Tr. 75-76.

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accident, Steen had discussed with MP&L representatives the possibility of relocating the power lines so that they would not interfere with ongoing work at the mine. Tr. 12-13, 43. Inspector King returned to the mine on July 6, 1988, to continue his investigation and found that the stacker-conveyor had been moved to a location approximately 75 feet from the power lines. Tr. 28. Inspector King spoke with Steen, Hufford, and another MP&L representative about the accident. Based upon his investigation, Inspector King issued to W.S.C. a section 104(d)(1) citation alleging a significant and substantial ("S&S") violation of section 56.12071, caused by the operator's unwarrantable failure to comply with the standard.

During his investigation on July 6, Inspector King noticed that a feeder-conveyor was operating close to the power line.(Footnote 6) Tr. 25, 28-29. After receiving authorization to conduct a regular inspection of the mine, Inspector King determined that the clearance between the feeder-conveyor and the power line was approximately eight feet. Inspector King then spoke with Steen about moving the feeder-conveyor. Steen replied that he had a few more weeks of work remaining at that location, and that he would move the equipment after he finished it. Tr. 27, 36, 82. Inspector King then issued to W.S.C. a section 104(d)(1) order, alleging a second S&S violation of section 56.12071, caused by the operator's unwarrantable failure. The order was terminated after the feeder-conveyor was shut down and moved away from the

power line. S. Exh. 4.

The Secretary proposed that civil penalties be assessed against W.S.C. in the amount of \$7,000 for the alleged violation involving the stackerconveyor, and \$8,000 for the alleged violation involving the feeder-conveyor.

The Secretary also proposed that a civil penalty in the amount of \$4,000 be assessed against Steen individually under section 110(c) of the Mine Act because, she alleged, he knowingly authorized, ordered, or carried out a violation of section 56.12071 involving the stacker-conveyor.

Following an evidentiary hearing, the judge found that W.S.C. had violated section 56.12071 in both instances, and that the violations were S&S and caused by the operator's unwarrantable failure. He first determined that W.S.C. had violated the standard through its operation of the stacker-conveyor within 10 feet of an energized high-voltage power line, "so that the conveyor came in contact with the line," without the power line having been deenergized or other precautionary measures taken. 13 FMSHRC at 260. The judge found that the violation was S&S because a miner had been electrocuted as a result of the violation. Id. In addition, the judge concluded that the violation was unwarrantable and resulted from the operator's "reckless disregard" for

the safety of miners, because the operator had been cautioned about working too close to the power lines before the accident, and because the operator should have recognized that operation of a large metal machine under a high voltage line is inherently dangerous. *Id.* The judge assessed a civil penalty in the amount of \$8,000 against W.S.C., rather than the \$7,000 penalty proposed by the Secretary.

6 The feeder-conveyor was used by W.S.C. to transport material from a portable crushing and screening unit to a stacker-conveyor. Tr. 13-14.

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The judge also sustained the citation alleging a violation of section 56.12071 involving the feeder-conveyor because he found that W.S.C. operated "the conveyor" directly below energized high-voltage power lines at a distance of 8 to 8 1/2 feet. *Id.*(Footnote 7) He determined that the violation was S&S because it "was extremely serious and was likely to result in serious injury if mining had been allowed to continue." *Id.* He noted that the operator had experienced a fatal accident five days earlier as a result of the same condition and that, therefore, the operator had unwarrantably failed to comply with the standard. 13 FMSHRC at 260-61. He then assessed the proposed civil penalty of \$8,000 against the operator. 13 FMSHRC at 261.

Concerning Steen's individual liability under section 110(c) of the Act, the judge found that Steen exhibited a reckless disregard for safety and knowingly authorized operation of the equipment close to high-voltage power lines. 13 FMSHRC at 261. The judge assessed a civil penalty in the amount of \$5000 against Steen, rather than the \$4,000 penalty proposed by the Secretary. The Commission subsequently granted W.S.C.'s and Steen's petition for discretionary review, in which they dispute the stacker-conveyor violation, whether that violation was caused by the operator's unwarrantable failure, whether Steen is individually liable, and the amount of the three civil penalties assessed by the judge.(Footnote 8)

II.

Disposition of Issues

A. Citation involving stacker-conveyor

The judge found that W.S.C. violated section 56.12071 when its stackerconveyor was operated near energized high-voltage power lines, clearance was less than 10 feet, and the power lines had not been deenergized, or other adequate precautionary measures taken. The petitioners argue that these

7 In his findings of fact, the judge stated that on July 6, 1988, "the stacker-conveyor was still below the energized 12,000 volt power line. It was approximately 8 feet directly below the line." 13 FMSHRC at 258 (emphasis added). The operator argues that this finding of fact is not supported by the evidence. P. Br. at 2. The record reveals that, in fact, the stackerconveyor had been moved to a location 75 feet away from the power line but on July 6, 1988, the feeder-conveyor was operating approximately eight feet from

the power line. Tr. 28-29. Although the judge misspoke as to the particular conveyor, we conclude that his error was harmless. In this case, the specific piece of equipment operating near the energized power line in violation of section 56.12071 is irrelevant.

8 The Secretary maintains that the petitioners have not sought review of the finding that the stacker-conveyor violation was caused by W.S.C.'s unwarrantable failure. S. Br. at 5 n.5. In fact, W.S.C. has sought review of this issue by disputing the judge's fourth conclusion of law, in which the judge determined that the stacker-conveyor violation occurred as a result of the operator's unwarrantable failure. P. Br. at 2; 13 FMSHRC at 260.

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findings are contrary to law and are not supported by substantial evidence. P. Br. at 2. We disagree.

The evidence is undisputed that, as the stacker-conveyor swung back and forth while it was being moved, it passed near the energized high-voltage power lines. Tr. 24, 50-51. Clearance between the stacker-conveyor and the power lines was less than 10 feet. The height of the power lines was approximately 19 feet-9 1/2 inches at the lowest point and 22 feet-1/4 inch at the contact point, while the stacker-conveyor's discharge height was approximately 23 feet. Tr. 18-19. The power lines were not deenergized, and Inspector King testified that Jobe's use of wooden planks to control movement of the stacker-conveyor was an inadequate precautionary measure. Tr. 21. No other precautionary measures were taken. We conclude that the foregoing evidence constitutes substantial evidence in support of the judge's findings, and we affirm his determination that W.S.C. violated section 56.12071 in its operation of the stacker-conveyor.

Substantial evidence also supports the judge's finding that the stackerconveyor violation was caused by W.S.C.'s unwarrantable failure to comply with section 56.12071. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghioghney & Ohio Coal

Company, 9 FMSHRC 2007, 2010 (December 1987).

W.S.C.'s actions resulting in the stacker-conveyor violation were properly characterized by the judge as aggravated. It is common knowledge that power lines are hazardous, and the standard itself provides notice that precautions are required when working near power lines with heavy equipment. In addition, W.S.C. had been warned by MP&L representatives before the accident that it was operating too close to the lines. Tr. 59. The evidence reveals that Steen knew that the stacker-conveyor would be operated near energized power lines and that the clearance would be less than 10 feet. Tr. 18-19, 24, 50-51, 79. Steen testified that the stacker-conveyor had been set up in the cited location since the previous September 1987. Tr. 79. In fact, he helped move it to that location. Tr. 75. The record also discloses that

W.S.C. was actually aware, through Steen, of the dangers involved in working around energized power lines. Steen testified that he had discussed with employees how to move the stacker-conveyor so as to avoid contact with the power lines. Tr. 72-73. Hufford also testified that he knew about the dangers associated with power lines from personal experience, although Steen had never discussed those dangers with him. Tr. 54.

W.S.C. also had sufficient knowledge, through Steen, that adequate precautionary measures were not being taken, in that Steen knew that the power lines had not been deenergized or relocated and that no steps had been taken to prevent contact between the stacker-conveyor and the energized power lines. Tr. 16, 24, 50-51. Even if the use of chock blocks were assumed to constitute an adequate precautionary measure, W.S.C. did not ensure that the miners were trained regarding their use. Jobe, who had been employed at the mine for two months before the accident, had never received formal training, and used wooden planks rather than the chock blocks, in an attempt to control the
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movement of the stacker-conveyor. Tr. 40-41, 52, 75-76.(Footnote 9)

Although the operator knew of the dangers involved in operating large metal machinery near energized power lines, it directly exposed its miners to such hazards without regard for their safety and without taking precautions. Such conduct is aggravated, and constitutes more than ordinary negligence. Accordingly, we affirm the judge's finding that W.S.C.'s violation of section 56.12071 was caused by its unwarrantable failure to comply with the standard.
B. Section 110(c) liability

In relevant part, section 110(c) provides:

Whenever 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, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. • 820(c). The judge found that Steen had sufficient knowledge of the dangers associated with operating equipment near energized high-voltage power lines to support a finding of individual liability under section 110(c) of the Mine Act. 13 FMSHRC at 261.

Preliminarily, the evidence is undisputed that at all times relevant to this case, W.S.C. was a corporation, and Steen was its president. Tr. 5, 68; S. Exh. 2. As we concluded above, substantial evidence supports the judge's finding that W.S.C. violated section 56.12071 through its operation of the stacker-conveyor. Steen challenges whether substantial evidence supports the judge's finding that he "knowingly authorized" W.S.C.'s violation within the meaning of section 110(c). We conclude that it does.

Steen argues that the judge's conclusion that he "knowingly authorized the violations in reckless disregard for the safety of his employees is

without any factual basis whatsoever." P. Br. at 2. Steen maintains that he was not at the pit at the time of the accident and played no part in the actual events that led to the death of Jobe. P. Br. at 4. He also asserts that the mine had previously been inspected, apparently when the equipment was set up in the same location, and that no violations had been cited. P. Br. at 5. He also argues that his discussions with MP&L centered around "some piles of gravel that might constitute a hazard if a front-end loader were operated on the piles" and that they did not discuss the stacker-conveyor. P. Br. at

9 It should be noted that since October 1, 1979, Congress, through the appropriations process, has prohibited MSHA from enforcing safety training regulations at certain types of surface nonmetal mines, including the Steen Pit Mine.

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2, 4. Steen further contends that he was not aware of the standard requiring 10 feet clearance from the power line, and that he did not knowingly and intentionally tell his employees to position the equipment in such a fashion that it would be in violation of federal law. Tr. 73, 77; P. Br. at 5. We reject Steen's arguments.

In order to establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. See, e.g., *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971). Steen's claimed ignorance of the law is not a viable defense. *Id.* at 563. Further, the fact that Steen was not present at the mine at the time of the accident is no defense to the finding that he had knowingly authorized the moving of the stacker-conveyor. Hufford testified that on the day of the accident, Steen would have been the individual who gave the orders to move the stacker-conveyor in order to construct new stockpiles. Tr. 50. As noted earlier, Steen was aware that the stacker-conveyor would be operated near energized power lines and that the clearance would be less than 10 feet. Thus, it is clear that Steen knowingly authorized miners to move large metal machinery near energized high-voltage power lines, yet failed to ensure that adequate precautionary measures were taken to prevent the hazards associated with that procedure.

The fact that MSHA may not have previously taken enforcement action with respect to the set-up of the stacker-conveyor does not obviate finding liability against Steen. The Commission has recognized that prior instances of inconsistent action by MSHA do not constitute a viable defense to liability. See, e.g., *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). Finally, Steen's argument that he had not been forewarned that the cited conduct was hazardous, because the MP&L representative did not specifically mention the stacker-conveyor, is unavailing; MP&L's warning was broadly directed to working near power lines. More importantly, the standard gives clear notice that operation within 10 feet of a power line requires precautionary measures. Accordingly, we affirm the judge's finding that Steen

knowingly authorized W.S.C.'s actions in violation of section 56.12071, within the meaning of section 110(c) of the Act.

C. Assessment of civil penalties

W.S.C. and Steen argue that the civil penalties assessed against them are not supported by evidence or by law. P. Br. at 2. They emphasize that the record shows no prior violations, that the violations were promptly abated, and that the accident was not caused by reckless actions of Steen but occurred as a result of Jobe's negligence.

When a judge's penalty assessment is at issue on review, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. • 820(i). See, e.g., *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). Within this framework, we examine the civil penalties assessed by the judge against the petitioners' arguments pertaining to its history of previous violations, its negligence, and its good faith in attempting to achieve rapid compliance after notification of a violation. See ~1132

30 U.S.C. • 820(i).

Between July 6, 1986, and July 5, 1988, W.S.C. was cited for one violation of a mandatory health or safety standard, which did not involve section 56.12071. S-Exh. 10; Tr. 22, 74, 86. The judge found that the operator's history of previous violations was such that an otherwise appropriate penalty should not be increased because of it. 13 FMSHRC at 257. The judge's findings with respect to the operator's history of previous violations are supported by substantial evidence.

Substantial evidence also supports the judge's negligence findings. The judge found that the violations committed by W.S.C. and Steen resulted from their "reckless disregard" for the safety of miners. 13 FMSHRC at 260-61. With respect to the feeder-conveyor violation, the record reveals that Steen knew that the feeder-conveyor was operating below an energized power line, and that an electrocution of one of his employees had occurred five days earlier when another conveyor had been moved near the power line. Tr. 26-27, 29, 51. Such evidence supports the judge's characterization of W.S.C.'s conduct as involving a high degree of negligence.

The judge also properly characterized the petitioners' violative conduct involving the stacker-conveyor as involving a high degree of negligence. As discussed above, the operator's conduct involving the stacker-conveyor violation was unwarrantable, i.e., amounted to aggravated conduct constituting more than ordinary negligence.

The petitioners also argue that the stacker-conveyor accident was caused by an employee's negligence and that the accident was unintentional. The Commission has found that, in some instances, an operator may be found negligent, even though the violation was committed by a non-supervisory employee. In *A.H. Smith Stone*, 5 FMSHRC 13 (January 1983), the Commission set

forth the following guidelines:

The fact that a violation was committed by a nonsupervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC at 15.

We apply the A.H. Smith guidelines to the judge's findings and the record evidence involving the stacker-conveyor violation, and conclude that Jobe's actions were foreseeable. As discussed above, Jobe was required to move the stacker-conveyor near energized power lines, and the clearance between the power lines and the stacker-conveyor was less than 10 feet. Jobe's actions in using the planks to control the movement of the stackerconveyor were foreseeable because miners had used the planks in such a manner

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in the past. Tr. 53-54. Second, the risks involved in moving the stackerconveyor near an energized power line were clearly serious. The stackerconveyor swung near the power lines and there was no clearance between the top of the stacker-conveyor and the power lines at their lowest point. Contact between the energized power line and the stacker-conveyor resulted in electrocution. Third, the operator's supervision, training and discipline of its employees with respect to this standard were inadequate. No designated supervisor was on the premises at the time the stacker-conveyor was moved. Tr. 72. Jobe had been hired only two months before the accident and had not received any training, and no formal training had been provided to other employees. Tr. 52, 54, 83. There was no evidence that the operator disciplined employees in order to prevent violations of the standard. In sum, consideration of the foreseeability of Jobe's conduct, the risks involved, and the operator's lack of appropriate supervision, training and discipline leads us to conclude that the judge properly found W.S.C. negligent.

As to Steen's individual challenge to the penalty assessed by the judge, we refer to our earlier discussion of the section 110(c) violation. Further, we concur with the judge that Steen, an individual with 20 years of experience, who personally directed the operation, acted with a high degree of negligence in allowing the stacker-conveyor to be operated so near to the power lines. Thus, we disagree that the penalty imposed on Steen by the judge was too harsh and, we affirm it.

The judge did not make specific findings with respect to the demonstrated good faith of the petitioners in attempting to achieve rapid compliance after notification of the violations. In such circumstances, we may examine the record for pertinent undisputed evidence. Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, Sellersburg Stone Co. v. FMSHRC,

F.2d 1147, 1153 (7th Cir. 1984). The record reveals that the petitioners abated the stacker-conveyor citation by moving the stacker-conveyor 75 feet from its previous location. Tr. 28. Although the petitioners did not unduly delay abatement of the stacker-conveyor violation, their operation of the feeder-conveyor in the same location weighs heavily against a finding of demonstrated good faith compliance. When he was notified that the feederconveyor

was operating too close to the power lines, Steen asked for two or three weeks time before he would be required to move it so that he could finish work in that area. Such conduct does not support a decrease in the civil penalties assessed by the judge.

In sum, we conclude that the three civil penalties assessed by the judge against W.S.C. and Steen are consistent with the statutory criteria and are supported by substantial evidence. Accordingly, we affirm the civil penalties of \$16,000 assessed against W.S.C., and \$5,000 assessed against Steen.

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III.

Conclusion

For the reasons set forth above, we affirm the judge's findings that W.S.C. violated section 56.12071 through its operation of the stacker-conveyor and that this violation resulted from its unwarrantable failure. We also affirm the judge's determination that Steen is individually liable under section 110(c) of the Act for knowingly authorizing W.S.C.'s violation of section 56.10271 involving the stacker-conveyor. Finally, we affirm the civil penalties assessed by the judge against W.S.C. and Steen.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner