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SOL (MSHA) V. AMARILLO ROAD
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

AMARILLO ROAD COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 86-93-M
A.C. No. 41-03327-05501

Crusher No. 2 Mine

DECISION

Appearances: Rebecca A. Siegel, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
E.E. Clark, Secretary-Treasurer, Amarillo
Road Company, Amarillo, Texas, pro se,
for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$30 for an alleged violation of mandatory safety standard 30 C.F.R. 56.16009. The respondent filed an answer denying the violation, and a hearing was held in Amarillo, Texas, on December 11, 1986. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty to be assessed

for the violation based on the criteria found in section 110(i) of the Act.

2. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5-12):

1. The respondent's mining activities involve products which affect interstate commerce, and the respondent is subject to the jurisdiction of the Act.

2. The respondent's annual mining production of limestone is 31,615 tons. The respondent is a highway contractor, and its limestone mining and crushing operations employ from 16 to 18 miners.

3. The cited condition or practice which resulted in the issuance of the violation was not the result of any negligence by the respondent.

4. For purposes of this case, the respondent has no prior history of violations.

5. The inspector's gravity findings, as reflected on the face of the citation, are accurate and correct.

6. The respondent exhibited good faith compliance in abating the cited condition or practice.

Discussion

Section 104(a) "S & S" Citation No. 2660902, issued on January 9, 1986, cites a violation of 30 C.F.R. 56.16009, and the cited condition or practice is described as follows:

A serious non-fatal accident occurred on January 2, 1986, resulting in two broken legs

and a broken back when an employee for some unknown reason walked under an unsecured 47 foot section of belt conveyor framework which had just been raised into place but not secured. Moments prior to the accident, all employees involved in setting the structure were advised by the foreman to stand clear until more jacks and supports could be installed to secure the section of conveyor and related load out bin.

The citation was terminated on February 5, 1986, and the termination notice states as follows: "When suspended loads are required at the crusher plant the employees has (sic) again been informed of the hazards involved at a safety meeting held on 1-13-86. Employees that violate the foreman's dissuade safety orders will face dismissal of employment."

MSHA's Testimony and Evidence

MSHA Inspector Michael C. Sanders, testified as to his training and experience, and he confirmed that he issued the citation in question on January 9, 1986, after conducting an investigation of the accident which occurred on January 2, 1986.

Mr. Sanders identified photographic exhibits P-1 through P-4 as the conveyor and portable load out bin, and confirmed that he took the pictures on January 9, 1986. Photograph P-1 shows the conveyor which fell on the accident victim resting against the lip of the load out bin; P-2 is a rear view of the bin with wooden support blocks under the axle; P-3 is similar to P-1; and P-4 shows a part of the load out bin supported by jacks and wooden blocks.

Mr. Sanders sketched a diagram showing the final flow of the limestone material along the bin feed out conveyor through to the load out bin, and to the truck load out conveyor (exhibit P-5), and he explained the processing sequence. He confirmed that the crusher "plant" consists of portable conveyors and bins which are moved from location to location as required.

Mr. Sanders stated that his investigation of the accident disclosed that at the time of the accident the plant was in the process of being moved and was in the final stages of assembly. One end of the conveyor which fell on the employee was elevated and resting against the lip of the bin as shown

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in photographs P-1, P-3, and R-1, but the safety chain normally used to secure the conveyor to the bin to prevent movement once the assembly is completed was not attached to the bin. The other end of the conveyor was resting on the ground.

Mr. Sanders stated that the end of the conveyor which was resting on the bin was lifted in place to that position by a front-end loader. Once in place, the loader pulled away and left the area. The supervisor on the scene, Vicente Loe, noticed that the three employees who were assembling the plant had not secured the conveyor chain to the bin as they had been instructed. He also observed that the weight of the conveyor, as it rested against the bin, resulted in some movement of the support blocks under the bin axle. Recognizing these hazards, Mr. Loe left the scene to bring back the front-end loader to stabilize the conveyor and to secure it to the bin. However, before leaving, Mr. Loe informed the work crew of the hazard of the unsecured conveyor and specifically instructed them to stay clear of the conveyor until he returned with the loader. For some unexplained reason, the accident victim disregarded Mr. Loe's directives and went under the conveyor. When he did, movement of the bin blocks caused the end of the conveyor resting on the bin to fall on the victim breaking his legs, and his back.

On cross-examination, Mr. Sanders stated that during his accident investigation he did not speak with the injured employee or the other two employees. He confirmed that he had no reason to question Mr. Loe's version of the accident, and he concluded that the respondent was not negligent, and that it resulted solely from the negligence of the injured employee who disregarded Mr. Loe's instructions to stay clear of the conveyor until it could be supported by the loader and secured by the chain.

Mr. Sanders confirmed that the conveyor which fell and struck the employee was not "suspended in the air," and that one end was on the ground, and the other end which fell was elevated at an angle resting against the bin and the chain was not secured to the bin. He stated that in the assembly and disassembly of the conveyor and bin, the conveyor is normally lifted off the ground by means of an end-loader and placed against the bin until it can be secured to the bin by a safety chain. According to his interpretation of section 56.16009, if the safety chain is not secured to the bin, he considers the conveyor to be "suspended" within the meaning of that standard, and that is why he cited this standard. If the conveyor were secured to the bin by the safety chain, he

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would not consider the conveyor to be "suspended" and he would not have issued the citation.

Respondent's Arguments

The respondent agreed that there is no dispute as to the facts of this case, and that the inspector's testimony regarding the circumstances of the accident in question is accurate. Although Mr. Loe was present in the courtroom, respondent's representative E.E. Clark stated that he saw no need to call him as a witness, and that the respondent's position is as stated in its answer and exhibits filed in this proceeding.

Mr. Clark took the position that the respondent has not violated section 56.16009, because the conveyor in question was not in fact a "suspended load," in that it had been placed at rest on the bin similar to an inclined plane, or a ladder resting against a wall. Mr. Clark pointed out that the conveyor was not free on all sides, or "suspended" or hoisted in the air as the phrase "suspended load" normally implies. He also argued that since section 56.16009, is included as part of MSHA's "Materials Storage and Handling" standards under Subpart O, Part 56, Code of Federal Regulations, it does not apply in this case because the conveyor cannot be considered "materials" as that term is used in the standards appearing in Subpart O.

Mr. Clark asserted that the respondent's safety rules (exhibit R-2) require each employee to follow instructions and not to take chances, and that the hoisting or lifting of objects over workmen is prohibited.

Mr. Clark maintained that the accident was not caused by the respondent's or Mr. Loe's failure to recognize a hazard and react accordingly in a safe and prudent manner, but was caused by the negligence of the injured employee who disregarded Mr. Loe's cautionary instruction to stand clear of the conveyor. Since MSHA agrees that the respondent was not negligent, Mr. Clark believes that the respondent should not be held accountable for any violation. Mr. Clark concludes that since the injured employee violated his supervisor's order to stand clear, and since the load was not suspended in the first place, no violation of section 56.16009 has been established.

I take note of the fact that as part of its answer to MSHA's proposal for assessment of civil penalty, the respondent included a copy of a company accident report filled out and signed by Mr. Loe on the day of the accident. Mr. Loe

stated that when he asked the two employees who were at the scene for an explanation as to why they did not attach the conveyor chain or wait until he returned, they responded that "they didn't know" and "just thought that they could block the bin and took a chance."

Petitioner's Arguments

Petitioner asserts that section 56.16009 is a broad standard which should be liberally construed, and that the inspector's interpretation and application of the phrase "suspended loads" was correctly applied and should be affirmed. In response to the respondent's assertion that since the cited standard appears under Subpart O, Part 56, dealing with storage and handling of materials, it is not intended to apply to equipment such as a conveyor, petitioner cites my prior decision of October 8, 1979, in Pennsylvania Glass Sand Corporation, 1 FMSHRC 1191 (August 1979). In that case, I concluded that the cited standard applied in the case of a motor suspended above a work area.

In response to the respondent's argument that it should not be liable for any violation when it is clear that it was not negligent, and that the accident was caused by the employee's negligence in failing to follow the safety instructions of his supervisor, petitioner states that the law is otherwise, and that the courts and the Commission have consistently ruled that a mine operator is liable for a violation without regard to fault.

Findings and Conclusions

The respondent in this case is charged with a violation of mandatory safety standard 30 C.F.R. 56.16009, which states that "Persons shall stay clear of suspended loads." MSHA concedes that the respondent was not negligent and that the foreman who was supervising the construction work at the scene of the accident warned his crew and the injured miner to stand clear of the conveyor in question until it could be further secured from any movement.

Two issues are presented in this case. The first question is whether or not the respondent can be held liable and accountable for a violation which resulted from the negligence of one of its employees who for some unknown reason clearly disregarded his foreman's instructions to stay clear of the conveyor which fell and struck him. The second issue is whether or not the cited mandatory standard section is

applicable to the alleged violative condition which prompted the issuance of the citation.

The respondent's contention that it cannot be held liable for a violation of any mandatory safety standard because it was not negligent is rejected. As correctly stated by the petitioner, the law is otherwise, and the Commission has consistently held that under the Mine Act, an operator is liable, without regard to fault, for violations committed by its employees. Asarco, Incorporated-Northwestern Mining Department, 8 FMSHRC 1632 (November 1986), and the cases cited therein.

The term "load" is defined in A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968 Edition, in pertinent part as follows at page 650:

f. The weight borne by a structure caused by gravity alone (dead load) or by gravity increased by the stress of moving weight (live load), as in the case of hoisting a string of drill rods.

The term "suspend" is defined in Webster's New Collegiate Dictionary, in pertinent part as follows: "[T]o hang so as to be free on all sides except at the point of support."

In the Pennsylvania Sand Glass case, supra, the inspector issued a citation based on his belief that someone had performed work under a scrubber motor which had been lifted up in the air by a chain hoist and tied off with a safety chain. The inspector believed that maintenance work was required to be performed in the area under the motor while it was in that suspended position. In addressing the question as to whether the standard applied to the motor, even though it appeared under a "materials storage and handling" general regulatory section, I concluded that "it may be applied to a situation where it is established that men are working under any suspended loads, whether it be 'materials', as that term is commonly understood, or motors or other equipment," 1 FMSHRC 1208. Although I concluded that the cited section was applicable, I vacated the citation on the ground that the inspector failed to describe the alleged violative condition with any particularity, and that he personally did not observe anyone working under any suspended load.

The facts presented in the Pennsylvania Sand Glass case are clearly distinguishable from the facts presented in the instant case. In Pennsylvania Sand Glass, the inspector's

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rationale for issuing the citation was based on his belief that someone was working under a motor while it was suspended in the air and held in that position by a chain lifting apparatus. In the case at hand, there is no evidence that the conveyor belt structure which fell was tied to any crane or other lifting apparatus, or was otherwise suspended at the time of the accident. The evidence established that one end of the conveyor piece in question had been lifted up by means of a front-end loader and placed against the side of the bin, while the other end remained on the ground at an angle. Further, once placed in that position by the end loader, the loader left the area and was not holding the end which had been laid to rest against the bin. Under these circumstances, I cannot conclude that the conveyor section which fell was a suspended load within the meaning or intent of section 56.16009, nor can I conclude that the cited section is applicable on the facts here presented.

I take note of the fact that the "condition or practice" cited by the inspector on the face of his citation makes no reference to any "suspended loads." However, the abatement and termination notice indicated that abatement was achieved by informing all employees of the hazards concerning "suspended loads." The testimony established that the end of the conveyor which fell was not secured to the end of the bin by a safety chain which is normally used for this purpose. While it may be true that the accident could have been prevented by securing the safety chain, the respondent here is not charged with any safety infraction for failure to secure the end of the conveyor to the bin. The respondent is charged with a violation that requires men to stay clear of a suspended load, and MSHA's theory is that the conveyor piece which fell was suspended. On the facts of this case, I cannot conclude that the petitioner has established a violation of section 56.16009.

ORDER

In view of the foregoing findings and conclusions, section 104(a) Citation No. 2660902, January 9, 1986, 30 C.F.R. 56.16009, IS VACATED, and the petitioner's civil penalty proposal IS DISMISSED.

George A. Koutras
Administrative Law Judge