

CCASE:
SOL (MSHA) v. ANDERSEN SAND & GRAVEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

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

CIVIL PENALTY PROCEEDING
Docket No. LAKE 91-10-M
A. C. No. 20-00667-05511

v.

Leix Road Dredge and Mill

ANDERSEN SAND & GRAVEL
COMPANY,
RESPONDENT

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor,
U. S. Department of Labor, Chicago, Illinois, for
the Secretary of Labor (Secretary);
Frank M. Andersen, President and Owner, Andersen
Sand & Gravel Company (Andersen), for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of the mandatory safety standard in 30 C.F.R. 56.9300(a) at Andersen's Leix Road Dredge and Mill. The violation was charged in a 104(d)(1) citation because of the unwarrantable failure of Andersen to comply with the regulation. Pursuant to notice, the case was called for hearing in Bay City, Michigan on July 23, 1991. Federal Mine Inspector Victor W. Chicky testified on behalf of the Secretary, and the Secretary called Charles Corl, Supervisor of the subject plant as a witness. Andersen cross-examined both witnesses, but did not call any additional witnesses. Both parties waived their right to file post-hearing briefs and argued their respective positions on the record. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. Andersen is the owner and operator of a sand and gravel pit in Tuscola County, Michigan, known as the Leix Road Dredge and Mill. Its operations affect interstate commerce.

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2. The plant is a small operation, which produces sand and gravel seasonally. It has one full time and one part time employee. In 1989, it produced and sold 45,889 tons of material. During the year, prior to the violation alleged herein, 3789 production hours were worked.

3. Andersen's history of prior violations is not such that a penalty otherwise appropriate should be either increased or decreased because of it.

4. The imposition of a penalty in this proceeding will not affect Andersen's ability to continue in business.

5. The subject operation involves the dredging of gravel from a lake or pond and transporting it by conveyor to a mill where it is screened, crushed, sized, washed, and distributed to customers.

6. In approximately November 1989, Andersen's Supervisor Charles Corl removed a berm which had been constructed at the dredging area of the plant in order to work on machinery involved in the floating dredge.

7. Between November 1989, and late March 1990, the dredging operation was shut down, although gravel continued to be sold to customers.

8. From the time the operation began in late March 1990, until May 2, 1990, Corl was involved in producing 2s sand which was needed by a customer. He knew the berm was missing, but had not gotten around to replacing it.

9. On May 3, 1990, a berm between 10 and 50 feet wide was missing from the dredging area at the lake. The vertical drop to the lake was about 12 feet.

10. The water in the lake was between 4 and 10 feet deep, shallower at the edge.

11. Corl was operating a front-end loader in the area. The loader was about 22 feet long and weighed 18 tons. Tracks were seen approaching 8 to 10 feet from the vertical drop off.

12. On May 3, 1990, Inspector Chicky issued a citation under Section 104(a) charging a violation of 30 C.F.R. 56.9300(a). It was modified on May 7, 1990, to a 104(d)(1) citation because of the unwarrantable failure of Andersen to comply with the standard.

13. The condition was abated immediately and the citation was terminated 20 minutes after it was issued.

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REGULATION

30 C.F.R. 56.9300(a) provides as follows:

Berms on guard rails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

ISSUES

1. Whether the evidence establishes a violation of the safety standard requiring berms?

2. If so, what is the appropriate penalty?

CONCLUSIONS OF LAW

1. Andersen is subject to the provisions of the Mine Act in the operation of the subject facility, and I have jurisdiction over the parties and subject matter of this proceeding.

2. Andersen failed to have a berm or guardrail on 10 to 50 feet of the bank of a roadway where a drop off of 12 feet existed. This is a violation of 30 C.F.R. 56.9300(a).

3. The violation was serious. It could have resulted in the front-end loader overturning, and the operator being severely injured or even drowned.

4. Andersen was aware of the violation, and the failure to comply with the standard was an unwarrantable failure.

5. Based on the criteria in Section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$500.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation No. 3444340 is AFFIRMED.

2. Respondent shall, within 30 days of the date of this decision, pay to the Secretary a civil penalty in the amount of \$500 for the violation found herein.

James A. Broderick
Administrative Law Judge