

CCASE:
SOL (MSHA) V. W. J. BOKUS INDUSTRIES
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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,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 92-106-M
Petitioner	:	A.C. No. 30-02790-05512
	:	
v.	:	Docket No. YORK 92-107-M
	:	A.C. No. 30-02790-05513
W. J. BOKUS INDUSTRIES, INC.	:	
Respondent	:	High Peaks Asphalt

DECISION

Appearances: William G. Staton, Esq., U.S. Department of Labor,
Office of the Solicitor, New York, New York,
for Petitioner;
W. J. Bokus, President, W. J. Bokus Industries,
Incorporated, Greenfield Center, New York,
for Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases the Secretary of Labor, (Petitioner) filed petitions for assessment of civil penalty, alleging violations by the Operator (Respondent), of various mandatory standards set forth in volume 30 of the code of Federal Regulations. Pursuant to notice, the cases were scheduled and heard on February 16 and 17, 1993, in Saratoga Springs, New York. At the hearing, Randall Gadway testified for Petitioner. James E. McGee, Patrick Durkin, Laura Mace, Thomas W. Barss, and William John Bokus testified for Respondent. Subsequent to the hearing, the parties filed post-hearing briefs on June 21, 1993.

On June 16, 1993, the Secretary filed and served Respondent with a Motion for Leave to Supplement Memorandum. Respondent did not file any reply to this motion and it is granted. The Secretary's Supplemental Post-Hearing Memorandum was filed June 30, 1993

Findings Facts and Discussion

I. Background

In 1983, William J. Bokus, Respondent's President, purchased the subject property consisting of 65 acres, "for the sole purpose of having an asphalt plant there" (Tr. 130). A stream bisects the property, and a road connects the portion of the property on the east side of the river, with that located on the west side.

In 1984, an asphalt plant was erected on the east side of the river. The asphalt plant is owned by High Peaks Asphalt ("High Peaks") and is leased to Palette Stone ("Palette"). High Peaks and Palette are corporate entities separate from W.J. Bokus Industries. Until 1990, the raw minerals used in the production of asphalt at the plant were obtained from mines not located on the subject site.

In October 1991, W. J. Bokus Industries, commenced operating a mine on the west side of the property mining sand, and gravel. A screen that is located on the east side of the property separates gravel from the mine by size. This material is crushed by a crusher, which is a non-permanent installation, but on the dates in issue, was located on the east side of the property. The crusher also crushes material from other mines. Also on the east side of the property are two stockpiles containing sand, stone, and "rubble", a by-product of crushed recycled concrete and asphalt. Some of these materials were previously mined at the subject mine. Approximately 20 to 50 percent of the material in these two stockpiles is sold as a final product, and the balance goes to the asphalt plant on the subject site.

In addition, there are two other stockpiles on the east side, one of which contains piles of old concrete and asphalt returned by Respondent's customers, and the other contains processed concrete products. The items in the latter two stockpiles are sold to customers.

Also on the east side of the property is a garage that contains electrical services, and repair parts for the asphalt plant. The garage is owned by High Peaks, and is leased to Palette. According to Bokus, the garage is used "primarily for the support of the black top (asphalt) plant" (Tr.133). (Emphasis Supplied) He said that "its primary purpose was for the repair of trucks" (Tr. 196). However, the garage is also used as a site for the repair of crusher and screen equipment. Stored in the garage are some oxygen and acetylene cylinders owned by Respondent. Also Respondent's employees at times work in the garage.

An office staffed by Respondent's employee is also located on the east side of the property. Truck drivers transporting material from the subject site weigh their trucks at a weighing station, and then report the results to Respondent's employee in the office.

On October 22, 1991, MSHA Inspector Randall Gadway inspected the subject site. He issued a number of orders pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, ("the Act",) (Footnote 1) alleging violative conditions concerning a loader which loads sand from a stockpile, equipment located in the garage, and a walkway near the office. Essentially, it appears to be Respondent's position that the stockpiles and equipment located in the garage, are not within Petitioner's jurisdiction.

II. Cylinders in the Garage (Order Nos. 3593041 and 3593042)

Gadway cited a total of seven cylinders (Footnote 2) in the garage that were not secured, in violation of 30 C.F.R. 56.16005. He also cited the same cylinders as lacking covers in violation of 30 C.F.R. 56.16006.

In general, oxygen and acetylene cylinders are used in welding. Cylinders such as those cited are used in the garage by Respondent's mechanic. Respondent's other employees as part of their duties, also work in the garage. Also, repairs to a crusher and a screen used in the preparation of gravel, are performed in the garage. Both Respondent and Palette store oxygen and acetylene cylinders in the garage.

Section 3(h)(1) of the Act defines a mine as, inter alia "...lands, structures, facilities, equipment, machines, tools, ...used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits...or used in, or to be used in, the milling of such materials, or the work of preparing coal or other minerals," The legislative history of the Act, as summarized with approval in *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984), indicates a clear intent for the Act to be given a broad interpretation. Nonetheless, it is manifest, based upon the clear language of Section 3(h)(1), supra, that structures, facilities, machines, tools, or equipment are considered a mine and within the jurisdiction of Petitioner, only if they are used in, or to be

¹Prior to the issuance of these orders, a citation pursuant to Section 104(d)(1) of the Act, supra, had been issued to Respondent on October 22, 1991.

²4 or 5 of the cylinders contain oxygen, and the rest contained acetylene.

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used in, or resulting from, either the extraction, milling, or preparation of minerals.

There is no evidence indicating that the specific oxygen and acetylene cylinders that were cited were used in connection with the repair or manufacture of tools or equipment specifically used in the milling or preparation of the minerals mined at the subject site. Further, even if it is inferred that the cylinders were so used, and hence were subject to MSHA jurisdiction, there is insufficient evidence to conclude that Respondent was an operator vis-a-vis the cited cylinders. In this connection, Section 3(c) of the Act, defines an operator as an "owner, lessee, or other person who operates, controls, or supervises a coal or other mine... ." Hence, in order for Respondent to be properly cited for the allegedly violative conditions of the specific cylinders cited, it must be established that it either was the owner, or lessee of the cylinders, or in some other fashion exercised control over them. There is no evidence with regard to the ownership of the cylinders in question. The garage was used to store cylinders that belong to either Palette or Respondent. To further complicate matters, Palette's employees were allowed to use the cylinders owned by Respondent, and Respondent's employees were allowed to use the cylinders owned by Palette. Since Respondent's employees worked at times in the garage, and at times used acetylene or oxygen cylinders, it is possible that they used or would be using these cylinders. However, due to the lack of evidence, I cannot conclude that it is more likely than not that the cylinders at issue were either used by Respondent's employees, or would be used by them in the ordinary course of Respondent's operation. Hence, Order Nos. 3593041 and 3593042 issued to Respondent concerning violative cylinders are to be vacated.

III. Grinding Machines in the Garage (Order No. 3594752)

Gadway also cited a grinding machine located in the garage that did not have a hood, in violation of 30 C.F.R. 56.14115. In general, Gadway testified with regard to the hazards relating to the violative condition. He also testified that James E. McGee, an employee of Respondent, told him that he had reported to William Bokus the lack of a hood, but Bokus did not do anything about it.

There is no evidence in the record as to the specific use of the grinder in question, especially as it pertains to the preparation or milling of stone. Since the grinder was located in the garage, and Respondent's employees worked there, it is possible that it might have been used in the milling or preparing of stone. However, I find that Petitioner failed to adduce sufficient evidence that would support such a conclusion. In other words, due to the lack of adequate evidence, I cannot conclude that it was more likely than not that the grinder was

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used in milling or preparing stone or other mine materials. For these reasons, Order No. 3594752 regarding the grinder is to be dismissed.

IV. Metal Stove in the Garage (Order No. 3594756)

Gadway also cited exposed wires connected to a fan that was mounted on the side of a metal stove in violation of 30 C.F.R. 56.12030. Gadway testified to the hazards inherent in this condition, but did not adduce any testimony with regard to the manner, if any, in which this stove is used in the milling or preparation of minerals. Thus, I conclude that it has not been established that the stove was subject to the Act, and regulations promulgated pursuant to the Act. Accordingly, Order No. 3594756 is to be dismissed. For the same reasons, the Section 107(a) order (Order No. 3594756) issued by Gadway for an alleged imminently dangerous condition regarding the wires "feeding" the stove, is to be vacated.

V. Hole in a Walkway (Order No. 3593043)

A. Violation of 30 C.F.R. 56.11012

On October 22, 1991, Gadway indicated that there was a hole measuring 2 feet by 3 feet in wooden planks located in front of the scale house (office) entrance. He indicated that the hole was 3 feet deep. Essentially, he indicated that the hole was within 3 feet of the walkway traversed by truckers when walking between the scale where trucks are weighed, and the office where the weight of the trucks is recorded. Gadway issued a Section 104(d)(1) order alleging a violation of 30 C.F.R. 56.11012.

As part of its mining operation sand and gravel are loaded by Respondent onto its customer's trucks. Thus, I conclude that the cited area in question is an integral part of Respondent's mining operation. Hence, I find that this area is considered mine property.

Laura Mace, Respondent's employee who works in the office in question, estimated the size of the hole as 6 inches by 2 1/2 feet. She estimated that it was a distance removed from the walkway equal to at least her height, which she indicated as 5 feet 4 inches. I accord more weight to Gadway's testimony regarding the dimensions of the hole, inasmuch as it was based upon actual measurements that he had taken. Also, based upon my observations of the demeanor of the witnesses, I accord more weight to the testimony of Gadway with regard to the distance the hole was removed from the walkway.

Section 56.11012 supra, provides, that "openings near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is

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impractical to install such protective devices, adequate warning signals shall be installed." 30 C.F.R. 56.2 defines a travelway as "...a passage, walk or way regularly used and designated for persons to go from one place to another." Within the framework of the above evidence, I find, as cited by Gadway, that on October 22, 1991, there existed an opening into which a person might fall that was near a travelway used by truckers going from the scale to the office. Hence I find that Respondent herein did violate Section 56.11012, supra.

B. Unwarrantable Failure

In essence, according to Gadway, he concluded that the violation herein was as a result of Respondent's unwarrantable failure, because "...by the looks of the board deterioration, it looked as if it was there for quite a while,..." (Tr. 214) (sic). He also said that the hole was "very obvious" (Tr. 217). Mace indicated that the hole had been in existence for at least a week prior to October 22, 1991, when it was cited. Respondent has not offered any evidence to establish why it had not fixed, protected, or warned of this violative condition. Considering these factors, and taking into account the size of the hole, I conclude that the violation herein was as a result of more than ordinary negligence, and constituted an unwarrantable failure. (See, Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987) (construing unwarrantable failure to mean aggravated conduct constituting more than ordinary negligence)).

C. Significant and Substantial

According to Gadway, a truck driver could fall in the hole by mistake, and suffer a permanently disabling injury such as a broken leg or hip. Gadway concluded that the violation was significant and substantial. In this connection, he said that a violation is significant and substantial if an injury is reasonably likely to occur, and the injury is of a type that will result in, at the least, a loss of workdays.

In analyzing whether the facts herein establish that the violation is significant and substantial, I take note of the recent decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious

nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g*, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (*U.S. Steel Mining Co., Inc.* 6 FMSHRC 1573, 1574 (July 1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986).

Southern Ohio, *supra* at 916-917.

Since Gadway's opinion that the violation herein was significant and substantial, was not based upon the proper test as set forth in Mathies, *supra*, and *U.S. Steel*, *supra*, I have not accorded it any weight. The only evidence before me on this issue is Gadway's opinion that a truck driver could fall into the hole. Clearly this hazard did exist. However, considering the fact that the hole was not in the travelway, but was approximately three feet away, and considering the lack of any other evidence on this point, I conclude that it has not been established that the hazard contributed to by violation, *i.e.*, a person falling into the hole or tripping on it, was reasonably likely to have occurred. Hence, I conclude that the violation herein was not significant and substantial.

D. Penalty

Considering the obvious nature of the hazard presented by the violative condition, the fact that the condition could have resulted in an injury such as a broken leg or hip, the fact that the hole had been in existence for at least a week prior to the

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time that it was cited, and considering the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty of \$450 is appropriate for this violation.

VI. Loader Loading from Stockpiles (Order Nos. 3594753 and 3594754)

On October 22, 1991, a loader was being used by Respondent's employee, Tom Barss, to remove sand from a stock pile on the east side of Respondent's property, and load it onto customers' trucks. The stockpile contained sand and other minerals mined from the west side of the property in question.

Gadway asked Barss if the horn and back-up alarm were functioning, and he indicated that they were not. Gadway did not observe them to be functioning. Gadway issued an order alleging a violation of 30 C.F.R. 56.14132, which, as pertinent, provides that horns or other audible warning devices on self-propelled mobile equipment "shall be maintained in functional condition."

Respondent argues that MSHA does not have jurisdiction over stockpiles. In this connection, Respondent refers to a statement made by an MSHA engineer, John Montgomery, who was one of the speakers at an MSHA seminar in Albany, New York, in the fall of 1992. James McGee, Respondent's employee who was at the seminar, testified that Montgomery, in response to a question from the audience after he had made his presentation on electrical matters, stated that MSHA jurisdiction regarding gravel operations did not extend to stockpiles. Clearly this statement cannot be considered to be a statement of MSHA policy, but is rather a statement of an individual not involved with policy. (See, Lancashire Coal Co., 13 FMSHRC 875, 888, (1991).

I find that the use of the loader in question, loading mined stocks onto customer's trucks, was an integral part of Respondent's mining operation, and hence the loader was within MSHA jurisdiction. Since the horn and backup alarm were not working, I find Respondent violated Section 56.14132, supra.

Gadway opined that as a consequence of this violation, an injury was reasonably likely to have occurred, since truck drivers in the area could have been hit by the loader when it backed up. Should this have occurred, a fatality could have resulted.

Certainly, a person could have been hit and injured by the loader when it backed up. Gadway indicated that the operator of the loader would not have known that a person was behind the loader. However, the record does not indicate the specific position of the loader operator on the loader, whether the loader had a rear view mirror, whether the operator would have had good

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visibility of the area behind the loader, and whether there were any blind spots when the operator looked to the rear of the loader. Within the framework of this record, I conclude that it has not been established that the hazard contributed to by the violation herein i.e., the possibility of a person being hit by the loader, was reasonably likely to have occurred. I thus conclude that it has not been established that the violation herein was significant and substantial.

According to Gadway, Barss indicated to him that the horn and alarm were not functioning, and said that the loader in question had been brought onto the subject property a week prior to the date the Order was issued, "in this condition". (Tr. 231). Gadway testified that Barss told him that Bokus operated the loader, and "he should have known" (Tr. 231). Barss, who testified later on at the hearing, did not rebut this testimony, nor did Bokus testify in rebuttal to rebut this testimony. Hence, since a loader is operated both forward and reverse, and since Respondent's employees operated the loader for a week knowing the horn or backup alarm did not function, I conclude that the violation herein was as a result of more than ordinary negligence, and constituted an unwarrantable failure. (See, Emery, supra).

Taking into account the statutory factors in Section 110(i), of the Act, and especially noting the degree of Respondent's negligence as discussed above, I conclude that a penalty of \$500 is appropriate.

VII. Order No. 3594754

On October 22, 1991, Barss informed Gadway that the parking brakes on the loader were not working. Gadway had Barss test them, and he concluded that the parking brakes were not working. Gadway issued a Section 104(d)(1) order alleging a violation of 30 C.F.R. 56.14101 which provides, as pertinent, that "...parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." Based on the testimony before me, I conclude that this standard has been violated as alleged by Gadway.

Gadway indicated that there was no engine shut-off, and thus an injury, as a consequence of the violation herein, was reasonably likely to have occurred. He said that the area where the loader loads the trucks is not completely level, but that there are "small ups and downs". (Tr. 240) He said that there are grades where the loader could roll to the stockpile. There is no evidence with regard to the specific terrain in the immediate area where the loader would have stopped, and remained stopped in its normal operation. Within this framework, I conclude that it has not been established that the violation was significant and substantial.

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When Barss was asked by Gadway if the alarm horn and parking brake were functioning, Barss indicated, in essence, that the loader had been brought on the property a week ago in this condition, and everybody had operated it, including Bokus. For the reasons set forth above, VI, infra, I conclude that the violation herein resulted from more than ordinary negligence and constituted an unwarrantable failure.

Taking into account the factors set forth in Section 110(i) of the Act, and considering the degree of Respondent's negligence, I find that a penalty of \$500 is appropriate.

VIII. Citation No. 3594758

Gadway indicated that on October 22, 1991, he had explained to Barss that he was issuing an Order requiring that the loader not be used until repaired, and that MSHA should be notified by the Operator (Respondent) that repairs have been done before the Operator would be allowed to use it.

Subsequent to the issuance of the 104(d)(1) Orders discussed above, VI, and VII, infra, Barss ordered parts to repair the parking brakes, and replaced the fuses for the horn and back-up alarm on October 22. However, MSHA was not informed.

On October 23, 1991, at approximately 9:00 a.m., Gadway returned to the subject property. He observed the same loader that had been cited the day before, loading crushed stone from the stockpile, and transporting it to the asphalt bin. According to Gadway, he left the premises after Bokus had told him that MSHA did not have jurisdiction over the asphalt plant, and the stockpiles. Gadway subsequently returned at approximately 11:40 a.m. At that time, he asked Bokus how many trucks had been loaded. Gadway indicated that Bokus informed him that three trucks had been loaded with the loader.

Mace, who works in the office, indicated that she heard all of Bokus' conversation on October 23 with Gadway, and that Bokus did not say that he loaded three trucks with the loader. In rebuttal, Gadway explained that upon his arrival at the site at approximately 11:40 a.m., he spoke to Bokus who informed him that he had loaded trucks with the loader. Gadway said that this conversation took place at the right side of the garage, which is not within the line of sight of the office where Mace works. Bokus did not contradict this testimony. I therefore accept it.

On October 23, 1991, Gadway issued a Citation alleging a violation of Section 104(d)(1), of the Act which, as pertinent, provides that once an Order has been issued under section 104(d)(1), persons in the affected area shall be withdrawn, and be prohibited from entering such area until an authorized representative of the Secretary determines that such violation

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has been abated.

Within the framework of the above discussed evidence of record, I find that the loader in issue was subject to two Section 104(d)(1) Orders, and yet Respondent operated it prior to a determination by Gadway that the violative conditions had been abated. Accordingly, I find that the Citation issued by Gadway was properly issued and is to be affirmed.

The record indicates that Respondent was made aware that the loader should not have been operated until it had been repaired, and MSHA was notified of that fact. Respondent's belief that MSHA had no jurisdiction over the stockpile is insufficient to mitigate its non-compliance with the Orders at issue. The proper course was to have complied with the Orders, and then to have filed a Notice of Contest to challenge the issuance of the Orders. Thus, the violation herein resulted from a high degree of Respondent's negligence. I find that a penalty of \$1,000 is appropriate for this violation.

ORDER

It is ORDERED that: (1) The following Orders are to be vacated and dismissed: Orders No. 3593041, 3593042, 3594752 and 3594756; (2) The following Orders are to be amended to reflect the fact that the violations alleged therein are not significant and substantial: Orders No. 3593043, 3594753, and 3594754; and, (3) Respondent shall pay, within 30 days of this decision, a civil penalty of \$2,450 for the violations found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

William G. Staton, Esq., Office of the Solicitor, U. S.
Department of Labor, 201 Varick Street, New York, NY 10014
(Certified Mail)

Mr. W. J. Bokus, President, W. J. Bokus Industries, Inc., 30 Mill
Road, Greenfield Center, NY 12833 (Certified Mail)

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