

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE N. W., SUITE 9500  
WASHINGTON, D.C. 20001

May 3, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-1197-M
Petitioner,	:	A.C. No. 15-04469-186365
v.	:	
	:	
CEMEX, INC.,	:	Mine: Kosmos Cement Company
Respondent.	:	

**DECISION ON MOTION FOR SUMMARY DECISION**

This case is before me upon petition for civil penalty filed by the Secretary of Labor pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. §§ 815, 820. The Secretary, on behalf of the Mine Safety and Health Administration (“MSHA”), issued one citation to CEMEX Group, Inc. (“CEMEX”), for an alleged violation of a mandatory safety standard on fall protection, which provides in relevant part that “[s]afety belts and lines shall be worn when persons work where there is a danger of falling.” 30 C.F.R. § 56.15005. In addition, the Secretary alleges that the violation was the result of low negligence and was “S&S” – i.e., it significantly and substantially contributed to the cause and effect of a mine safety hazard.<sup>1</sup> CEMEX timely contested the Secretary’s assessment of civil penalty, and the case was assigned to me for adjudication.

**I. STATEMENT OF THE CASE**

On November 5, 2010, I held a conference call with counsel for the Secretary and with CEMEX, who appeared *pro se* through its representative Gayle R. Harrison. The parties agreed that the facts in this matter were not in dispute and the case could be disposed of through a motion for summary decision. I asked that the parties confer to establish a joint statement of uncontested material facts and requested that the Secretary then initiate a motion for summary decision, after which CEMEX would file a written response.

On December 1, 2010, the Secretary filed Petitioner’s Motion for Summary Decision pursuant to Commission Rule 67. 29 C.F.R. § 2700.67. Under Commission Rules 7, 8, and 10, CEMEX had until December 20, 2010 to file a written response. 29 C.F.R. §§ 2700.7-.8, .10. On December 14, 2010, my office received a phone call from Harrison asking what he should do

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<sup>1</sup> The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d)(1).

next. That day, I instructed my law clerk, Joshua Shaw, to grant CEMEX 30 days to file a written response to the Secretary's motion.

On December 16, 2010, CEMEX filed a one-page letter responding to the Secretary's motion. Harrison wrote: "I do not want to rescind my opportunity to state my case, as I was led to believe that a motion for summary decision might bring that about. I apologize for my lack of knowledge in legal proceedings, but I don't think that should preclude the mine operator from defending himself in legal action." (Letter from G. Harrison to J. Shaw of 12/16/2010.) Harrison then set forth his arguments for CEMEX in response to the Secretary's motion for summary decision. (*Id.*)

Thus, on January 11, 2011, I issued an order allowing CEMEX to file an additional written response to the Secretary's motion by January 31, 2011, if it wished to do so. Given Cemex's *pro se* status, I wanted to ensure it would have a full opportunity to defend itself in the matter. On January 24, 2011, Harrison stated in an email to my law clerk: "I returned to you what was essentially my defense in a letter dated 12-16-10. Other than the contents of that letter, I have no more input to present supporting my position in KENT 2009-1197-M." (Email from G. Harrison to J. Shaw of 1/24/2011.)

## II. ISSUES

In contesting the civil penalty petition, CEMEX argues that it should not be held liable for the driver's violation because he was employed by Pyles Trucking, Inc., an independent contractor. Harrison asserts the inspector stated, "[A]ccording to MSHA standards I cannot legally write a citation to the contract carrier, so therefore it must go to the mine operator." (Letter from G. Harrison to J. Shaw of 12/16/2010.) Harrison argues that "research indicates that similar violations have occurred from contract carriers resulting in citations from MSHA." (*Id.*) The Secretary argues that the Act places operators under strict liability for violations of MSHA safety standards; thus, the driver's violation should be imputed to CEMEX as a matter of law. Neither party disputes the validity of the violation or the gravity, negligence, and significant and substantial designations.

The dispositive issues in this case are whether a mine operator may be held liable when a driver employed by an independent contractor violates a mandatory safety standard, and if so, whether the assessed penalty is appropriate.

## III. FINDINGS OF FACT

The parties agree that the following material facts are undisputed in this case.

Cemex operates Kosmos Cement Company ("Kosmos"), a mine as defined by 30 U.S.C. § 802(h)(1). The Kosmos mine is located in Jefferson County, Kentucky. (Secretary's Mot. for Summ. Decision ¶ 3.)

On April 21, 2009, MSHA inspector Sonia Conway conducted a regular inspection of the Kosmos mine. (*Id.* at ¶4.) During the inspection, she observed the driver of a tractor trailer tanker standing on top of the tanker, attempting to close a hatch. (*Id.*) The top of the tanker was about three-feet wide and rounded, and the driver stood approximately twelve feet above the ground. (*Id.*) He was not wearing a line, safety belt, or other fall protection. (*Id.*) Conway also observed gusty wind conditions at the time the driver stood on top of the tanker. (*Id.*)

On the day of the inspection, CEMEX had posted signs at the entrances to Kosmos, informing customers that they were required to use the provided enclosed safety platforms to access the tops of the tankers. (*Id.* at ¶ 5.) CEMEX posted similar signs at the platforms themselves. (*Id.*)

The driver who Conway observed was not a CEMEX employee but a driver for Pyles Trucking, Inc. (*Id.* at ¶ 4.) Pyles Trucking is an independent company that contracts with CEMEX customers to pick up the product from Kosmos for delivery. (*Id.*) Conway spoke to the driver after he descended from the tanker roof, and they discussed what she had seen. (*Id.* at ¶ 6.) The driver indicated that he knew CEMEX policy forbade customers from standing on top of their tractor trailer tankers and that, instead, customers were required to use the enclosed safety platforms. (*Id.*) He admitted to entering the enclosed safety platform, lifting its protective barricade, and climbing on the tanker roof. (*Id.*)

Conway thereafter issued Citation No. 6512890 to CEMEX for a violation of 30 C.F.R. § 56.15005. (*Id.* at ¶ 7.) In the citation, “[s]he assessed the violation as reasonably likely to occur, as having a risk of causing fatal injury, and as serious [*sic*] and substantial.” (*Id.*) Conway determined that CEMEX’s negligence was low. (*Id.*)

#### **IV. PRINCIPLES OF LAW**

Commission Rule 67(b) sets forth the grounds for granting summary decision and provides as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b) (2010).

With regard to the issue of operator liability, the Commission and various courts have long recognized that the Act imposes strict liability on mine operators for violations of mandatory safety standards, regardless of fault, even for violations committed by contractors. *Dotson Trucking Co.*, 22 FMSHRC 441, 446 (Mar. 2000) (holding a mine operator liable for a

violation caused by an independent contractor); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) (noting that if the Secretary could not cite a mine operator for a contractor's violations "the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work"). Section 110(a)(1) of the Act provides that "the operator of a coal mine or other mine in which a violation occurs of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary." 30 U.S.C. § 820(a)(1). The statute's plain language indicates that "when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Ascaro v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989). Moreover, the Commission and courts have held that the Secretary has wide enforcement discretion and may proceed against an independent contractor, an operator, or both for a given violation. *Carmeuse Lime & Stone*, 29 FMSHRC 815, 820 (Sept. 2007); *Dotson*, 22 FMSHRC at 446.

## V. ANALYSIS AND CONCLUSIONS OF LAW

### A. Operator Liability

Commission case law on operator liability for a contractor's actions is clear and long-standing. As a mine operator, CEMEX may be held liable for all safety violations that occur at the mine, including those committed by the employees of its contractors. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1032 (Jun. 1997) (holding a mine operator liable for safety violations committed by a truck driver employed by an independent contractor); see *El Paso Quarry*, 1 FMSHRC at 2047 (holding a mine operator liable for safety violations committed by a customer while he picked up product from a mine). Whether CEMEX and the driver had a formal contractual relationship is immaterial; even customers who fail to comply with standards on mine property are "miners" within the meaning of the Act, and the operator will be held liable for their violations. *C.D. Livingston*, 7 FMSHRC 1485, 1487 (Sept. 1985) (citing *El Paso Quarry*, 1 FMSHRC 2046, 2047 (Dec. 1979)). Thus, CEMEX is liable for the actions of the Pyles Trucking driver while on the Kosmos mine property, regardless if Conway was wrong in her belief she could not cite the contractor. Conway could have cited CEMEX, Pyles Trucking, or both. *Carmeuse Lime & Stone*, 29 FMSHRC at 820. I determine that the Secretary properly cited CEMEX for the driver's conduct, despite the fact he is employed by an independent contractor.

Therefore, based on the above analysis I conclude that CEMEX was properly cited for a violation of 30 C.F.R. § 56.15005, even though the violation was committed by an employee of one of its contractors. Consequently, the Secretary is entitled to summary decision as a matter of law pursuant to 29 C.F.R. § 2700.67.

### B. Penalty

The Commission outlined its authority for assessing civil penalties in *Douglas R. Rushford Trucking*, stating that "the principles governing the Commission's authority to assess

civil penalties *de novo* for violations of the Mine Act are well established.” 22 FMSHRC 598, 600 (May 2000). While the Secretary’s system for points in Part 100 of 30 C.F.R. provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a Commission Judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

Here, the inspector viewed the driver standing atop the tanker in plain sight, and the driver stated that no one from CEMEX prevented him from accessing the tanker roof in this manner. However, it is clear the driver knew of CEMEX’s policy requiring him to use the enclosed safety platform – he simply chose to ignore it. Indeed, CEMEX provided drivers with enclosed safety platforms so they could safely access the tanker hatch and posted numerous signs notifying drivers they were required to use the platforms. Moreover, the driver is a contractor and not an employee subject to the discipline schemes of the operator. I note the operator does not contest the gravity, negligence, or S&S designations. Nevertheless, after reviewing all these facts when weighing the section 110(i) factors, especially as they relate to the operators level of negligence, I determine these mitigating factors should be reflected in the penalty. I therefore conclude that a penalty of \$500.00 for the violation is appropriate.

## **VII. ORDER**

In view of my conclusions above, it is **ORDERED** that Petitioner’s Motion for Summary Decision is **GRANTED**. Citation No. 6512890 is hereby **AFFIRMED**.

**WHEREFORE**, the Respondent is **ORDERED** to pay a penalty of \$500.00 within 40 days of this decision. Upon receipt of full payment, this case is **DISMISSED**.

Alan G. Paez  
Administrative Law Judge

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