

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 22, 2011

LAKEVIEW ROCK PRODUCTS, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	
v.	:	Docket No. WEST 2010-1856-RM
	:	Citation No. 6580393; 09/08/2010
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Lakeview Rock Products
Respondent	:	Mine ID 42-01975

DECISION

Appearances: Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor
Denver, Colorado, for the Secretary of Labor;
Kevin R. Watkins, Esq., Hughes General Contractors, Inc., North Salt Lake, Utah,
for Lakeview Rock Products, Inc.

Before: Judge Andrews

This Contest Proceeding is before me pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”).

The Procedural History

The parties in conference and by email made a joint request for summary decision, and have filed a Joint Statement of Undisputed Facts, Joint Exhibits of the Parties, Cross-Motions for Summary Decision, and Cross Oppositions to the motions. The case involves a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under Section 104 (a) of the Act alleging a violation of 30 C.F.R. §56.9300(b) by Lakeview Rock Products, Inc. (“Lakeview”).

The Citation

Section 8, Condition or Practice, reads as follows:

The six truck scales located on the mine property were not provided with berms or guard rails that were mid-axle height of the largest self-propelled mobile equipment that travels

the roadway. The mid-axle height of the trucks that run on these scales are [sic] approximately 24 inches. The rub rails that were provided on the scales were between 8 and 8.5 inches in height. Several sections of these rub rails in various areas on different scales had broken welds and pipe. These scales are used by approximately 5 to 100 plus trucks per day. The broke [sic] sections of the rub rails as well as the height of the scales AGL creates a rollover hazard should contact occur. The two scales at the upper pit were approximately 54 inches AGL. The two scales at the lower pit were approximately 36 inches AGL. The two scales at the Thomas pit were approximately 32 inches AGL.

Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway. Joint Exhibit No. 1.

Lakeview timely contested the citation.

The Issue Presented

Whether Citation No. 6580393 issued to Lakeview on September 8, 2010 is valid.

The Stipulations

The Joint Statement of Undisputed Material Facts is as follows:

The Secretary of Labor (the “Secretary”) and Lakeview Rock Products, Inc. (“Lakeview”) through their counsel, stipulate to the following undisputed material facts to be submitted with their respective Motion for Summary Decision to be filed in this matter:

1. At all times relevant to this proceeding, Lakeview was an “operator” as defined by section 3(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”).
2. At all times relevant to this proceeding, Lakeview operated a sand and gravel quarry at 2600 North Beck Street, Salt Lake City, Utah 84054 (“the mine”). The quarry is a “mine” as defined by Section 3(h)(1) of the Act, and its mining services affect interstate commerce. Lakeview is Assigned Mine Id. No. 42-01975.
3. Lakeview is subject to the jurisdiction of the Mine Act, and the Administrative Law Judge has jurisdiction in this matter.
4. On September 8, 2010, MSHA Inspector Mike Tromble (“Inspector”) issued to Lakeview a Citation, numbered 6580393 (“Citation”) for allegedly violating 30 CFR 56.9300(b). 30 CFR §56.9300(b) reads, in part:
 - (a) Berms or guardrails 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.

(b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway. A copy of the Citation is attached as “Joint Exhibit 1.”

5. The Citation was properly served by a duly authorized representative of the Secretary upon an agent of Lakeview on the date and at the place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.
6. The Inspector alleged in the Citation that three pair of scales that are located at the mine did not comply with § 56.9300(b). (Joint Exhibit 1.)
7. Lakeview’s mine includes three pits from which sand and gravel is mined. Both customers and Lakeview employees drive their trucks onto the mine property and sand and gravel products are loaded by Lakeview loaders into either the beds of the trucks or trailers being pulled by tractor trucks. The trucks then drive with their loaded sand and gravel products to one of the six scales, and drive the trucks on the scales to be weighed. At the entrance of the scales at the lower and upper pits (as described in paragraph 8 below) there are signs measuring eighteen inches wide by twenty-four inches high that read “Stop Before Entering Scale, Then Idle On.”
8. There are a total of six scales at Lakeview’s pits; two at what is referred to as the “Thomas Pit,” two at what is referred to as the “Lower Pit,” and two at what is referred to as the “Upper Pit.” All of the scales are elevated in order for Lakeview employees to perform annual maintenance and calibration work on each of the scales.
9. One of the two scales at the Thomas Pit is elevated to a height of thirty one and a half inches above ground level and the other scale at the Thomas Pit is thirty-eight inches above ground level; both scales are steel plates with the north scale measuring eleven feet four inches wide and one hundred twenty feet long, and the south scale is ten feet six inches wide and one hundred five feet six inches long. Both scales have eight inch high steel “rub rails” running the length of the scale (See photographs attached as “Joint Exhibits 2-9.”)
10. At the Lower Pit one of the scales is thirty-five inches above the ground, and the other scale is thirty-eight inches off the ground. Both scales are also steel plates, with the north scale measuring eleven feet wide by one hundred ten feet long, and the south scale measuring eleven feet wide and one hundred five feet six inches long. Both have eight inch high steel “rub rails” running the length of the scales. (See photographs attached as “Joint Exhibits 10-18.”)
11. At the Upper Pit the west scale is fifty-four inches above the ground, and the east scale is fifty-four inches on one side of the scale and is at ground level at the other side of the scale. The east scale measures ten feet wide by seventy feet six inches

long, and the west scale measures ten feet by one hundred four feet long. The Upper Pit scales also both have eight inch high steel “rub rails” running the length of the scales. (See photographs attached as “joint Exhibits 17-25.”)

12. The trucks that use the scales include ten-wheeled dump trucks, ten-wheeled dump trucks with a “pup” trailer, single or double belly dump trucks, and tractors with end or side dump trailers. Their wheelbases range from twenty-two feet eight inches to sixty-one feet two inches. The mid-axle height of these trucks range from twenty inches to twenty-four inches. Their loaded weights vary from 19,000 pounds empty, to 80,000 pounds loaded. Between fifteen and one hundred trucks use the scales daily.
13. At the Upper Pit the trucks, after they are loaded, travel less than ¼ mile from a loading area and descend down a roadway, and then to the west down a ramp to the scales. (Joint Exhibits 23 and 24). After driving on the scales trucks then travel out of the mine area.
14. At both the Thomas and Lower Pits trucks are loaded with material at a loading area where other stockpiles are located. Trucks then travel across the loading area to a point that exits the pits where the scales are located; all the vehicles must travel across the scales to exit the loading area. The trucks drive on the scales, are weighed, and then exit the scales to turn on a public roadway.
15. At least one accident has occurred when a truck traveling from the loading area of the upper pit slid down the ramp and struck the scale house that sits adjacent to the east scale at the upper pit (see photographs attached as “Joint Exhibits 23 and 24”). This accident occurred on a day when the Lakeview mine had posted a sign at the entrance of the pit that the pit was closed. Lakeview posted this sign because there was approximately four to six inches of snow on the ground; this amount of snow was present at the time of the accident.
16. Were the Citation terminated, MSHA’s Office of Assessments would propose a civil penalty of one hundred ninety-six dollars (\$196.00) for the alleged violation. Lakeview reserves its right to contest the fact of violation and the negligence attributed to it therein. However, Lakeview stipulates that the proposed penalty would be appropriate if the violation were found to have occurred. Lakeview further agrees that payment of the proposed penalty would not impair its ability to remain in business.

The Contentions

Contestant Lakeview argues that there is no evidence the rub rails at Lakeview’s scales would not prevent trucks traveling slowly over the scales from dropping off the scales; that the evidence submitted by Respondent MSHA does not prove that a truck could drive off of their scales, overturn or drop onto its axle, and endanger the person in the truck; that there is no

scientific or expert analyses of variations in truck speeds or expert biomechanical analyses showing the potential effects on occupants of trucks dropping onto axles or driving off of scales similar to Lakeview's; that the rub rails at Lakeview's scales are of sufficient height and strength that even a fully loaded truck would merely push against the rail and slide along the rail rather than climb up and over the rail and drive off the scale; that there is no evidence of any kind about actual accidents or injuries resulting from trucks driving off scales like those at Lakeview; and that the rub rails at Lakeview's scales do not create a rollover hazard.

Respondent Secretary argues that each scale at Lakeview has a drop-off of sufficient grade or depth to cause a vehicle to overturn and endanger persons in equipment; that the Lakeview scales are not equipped with guardrails of at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway; that the rub rails at Lakeview's scales are eight inches high, only one-third of the twenty-four inches required by the regulation; that the Secretary has provided a detailed engineering analysis, the opinion of the Inspector, and citations to Commission case law showing that each of the Lakeview scales has a drop-off as would cause a vehicle to overturn and the standard at 30 C.F.R. §56.9300(a) is applicable; and that the Program Policy Letter No. P10-IV-1 clarifies that elevated truck scales require guardrails and also provides design parameters.

The Standard of Review

Summary decisions may be granted only where 1) the entire record, including pleadings affidavits, and answers to interrogatories, establishes that there is no genuine issue as to any material fact; and 2) the moving party is entitled to summary decision as a matter of law. Commission Rule 67, 29 C.F.R. § 2700.67(b); *UMWA, Local 2368 v. Jim Walter Resources, Inc.*, 24 FMSHRC 797, 799 (2002). See also *Energy West Mining Co.*, 17 FMSHRC 1313, 1316 (1995), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (interpreting Fed. R. Civ. P. 56). In this contest case, the burden of proof rests with the Secretary. *Asarco Mining Company*, 15 FMSHRC 1303, 1306-1307 (Jul. 1993).

The Questions for Consideration

-Whether a scale roadway presents the same circumstances of use, conditions and dangers as the haulage roadways on Lakeview's mine property.

-Whether a truck, traversing Lakeview's scales at idle speed and required to stop twice for entry and for weighing, would climb up and over or through the eight inch high rub rail and drive off of the platform.

-Whether Lakeview's scales constitute a drop-off and/or overturn hazard to vehicles crossing the scale roadway to be weighed.

The Evidence Submitted

The Declaration of Mike H. Tromble, the inspector, is of record as Exhibit 1 of the Secretary's Motion for Summary Decision. Mr. Tromble has been a MSHA Inspector since 2008, with prior experience at mines as a mechanic and lead blaster. While inspecting Lakeview in March 2010, he observed trucks being driven onto the elevated scales for weighing. He measured the height of the six scales as ranging from thirty-one to fifty-four inches above the ground. He opined that if a wheel of a truck went off the edge, the vehicle would either overturn and crash onto the ground or an axle would crash onto the edge of the scale, seriously jarring and risking injury to the occupant(s). He measured the rub rails at the scales as eight to eight and a half inches high. He gave the mine operator a copy of a MSHA slide presentation on truck scales. When he returned to Lakeview on September 8, 2010, none of the rub rails had been raised, and he issued Citation No. 6580393. He took the twenty-four photographs introduced as evidence. Joint Exhibits 2-25. Tromble concluded, in effect, that MSHA policy had not been complied with and therefore the mandatory safety standard at 30 C.F.R. §56.9300(b) had been violated.

The slide presentation contains the information that since 2005, MSHA has issued citations for inadequate berms or guardrails on truck scales. It was noted that MSHA personnel have been told of numerous near misses of truck or equipment runovers at scales. The remainder of the statistics and information presented concerned powered haulage and not scales. The photographs of various scales in this presentation did not show any drive-over or roll-over incident at any scales. Only one of the photographs showed a scale similar to those at Lakeview. In the summary of the presentation, it was noted that berms and guardrails are meant to moderate or limit travel and provide the driver a warning. Exhibit No. 2, Secretary's Motion for Summary Decision.

Exhibit No. 3 of the Secretary's Motion is the Declaration of Terence M. Taylor. Mr. Taylor is a Senior Civil Engineer employed by MSHA since 1987. He holds Bachelors and Masters Degrees in civil engineering, and is a Registered Professional Engineer. He assisted in the preparation of the Program Policy Letter No. P10-IV-1 ("PPL"). Based on his measurement assumptions, a truck with a twenty-four inch axle height and a vertical center of gravity of eight feet would overturn if it drove over the edge of the two Upper Pit scales. At the four scales of the Thomas Pit and the Lower Pit, the truck would not overturn. For all six scales, if the front tire drove over the edge, the axle would likely impact the deck of the scale. Hand written calculations and information relating to haulage roadway roll over and truck structures are a part of this exhibit. Although he had prepared over five hundred sixty engineering reports that included field investigations, accident investigations and design reviews, the Declaration did not contain any report based on either his experience or his research of a vehicle being driven over or through a rub rail eight inches in height.

Submitted as Exhibit 4 of the Secretary's Motion for Summary Decision is the PPL regarding elevated truck scales at mines that became effective on August 26, 2010. The purpose of the PPL was to clarify that truck scales are considered elevated roadways and require guardrails under 30 C.F.R. §56.9300. It was also issued to provide guidance on the design

parameters for the guardrails,¹ which would depend on the elevation level of the scales and the size of the trucks or equipment traversing the scales. It was noted that most truck scales are provided with a rub rail intended to guide the vehicle and provide a visible, audible, or tactile indication to the driver identifying the edge of the scale roadway.

Submitted as Exhibit A of Lakeview's memorandum in Support of the Motion for Summary Decision is the Affidavit of Scott G. Hughes with a CD disk containing two short video clips. Mr. Hughes is the Vice President of Lakeview, who has installed, calibrated, repaired and maintained all of the scales and equipment supporting the scales at the mine. In the thirty-five years he has watched thousands of trucks cross the scales, there has never been an accident involving a haul truck overturning by driving off or falling off the scales. All trucks come to a complete stop before driving onto the scales, then slowly roll, coast, or idle onto the scales to be weighed. There are rub rails attached to the side of the scales that prevent trucks from driving off the scales. In a test he attempted to drive a truck, loaded and unloaded, against the rub rail to determine whether the truck could be driven up onto the top of the rub rail. He was unable to make the truck drive up onto the rub rail or off the scales. His attempt was documented by a co-worked with a handheld video. Mr. Hughes also opined that even if a truck could be driven off the scales, it would come to rest on its axle and not overturn.

The CD at Attachment A contains the two short videos referred to by Mr. Hughes. In one video, as the truck rolls at what appears to be idle speed from the haulage roadway forward onto the entry platform the driver steers the front wheel into the rub rail. The wheel is kept turned into the rail, and the wheel slides or rubs along the rail but there is no indication that it starts to climb up onto the rub rail. The second video clip is similar, but the truck starts with the wheel further away from the rub rail, yet again after turning into the rail the wheel rubs along the rail but does not climb up the rail.

The Joint Exhibits of the parties consist of Citation No. 6580393 issued to Lakeview on 9/8/2010 and twenty-four photographs of the six scales. Since the scale measurements have been specifically set forth in the stipulations and do not need to be repeated here, the undersigned would only observe that each of the scales does have rub rails at edges with drop-offs.

The Discussion

At Lakeview there are six scales, two at each of three pits. The scales are elevated from approximately two feet eight inches to four feet six inches above ground in order that employees can perform annual maintenance and calibration work. The Joint Exhibit photographs show the steel construction, the entry/exit platforms, and a separate but adjoining middle platform used for weighing. The length of Lakeview's scales varies from seventy feet six inches to one hundred twenty feet, and all have eight inch high steel rub rails installed the entire length. At the entrance of the scales there are eighteen inch by twenty-four inch signs that read "Stop Before

¹ Other structures listed are "curb", and "rub rail".

Entering Scale, Then Idle On”. The trucks that usually use the scales have mid-axle heights from twenty inches to twenty-four inches.

When observing the scales in March 2010 Inspector Tromble gave the mine operator a copy of the MSHA slide presentation on truck scales. Exhibit 2, Secretary’s Motion for Summary Decision. This presentation is entitled to little, if any, probative value in the instant determination. This is because the photographs of the scales, with one exception, bear scant resemblance to those at Lakeview. The information and statistics listed regarding fatalities and tip-overs concerned **powered haulage** and not **truck scale** usage. Very revealing was the admission that MSHA personnel has been told of “numerous near misses” at scales, essentially establishing that no accident, injuries or fatalities had occurred due to drive-overs at truck scales. The presentation did not consider the effect of eight inch rub rails, except to label them as inadequate, and this in the face of the summary information that guard rails are meant to limit travel and provide the driver a warning. As shown by the videos, the eight inch rub rails do indeed serve these purposes.

It is useful to take notice of the common conditions of use of truck scales such as those at Lakeview. When approaching the scales from the haulage roadway the truck must come to a complete stop at the entry platform. The truck then “idles” onto the platform, stopping completely again when positioned on the weighing section. After being weighed, and upon idling forward onto the exit platform, the truck may be required to stop again before re-entering the haulage roadway. In using the scales, the truck has traveled only about thirty to forty yards at very low speed and stopped two to three times. This means that the truck has only moved about ten to fourteen yards between complete stops. In stark contrast is a truck’s typical use of haulage roadways.

Commission judges have considered the question of whether scales are a part of a mine’s roadways. Administrative Law Judge (“ALJ”) Maurer found that where scales were elevated three and a half feet above ground level with **no guardrail provided**, §56.9300 was violated. *Walker Stone Company, Inc.*, 16 FMSHRC 1955, 1960 (1994) (*emphasis added*). In *Highway 195 Crushed Stone, Inc.*, Judge Melick found that an elevated roadway going to and exiting from a set of scales with **no berm or other guarding** was a violation even though the cited standard, 30 C.F.R. §56.9300, suffered from ambiguity and vagueness. 21 FMSHRC 800, 803-804 (Jul. 1999) (*emphasis added*). In a later case again involving scales with an **unguarded** edge Judge Weisberger relied on the dictionary definition of the term “roadway” to find that a scale was considered to be a part of that mine’s roadway. *APAC-Mississippi, Inc.*, 26 FMSHRC 811, 812-815 (Oct. 2004) (*emphasis added*). Judge Manning vacated a similar citation involving elevated scales with **no berms or guardrails** on the basis that the mine did not have adequate notice that guardrails were required. *Carder, Inc.*, 27 FMSHRC 839, 858 (Nov. 2005) (*emphasis added*). Judge Manning pointed out that a reasonably prudent person familiar with the mining industry would not have recognized that the scale was covered by §56.9300 because, in part, the truck drivers drive over the scale at a very low rate of speed. *Id.* Notwithstanding the notice issue and the circumstances of use, Judge Manning found that the scale did fit within the scope of the safety standard. *Id.*

All of the above ALJ decisions are distinguishable from the instant case. Each of the decisions involved elevated platforms and scales with *no* berms, guardrails or guarding of *any* kind. With these types of scales it would appear that a truck driver with no visual, tactile, or audible warning could drift close to and possibly over the edge of the metal deck even at idle speeds. The fact that Lakeview's scales have rub rails at the edges with drop-offs sets the instant case apart from the decisions cited above.

While accepting the guidance of the prior ALJ decisions that scales are a part of a mine's roadways, in the opinion of the undersigned a distinction must be drawn between the use of haulage roadways as opposed to the use of scale roadways. Already noted is the marked difference in the speed of the truck. The surface conditions are quite different; the scales are made of metal and level, whereas haulage roadways might be dirt, gravel, or both, with inclines and slopes contributing to the dangers of travel. Established hazards are also markedly different, since haulage roadways have an unfortunate history of accidents, injuries and fatalities, yet on the record before me there is no evidence of such incidents at scale roadways. I find the statement of Hughes that there has never been an accident involving a truck using the scales at Lakeview to be credible.

A recent case did involve elevated truck scales with nine inch high manufacturer-installed rub rails along the length of the edges of the scales at the Coffee Lake Road mine of the Knife River Corporation. *Knife River Corporation v. Secretary of Labor*, 2010 WL 2995087 (July 2010). Judge Rae found the Secretary had failed to meet the burden of proof that the scales were of a depth and/or grade as would trigger application of the standard and dismissed the citation. The reasoning was that no expert's statement, case law, or any other authoritative guidance was provided as to how or why a twenty-six to thirty-six inch elevation would pose a danger of a vehicle overturning or endangering persons in equipment.

Soon after Judge Rae's decision, MSHA released the PPL apparently to address the lack of authoritative guidance. The citation in the instant case was issued soon after the release of the PPL.

Despite the assumptions and calculations of Taylor, and those contained in the PPL, just as in *Knife River*, there is still a lack of probative evidence to establish that truck scales such as those at Lakeview pose a danger of a vehicle overturning or endangering persons in equipment. This is because the Secretary has failed to establish how and/or under what circumstances a truck's front tire would be able to drive up onto and over or through the eight inch high rub rail installed on the scales. Neither the engineering analysis nor the PPL contains information regarding the speed, force, amount of power/throttle, angle of steering, or other physical factor leading up to the driving over or breach of these rub rails. It would be obvious even to a lay person that once a front wheel is almost or completely over the edge of a scale platform the vehicle would fall down onto its axle. The conclusion of the engineering study that a vehicle might overturn depending on the depth of drop-off may be correct, and this does stand uncontroverted by any expert opinion submitted by Lakeview. But the conclusion begs the question of how the front tire could climb over or breach the rub rail *before* any drop-down or tip-over could even occur. The undersigned finds the engineering analysis remarkable mainly

for what is *not* shown. The report assumes a drive-over would occur, but does not establish how this would happen. One might speculate that with the wheels forcefully turned and kept angled into a rub rail, and with sufficient throttle, a truck could intentionally be powered up onto and over the rail. However, the record is devoid of evidence as to how such an incident could actually occur or facts of such an event occurring in the past.

On the other hand, the respondent has provided demonstrative evidence that the undersigned considers to have great probative value. The CD at Attachment A contains two short, yet persuasive, videos. In one video, as the truck rolls at what appears to be an idle speed from the haulage roadway forward onto the entry platform the driver steers the front wheel into the rub rail. Although the wheel is kept turned into the rail, the wheel slides or rubs along the rail but there is no indication that it starts to climb up onto or break through the rub rail. The second video clip is similar, but the truck starts with the wheel further away from the rub rail, yet again after turning into the rail the wheel rubs along the rail but does not climb up the rail.

Close and repeated observation of these videos reveals that they do accurately reflect the circumstances under which a truck would traverse the scales. Trucks would be traveling at minimal speeds due to the fact that the scale platforms are too short for any substantial momentum to be accumulated and the fact that the trucks come to a complete stop at least two times. These low speeds are imposed on the trucks by Lakeview. The posted signs require the trucks to stop and idle onto the scales.

It is clear, then, that the eight inch high rub rails do limit the travel of a truck and are sufficient to provide the driver with tactile, visual and/or audible warnings that the side of the scale platform has been reached. The driver would be able to take corrective action to position the truck.

I agree with Lakeview's contentions to the effect that the scales do not present a drop-down or tip-over hazard to trucks, equipment or personnel. The Secretary has not carried the burden of proof and has failed to establish by a preponderance of evidence that Lakeview's scales present a drive-over hazard and constitute a violation of a mandatory safety standard.

ORDER

The Secretary's Motion for Summary Decision is **DENIED**. Lakeview's Motion for Summary Decision is **GRANTED**. Citation No. 6580393 issued on September 8, 2010 is not valid and is hereby **VACATED**.



Kenneth R. Andrews
Administrative Law Judge

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