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SOL (MSHA) V. DWIGHT IRBY CONSTRUCTION
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. DENV 79-68-PM
A.C. No. 35-00432-05001

v.

St. Helens Quarry

DWIGHT IRBY CONSTRUCTION CO.,
RESPONDENT

DECISION

Appearances: Marshall Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
Dwight Irby, pro se, St. Helens, Oregon

Before: Judge Charles C. Moore, Jr.

By a complaint filed on November 20, 1978, Respondent was charged with four violations of the Act and regulations. The complaint was based on Citation No. 345421, charging that a jaw crusher fly wheel was not properly guarded, Citation No. 345422, charging that the small elevated deck of the jaw crusher fly wheel was not provided with a railing, Citation No. 345423, charging that compressed oxygen was stored with oil and grease, and Citation No. 345424, charging that the ramp leading to the feed hopper was not provided with berms.

The mine in question is a relatively small mine working only slightly more than 1,400 manhours per year. Respondent's Exhibit Nos. 1-6 are photographs of the mine depicting various aspects and showing just about the entire mine. Solid basalt is mined by shooting explosives, and then crushing and grading the debris into various sizes of gravel and stone. The normal method of shooting at this mine was by drilling what are termed "coyote holes" and implanting the explosives therein. A coyote hole is made by drilling a hole big enough for a man to enter at right angles to the face of the basalt for a certain distance, then drilling two other holes at right angles to the first hole for implanting the explosives. The top view of the coyote hole would be in the shape of a "T," but the dimensions of the various arms are not brought out in the testimony. Respondent did try other methods of blasting, but testified that coyote holes were much cheaper.*/

While coyote holes are not prohibited by the Act and regulations, a number of miners consider them as a hazardous method of operation and the evidence indicates that Inspector Tallmadge, who issued all of the citations involved in this case, attempted to discourage Respondent from using coyote holes. Respondent is of the opinion that he was harassed by the inspector because of his use of the coyote holes. It was his statement that if an inspector gets down on you, he can always find something to cite you for, and while I am inclined to agree with the latter statement as a general proposition, if the inspector in this case had been carrying out a personal vendetta against Respondent, I am sure he would have found more than four violations.

The first two citations mentioned above, involve the area of the jaw crusher. The jaw crusher is basically two pieces of large flat steel which come together periodically as the blasted basalt is fed in from a hopper. The engine which powers the jaw crusher in this mine is mounted on metal frame work which is about 2 feet above ground level. The engine contains a fly wheel and the outer part, that is the part away from the engine, was guarded, but there was no guard, according to the inspector's testimony, on the inner side of the fly wheel. It was his opinion that because of a V-belt driving the fly wheel a pinch point existed. I can accept the inspector's testimony regarding the pinch point, a point where a serious injury could occur if a miner were to be caught either by his hand or a piece of his clothing, but I cannot accept his opinion that the pinch point in this case was sufficiently accessible to constitute a violation of the standard. It was surrounded by 2-foot high framework. In order to get caught in this pinch point, a miner would have to climb through the framework. This would be a more difficult task than merely removing the guard, which Respondent placed on the inner side of the fly wheel in order to abate the citation. The framework itself was a guard and while the guard could be evaded, it could not be evaded so easily as the simple fly wheel guard which the inspector required. I find there was no violation of the standard.

I also find that the top of the framework was not a platform requiring a guard rail as charged in Citation No. 345422. Respondent's employee Mr. Cecil had thrown some screening over the framework and stored some material there just to get it out of the way. Inspector Tallmadge considered the framework with some material on top of it, perhaps some boards which he remembered, as a walkway. The "platform," however, was 2 feet high and had no steps leading to it. It would certainly have been difficult to step onto a platform 2 feet high and in my opinion, it was not a work platform. There would have been no purpose in having a work platform in the area since a platform of that height would have made working on the equipment more difficult rather than easier. I find there was no platform and that the guard rail required by the inspector was not necessary.

Citation No. 345423 charges that compressed oxygen and acetylene cylinders were stored with oil and grease. The inspector issued the citation because he saw the oxygen and acetylene tanks in the back of a shed and saw oil and grease cans in the same shed. There was also a large grease gun which may or may not have contained grease at the time the inspector saw it, and it may have been sitting just inside the door or just outside the door of the shed. Testimony brought out by Respondent himself established that the grease gun was kept outside of the shed during working hours but was placed inside for overnight storage. Since the grease gun contained grease, oxygen and grease were stored together, but the inspector did not issue his citation on the basis of the grease gun. He issued it because of the cans he saw in the shed labeled "Grease." Respondent's witnesses, however, clearly established that the grease cans were used to store nuts and bolts and other odds and ends and that they did not, in fact, contain any grease. I will not rule on the question of whether overnight storage of the grease gun itself in the same shed with the oxygen is a violation, but I do rule in Respondent's favor insofar as the specific charges in this case are concerned. I find the various cans labeled "Grease" did not contain grease and that therefore, the citation was improperly issued.

Citation No. 345424 charges that the ramp leading to the feed hopper was not provided with a berm or other protective barrier. In *Cleveland Cliffs Iron Company v. MSHA*, Docket No. VINC 78-300-M, issued on September 8, 1978, I stated at page 3: "Inasmuch as it is the elevation which creates the hazard that berms are designed to alleviate, the intent of the regulation must be to require those berms wherever there is a hazard created by the elevation."

In the case quoted above, the road was elevated approximately 40 feet above the surrounding terrain and the banks were at an angle of approximately 60 degrees from the horizontal. In my opinion, that elevated roadway presented a clear hazard. In the instant case, the roadway is 12 feet long, 9 or 10 feet wide and the elevation varies from 0 at the beginning up to 4 feet at the hopper. The articulated front-end loader that operates on this ramp is itself 10 feet long. If therefore, the front-end loader is as close to the hopper as it can get, the back wheels would only be 2 feet onto the ramp and almost on level ground. In my opinion, this is not a type of elevated roadway which is sufficiently hazardous to require berms. In fact, the berms which were built in order to abate the citation may have created a hazardous condition themselves.

