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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

v.

MASSEY SAND AND ROCK COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. DENV 78-575-PM
A.O. No. 04-02065-05001

Garnett Pit & Mill

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Office of the Regional Solicitor, U.S. Department of Labor San Francisco, California, for the petitioner
Jack L. Corkill, Indio, California, for the respondent

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on September 25, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for 10 alleged violations of the provisions of mandatory safety standard 30 CFR 56.14-1, set forth in 10 citations issued by a Federal mine inspector on March 28 and 29, 1978. Respondent filed an answer and notice of contest on October 23, 1978, denying the allegations and requesting a hearing. A hearing was held in Indio, California, on March 12, 1979, and the parties waived the filing of written posthearing proposed findings, conclusions, and briefs, but presented oral argument on the record.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations, as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged

violations, based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Interim Commission Rules, 29 CFR 2700.1 et seq.

Discussion

The petition for assessment of civil penalties filed in this proceeding charges the respondent with 10 violations of mandatory safety standard 30 CFR 56.14-1, and the violations were noted in the following citations issued by MSHA inspector Hilario S. Palacios during site inspections which he conducted on March 28 and 29, 1978:

March 28, 1978

376001. The pinch point on the rollers underneath the skirt boards of the main feed chute of the No. 5 conveyor belt at the pit were not guarded on the south side.

376002. The pinch points on the rollers underneath the skirting of the feed chute of the No. 5 conveyor to the No. 4 conveyor belt at the pit were not guarded on both sides.

376003. The pinch points on the rollers underneath the skirting of the No. 3 belt by the head pulley of the No. 4 belt at the pit were not guarded on both sides.

March 29, 1978

376005. The pinch points on the rollers underneath the skirting of the feed chute of the No. 1 belt at the pit were not guarded on the north side.

376006. The pinch points on the rollers underneath the skirting of the feed chute of the fine sand belt at the mill were not guarded.

376067. The pinch points on the rollers underneath the skirt boards of the feed chute of the wet sand belt at the mill were not guarded.

376010. The pinch points on the rollers underneath the skirt boards of the feed chute of the lower belt at the mill were not guarded.

376012. The pinch points on the rollers underneath the skirt boards of the feed chute of the left to the crusher at the mill were not guarded on the north side.

376013. The pinch points on the roller underneath the skirt boards of the feed chute of the second sand belt at the mill were not guarded.

376014. The pinch points on the rollers underneath the skirt boards of the feed chute of the first dry sand belt at the mill were not guarded.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Hilario S. Palacios, confirmed that he inspected the mine facility in question on March 28 and 29, 1978, and examined the 10 belts in question to ascertain whether they were properly guarded. He identified Exhibit P-1 as a diagram of a belt which is representative of the belts he inspected. All of the belts were equipped with skirt boards as depicted in the diagram and they were not guarded at the pinch points, that is, the point on the belt where the belt and skirt board come together. He indicated that these pinch points have a "wringer" effect, and if someone were to be caught in these pinch points, he could not get out. He believed that the stop cords were inadequate and not sufficient for compliance because once a man is caught in the pinch point beneath the skirt boards, damage would have occurred. He also believed that four men were exposed to a hazard of getting caught in the moving belt parts because they are usually working around tail pulleys greasing or shoveling or walking along the walkway, and in one instance, one man was walking along taking care of a couple of feeder belts (Tr. 7-14).

Inspector Palacios testified that when he called the violations to the attention of the respondent's representatives, they ceased operating the belts and began installing screen guards over the pinch points. He believed the respondent knew of the conditions cited because stop cords were installed from one end of the belt to the other, and one could tell by observation that the pinch points were

not guarded. The belt tail pulleys and takeup pulleys were guarded, and the ones where no one could get at were guarded by location. He believed that the safety standard which he cited applied to the belt skirt board locations and he cited page 2 of a MESA memorandum dated December 19, 1975 (Exh. P-2), which states that section 57.14-1 may be cited for failure to provide guards at skirt board locations on a belt, and he believes that the industry recognizes the need for guarding these areas. He also identified Exhibits P-3 and P-4 as pictures of similar belts to the ones he cited which show skirt boards and guards, and he believes this supports his view that the industry recognizes the need to guard those locations (Tr. 14-21).

On cross-examination, Inspector Palacios conceded that the manufacturer of the equipment depicted in Exhibits P-3 and P-4 may not be the only manufacturer of such equipment, but it is the only guarded equipment that he has seen. Theoretically, every roller and belt traveling in the same direction constitutes a pinch point, and while all moving parts on a belt are similar, all pinch points are not. He confirmed that the belts were immediately stopped when the violations were called to the attention of company management. He would not consider the MESA memorandum previously referred to as an "advisory circular" to district offices (Tr. 21-25).

On redirect, Inspector Palacios testified that he considered the MESA memorandum to be mandatory on him. In all 10 citations, his concern was with the pinch points beneath the belt skirting, and he believed that someone walking adjacent to the belt or working around it could get his hand or clothing caught in those pinch points. The height and elevation location of the belts varied, and he indicated that if a man can reach 7 feet, he can stick his hand into a pinch point. Some of the belts in question were waist-high, others were higher, and others had work platforms around them where a man could perform work around the pulleys. Mr. Palacios did not believe that someone getting his hand caught between a roller and belt would be seriously injured because, unlike the skirt board "wringer" pinch points, there is no pressure exerted which would create a pinch point (Tr. 25-29).

Mr. Palacios could not state whether any one of the belts cited by him were more frequently worked upon than others, although he did indicate that he observed one man working on three belts, and that the usual work entails greasing and cleaning. He did not know whether greasing was performed while the belt was running because he had never observed that type of work being performed. He believed the danger present on all 10 belts cited was the same, and walking near the belts or shoveling under the tail pulleys would expose men to the pinch points. Men would likely spend more time at the feeder belts, such as the one involved in Citation No. 376001, than at the other belts. The person assigned to that belt normally works for 4 hours performing maintenance to insure the belt runs properly or he is cleaning material off the belt. The belts in question are used

to move materials and men do not ride them. He did not know how many men would be at any of the locations cited by him at any given time (Tr. 30-36).

Inspector Palacios stated that abatement was achieved by the installation of screens over the pinch points. With respect to the skirting which was installed on all of the belts, he indicated it varies in size depending on the materials moved along the belt. Regarding the skirting depicted on his sketch, Exhibit P-1, he indicated that if someone fell against the skirting, it would be pretty difficult for him to put his hand into the pinch point and he would have to do it intentionally. He has seen someone do precisely that (Tr. 36-39).

On recross, Mr. Palacios indicated that he observed no one shoveling around the belts on the days the citations issued, and that some of the belts are elevated with an open area underneath where materials can fall to the ground and are cleaned up there. Of the four people he observed around the belts, one was "stationed down below taking care of the three belts," but he could not recall any mucking or maintenance being performed at the time. The "moving machine" parts that he was concerned with in this case are the belt rollers (Tr. 40-43). He indicated that respondent has no prior history of violations (Tr. 47).

Respondent's Testimony

Milton H. Mathers, respondent's production foreman at the Garnett Plant, testified that the plant is inspected at least once a year by MSHA and OSHA, but the skirt guarding question has never previously come up in these inspections. He described the belt system and the components, and stated that the components, such as head, drive, and snub pulleys, have been guarded. Since the time guarding was required on the skirt boards, the emergency stop cords had to be moved and attached to the guard just before the skirting. The belt components are greased when the belt is shut down, and greasing is performed by means of grease line fittings located just outside the belt frames. One can stand away from the belt, at a distance of 6 inches or a foot, attach a grease gun to the grease line and grease the components, and the grease line usually comes out of the guarding. One or two men work on the belt system. One is an operator who observes the conveying system while it is running and he is watching for breakdowns, belt tears, etc. The second man is a laborer who cleans out from under the belt, and shoveling is conducted while the belt is running and also when it is stopped. Shoveling is only done along the middle part of the belt between the head and tail pulley, and only along the ground level of the belt and not at the elevated portion. Any shoveling at the tail pulley is away from the guarded areas, and that location is guarded. The roller area between the skirting and head pulley is not required to be guarded. A stop line runs along the length of

the belt and no one ever mentioned the fact that the skirting area needed to be guarded. He described the skirting used on the belts in question, indicated that they were not like the pictures depicted in Exhibits P-3 and P-4, but ran approximately 2 or 3 inches inside the belt, sloping away, and the outside edge of the belt has no weight on it (Tr. 55-62).

On cross-examination, Mr. Mathers testified that while the areas in question are now guarded, prior to that time it was possible in some instances for someone to come in contact with the rollers while greasing, and that at the time of the citations, three employees were assigned to the belt system. Also, in some places it was possible to shovel in the area where the stop cord was located, that is, just past the tail pulley (Tr. 62-63).

On redirect, he stated that before the guards were installed, the stop cord was a little lower than the belt and a person would have to go under the cord or fall through it to get caught in the rollers. Such a person would have to deliberately stick his arm in or not watch what he was doing in order to get caught in the roller (Tr. 63). However, loose clothing could get caught in the roller, but one would have to be close to the equipment for this to happen. The belt travels at a constant speed, roughly 300 rpms (Tr. 64).

James W. Harris, Engineering Representative, Aetna Life and Casualty Company, testified he is familiar with section 56.14-1 of the mandatory safety standards in question. He stated that there are other standards recognized by the conveying industry, namely, the American National Standards Institute or ANSI standards. He cited ANSI Standard 6.01.1.1, which covers belt conveyors which are fixed in place, and indicated that the standards mention guarding troughing and skirting area rollers, as well as life lines. He does not consider troughing and idler or return rollers to be part of the drive train components of the conveyor system. He identified a MESA publication concerning surface mining fatalities indicating that head, tail and takeup pulleys should be guarded, unguarded conveyors should be equipped with emergency stop devices or cords along their full length, and that pulleys or conveyors should not be cleaned manually while the conveyor is in motion. He also identified an MSHA "fatalgram" dated December 15, 1979, reporting an accident involving someone whose arm was caught between a moving conveyor belt and troughing roller, and MSHA's recommendation in that case was that "Persons under the influence of alcohol shall not be permitted on the job 55.20-1," but there is no recommendation as to guardings (Tr. 65-72).

Discussion

Fact of Violation

Petitioner's Arguments

Petitioner's counsel candidly admitted that all of the citations which were issued by the inspector in this case were issued because of the failure of the respondent to install guards at the belt skirt board pinch point locations cited by the inspector. Counsel also indicated that while the inspector cited 10 separate violations, he could just as well have cited one violation as a "practice," but designating 10 separate locations where they occurred. He conceded that the citations were rapidly abated by the respondent, and that the inspector was most impressed with the company's cooperation and concern for safety. As for the gravity presented by the violations, he indicated that the initial assessments made by the Assessment Office in the amount of $8 each, answers that question. Counsel believed that the penalties should be somewhat higher because of the severity of the injury which could result from the violations (Tr. 43-50). Counsel indicated that he considered the roller pinch points to be a "similar exposed moving machine part" and that the addition of the skirt board becomes critical because of the additional danger (Tr. 74). In support of his theory of the case, counsel cited Judge Moore's decision in Dravo Lime Company, IBMA 77-M-1, October 28, 1977, holding that a skirted belt, in combination with a catwalk and ladder next to idler pulleys which are unguarded, constitutes a pinch point and "similar exposed moving machine parts which may be contacted by persons, and which may cause injury %y(3)5C" (Tr. 83).

Inspector Palacios confirmed that he issued the citations because of the presence of the skirt boards and stated that if a skirt board were not present on the belts in question, he would not have cited a violation because the addition of the skirt board is what creates the hazard, since it has a tendency to squeeze someone in. The "similar exposed parts" are the combination of rollers and belt, but the skirt board itself is not such a moving part. The presence of the skirt boards led him to believe that someone could be injured (Tr. 76).

Respondent's Arguments

At the close of the testimony, respondent's counsel moved for a dismissal of the case on the ground that the inspector cited section 56.14-1 simply because of the presence of the skirt boards, and the standard does not mention such skirt boards, nor are they "similar moving parts" because they are welded to the side of the belt itself (Tr. 78). Regarding the gravity of the situation, counsel argued that the areas at the tail pulley where a man would be shoveling have always been guarded and stop cords were installed in compliance with section 57.9-1. As for any negligence, counsel argued that guards

have always been provided when required, the cited section makes no mention of anything other than drive train components, and that the skirt board memorandum relied on by the inspector cannot be charged to the respondent since it is obviously addressed to someone within the agency to clean up an apparent unclear interpretation. Respondent maintains it has always acted in good faith in complying with safety requirements and that the stop cords were installed along the full belt lengths in compliance with a standard which it believed took care of the matter (Tr. 84-85).

Respondent's counsel indicated that the violations were initially assessed at $52 each, but reduced at the conference stage because of the rapid compliance demonstrated by the respondent in abating the conditions cited. Counsel expressed a concern that the company would be cited for 10 violations and have that on its record. He explained that a stop cord was installed along the entire length of the belts in compliance with section 57.9-7, that prior to starting the belts, there is a 12- to 15-second delay siren that sounds to warn persons of the startup, and that in all of the years that the company has been inspected, the problem has never been brought to its attention, and had it known, it would have corrected the situation (Tr. 52-53).

Findings and Conclusions

The condition or practice cited by the inspector in all 10 of the citations issued in this case charges the respondent with a failure to provide guards at the "pinch points on the rollers underneath the skirting (or skirt boards)" of certain designated conveyor belts. The gravamen of each charge is the assertion by the inspector that the respondent violated section 56.14-1 by failing to install a guard as required by that standard which reads as follows: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

Although the inspector generally alluded to the hazards which may result from someone getting his hand or clothing caught in a pinch point due to the "wringer" effect which he described, he indicated that the hazard presented at all 10 belt locations which he cited were identical, that is, anyone walking near the belts or shoveling under the belt tail pulleys would be exposed to the pinch points at the rollers beneath the belt skirting and could get their hand or clothing caught in those pinch points. However, it seems clear from his testimony that he was unaware of any specific work activities taking place at any of the locations cited which could reasonably have exposed men to danger. In addition, although he indicated that the height and elevation of each belt varied, that some were waist-high and others

higher, he did not specify which belt locations were readily accessible to someone walking by or working around the pinch points. Further, while he indicated that men usually work around tail pulleys greasing or shoveling, he could not state whether greasing is performed while the belt is moving because he never observed that type of activity going on. As for any cleanup activity, he observed no one shoveling around the belts in question and indicated that some of the belts are elevated and allow materials to fall to the ground below where they are cleaned. However, he did not indicate which belts were cleaned from the ground and which were not. As for the tail pulleys and takeup pulleys, he stated that they were, in fact, guarded, and those where no one could get at were guarded by location, that is, they were apparently so inaccessible that physical guards were not required. And, as for the skirt boards in question, he indicated that if someone fell against them, it would be difficult to get their hands into the pinch point, and one would have to do it deliberately.

I believe it is clear from the testimony of the inspector that he issued the citations in question solely because of the presence of the skirt boards which were permanently attached to the belt frames, and in the absence of the skirt boards, he would not have cited any violations. In issuing the citations, the inspector followed an interpretative memorandum issued to all metal and nonmetal district and subdistrict managers by the then Acting Assistant Administrator for Metal and Nonmetal Mine Health and Safety on December 19, 1975. The concluding paragraph of that memorandum states that "Skirt board locations, head pulleys, tail pulleys, open shaft ends, and other pinch points on conveyor belts can be cited for lack of guards under Mandatory Standard 55, 56, 57.14-1." It is obvious in this case that the inspector viewed that memorandum as a directive which required him to cite a violation whenever he discovered a skirt board installed on a belt at a location which he believed constituted a "pinch point." While I cannot fault the inspector for following what he believed was the proper procedure for citing violations of section 56.14-1, the action taken by him must be examined in light of the language of the standard and the circumstances which prevailed at the time of the citations, particularly since the standard, on its face, does not specifically refer to "pinch points" or "skirts."

I have carefully reviewed the Dravo Lime Company decision cited by the petitioner in support of its case, and aside from the fact that the decision by Judge Moore is not binding on me, the facts are distinguishable. Judge Moore made a finding that in the absence of a skirt, a belt idler pulley does not normally constitute a pinch point. However, he concluded that the combination of a skirted belt with a catwalk and ladder next to it caused the idler pulley to become "similar exposed moving machine parts which may be contacted by persons, and which may cause injury." Judge Moore observed that drive pulleys, head pulleys, tail pulleys, and takeup pulleys all contain

pinch points, and that was undoubtedly the reason why these particular pulleys were specifically included in the standard. Thus, by interpreting the standard in the way that he did, Judge Moore, in effect, added "idler pulley" to the standard, and, if I were to accept petitioner's arguments in this case, I would add "skirt board" or "roller" to the standard. I find this to be a most unsatisfactory method or procedure for enforcing or promulgating mandatory standards, violations of which will subject a mine operator to monetary civil penalties and possible mine closures.

In this case, the respondent takes the position that it was never notified of the memorandum relied on by the inspector, that it complied with the guarding requirements of section 57.9-7 by installing safety stop cords along the belt walkways, and that the belt tail pulleys have always been guarded. Respondent's counsel asserted that it stands ready to comply with any clear and unambiguous safety standard which it is apprised of, but finds it basically unfair to expect compliance with a standard such as section 57.14-1, which, in effect, has added a guarding requirement for skirt boards by means of an internal memorandum communicated only to MSHA's district and subdistrict offices.

The requirement of the mandatory safety standard in issue in this proceeding is that certain designated machine parts, as well as similar exposed moving parts which may be contacted by persons, and which may cause injury to such persons, must be guarded. The standard makes no mention of pinch points or skirt boards. It seems to me that if the Secretary deems it desirable to include these factors in the standard, he should specifically take steps to amend the standard accordingly. Further, if the Secretary deems it desirable to distribute to his enforcement personnel an interpretive memorandum regarding any safety standard, basic fairness dictates that it also be circulated to mine operators so that they are made aware of the ground rules. It seems clear to me that any basic changes or revisions in the application of safety standards set forth in the regulations must be accomplished in accordance with the rulemaking provisions of the Act, United States v. Finley Coal Company, 493 F.2d 285 (6th Cir. 1974). Further, enforcement of a standard that fails to inform a party what he must do to comply therewith does not comport with due process requirements. Cape and Vineyard Division v. OSAHRC, %y(3)6D F.2d %y(3)6D (1st Cir. No. 74-1223, decided March 3, 1975). Where regulations are subject to civil sanctions, parties against whom such regulations are sought to be enforced are entitled to receive fair warning of the conduct required or prohibited thereby. Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962); Jordan v. DeGeorge, 341 U.S. 223 (1951). They are further entitled to be free from the arbitrary application of regulations which are capable of multiple interpretations. Bowie v. City of Columbia, 378 U.S. 347 (1964). As pointed out by the Fifth Circuit in Stokes v. Brennan, 476 F.2d 699, 701 (1973): "Far from impeding the goals of law enforcement, in fact, the disclosure of

information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law."

While I subscribe to the proposition that the Act should be liberally construed to insure the safety and health of miners, I also believe that rational and workable interpretations must be applied so as to insure that those mine operators who are regulated by the Secretary clearly know what is to be expected of them in terms of compliance. I do not believe that an internal memorandum, addressed only to the enforcing arm of the Secretary, summarily advising mine inspectors to ipso facto cite a violation when skirt boards are encountered, thereby expanding the scope of the codified standard, serves to put an operator on notice as to what his responsibilities are. This is particularly true in proceedings brought under the 1977 Act which provides for assessment of civil monetary penalties for violations. Prior to the enactment of the 1977 law, metal and non-metal mine operators were not subjected to civil penalties. A citation issued under the now repealed Metal and Nonmetallic Mine Safety Act simply imposed a duty on an operator to abate the condition cited within the time fixed for abatement, and his failure to do so resulted in a closure order effectively shutting down the mine. There were no provisions for the imposition of monetary civil penalties. However, under the 1977 law, metal and nonmetal mine operators are now subjected to civil penalty assessments for proven violations of any mandatory health or safety standard. In this setting, it seems to me that basic fairness dictates that the Secretary clearly and precisely advise an operator of what his responsibilities are, and the way to do this is to promulgate clear, rational, and understandable guarding standards. Based on the facts and evidence developed in this proceeding, I am of the view that the present guarding standards are ripe for Secretarial scrutiny so as to insure clear understanding by both the enforcers and enforcees.

On the basis of the facts developed in this proceeding, it is clear that the inspector acted on the basis of the internal memorandum concerning skirt boards. However, that memorandum is not a mandatory standard and is in no way binding on an operator, particularly when there is no evidence that the respondent in this case was even aware of it. See North American Coal Corporation, 3 IBMA 93 (1974); Kaiser Steel Corporation, 3 IBMA 489, 498 (1978). I find that the memorandum's language goes beyond any reasonable and clear reading of the plain terms of section 56.14-1. I cannot conclude from the facts presented in this proceeding, as did Judge Moore in Dravo, that a skirt board can be construed to be a "similar exposed machine part." Nor can I conclude that anyone reading section 56.14-1 can reasonably conclude or know that skirt boards, in and of themselves, are required to be guarded. While I recognize the fact that serious injuries, as well as fatalities, have occurred when persons become

entangled in a moving belt, that does not justify a general indictment of all such devices, particularly in situations where they are isolated, otherwise adequately guarded, are located in areas where no one is likely to come into contact with them, or are covered by other pertinent standards. As indicated earlier, if the Secretary feels that all potential pinch points, or all skirted areas of belts should be guarded, then it is incumbent on him to promulgate and articulate this by means of a clear and unambiguous standard. The present guarding standards, in my view, leave much to the imagination. For example, one standard allows the installation of a stop cord along the entire length of an unguarded belt as satisfactory protection against someone falling against a moving belt which may be loaded with materials.

Although every roller on a belt may constitute a potential pinch point, there is no requirement for guarding "ordinary" rollers on the theory that someone is not likely to get "seriously" injured if he caught his hand or clothing in such a situation. No distinctions are made in loaded and empty belts, and the term "pinch point" is not further defined. Although some of the belts which are isolated and out of reach are apparently deemed to be "guarded by location" and need not be physically protected with a guard or screen, the inspector in this case failed to distinguish them since he obviously believed they all required guards because of the installation of skirt boards.

I believe that when an inspector cites a violation of section 56.14-1, it is incumbent on him to ascertain all of the pertinent factors which lead him to conclude that in the normal course of his work duties at or near exposed machine parts, an employee is likely to come into contact with such parts and be injured if such parts are not guarded. On the facts presented in this proceeding, I cannot conclude that the inspector made any real assessment of all of the circumstances which prevailed at each of the locations cited by him at the time the citations issued. I conclude that he relied solely on the memorandum which he interpreted as an instruction to cite a violation whenever he encountered a skirt board attached to a belt, without any real consideration given as to whether one was likely to come into contact with moving parts during the course of his duties. Here, the testimony of the inspector reflects that while he believed that the area where the belt and skirt board came together constituted a pinch point, he also believed that it would be difficult for someone falling against the skirt board to become entangled in the pinch point unless he deliberately reached into that area.

In view of the foregoing, I conclude and find that petitioner has failed to establish a violation of the cited standard, and my finding in this regard is based on the following:

> 1. The inspector relied solely on an internal memorandum which he viewed as a mandatory requirement that he cite a belt with a guarding violatioin when a skirt board was attached.

2. The inspector failed to determine whether each of the locations cited by him did in fact present a hazard, that is, he failed to ascertain whether, in the normal course of his duties, it was likely that a miner would be exposed to a hazard of becoming entangled in a pinch point.

3. The evidence adduced by the petitioner does not establish that it was likely that any miner would, in the normal course of his duties, become entangled in any of the belt locations cited simply because of the fact that a skirt board had been installed at those locations.

ORDER

In view of the foregoing findings and conclusions, it is ORDERED that the petition for assessment of civil penalties filed in this proceeding be DISMISSED, and the citations isssued be VACATED.

George A. Koutras
Administrative Law Judge