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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. DENV 79-320-PM A/O No. 02-00842-05003
v.	Docket No. DENV 79-321-PM A/O No. 02-00151-05003
MAGMA COPPER COMPANY, RESPONDENT	Docket No. DENV 79-433-PM A/O No. 02-00842-05001 Docket No. WEST 79-32-M A/O No. 02-00842-05002 San Manuel Mill and Mine

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, Department of Labor, for Petitioner MSHA
N. Douglas Grimwood, Esq., Twitty, Sievwright & Mills, Phoenix, Arizona, for Respondent

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110 of the Act by the Secretary of Labor, Petitioner, against Magma Copper Company, Respondent.

The cases were duly noticed for hearing and were heard as scheduled on June 19, 1979. At the hearing, pursuant to agreement of the parties and in accordance with the regulations, the subject docket numbers were consolidated for hearing and decision.

At the hearing, the parties agreed to the following stipulations:

1. The operator is the owner and operator of the subject Magma Copper Company, its mine and mill.

2. The operator, its mine and mill, are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The administrative law judge has jurisdiction of these cases.

4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary, and all witnesses who will testify for both the Secretary and the operator are generally accepted as experts in mine safety.

5. True and correct copies of the subject citations were properly served upon the operator.

6. Copies of the subject citations and termination of the violations in issue in these proceedings are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein.

7. Imposition of any penalty will not affect the operator's ability to continue in business.

8. All alleged violations were abated in good faith.

9. The operator has no history of prior violations.

10. The operator is large.

Citation Nos. 377156 and 377157

The Solicitor moved to withdraw the petition with respect to Citation Nos. 377156 and 377157. The motion was granted from the bench.

Citation No. 376720

The Solicitor moved to withdraw from the petition Citation No. 376720 without prejudice. This item is the penalty aspect of the "walkaround" provision involving the operator which is presently before the Commission. The motion to withdraw without prejudice was granted from the bench.

Citation No. 377123

The Solicitor moved to have a settlement approved for Citation No. 377123 in the amount of $56 which was the originally assessed amount. In view of the Solicitor's representation of moderate gravity and because of the operator's lack of previous history, the recommended settlement was approved from the bench.

Citation No. 347618

The Solicitor moved to have a settlement approved for Citation No. 347618 in the amount of $114 which was the originally assessed

amount. In view of the Solicitor's representation that occurrence of the feared accident was unlikely and because of the operator's lack of previous history, the recommended settlement was approved from the bench.

Citation No. 376616

This citation, as amended, alleged a lack of guarding for rod mill Nos. 1, 9, 6, 8, and 10. The operator admitted the lack of guarding, and the originally assessed penalty of $210 was imposed from the bench.

Citation Nos. 376703, 376704, 376619, and 376701

Since these citations contained the same condition and alleged the same violation as those set forth in Citation No. 376616, as amended, they were dismissed from the bench.

Citation No. 376705

This citation, as amended, alleged a lack of guarding for the Nos. 13, 15, 16, 17, 18, 19, and 20 ball mills. The operator admitted the lack of guarding, and the original assessed penalty of $280 was imposed from the bench.

Citation Nos. 376706, 376707, 376708, 376709, 376710, and 376712

Since these citations contained the same conditions and alleged the same violations as those set forth in Citation No. 376705, as amended, they were dismissed from the bench.

Citation No. 377135

This citation, as amended, alleged a lack of guarding for regrind mill Nos. 1 and 2. The operator admitted the lack of guarding, and the originally assessed penalty of $80 was imposed from the bench.

Citation No. 377136

Since this citation contained the same condition and alleged the same violation as set forth in Citation No. 377135, as amended, it was dismissed from the bench.

Citation No. 377129

This citation, as amended, alleged a lack of guarding for belt drives on secondary crusher Nos. 1 and 2. The operator admitted the lack of guarding, and the originally assessed penalty of $80 was imposed from the bench.

Citation No. 377130

Since this citation contained the same condition and alleged the same violation as set forth in Citation No. 377129, as amended, it was dismissed from the bench.

Citation No. 377131

This citation, as amended, alleged a lack of guarding for belt drives on tertiary crusher Nos. 1, 2, 3, and 4. The operator admitted the lack of guarding, and the originally assessed penalty of $160 was imposed from the bench.

Citation Nos. 377132, 377133, 377134

Since these citations contained the same conditions and alleged the same violations as those set forth in Citation No. 377131, they were dismissed from the bench.

Citation No. 376614

The Secretary and the operator introduced documentary exhibits and testimony with respect to this citation. Upon the conclusion of the testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench. After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 60-62):

> I find a violation existed. Section 57.14-1 requires that gears, sprockets, chains, drive, head, tail and takeup pulleys, fly wheels, couplings, shafts, saw blades, fan inlets, and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded. The machinery here was a drive shaft and a coupling. These items fall squarely within the mandatory standard. In addition, I believe the evidence from both the inspector and the operator's witness demonstrates that these parts may be contacted by persons and may cause injury. It is not necessary under this mandatory standard to establish precisely the probability of injury or of contact by individuals. It is enough that there may be contact and that there may be injury. Both those elements are present here.
> I further find that as the Solicitor admitted (Tr. 53), the violation was of minimal gravity. The inspector and the operator's assistant safety director were in conflict with respect to whether an individual or

his clothes could get caught in the moving drive shaft. The drive shaft was moving at two seventy (270) rpm's so that if someone tripped or fell, injury could result. However, I recognize that in accordance with the evidence people are not usually in the area in question, and that when equipment is being serviced, it is supposed to be turned off. It is a truism that if everyone did what they were supposed to do, the mining industry would not be as hazardous as it is. Therefore, I cannot find that the violation was nonserious. I find that the gravity was substantially reduced because the likelihood of an accident occurring was remote.

I further find the operator was negligent. This equipment should have been guarded. The guard that was present could have been moved a little closer, and although it would not have completely covered the coupling, it would have to some extent, reduced the danger.

I take note of the decisions furnished by the operator's counsel with respect to the accessibility of certain equipment to employees as a condition for the finding of a violation. That may be the rule under the Occupational Health and Safety Act. It has never been the rule under the Mine Safety Act. I further recognize that at least one administrative law judge of the Federal Mine Safety and Health Review Commission has held that where the evidence does not establish the necessity of a guard, a violation does not exist. I further note, however, that the decision in that case which is Great National Corporation, Docket No. DENV 77-59-P, also is based upon the ground that the relevant machinery was in any event, adequately guarded. As counsel for the operator pointed out, I am not bound by a decision of another administrative law judge. In my view, the mandatory standard is clear in covering this situation. It is not for me to substitute my judgment for that of the Secretary in writing the regulations, as long as the regulations are not inconsistent with the Act.
I also take into account, in accordance with the stipulations, that the operator has no prior history of violations, that the violation was abated in good faith, and that the operator is large in size. Taking all the statutory factors into account, a penalty of fifty dollars ($50) is assessed.

Citation No. 377125

The Secretary and the operator introduced documentary exhibits and testimony with respect to this citation. Upon conclusion of the

testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench. After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 84-86):

> I find a violation existed. Section 57.20-3 directs that workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. The area in question is on the east side of the conveyor belt. Admittedly, a wider walkway exists on the west side of the beltway. The area in question is approximately two and a half (2-1/2) feet wide. Nevertheless, the area on the east side which is the area covered by the citation, is the only way to reach the east side of the beltway. It was open-ended, and furthermore, the evidence demonstrates that maintenance and cleanup people did walk through this area. Moreover, these people were in this area to perform their assigned tasks. In addition, the area was available for complete transit from one end to the other, to any individual who should be so inclined. I recognize that, as I stated before, a wider walkway existed on the west side of the beltway, on the west side of the conveyor belt. Nevertheless, people do not always do what is expected of them, and a great many of the mandatory standards are written to restrict the individual's freedom of action, in order sometimes to protect them from themselves.
>
> Accordingly, I hold that the area covered by the citation was a passageway within the purview of the mandatory standard. The existence of the cited materials is undisputed. Moreover, the inspector's estimate that the accumulation had been there for several days also is undisputed. Based upon all this evidence, I find once again that a violation existed. The inspector testified a person could slip and fall because of the debris. The hazard was increased because the passageway was an incline and was narrow. Based upon this evidence, I find the violation was serious.
>
> The operator's mill superintendent stated that the operator has a cleanup plan whereby this area is cleaned every three to five days. However, the inspector's estimate that the accumulation cited in the order had existed for several days, is uncontradicted. Based upon the estimate that the accumulation in question existed for several days, I find the operator was negligent.

In accordance with the stipulations of the parties, I find the operator has no history of previous violations, that the violation was abated in good faith, that the operator is large in size, and that the imposition of any penalty will not affect the operator's ability to continue in business. A penalty of eighty-five dollars is imposed.

Citation Nos. 347617 and 347406

The Secretary and the operator introduced documentary exhibits and testimony with respect to both these citations at the same time. Upon the conclusion of the testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench. After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 136-139):

> The following is a decision with respect to Citation Nos. 347617 and 347406, both of which involve the same mandatory standard and identical facts. Section 57.12-32 requires that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs. There is no dispute that covers were not present on the two brake release switches involved in the two subject citations. The evidence indicates that heavier wiring had been placed in the switches and that the existing covers would not fit over them. According to the operator's witness, the covers had been off for a month. This is far too long a time to fall within the exception in the mandatory standard for repairs. Covers such as these simply cannot be off indefinitely, especially where, as discussed hereafter, the hazard presented by their absence was so great.
>
> The brake release switches were located in the hoist pit. In order to reach the hoist pit, a man would have to go down into the basement and then back up again, six feet of stairs into the hoist pit. The hoist pit was not directly accessible from the surface. These factors do not, however, affect the existence of a violation. Covers were required. They were not provided and indeed they had not been provided for a very long period of time. Therefore, the mandatory standard was violated.
>
> One of the inspectors testified that there was enough voltage in the exposed wiring to electrocute an individual, if he touched the open wiring. The testimony also shows that electricians and maintenance people such as greasers worked in this area. Even if these people were

experienced, they should not have been exposed to this hazard. Moreover, as the inspector stated, the floor was greasy and a man could slip and reach out, thereby touching the brake release switch, and electrocuting himself. Experience would be no protection against such an involuntary reaching out. Based upon this testimony, I find the violation was extremely serious.

I recognize that there usually was a hydraulic oil pan at the top of the stairs leading to the hydraulic pit, and that it would impede an individual from readily touching the switch. This, however, is not a defense either to the existence of a violation or to the conclusion of extreme gravity. The hydraulic oil pan was not designed and indeed, did not function as some sort of guard. It certainly did not replace the need for a cover. One of the inspectors testified that fittings in the hoist pit were greased approximately once a week. So, at least, once a week or so, the hydraulic oil pan had to be removed for the greaser to get into the area. Moreover, an individual could step into the pan and get into the area. It is no answer to say that a sensible or experienced man would not do this. The Mine Safety Act is designed to protect experienced and sensible people from doing the unexpected. The Mine Safety Act limits the freedom of individuals for their own protection.

Finally, although the inspector's testimony at that point was not entirely clear, I find that there was no pan in place on the day of his inspection. Accordingly, I state once again that the violation existed and that it was extremely serious. The absence of covers for one month demonstrates a high degree of negligence, especially in view of the serious hazard presented.

In accordance with the stipulations entered into by the parties, I find that the operator has no history of previous violations, that there was good faith abatement, that the imposition of a monetary penalty will not affect the operator's ability to continue in business, and that the operator is large in size. I impose a penalty of two hundred and fifty dollars for each of these citations. I would state that were it not for the fact that the operator has no history of prior violations, the penalty would be much higher. I believe that the extreme gravity warrants the imposition of this penalty which is substantially more than the Solicitor recommended.

ORDER

It is hereby ORDERED that as set forth herein, the dismissal of certain citations from the bench be AFFIRMED and that the imposition of penalties from the bench with respect to other citations, as is also set forth herein, be AFFIRMED.

In accordance with the foregoing determinations, the operator is ORDERED to pay $1,615 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge