CCASE:
SOL (MSHA) V. WASHINGTON CONSTRUCTION CO.
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19791005
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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 Proceedings Docket No. DENV 79-288-PM A.C. No. 10-00634-05001
v.	
WASHINGTON CONSTRUCTION COMPANY, RESPONDENT	Docket No. DENV 79-323-PM A.C. No. 10-00634-05002 Monsanto Quartzire Quarry

DECISION

Appearances: Mildred Lou Wheeler, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
James A. Brouelette, E.E.O./Safety Officer, Washington Construction Company, Missoula, Montana, for Respondent

Before: Administrative Law Judge Michels

These proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (the Act). The petitions for assessment of civil penalties were filed by the Mine Safety and Health Administration on January 30, 1979, and February 9, 1979, respectively, and timely answers were filed thereafter. A hearing was held on July 26, 1979, in Missoula, Montana, at which both parties were represented.

The parties agreed that the Washington Construction Company's operations affect commerce within the meaning of section 4 of the Act (Tr. 5). The parties also agreed to settle in Docket No. DENV 79-288-PM, Citation Nos. 345011, 345017 and 345019 for the full amounts assessed by the Mine Safety and Health Administration which are respectively $30, $30 and $22. This settlement was approved (Tr. 5-6).

Docket No. DENV 79-288-PM

Citation Nos. 345010, 345013 and 345018

Evidence was received in a consolidated fashion on the above-listed citations and the decision and assessments were made from

the bench. The decision from pages 54-59 with some necessary corrections and deletions follows:

> THE COURT: May I see the exhibit, please? The decision from the bench on three of these citations is as follows: The citations are Nos. 345010, 345013, and 345018. Each of these citations alleges the violation of mandatory standard 30 CFR 56.12-32. This standard is mandatory, and it 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." The evidence received indicates clearly that the cover boxes were off, so it is a violation in each instance of that particular mandatory standard. It was the position of Mr. Brouelette that these were housekeeping types of violations; but nevertheless, they do go contrary to the Act. So, I have really no option except to find the violation; and of course the other elements go to the amount of the penalty or the assessment.
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> Now, I should make clear that as the Administrative Law Judge, I am not bound by the point system used by the Assessment Office. However, I try to make the assessment on as rational a basis as I can taking into account all of the evidence as well as the statutory criterion. If it was not clear, I will now make it clear, and I hereby find a violation of 30 CFR 56.12-32 for each of those three citations. I will now take into account or make findings of each of the statutory criteria.
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> So far as past history is concerned, the evidence shows 14 citations, apparently all of which were issued on the same occasion of this inspection. I find that this is not an appreciable history. The evidence was received as to the size of the operator. It appears that its production is in the neighborhood of 200,000 tons per year, and employees, 500 to 1,500 [company wide].
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> * * * * * * *
>
> It seems to me that company wide we have a medium size company; but possibly for the site itself, it would be maybe small to medium; and I so find. It was stipulated that the fines to be assessed here would have no effect on the operator's ability to continue to do business. It was further stipulated that the operator abated the violations in good faith within the time allowed by the inspector.
>
> So, as far as the gravity and negligence is concerned, it would be my view that with some variations, which I don't

think are necessarily too important, that the seriousness or gravity and the degree of negligence are about the same for the three. So, I will proceed to make findings for each of the three violations on those further criteria. I will take first the gravity.

I think I could accept in part that in these three situations, the probability of serious harm or injury was slight; and it is my impression from the inspector's testimony that he virtually agreed to that. I think that was in part because of the location of the boxes, and the fact that there was very little traffic near the boxes. On the other hand, I don't want to underestimate the general seriousness of any electrical violation. The standard where the regulation was promulgated was for a good reason; and that is, while most of the time possibly a person could put his hand in that box and not be affected, there is also the risk or the chance that because of some faulty connection or a bare wire, a person could seriously be burned or electrocuted. Of course, while it is true that maybe this wouldn't happen very often, it could happen where you have poor visibility, people groping around, and accidentally reaching into the box. So, there is that possibility.

Now, we can say that maybe in these instances it was remote, but when you look at the overall history of mine accidents, you see that you do have an accumulation of such things. You have maybe not too many of them, but you will have one or two here and one or two elsewhere for some other thing, and that again is quite remote; but the net effect is to cause overall, a history of injuries and perhaps even deaths, that the whole purpose of the Act is to eliminate. So, I can't discount that that is serious in that sense. I will find it serious with the qualifications that I mentioned.

Now, so far as the negligence is concerned, in this instance the lack of the covers was clearly visible, so it is the kind of thing that I think that safety people would normally expect the mine management and miners themselves to note and to do something about it. I do appreciate, and I will take into account the fact that in this case it is apparently due to one particular person, and that person is no longer working the mine. At first I was somewhat impressed by the fact that there were, in these particular cases, four of these violations which seemed to be sort of a pattern and which suggested that maybe it was a very serious case of negligence; but because of the circumstances I just related I understand this is now taken care of and will not happen in the future. So, taking that into

account, I would just say it is a low degree of ordinary negligence. I believe, then, that I covered all of the criteria which brings me to the assessment.

In my experience, I would say that the amounts assessed are not really excessive. I would think that ordinarily those would be appropriate assessments. However, I am going to take into account some of the factors that I just mentioned for these particular cases. It is my understanding that the first assessment was somewhat larger because of perhaps more access to that particular box. Considering all of these circumstances, I am going to make an assessment of one-half of the amounts originally asked, namely, that would be for Citation No. 10, $16, for Citation No. 13 it would be $12, and for Citation No. 18 it would be $12.

That completes my decision on these first three assessments. We may go to the next.

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Citation No. 345012

Evidence was received on this citation and the decision and assessment were made orally from the bench. It is recorded at pages 72-74 of the transcript and with necessary corrections and deletions is as follows:

THE COURT: I will now proceed to make the decision on Citation No. 345012. The first consideration was whether or not the Act or the regulation has been violated as charged. The charge in this instance is that the conduit elbow had broken causing some at least slight damage to the cables to the Telesmith Cone Crusher Motor. Mr. Brouelette has argued here that this should not be a violation because of the lack of any hazard, in his view. Mr. Brouelette [also argued there was no] violation in this particular instance in that the condition, which existed, was [not] contrary to the regulation.

Now, the regulation, that portion that the inspector had in mind, requires that, "Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings." The results of the broken elbow and the cable then hanging loose meant that it was not entering the box through proper fittings. It is not the purpose of these regulations to decide in each case whether or not there is a specific hazard before the violation occurs. Maybe some of the regulations are written that way,

but most of them just assume that if that condition existed, it has the potentiality for a hazard under some conditions. So, that is why a good electrical practice, I assume, requires that those kinds of conditions not be allowed to exist. Therefore, regardless of the degree of the hazard or the possibility of harm, it is really not relevant as to the question of whether or not there was a violation. If the condition exists, there is a violation.

Now, maybe as a layman it is difficult for you to understand that, but that is the way most of these regulations are written, and that is the way they are enforced. So, with that in mind, I would find that because of these broken connections and the condition that has been described and it is not disputed, as I understand it, that there then was, and I do find a violation of 30 CFR 56.12-8. I should say the findings have already been made as to all of the criteria except as to gravity and negligence of the citation. so, I would just confine myself to those two criteria.

As far as the seriousness is concerned, I just have to believe that when a cable such as this is broken, and that there is a vibration existing and the possibility, at least, even though it may not be at all that great of contact, electrical contact, that it is, what I would classify it as, serious, and I so find. On the negligence factor, I think it is clear. I don't believe it is really disputed that this happened at the time that repair was done on the machinery; so it was known and that should not have been permitted to exist.

I will, however, take into account, even though there is no evidence on the subject in the strict sense of the word, the fact that the company had ordered parts for this. I do that because Mr. Brouelette is not familiar with legal procedures, and he did not have the evidence at hand; but I will take his word for it under these circumstances that it was on order. Thus, it seems to me that the company did recognize the problem and was prepared to do something about it. I don't think that that means that they are relieved of all responsibility here. In some of these situations it may be that the machine simply cannot be operated if a danger exists. However, I will take that factor into account and I will do exactly, because of that factor, the same as I did for the other assessments, and I will reduce it by one-half. So, accordingly, I hereby assess for Citation No. 345012 the sum of $15. That completes the decision in this citation. You may go to the next citation.

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Docket No. DENV 79-323-PM

Citation No. 345020

Upon the receipt of evidence on this citation, a decision and assessment were made orally from the bench. It is recorded at pages 101-105 of the transcript and with certain necessary corrections and deletions reads as follows:

> This is a decision in DENV 79-323-PM, which contains a single citation. That citation is that the jaw discharge conveyor belt was used as a walkway to the drive motor and was not provided with handrailing. The standard cited as being violated is 30 CFR 56.11-2. This citation reads, "Cross-overs, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." That is a quotation, and that it is the end of the relevant part.
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> The only evidence on the fact of the violation is that of the testimony of the inspector and also the document which is a picture. I don't understand that there is any contest as to the facts. The conveyor belt was used by men, by miners, including a supervisor, as a means of access to the motor. The conveyor belt is, if I have it correctly, some 160 feet and rises to an elevation of as much as 30 feet at the very tip. The specific issue, it seems, is [the operator's] contention that such a conveyor belt is not a walkway. The regulation that I read does not specifically mention the conveyor belt. At this point I should state that with these regulations, these mandatory standards, that it is not infrequent that they do not mention specific pieces of machinery and specific conditions; but they are written in a way, in a general way to cover situations that come within their scope even though they are not specifically listed.
>
> Now, it would be very helpful here, of course, if this was a matter that somebody had previously considered and ruled on, and we would perhaps have authority then for whether or not a conveyor belt used in this matter is a walkway.
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> The argument of MSHA is simply, since it in fact was used as a walkway, that therefore it is a walkway and therefore it is subject to the provisions of that particular regulation. So, it would be up to me to make that decision, and since I have decided to do it from the bench, I will attempt to do so, keeping in mind, however, that I may be ruling on something [for] which there may be legal precedent

or other information which would bear on this and [of] which I am unfamiliar.

So, my ruling, then, I think you should understand is based on the confines of this case and the testimony and evidence that we have taken here today. Now, I appreciate the view that you have mentioned that [such] construction of this particular standard could mean a lot of areas not otherwise thought to be walkways [would be covered]; but I am going to confine this to this particular condition and piece of machinery which was a relatively long area, namely, 160 feet. It was elevated up to 30 feet, which is a long way off the ground, and certainly would suggest a clear hazard to miners using that. It, according to the statements made, is a relatively stationary piece of machinery. It is not moved daily or monthly or even yearly. It stays there more or less permanently, as these things go. It would not be similar, at least I would not view it, to the analogy made of a steel worker on a beam. These beams have to be moved around to be put into place, and even there, I am not confident that they don't require some kind of protection for those steel workers; but in any event, that is a temporary, impermanent walkway kind of situation, and that is not what we are dealing with here, as I see it, at least. I see it as a more permanent situation, and I would accept the position of the Government on this, that since it was used in this manner, that therefore it does become a walkway.

I will take into account, I think, a little bit, at least in the assessment, the fact that this does come as something new. Even the inspector was not completely sure about it. He had to consult his supervisor, and in that kind of situation, I suppose that we can't expect the companies subject to these regulations, then, to know either. So, therefore I think that that ought to be a big consideration in the assessment of a penalty, namely, this is more like a warning rather than a severe penalty for something that should clearly be done; but having said that, then, and I hope having made myself fairly clear, if not completely satisfactory to everybody concerned, I will find, then, that based on the use of this conveyor belt as a walkway and the fact that it had no guard rail, that it was a violation as charged of 30 CFR 56.11-2.

Findings have already been made on all the criteria except as to gravity and negligence. So as far as the gravity is concerned, I think there is no question that it is a serious matter. Even though these men are experienced

and are aware of the hazard that is there, and almost anything could happen to cause a severe injury to a miner, so I would find that the violation is serious. Now, as to the negligence, I have already covered that in part. Surely the company did know there were no handrailings, and even the supervisor used it; but what they did not know and could not apparently know, there being no history of this being cited as a violation, that that would be construed to be a walkway. So, therefore, the negligence in this instance would be minimal. It would be slight negligence in my view, and for that reason, then, I would reduce the penalty to what I would consider just a nominal penalty in this circumstance. In that I consider this in the nature of a warning, and so therefore it should not be a severe penalty. With that in mind, I would assess a penalty for this alleged violation of $5.

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The following is a summary of the assessments made or agreed upon herein:

Docket No. DENV 79-288-PM

Citation No.	Penalty Assessed or Agreed Upon
345010	$ 16
345011	30
345012	15
345013	12
345017	30
345018	12
345019	22
Total	$137

Docket No. DENV 79-323-PM

Citation No.	Penalty Assessed
345020	$ 5
Grand Total	$142

ORDER

It is ORDERED that the Respondent pay the total penalties of $142 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge