CCASE:
SOL (MSHA) V. CALICO ROCK MILLING
DDATE:
19791017
TTEXT:

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 79-219-PM A.C. No. 04-00035-05002
v.	
CALICO ROCK MILLING, INCORPORATED, (Footnote 1) RESPONDENT	Docket No. DENV 79-241-PM A.C. No. 04-00035-05001 Calico Quarries & Mill

DECISION

Appearances: Donald F. Rector, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Howard M. Peterson, President, Calico Rock Milling, Incorporated, Barstow, California, for Respondent

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). On January 18, 1979, the Mine Safety and Health Administration (MSHA) filed a petition for the assessment of civil penalties, docketed in DENV 79-219-PM, alleging that Respondent committed violations of 30 CFR 56.9-87, 56.9-7, 50.20, sections 109(a) and 103(a) of the Act, and two separate violations of 56.14-1. Thereafter, on January 26, 1979, MSHA filed a second petition, docketed in DENV 79-241-PM, alleging that Respondent committed two violations of 30 CFR 56.14-6. On March 30, 1979, Respondent filed answers contesting the violations in both dockets. A hearing was held on August 7, 1979, in San Bernardino, California, at which Petitioner was represented by counsel and Respondent was represented by its president,

Mr. Howard M. Peterson. The two dockets were consolidated for the hearing and for this decision (Tr. 2). (Footnote 2) At the start of the hearing, the parties stipulated (1) that Respondent does not have a prior history of violations, (2) that Respondent is a small company, and, (3) the imposition of these penalties would not impair the operator's ability to continue in business (Tr. 4-5). Thereafter, the following action was taken:

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Citation No. 375049, July 18, 1978

Evidence was first received regarding Citation No. 375049, which alleges a violation of 30 CFR 56.9-87. The condition or practice cited by the inspector is as follows: "An automatic warning device which would give an audible alarm when the equipment is put in reverse was not provided on the Michigan 125 Front-end loader." The regulation, 30 CFR 56.9-87, provides that:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

On the basis of the evidence presented, and in light of the statutory criteria, a decision was made from the bench finding a violation of the standard and assessing a penalty of $40. This decision from pages 76-78 of the transcript, with some necessary corrections, is set forth below:

> Now to get onto the citation. This citation is that an automatic warning device, which would give an audible alarm when the equipment is put in reverse, was not provided on the Michigan 125 front-end loader. This is cited as a violation of 30 CFR 56.9-87, which does require that heavy duty mobile equipment be provided with audible warning devices. The evidence indicates that this is the kind of equipment which should be so provided. It further indicates, and I do not believe that Mr. Peterson has disputed, that it was not provided. There is some question apparently as to whether this [equipment] was fully in operation, because the indication is that it was being used * * * in the process of doing a repair to test it out.

> Well, I would say this. That as far as the need for such a device is concerned, it is, of course, to warn people in back. It is hard for me to draw a distinction between operating generally or operating just in the context of the repair. So I fail to see that this would be much of a mitigating circumstance in this instance.
>
> The net result is that I would find that there has been a violation as alleged. * * * We have already considered three of the criteria. As far as the abatement, I just don't think there is enough evidence for me to determine that it was not abated in good faith, so I will just simply let that finding go as though there was an abatement within the time set by the inspector.
>
> There are two other elements or criteria to consider. As to gravity, the testimony was that people, that other miners were in the area and in back of it. In my mind, there is no question about the seriousness of not having these devices. It is all too easy for somebody to get injured when they do not hear the machine being backed up. So I would have to naturally find that it is serious.
>
> There is also the question of the negligence. Based on the evidence I heard, I think there is no question that Mr. Peterson and his company knew that these were required and apparently also knew that it was not on this machine, although it should have been. There is one slight mitigating factor, that maybe it was not appreciated that this should have been on there in this particular situation, where it was being used in connection with other repairs to test out the machine.
>
> As I said, I can't see any distinction, so I wouldn't make much of a point of that. The Government has asked for $56 here, which is, of course, nominal. But taking into account this slight mitigating factor, I would reduce that somewhat to $40. I will take $16 off. So, accordingly, my finding would be for an assessment of $40 for this citation.

The above bench decision and assessment are hereby AFFIRMED. Citation Nos. 375050 and 375051, July 18, 1978

Following the above decision, Petitioner and Respondent introduced evidence in a consolidated fashion on Citation Nos. 375050 and 375051 which both allege violations of 30 CFR 56.14-1. The condition or practice cited in Citation No. 375050 states: "The V-belts on the

drive motor of the secondary crusher was not guarded to keep employees from coming into contact with the pinch points." On Citation No. 375051, the inspector, as to the practice stated: "The balance wheel on the secondary crusher was not guarded to keep the employees from coming in contact with it." The regulation requires that: "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."

The following bench decision found at pages 130-137 of the transcript, with some necessary corrections, was issued at the hearing on the merits of these two violations:

> To begin with, I must find whether or not there was a violation, you see. In this case, we are dealing with two different citations, 375050 and 375051, both charging a violation of 30 CFR 56.14-1. This is under 30-CFR. The evidence shows that the citations were issued against a piece of machinery which on either end had a V-belt and a balance wheel which were not covered.
>
> The charge was, of course, that they were not guarded and 56.14-1 requires that moving machine parts which may cause injury shall be guarded. So the evidence that has been received has turned on, in part at least, a question of whether or not there was a guarding. Now, I think there is one disputed area and that is whether or not there was a chain with a sign as shown in one of the pictures.
>
> The inspector testified that he did not see any such chain or sign, and I think that -- or I will accept his testimony on that, because Mr. Cowley also stated that on the date of the abatement that there was a screen there; that there was no chain or sign. * * *
>
> As I observed, it is my understanding that this machinery was previously guarded either completely or with separate guards. I don't know which. And that these were removed. They were removed apparently because the State inspector had believed that if there was no access, then that would be adequate.
>
> Now, as it turns out, however, there was access and it is admitted that there was a ladder there on that day so that miners could have gone up there. I believe it is clear that they did go up there for maintenance and oiling, but it is not clear, of course, in fact there is no evidence, that anybody was ever up there while the machinery was moving.

Well, I am getting a little bit ahead of myself. The question is whether or not that was guarded. Now, the question has been raised, and properly so, as to whether or not the regulation that we have is adequate and I think it is. At least in relation to this particular piece of machinery, a guard simply means -- it seems unquestionably -- a cover that would keep people out, so that they would not get pulled into it or their clothing pulled into it. If it is inaccessible, I would go along with the proposition that you wouldn't necessarily have to have a guard. If it is way out of reach of anybody. But this was not out of reach. * * * [I]t could be reached via the ladder and right into the machine. Of course, the inspector did not observe any person up there, but I believe that it is clear that people do go there, and that was the reason for the ladder, to allow access so that they could get up for maintenance. That is my understanding.

Now, I just would have no alternative really except to find that this was unguarded as alleged, and I do so find. In other words, there is a violation as charged in both of these citations of 30 CFR 56.14-1. * * *

So that brings us to the point of the assessment. The findings have already been made on all of the criteria, except abatement, seriousness and negligence. I think counsel, Mr. Rector, has made a big point on abatement because of Mr. Peterson's statement that he wasn't going to do anything further or guard this. I really didn't understand it that way. What I understood you [Mr. Peterson] were saying, and I so interpret it, is that you believed what you had there was adequate in all the circumstances.

So I don't add, I would not add a further penalty or increase the penalties for that reason. * * * Abatement did not take place within the time permitted, but it did take place eventually to the satisfaction of Inspector Cowley.

Now that brings up seriousness or gravity. My finding would be that it is a serious violation. I think that open machinery which is not guarded is very dangerous. [The cited condition] is mitigated here a little bit by that fact that nobody was seen there, and there is no evidence at all that anybody was ever there when the machinery was moving. * * *

Now, as far as negligence is concerned, I find ordinary negligence, because I believe that it should be known that these should be guarded. I mean, either an operator knows or should know about that. I think that it is a mitigating

> factor that the State inspector did give his advice or permission to remove those guards under certain circumstances. So it is not, as I see it, the gross negligence that has been suggested. But even with all of those factors in mind, I don't think I can reduce these fines. So therefore, I will assess the penalties that have been assessed by MSHA in their Assessment Office, namely, that is, for each of these violations the sum of $56.

(Tr. 130-137).

I hereby AFFIRM the above bench decision.

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Citation Nos. 375052 and 375053, July 18, 1978

Thereafter, the parties presented evidence on Citation Nos. 375052 and 375053, which are the only two citations docketed in DENV 79-241-PM. Both charge Respondent with separate violations of 30 CFR 56.14-6. The condition or practice cited in Citation No. 375052 states: "The guard for the V-belts of the drive motor on the No. 2 Shaker Screen was not in place while belt was running to keep employees from coming into contact with the pinch points." The wording of Citation No. 375053 is the same except that it refers to the No. 1 Shaker Screen. 30 CFR 56.14-6 provides: "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

After considering the evidence, a decision was issued from the bench. This decision found in the transcript at pages 153 and 154, with some corrections, is set forth below:

> These citations are 375052 and 375053. They both involve charges of 56.14-6, alleging that the guards on the particular pieces of machinery involved were not in place while the machines were running. This particular regulation, I will read it in full, states: "Except when testing the machinery, guards shall be securely in place while the machinery is being operated."
>
> Now, it is clear from the testimony that guards were not on the machinery while it was being operated. I suppose then the issue is whether the conditions come within the exception, that is, except when testing the machinery. Mr. Peterson has testified to the effect that they were in a testing posture. The one indication that this might not have been true was mentioned by the inspector, and that is that one [guard] seemed to be covered with dust or dirt or rock, indicating it had been there a long time, although

> Mr. Peterson has explained that. [He testified that within an hour's running, dust could build up to an inch or an inch and a half (Tr. 152-153).
>
> There was no rebuttal of that [the claim that tests were taking place]. I have no reason whatsoever not to believe Mr. Peterson on his explanation. Therefore, my understanding would be that it comes within the exception. This is no criticism of the inspector. He called it as he saw it when he went there. Unfortunately, he didn't find out, I guess, that it was in a testing posture.
>
> That being the case, I would dismiss then as to those two citations. Accordingly the petitions [are vacated] and the whole docket, DENV 79-241-PM, is dismissed.

(Tr. 153-154).

I hereby AFFIRM the above decision vacating Citation Nos. 375052 and 375053 and dismissing DENV 79-241-PM.

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Citation No. 375054, July 18, 1978

Next, evidence was introduced on Citation No. 375054 which charges a violation of 30 CFR 56.9-7. After the conclusion of the parties' presentation of evidence, the following decision found in transcript pages 171-174, with some corrections, was rendered from the bench:

> I will therefore make my decision. This is Citation 375045. The citation states that the conveyor side of the walkway on the hopper/conveyor was not equipped with emergency stop devices or a cord along the full length of the conveyor belt. The standard, in this instance, states: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."
>
> Well, the evidence here on a number of points seems undisputed, that is, that there was a walkway along a conveyor that was in operation; furthermore, that there was no emergency stop device on the walkway. I don't think there is any dispute about that.
>
> Mr. Peterson has mentioned several points in his defense. The first one being, I believe, the contention that it was in fact guarded, so that it was not unguarded -- asserting and testifying that there was a chain.
>
> Contrary-wise, if my recollection of the testimony is correct, I think Mr. Goodspeed did say that there was no

guard and it was accessible. So I have a direct conflict in the testimony and in the evidence.

Here, again, of course, we have some kind of problem or controversy as to what we would mean by guarded. Would, for example, a chain be adequate if it was there or if it had been there?

Well, I have to make a decision on it, and I don't know perhaps enough about this whole procedure or arrangement to make a decision which I think is necessarily going to be a precedent for other cases, but I am thinking just in terms of this situation. I would find for this citation that the mere chain would not be enough. I agree that a chain can be too easily taken down. It is usually just put up with some snap, and if somebody wants to use it they go under it or use it in some way. * * * Therefore, that guard has to be a secure kind of guard that would probably have to be some kind of a link fence or whatever the barrier would be. I say, I readily admit, I have not researched this area, and I don't want to be making a kind of a ruling that would be necessarily a broad precedent here. But I think, as I understand this situation, it would not be guarded [with only a chain].

So then the next point -- well it was not equipped with the emergency stop devices. * * * If [the conveyor] doesn't have this cord, it violates this standard. Now, that may seem harsh and it may seem strict, but I believe that these regulations were written with the thought that if these are enforced, it will prevent those accidents from happening which shouldn't occur. Men probably shouldn't, maybe very seldom go on it, but just as surely as you don't follow the correct procedures, we will find miners doing that, and we will find injuries. So I would have to sustain the proof as alleged, and I find then a violation as charged of 30 CFR 56.7-9.

So far as the criteria specifically applicable to the abatement, the evidence is that it was not abated within the time set, so I would have to take that into account in assessing the penalty. As far as gravity is concerned in this instance, I believe it is serious, although it is mitigated to some extent by the testimony that it [the walkway] was rarely used.

Negligence: It seems to me that this was a regulation and a requirement which the company knew or should have known. So I will find ordinary negligence.

I will assess the penalty which has been requested by MSHA, which is $48.

(Tr. 171-174).

The above decision and assessment are hereby AFFIRMED.

Citation No. 375055, July 18, 1978

Following this decision, the parties presented evidence on Citation No. 375055 which states: "Records pertaining to reporting of accidents, injury, illnesses, and employment are not being kept at the mine site office as required in the Mine Safety and Health Act of 1977." A violation of 30 CFR 50.20 was charged in the petition but not on the citation issued to the Respondent. This standard reads in pertinent part: "Each operator shall maintain at the mine office a supply of MSHA Mine Accident Injury and Illness Report Form 7000-1."

After considering the parties' evidence, the following bench decision was issued:

> I will proceed to decide on this citation. My understanding of the testimony is that there were no records [at the site], which namely are the completed records, and that this was what the charge entailed. However, as I understand it, and as we have discussed it formerly, the matter has become confused because of the charge in the petition [was] that it was a violation of 30 CFR 50.20, which raises a different issue entirely. There is no testimony on that issue and accordingly I have no recourse except to vacate and dismiss as to this citation.

(Tr. 193-194).

The matter was dismissed without prejudice (Tr. 212).

The above decision vacating Citation No. 375055 and dismissing the petition as to it without prejudice is hereby AFFIRMED.

Citation Nos. 375061 and 375067, July 18, 1978

Following this decision, Petitioner and Respondent introduced evidence on Citation No. 375061, which alleges a violation of section 109(a) of the Act stating that: "Citations issued during the inspection made July 18, 1978, had not been posted on the mine bulletin board." The cited section of the Act requires that:

> At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the

> office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

Evidence was also presented on Citation No. 375067, which alleges a violation of section 103(a) of the Act stating: "H. M. Peterson denied entry by ordering the inspector, Tyrone Goodspeed, off the mine property preventing him from completing an inspection under the Mine Safety and Health Act of 1977." Section 103(a), in pertinent part, provides:

> For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

These citations were decided orally from the bench. The decision rendered on these citations is located at pages 214-218 of the transcript.

As to Citation No. 375061, it was found that the Act in section 109(a) requires such postings, that according to the testimony, there were no postings and, in substance, that the Respondent violated the Act as charged. Respondent's defense that it was not aware of the requirement was accepted but only as justification to reduce the penalty.

It was further found that the abatement took place at the time the next inspector arrived, that the violation was not serious, and that there was slight or no negligence in connection with the violation.

Respondent was fined a penalty of one-half of the amount assessed by the Assessment Office or a penalty of $7.

Concerning Citation No. 375067, it was found that the operator had denied entry by ordering the inspector, Mr. Goodspeed, off the mine site, preventing him from completing an inspection under the Act. This was found to be a violation as charged.

It was further found that no abatement time was set and that the violation was thereafter abated when two other inspectors, Mr. Cowley and Mr. Plumb came to the mine and were allowed to inspect it. The violation was found to be highly serious because inspections are fundamental to an orderly administration of the Act and because inspectors must have freedom of movement at the mines. Finally, it was found that the operator was greatly negligent because it interfered with orderly procedures to prevent accidents and did so knowingly.

The fine levied by the Assessment Office of $345 was found appropriate and assessed against the operator for this violation.

I hereby AFFIRM the decision and assessments for Citation Nos. 375061 and 375067.

The summary of the dispositions in these two dockets is as follows:

Docket No. DENV 79-219-PM

Citation No.	Assessment or Action Taken
375049	$ 40
375050	56
375051	56
375054	48
375055	vacated
375061	7
375067	345

Docket No. DENV 79-241-PM

Citation No.	Action Taken
375052	vacated
375053	vacated

ORDER

It is ORDERED that Respondent pay total penalties of $552 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge

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Footnote starts here

~Footnote_one

1 At the beginning of the hearing, Respondent moved to amend the caption in this case from Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Calico Rock Company, to the above. Petitioner did not object to this change and the caption

has been amended accordingly (Tr. 15).

~Footnote_two

2 The citations were heard in numerical order which meant that the two citations in Docket No. DENV 79-241-PM were heard in the middle of the citations heard in Docket No. DENV 79-219-PM.