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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. DENV 79-114-PM A.C. No. 02-01510-05001
v.	Crushed Granite Operation
MADISON GRANITE COMPANY, RESPONDENT	

DECISION

Appearances: Malcolm R. Trifon, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
W. T. Elsing, Esq., Phoenix, Arizona, for Respondent

Before: Administrative Law Judge Michels

This proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The petition for assessment of civil penalty was filed by MSHA on December 5, 1978, and a timely answer was filed thereafter by the Respondent. A hearing was held in Phoenix, Arizona, on September 11, 1979, at which both parties were represented by counsel.

The charges concern seven citations. Evidence was received as to each each citation and a decision thereon was rendered from the bench. These decisions as they appear in the record, with certain necessary corrections or changes, are set forth below, seriatem. The Petitioner filed a motion for reconsideration of the decision in one such citation. That matter will be taken up under the citation involved.

Citation No. 371248, April 12, 1978

The following is the bench decision on this decision found at pages 31-34 for the transcript:

> This decision relates to Citation Number 371248. [The] inspector issued a citation April 12, 1978, in which he charged as follows: "Guard tail pulley of stacker belt (reinstall guard removed for cleanup)." This condition or practice was charged to be a violation of 30 CFR 55.14-1.

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This particular mandatory standard reads as follows: "Gears; sprockets; chains; drive, head tail, and takeup pulleys; flywheels; couplings; and 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".

My first finding would be to the fact of the violation and based on the testimony I would have to find that there was a violation of the mandatory standard as charged. The inspector visited the site. He found that the guard was not on the particular belt pulley as required by law and, accordingly, there is a violation of 55.14-1 and I so find. I will add to that this observation: That even though this particular condition was caused by the negligence of an employee, it is still under the law chargeable to the operator. The law as written places the full responsibility on the operator and these other factors are taken into account only under the criteria that are considered in evaluating and deciding upon [an] appropriate penalty for the violation. So, while in some cases it may seem rather harsh and perhaps technical, that is as I understand [it] the way the law is written, and I would really have no choice but to find a violation. I should also add to this and I think it was clear from the testimony, that it was not disputed the guard was in fact removed and not replaced.

The criteria, some of these I will find for -- make the findings for this violation only and these findings will be applicable to the subsequent citations also, if any are found to be violations.

It was stipulated that there is no history of prior violations and I so find. It was stipulated that the operator has seven (7) employees who work thirteen thousand eight hundred and ninety-five (13,895) man hours per year. I have no other evidence on the size of the company and it seems to me that [this] represents a small operation and I so find. No evidence was presented as to the operator's ability to continue in business. Based on an assessment of an appropriate penalty for this citation, I find that the penalty to be assessed will not affect the operator's ability to continue in business.

The inspector testified that he had every reason to believe the violation was expeditiously corrected and I so find. I find that the gravity of this violation in the circumstances to be slight. The inspector testified that there is some possibility of an employee slipping into a

pinch point in this belt pulley and being injured. Approximately three (3) employees might be affected. However, it was brought out and I think by both witnesses, that this possibility in all of the circumstances was quite remote. So, therefore, my finding is slightly serious.

So far as negligence is concerned, just as a technical matter I would find some degree of negligence. It is, I think, a slight negligence because the operator has a very good record as indicated by the testimony of safety and it was also shown that this particular violation was caused wholly by an employee who was later discharged. Furthermore, since there was no foreman or other employee of the operator at the plant in this period to observe the lack of the guard, it does appear that the operator had no real opportunity to be aware of it except as a technical and legal concept of responsibility under the law. So therefore I would find only that slight degree of negligence as the law would require here.

The penalty assessed by the Office of Assessments in this case was sixty ($60.00) dollars and it seems to me that in light of all the circumstances revealed at this hearing that [this] would be excessive. As I indicated, the gravity is slight. There is little or no negligence and in light of the operator's good record of safety I look at it more as a -- in this instance and in these circumstances as a technical legal violation, but as I previously indicated, it is necessary to -- not only to find that the operator is in violation but I have no choice but to assess some penalty. Accordingly, I will assess the penalty of ten ($10.00) dollars for this citation.

The bench decision on this citation is affirmed.

Citation No. 371249, April 12, 1978

The bench decision on this citation, found at pages 105-108 of the transcript follows:

The inspector -- I'm now referring to Citation 371249 and the inspector charged the condition or practice [as follows:] "Establish a continuous ground. All motors, metal frames to be tied into it. Have electrician from registered contractor check your ground and write in log what its resistance is, and that you have an established ground". The mandatory standard applicable on November 30, 1977, and therefore at the time this violation was cited as follows: It is 30 CFR 55.12-28. "Continuity and resistance of grounding systems shall be tested immediately

after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative."

Now I agree with Mr. Elsing that this regulation requires only two (2) general things; that is, the testing at certain specified times and a recording of those tests and their availability to the inspector. Applying that regulation to the facts here, in my view, the requirement that it be tested immediately after installation is not applicable because the operator was not subject to the law at the time of the installation which, based on the evidence and the reasonable inferences to be drawn therefrom, was prior to March 9th, 1978. Also, there is no evidence that there is involved here either repair or modification, so therefore such times are not applicable here. The only phrase so far as I can see that's applicable is "and annually thereafter" and there is a question as to its meaning. Counsel for MSHA contends it means that testing should have followed immediately after the law became effective. Counsel for the operator, on the other hand, contends that it would mean one (1) year after the effective date of the law and its applicability to this operator, which would be one (1) year from November 30, 1977, or November 30, 1978.

I should interpose that there are other regulations which as I understand it would require proper grounding systems. We are here only talking about a requirement which specifically and explicity requires testing and at certain times. I can't read into that any requirement that this testing take place immediately after either the effective date of the law or the date that it becomes applicable to this operator. This operator as I read this is required to make -- to test annually and the question is, from what reference point, considering the fact that this standard was in effect at the time it became applicable to the operator. It seems to me that it would be logical to construe that as Mr. Elsing has argued, that it would be within one (1) year after its applicability or namely, by November 30th, 1978.

My ruling here which I think you're already anticipating is with regard [to what] I consider the extreme gravity of the failure to test. I am absolutely sure from prior circumstances that this is vital for safe practice involving these electrical systems, to test and perhaps keep a record of it, but I don't think that issue is before me.

> The only issue before me is whether at the time charged the operator should have tested and recorded that test and my ruling is that since the law as made applicable to the operator did not require a testing at that particular time, that there has been no violation of that standard and that is my finding * * *.
>
> Now I think this regulation does require testing immediately after installation where applicable and a year thereafter and if the date of installation is known, then the testing would have to be within one (1) year or approximately, I suppose, a year thereafter * * *. And the same applies for repair and modification in my view. If those were factors involved in the matter, as I would interpret it, the testing would have to be at that time and annually thereafter.
>
> In this instance, the problem has been there was no evidence as to the time of installation, which was the only time that was involved. There is no evidence as to whether the operator knows or does not know. I think that it would be a part of the burden of the MSHA to show what timespread it is applying here and if it's based on the installation, to show that, and so therefore my decision is based on the failure of proof in that regard. Accordingly, the Citation Number 371249 is vacated and the petition will be dismissed as to that citation.
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> The above decision is affirmed.

Citation No. 378006, May 5, 1978

A decision was rendered from the bench as to this citation, which will be found at pages 81-83 of the transcript. MSHA charged a violation of 30 CFR 55.15-2 in that the crusher operator was observed not wearing a hard hat while walking around the crusher area. I found in the bench decision that there was no violation based on the precedents of the Board of Mine Operations Appeals and also OSHA which hold the employer not liable in some circumstances for an employee's failure to wear protective clothing or other devices.

On October 22, 1979, Petitioner filed a motion for reconsideration of the decision of this citation submitting that this case is distinguishable from the cases relied upon, decided by the Board of Mine Operation Appeals and OSHA. (Footnote 1) Respondent answered asserting that the decision was correct and should be affirmed.

Having reviewed the applicable cases and the Commission's recent interpretation thereof, it appears that my reliance on Board case precedent was misplaced. North American Coal Corporation, 3 IBMA 93 (1974), is the principal Board decision supporting dismissal, but it has been so qualified and limited that it no longer constitutes a valid precedent for the position taken in the decision above. Cf. Webster County Coal Corporation, 7 IBMA 264 (1977), and Rushton Mining Company, 8 IBMA 255 (1978).

Furthermore, the Commission held in United States Steel Corporation, Docket Nos. PITT 76-160-P and 76-162-P (September 17, 1979), that it is well established that under the Federal Coal Mine Health and Safety Act of 1969, an operator is liable for violations of mandatory health or safety standards without regard to fault (footnote omitted). In a footnote the Commission observed:

> 3 U.S. Steel's argument relying on North American Coal Corp., 3 IBMA 93 (1974), is not persuasive. The rational of the Board's decision in North American has been limited to the language of the particular standard involved in that case, 30 CFR 75.1720. Webster County Coal Corp., supra. See also Ruston Mining Co., supra. The present case presents no occasion to determine whether we agree with the Board's interpretation of 30 CFR 75.1720.

Accordingly, I hereby amend my bench decision on this citation, by substituting therefor the following:

> The inspector listed the following condition or practice in his citation: "The crusher operator was observed not wearing his hard hat while walking around the crusher area." This was charged to be a violation of 30 CFR 55.15-2 which reads: "All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard."
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> The employee without a hard hat was working in an area in which as a matter of policy the operator required the wearing of hard hats (Tr. 74). The regulation, however, is phrased not in terms of hard hat areas but areas "where

falling objects may create a hazard." The inspector observed the employee climbing down the shaker screen without a hard hat (Tr. 66-67). He testified that the employee had to check the belts underneath the shaker screen and that the employee was in a dangerous position part of the time. The inspector indicated his belief that the hazard was the material flowing through the conveyors and the belts (Tr. 69). There is no testimony from the inspector that he saw falling objects or even that the conditions indicated the possible presence of falling objects.

The inspector stated that "if" a rock fell down, the employee could have gotten hurt when getting off the shaker screen. Mr. Madison, the plant owner, testified, however, that the employee does not go under the conveyor belts and that when coming down the ladder, he is 6 to 7 feet away from the conveyor belt. Mr. Madison also testified that the speed of the conveyor belt would allow rocks to fall only on the screen and that in no way could rocks fall on a man (Tr. 73-74; R-3). This testimony was not disputed or challanged. Further, the inspector testified that the operator had operated for a long time with an excellent safety record (Tr. 18).

MSHA has the burden of proof to show by a preponderance of the evidence, not only that an employee was not wearing a suitable hard hat but that such employee was in or around a mine or plant where falling objects may create a hazard. MSHA has shown that no hard hat was worn, but it has not shown with a preponderance of the evidence that the employee was in an area where falling objects may create a hazard. I so find. (Footnote 2)

I do not suggest that the operator's policy of requiring hard hats in the screening area should be abandoned. It is a valuable precaution and possibly even a necessity for the protection and safety of employees. This matter is decided only on the ground of failure of proof; it is not a decision on the actual need for hard hats in the area concerned.

I should also note that the circumstances in this instance were peculiar and will likely not be repeated. The operator has a policy to require everybody in the

crushing and screening area to wear hard hats (Tr. 74). Hard hats were available and the employee in question had one in his car (Tr. 69). This policy was verbally enforced by the superintendent or the working foreman. The employee involved had been warned to wear his hard hat. He had had headaches and was off work quite a bit. He claimed that the hard hat contributed to his headaches (Tr. 75). This employee had been given a job apparently in spite of his problems because he had a large family and was on relief (Tr. 71). The employee was discharged for his failure to comply with the operator's instructions (Tr. 75).

I find no violation in Citation No. 378006 and it is hereby vacated and the petition dismissed as to this violation.

I affirm my decision from the bench as amended.

Citation Nos. 378007-378010, May 5, 1978

A decision was rendered from the bench on these citations which will be found at pages 128-131, of the transcript as follows:

> Judge Michels: That then completes the evidence on these four (4) citations. So the decisions on the Citation Number 378007 through 378010 are as follows: -- this will be a consolidated resolution. The inspector charged for each of four (4) different conveyors essentially the same; namely, that the conveyor did not have a stop cord or a guard along the walkway. Three (3) of the citations charge that there was no guard along the walkway on either side of the conveyor. This condition is charged to be a violation of 30 CFR 55.9-7. That regulation or mandatory standard requires as follows: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length".
>
> The evidence on these citations which is essentially undisputed, is that the four (4) conveyors did not have a continuous stop cord; that is, a stop cord along the full length, nor were they guarded. The requirement clearly is that unguarded conveyors with the walkway shall be equipped with these emergency devices. Since the emergency devices were not in place I find that there was a violation in each of the four (4) instances. I find a violation, in other words, of 30 CFR 55.9-7 for each of the citations in 378007 through 378010.
>
> There are findings to be made on three (3) of the criteria, findings having already been made on the three (3) other criteria that are generally applicable. First, on the gravity or seriousness. There is a conflict to some

extent in the testimony as to whether the conveyors are as safe now as they were before the installation of the guards. The guards were installed for purposes of abatement or to correct the alleged condition. Based on the testimony of witness Herr and the picture [Respondent's Exhibit R 4], I suppose that one might conclude that with that rail an accident could be more serious if somebody should put his hand under the roller. However, it seems to me that the rail would be instrumental, at least in preventing accidental instances of limbs being inserted under the roller. But in any event, the question of abatement or the correct means of guarding is not really before me. The real issue is whether there was a cord or not, a continuous cord, cut-off cord on an unguarded conveyor. Now if the conveyor is guarded then you don't need the cord and the abatement purpose of the guard was to replace the need for the cords. The operator is of course free to install the kind of guard, I believe, that it believes will serve the purpose and prevent injury and if additional screening or additional guarding is necessary, that perhaps should be done. But as I understand it, the inspector was satisfied with the minimum type of railing that was installed and accepted that and I have no reason at this time to go behind his judgment on accepting that as being adequate abatement.

To get back to the hazard, I find from the evidence that there is a danger of miners working around the conveyors or perhaps walking, using the conveyors, of accidentally becoming entangled in them and becoming injured and, without the stop cord, having no means to stop the conveyor and reduce or eliminate the possible injury.

On the question of negligence the mandatory standards place on operators the requirement that they know what the standards are and to comply with them. The lack of either a stop cord or the guarding in these circumstances was certainly readily observable and so therefore should have been known and I find some degree of negligence for the failure to install either the guard or the stop cord. Abatement, based on the evidence, was done rapidly and in good faith and I so find.

The Assessment Officer has assessed a fine -- or proposed a fine of thirty-eight ($38.00) dollars for each of the four (4) violations. These proposals are not binding upon me, but I believe that in all the circumstances that would be an appropriate fine for the violation found. So in conclusion, therefore, a fine is assessed of thirty-eight ($38.00) dollars for each of the four (4) violations found in the Citations Numbers 378007 through 378010.

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I hereby affirm the above-decision in Citation Nos. 378007-378010 except for the size of the assessments. After reading the transcript and reconsidering the matter, I believe that I assessed these citations too high since there was a low degree of negligence. It is true that for a clearly defined walkway, the absence of a guard or cord would be obvious and known or should be known. These, however, were not clearly defined walkways. They were merely the ground alongside the conveyors which miners used and walked along to service the equipment (Tr. 110-111, 115, 118). I agree that these are walkways within the meaning of that term as used in 30 CFR 55.9-7, but that fact may not be so clearly evident to an operator. Thus, it seems that a small degree of negligence is involved. Accordingly, I will reduce the assessments by one-half and reassess for each of these citations a penalty of $19.

A summary of the dispositions in this case follows:

Citation No.	Action taken or or Assessment
371248	$10
371249	vacated
378006	vacated
378007	19
378008	19
378009	19
378010	19
$	$86

IT IS ORDERED that Respondent pay the penalties totaling $86 within thirty (30) days of the date of this decision.

Franklin P. Michels
Administrative Law Judge

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~Footnote_one

1 It does not appear that the rules of procedure prohibit reconsideration such as is sought here. While there is no specific provision on authority for reconsideration, the rules do provide that "the jurisdiction of the Judge terminates when his decision has been issued by the Executive Director" 29 CFR 2700.65(e). This has not yet happened. No problem arises here relating to review by the Commission, a matter which concerned the agency in Secretary of Labor v. Penn Allegh Coal Company, Inc., Docket No. PITT 78-97-P (January 3, 1979). This decision, as provided for in 2700.65(a), has not yet been reduced to writing or issued by the Executive Director. Furthermore, the parties have raised no issue on the authority of the Judge to

reconsider his decision at this stage.

~Footnote_two

2 I recognize that the amended decision differs from my bench decision on the finding of whether the area was one "where falling objects may create a hazard." No specific finding was made on the point in the bench decision, and I accepted the showing that the area was a hard hat area as sufficient. A full review of the evidence now satisfies me that the finding on this question in the amended decision is the correct finding.