CCASE:
SOL (MSHA) V. EXCEL MINERAL
DDATE:
19791205
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. WEST 79-173-M A.C. No. 04-00551-05001
v.	Docket No. DENV 79-454-M A.C. No. 04-00551-05002
EXCEL MINERAL COMPANY, RESPONDENT	Sheep Springs Pit & Mill
	Docket No. WEST 79-174-M A.C. No. 04-02964-05002
	Excel Pit & Mill

DECISION

Appearances: Judith G. Vogel, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Louis F. Fetterly, Esq., Los Angeles, California, 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 (the Act), 30 U.S.C. 820(a), by petitions for assessment of civil penalties filed by MSHA. Timely answers were filed by the Respondent in general denying the allegations and requesting a hearing. The cases were heard in Bakersfield, California, on October 30, 1979. A decision was made from the bench as to each citation in these three dockets except for one in which decision was reserved. These are hereby reduced to writing pursuant to 30 CFR 2700.65(a). Some corrections or clarifications have been made.

Preliminarily, the Petitioner requested dismissal of Citation No. 371373 in Docket No. DENV 79-454-PM. There being no objection, the petition was dismissed as to this citation with prejudice (Tr. 5). This ruling is amended by further vacating Citation No. 371373 and as so amended, it is affirmed.

Also pending was a motion to dismiss Citation No. 371370 in Docket No. WEST 79-173-M and Citation No. 371359 in WEST 79-174-M. There being

no objection, this motion was granted and the petitions dismissed as to these citations with prejudice (Tr. 5). This ruling is amended by further vacating Citation Nos. 371370 and 371359 and as so amended is affirmed.

Findings on Certain Criteria

Findings, based on stipulations were made as to certain generally applicable criteria as follows: "* * * I find as stipulated, that there is no history of prior violations. I further find that this is a small operator as stipulated. I further find that the penalties to be [assessed] here will not impair the operator's ability to continue in business" (Tr. 8).

It was further found that the Sheep Springs Pit and Mill and the Excel Pit and Mill were engaged in commerce and are subject to the jurisdiction of the Mine Safety and Health Review Commission (Tr. 8).

WEST 79-173-M

Citation No. 371370 - Vacated

Citation No. 371375

The following is the bench decision on this citation found at pages 43-46 of the transcript:

> THE COURT: * * * This is my decision on citation number 371375: The condition or practice as alleged by the inspector is as follows: Quote, "The trailers at the docks were not all blocked from moving. Wheel chocks were available on chains secured to the docks. Loading of trailers with forklifts is a continuous operation."
>
> The inspector cited the regulation or mandatory standard number 55.9-37. That reads as follows: Quote, "Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement."
>
> The first finding required is that of the fact of violation. In this instance, the inspector testified that he observed two trailers which were free-standing and which were not chocked or blocked. There's testimony that -- to the effect that the trailers were blocked. But in this instance, I accept the testimony of the inspector that there were two non-blocked trailers.

The portion of the standard cited by the inspector is the second sentence. And this, as noted when I read it, requires that it be both mobile equipment and that it be parked on a grade. So far as whether or not this is mobile equipment, the testimony of the inspector is that it is in that category, and I accept his testimony.

I have to admit that I have some difficulty with that since it seems to me that it is at least partially immobile and not a piece of mobile equipment in the sense of a tractor or a drag line or some other similar kind of equipment. Nevertheless, I do find that it was mobile.

That brings me, then, to the point as to whether or not these trailers were on a grade. In spite of the fact that the inspector did indicate there was a slight or possible one percent grade, which I accept, I find that it is not a grade within the meaning of this regulation.

Further, the inspector did testify that it was "more level than anything." In my view, it would be difficult to find a place on the earth that is absolutely level like a billiard table. And so, accordingly, the regulation could not have meant that. It surely meant, or means, a grade of some significance so that if the equipment does begin to roll, it will keep rolling.

In this case, as I have already indicated, it was a relatively minor grade. So far as I could understand from this testimony, the effect of a trailer on this minor or one percent grade would be little different from that on a leval grade when pushed. Accordingly, my finding is that there has been no proof of a violation of this mandatory standard as charged. The citation is hereby vacated and the petitioner dismissed as to that citation.

I think it might be appropriate to add the comment that even though the standards do not literally seem to require chocking in that situation, I do not intend to mean by my decision that that practice of blocking or chocking those wheels isn't a good practice. There was testimony, and I would accept that, that there is always the possibility of the pushing of these machines, even though they are not on a significant grade, and therefore the possibility of danger and a hazard. My finding is only that it is not covered by this specific regulation.

That completes, then, my decision.

This decision is hereby affirmed.

Docket No. WEST 79-174-M

Citation Nos. 371343-371347 and 371349-371351

These citations all concern Respondent's prescreening plant which was built out of used equipment (Tr. 154). These were consolidated for decision at the Respondent's request so that consideration could be given to the issue comprehending all of the citations of whether the prescreening plant was under testing procedures at the time the citations were issued.

The oral decision from the bench on the listed citations, which in general cover the alleged lack of guards or handrails, is contained in the transcript at pages 189-199 and is as follows:

> My decision on these seven citations will follow. For the purpose of the record, this concerns the following citation numbers: 371343, - 344, -345, -346, -347, -349, -350 and -351. I don't believe that I will be able to decide these cases on an absolutely consolidated basis. But I would take the principal argument, or a principal argument you made first and dispose of that. That is, whether or not this was in a so-called testing posture.
>
> My remarks on that would be then applicable to each citation.
>
> The record will show that the testimony is in some dispute on this issue. The inspector has a clear view to the effect that this is not, quote, "Testing," unquote, for the reasons that it involved a prescreening plant that was in operation over a long period of time, and it did not involve the testing of a particular part of that plant on a limited basis, that is, where the screen or guard would simply be taken off, or handrail, also, and when the particular repair or testing is done, replaced. On the other hand, we do have the testimony of Mr. Rutledge, who contends that the plant was in what I would think of as a start-up posture. It was composed of used machines that were put together and assembled, apparently over a relatively long period of time, and according to his testimony, it was not until May and June that any appreciable production occurred. His view was that this was testing.
>
> Now, one of the little technical or legal problems here is that I don't believe that any of the sections cited specify removal for testing in so many words. And so far as railings are concerned, I'm not even sure there's anything in the regulations at all that would contemplate that kind of an exception.

~2005

Now, when it comes to guards, we do have one statutory standard, which is 56.14-6, which says, "Except when testing the machineryguards shall be securely in place while machinery is being operated."

Now, I suppose, and I don't believe it's been really seriously disputed here that insofar as a guard is concerned, at least, under 56.14-1, that there could be removal for that testing purpose. In other words, 56.14-6, in a sense, modifies 56.14-1. And I don't believe there's any dispute on that. [Reference to Part 56 corrected to refer to Part 55. See below.] My finding would be on this that I would conclude as a general matter that this would not be what I would refer to as testing. I appreciate that there were problems in this start up over a period of time that might have dictated certain kinds of procedures that you wouldn't normally expect in a fully operational plant. And to an extent, I'm going to take that into account.

However, for many of the violations, there were no screens, there were no guards. The inspector saw none, even in the areas. And in some it was admitted that the guards had not been made for the particular pulley or screen, whatever it may have been. So it did mean that over a relatively long period of time, that is, several months, even though it was not fully operational, it was in operation, and certain employees, apparently only two for the most part, were subjected to those hazards.

In short, it was not the situation where a screen or a guard would be taken off temporarily for some particular repair or test and then placed back on, but it was more, in my view, of an operational situation in which there were really no -- at least in some instances, no guards or railings supplied.
So for that reason, I would reject that particular general argument.

Now, I will take each one -- or at least some of them one by one. * * * The first citation in this group is 371343. The inspector charged here, quote, "There was no handrail at the head pulley end of the walkway of the number one conveyor in the pit to prevent persons from falling about 20 feet to the ground below." He charged a violation of 55.11-2.

I should interject at this point that I have been improperly referring to the 56 series. However, the regulations, I believe, are exactly the same in both 55 and 56 as regards these particular standards. But I would like the record to be corrected on that point.

To continue, 55.11-2 reads, quote, "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, towboards shall be provided,". There's no dispute in the testimony that there was no handrail at the end of the walkway. There is no dispute that this was a walkway. It did have a handrail for the full length except for the end where it was missing. The walkway was some 20 feet off the ground. The testimony of Mr. Gibbs is that this handrail at the end was removed for the purpose of doing some maintenance repair work on the conveyor. His notes showed that it had been removed -- or that work had been done on this part of the conveyor on the 11th and 12th of July. The citation was issued on July the 19th, which is almost seven days later.

There's also testimony that the particular repair could not be accomplished with the rail in place. This testimony -- that was by Mr. Gibbs. And this testimony was disputed by Mr. Drussell. There was also the testimony of Mr. Gibbs that the plant was not in operation at the time.

This is an example, I think, of an instance in which the standards are mandatory, and they really don't provide any particular exceptions. It did result in a hazardous situation.

There is, furthermore, dispute that this [rail] needed to be removed for the repair. Mr. Drussel testified that he did not understand why it had to be removed. Moreover, it seems that some temporary type of protection could have been provided if, in fact, it was necessary to remove that section of the rail. It is my impression from the evidence that this was too long a period of time to be considered in the context of a temporary removal for an immediate repair, because it appears that it had not been worked on for at least seven days. I think in all those circumstances, I have really no alternative except to find that this is contrary to that standard.

So I find a violation of 30 CFR 55.11-2.

The following covers my findings on the criteria: It is clear that the removed rail was readily visible, and so

therefore it should have been known to the operator. On this, as well as all of these violations, I'm going to find less than ordinary negligence because of the complications of the start up. In other words, there is testimony that the employees of the operator did not believe they were violating any law because they thought they were in a testing posture. So I will take that into account on this as well as the others.

I believe this is a serious violation, because if there should be an accident and somebody should fall from that height, it could be a serious injury. So I find it to be a serious violation.

It was abated, according to the testimony, within the time set by the inspector, and I so find. Taking all of those factors into account, I hereby assess a penalty of $25 for this violation.

The next citation is 371344. The inspector charged, quote, "There was no stop cord or railing along No. 1 conveyor in the pit, to prevent falling on the conveyor and being carried along it to the end where it emptied into a vibrating screen." He charged a violation of 30 CFR 55.9-7. That standard reads, quote, "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length." My finding on the fact of violation is as follows: The inspector testified that on the number one conveyor there was no protective guard along the walkway between a person walking on that walkway and the conveyor; and further, that there was no stop device. This testimony is disputed by Mr. Gibbs, who testified that there was a screen in place along that walkway. And a picture was put in evidence, identified R-1, which shows such a screen. However, it is clear that that picture was taken long after the citation was issued.

On this citation, there's a 100 percent difference on the question of whether or not a screen was in place. It's difficult for me to find any way to determine who exactly may have been right and who may have been wrong. A screen as shown by the picture is something that could hardly be overlooked. Yet, the two witnesses in good faith, I assume, testified exactly the opposite about the existence of that screen. If a screen did exist, I think it's clear there was no violation. There are some factors here which suggest to me that possibly I should accept the inspector's testimony. But about the only one that is worth mentioning would be the fact that there were other screens and guards not in place. But I don't know that that's sufficiently strong to overcome the testimony that there was a screen in place.

In such a situation as this, I sometimes go back to the principle that the burden of proof is on the government by a preponderance of the evidence where there is really no way to make a determination between the two exactly opposite pieces of testimony. I would have to conclude that the government did not carry its [burden of proof as] required.

And I would like to make clear, however, that that does not mean that I did not consider the inspector's testimony credible, but Mr. Gibbs was credible, also. And I believe that they both testified in good faith as to what they saw, and for some reason they saw different things. And so I would just rely on the burden and find in this instance no violation. Accordingly, as to citation 371344, the citation is vacated and the petition is dismissed as to that citation.

I'm going to try to handle, to speed this up, the following set of citations in a group: That is, 371345, 371346, 371347, 371349, and 371350. In each of these citations, the inspector charged for particular designated machines that the drives, pulleys, or other turning devices were not guarded. I will just read the first one as an example. Quote, "The V-belt drives on the vibrating shaker screen in the pit were not guarded to prevent getting caught in the pinch points or contacting the moving pulleys" [Petitioner's Exh. P-4]. In each of these cases, the charge is that it was a violation of mandatory standard 55.14-1. That is of 30 CFR. That standard reads as follows: Quote, "Gears, sprockets; chains; drive, head, tail, and take up 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 other citations are similiarly worded, except that they refer to different drives or pulleys.

In each of these citations, there is no question and no dispute that the proper guards were not in place. There were circumstances which were offered as a defense in several of the instances, which I will take up. But so far as the evidence is concerned, it does show that the guards as required were not in place. In each instance, the inspector testified that he did not see any evidence of the guards and he did not know nor did he see any evidence as to how long they had been off. In some instances, it is clear that there were no guards at that time available for some of the devices.

In looking at my notes as to the testimony, it appears to me that it is only in the case of 371345 that there was a general defense offered other than the defense of testing. And in that case, Mr. Gibbs testified that there was a bad bearing, and he wasn't sure which side the bearing was on. He had the guard off, according to his testimony, in order to make the necessary tests to determine which bearing was faulty.

His testimony was that the V-belt drive of the vibrating shaker had been run with the guard off for a day or more. He further claimed that this was necessary to make the tests or measurements required.

In this instance I will accept Mr. Gibbs' representations and conclude that there was a specific testing situation in which the guard was removed for a purpose while testing. So, accordingly, as to 371345, I hereby vacate that citation and dismiss the petition as to that citation.

So far as the other citations are concerned [i.e., 371346-371347 and 371349-371350], I believe that, in fact, a violation has been proved. And I so find. In each case the inspector testified that the operator knew or should have known because the lack of guards was easily visible. And I so find. He further testified to the fact that in each case it was a hazard. And I find, therefore, that the violations were serious.

In each case, the evidence is that the violations were abated in good faith within the time set by the inspector, and I so find. I would supplement my finding on negligence somewhat by stating as I did before, that for each of these I find less than ordinary negligence because of the circumstances mentioned heretofore.

For each of the four violations which were proved, I will assess a penalty of $40.

The remaining citation in this group is 371351. In this instance, the inspector charged, quote, "The work platform at the balance wheel of the shaker screen in the pit was not provided with handrails." He charged a violation of 55.11-27. This standard provides as follows: Quote, "Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition." That is the end of the quotation on that part of the standard which is relevant to the citation.

> The evidence is clear and it is admitted that there were no handrails. In this instance, a work platform was prepared of approximately two by four feet for the purpose of installing a bearing on the shaker screen. This platform was ten or more feet off the ground. Mr. Gibbs testified that he considered it a hazard to have a handrail on that platform in that if the balance wheel popped off it might crush him. He also testified that though safety belts were provided, he did not wear [one].
>
> Mr. Drussel testified that in his view if safety procedures had been employed in the removal of that bearing, that the hazard referred to should not have occurred; that in any event, without the rail, there was a hazard either way, either being crushed or being thrown over and subjected to that long fall.
>
> In this instance, I am going to accept Mr. Drussel's testimony that proper procedures would have eliminated, or at least mitigated, the particular hazard of the counterweight, I believe it was called.
>
> In the case of this standard, it's relatively a rigid requirement that if you have a work platform, it must have a railing. And it does not actually allow for exceptions. I think in some circumstances it may be that there would be conditions where it should not be required. But I don't believe that we're faced with that here.
>
> So I find, therefore, that there was a violation of 20 CFR 55.11-27.
>
> The findings on the criteria are as follows: It was easily visible from the ground, and therefore there was some negligence because it should have been observed. I find less than ordinary negligence, for the reasons previously indicated. It was a clear hazard. Working on a platform of that nature without a belt could have resulted in serious injury to an employee falling therefrom. So as far as abatement is concerned, it was abated in good faith within the time set by the inspector. And I so find.
>
> I hereby assess a penalty for this violation of $40. That completes the decision on the series of citation relating to the prescreening plant.

This decision as to Citation Nos. 371343-371347 and 371349-371351 is hereby affirmed.

This citation was decided orally from the bench. The decision contained in the transcript pages 212-214 follows:

> THE COURT: This is my decision in citation 371348: In this citation the inspector charges as follows, quote, "There was no berm or guard rail along the outside edge of the haul road from the loading area under the mill in the pit." The charge is 30 CFR 55.9-22. This reads as follows: "Berms or guards shall be provided in the outer bank of elevated roadways." On the fact of violation, first, it is clear, there is no dispute this was an elevated roadway. The standard is mandatory. It does require a berm. There has been testimony that such berms too high could be unsafe. It would not be appropriate for me, I believe, to decide that issue here. The issue was decided when [the Secretary] issued the regulation. There are provisions for variances or waivers or modifications of the applications of these rules. And if it does not apply or suit in a particular situation, that would be the appropriate procedure. Otherwise, the regulation or the standard is applicable.
>
> Now then, there has been the argument -- the argument was made, rather, that there were berms there, they just weren't of the height of what the inspector required. I think the evidence shows that there were berms in some areas, or ridges up to possibly ten inches. The inspector testified that that was not sufficient. It seems to me that a fair reading of that standard would require adequate berms. There might be some dispute as to what the height actually should be to be adequate. But I think we could safely say that ten inches is so small that it perhaps would be a little more than no berm at all where you're dealing with larger vehicles.
>
> So accordingly, I would hold that there was no berm in those areas as required by the standard. I do find a violation, therefore, of 30 CFR 55.9-22 as charged.
>
> I find that the operator was ordinarily negligent, because it knew or should have known that an adequate berm was needed. Insofar as the hazard is concerned, or the seriousness, I accept the inspector's testimony that a truck could go over the edge and cause death or serious injury to an employee without the berm. Accordingly, I find that this violation was serious.
>
> I find that, finally, it was abated with good faith within the time set by the inspector.

> On this violation I assess the penalty sought by the MSHA, which in this instance is $44. I assess that amount. That completes the decision.

This decision is hereby affirmed.

Citation No. 371360

The decision on this citation was reserved because of the issue raised as to the jurisdiction of the Secretary over this particular facility.

The inspector charged as follows: "The operator of the dragline at the ponds was not protected from contacting the moving cable drums and brake assembly or getting caught by the cable as it wraps on the drums while he operated the machine from the operator's seat." This condition was alleged to be a violation of 30 CFR 55.14-1 which is quoted under a previous citation above. It requires, in brief, that exposed moving machine parts which may cause injury be guarded.

The machine against which the citation was issued is a dragline operated at ponds of water at the main processing plant. It is used to drag the silt out of settling ponds (Tr. 214-217). The machine is located about 9 miles from the pit (Tr. 225). Respondent argued on the record that the operation of taking silt out of the ponds at the mill could not be construed as "mining." Subsequently, on November 15, 1979, Respondent filed a motion withdrawing its contention of a lack of jurisdiction.

I hereby find that the milling facility is subject to the Act and the regulations based on the legislative history, the plain language of the Act, and applicable precedents. For a full discussion of this issue, see my decision in Ready Mix Sand & Gravel Company, Inc., Docket No. WEST 79-66-M, issued December 5, 1979.

There appears to be no dispute that the machine drums and brake assembly were not fully guarded. The inspector testified that the machine may have had a small screen over some of the parts, but was not guarded as to the main moving parts (Tr. 215). Robert Hurst, employees' personnel and safety supervisor, testified that while he was not there on the day of the citation that the drums have three-quarter guards which were factory installed (Tr. 221). He admitted parts of the drums were still exposed (Tr. 222).

I find that moving machine parts were not guarded in that they were not adequately or completely covered and that this created a hazard to employees working in the area. I find therefore a violation of 30 CFR 55.14-1 as charged.

My findings on the criteria are as follows: This was a serious violation because an operator of the machine could get caught in the moving parts resulting in the probable loss of an arm or hand (Tr. 216). The

operator was responsible for some negligence. There is evidence to the effect that the lack of guards might have been difficult to observe from ground level. However, this condition would have been readily observable on a regular inspection of the machine. Because the machine was an older model which, according to the testimony, did not have full guards installed at the factory, the degree of negligence is somewhat lessened.

In all the circumstances, I assess a penalty of $45 for this violation.

DOCKET NO. DENV 79-454-PM

Citation Nos. 371371-371374

Under this docket Citation No. 371373, at Petitioner's request, was dismissed. As to the remaining citations the parties negotiated a settlement which was approved. Citation No. 371371 assessed originally at $66 was settled for $40; 371372 previously assessed at $72, was settled for $45; and 371374 assessed by the Assessment Office at $52 was settled for $40. The decision from the bench approving the settlement of these citations follows:

> THE COURT: I would note in connection with that stipulation that the parties have entered into a settlement for these citations. The first two, namely 371371 and 371372, both involve the standard 30 CFR 55.14-1. This is the same mandatory standard that was dealt with in other dockets. There it was my view that the penalty of, I believe it was, $40, was appropriate in all of the circumstances. There may be some different circumstances here, but looking at the total picture, I conclude that the settlement of respectively $40 and $45 is appropriate and I accept that.
> So far as 371374, the reduction has been from $52 to $40. This does not appear to me to be an excessive reduction, and for the reasons stated by Counsel, I accept that as appropriate in the circumstances. Accordingly, that disposes of the three remaining citations.

This decision is hereby affirmed.

A summary of the dispositions in the captioned proceedings follows:

DOCKET NO. WEST 79-173-M

Citation No.	Assessment or Other Disposition
371370	Vacated
371375	Vacated

DOCKET NO. WEST 79-174-M

Citation No.	Assessment or Other Disposition
371343	$ 25.00
371344	Vacated
371345	Vacated
371346	$ 40.00
371347	$ 40.00
371348	$ 44.00
371349	$ 40.00
371350	$ 40.00
371351	$ 40.00
371359	Vacated
371360	$ 45.00

DOCKET NO. 79-454-PM

Citation No.	Assessment or Other Disposition
371371	$ 40.00
371372	$ 45.00
371373	Vacated
371374	$ 40.00

Total assessment for all dockets: $439.00

~2014

ORDER

It is ORDERED that Respondent pay total penalties of $439.00 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge