CCASE:
SOL (MSHA) V. EL PASO ROCK QUARRIES
DDATE:
19791214
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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 79-139-PM A.O. No. 41-00046-05001
v.	Docket No. DENV 79-140-PM A.O. No. 41-00046-05002
EL PASO ROCK QUARRIES, INC., RESPONDENT	Docket No. DENV 79-176-PM A.O. No. 41-00046-05003
	El Paso Quarry & Plant Mine

DECISION

Appearances: Barbara G. Heptig, Esq., and Jack Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Ralph W. Scoggins, Esq., El Paso, Texas, for Respondent

Before: Judge Charles C. Moore, Jr.

The three cases captioned above were consolidated for hearing to the extent that general information introduced in the first docket number tried was not repeated in the other docket numbers although it was agreed that such information or evidence could be considered as having been introduced in all three cases. The company is a large operator and I find that no penalty that might be assessed will affect its ability to continue in business. It has no prior history of violations and all violations which are found herein to have occurred, were abated promptly and in good faith.

DOCKET NO. DENV 79-139-PM

Citation No. 159658 alleges that an elevated roadway was not equipped with berms or guards along the outer edges in violation of 30 CFR 56.9-22. The road that is subject to the citation is for access to the very top of the quarry wall for the purpose of drilling and blasting. Inspector Kirk stated that the road was not used for hauling, loading, or dumping. In Cleveland Cliff Iron Company v. Secretary of Labor, VINC 78-300-M (September 8, 1978), I ruled that an identical berm standard only applies to mine roads designed for hauling, dumping and loading. I see no reason

why the requirement should be restricted to such roads, but it nevertheless is, and until the standard is changed or the Commission rules otherwise, I shall continue to interpret the standard as applying to only such roads as I have indicated. The citation is VACATED.

Citation No. 159660 alleges that two employees on the No. 2 bench were breaking boulders with a hammer and were not wearing eye protection as required by 30 CFR 56.15-4. The evidence disclosed that the two "employees" were actually what is termed "rock pickers" in the El Paso area. They are not employees of El Paso Rock Quarries, Inc., but are actually either customers or employees of customers. As the evidence showed, a customer comes in and agrees to buy rock that has been blasted by the Respondent. The customer then takes his own employees to the area and has them break up the rock for collection in a truck.

This is not the typical "independent contractor" case such as the Interior Department's Board of Mine Operations Appeals, the Federal Mine Safety and Health Review Commission, the Federal courts, and the administrative law judges have been struggling with. In all of those cases, the alleged violation was caused by, or was allowed to occur by, an independent contractor who was performing some function for the mine operator. The alleged culprit was being paid by the mine operator to perform some service in those cases. In the instant case, however, the individuals who were not wearing the required protective goggles, were not performing any function for the mine operator. They were customers buying rock or they were the servants of customers buying rocks.

I cannot find in the cases decided by the Board or the Commission any guidance as to the question of whether a mine operator should be held responsible under the mine safety law for acts committed by a customer or a customer's servant. Section 3(g) of the Act defines a "miner" as "any individual working in a coal or other mine." Inasmuch as the rock picker is doing his work in a mine, he fits the definition of a miner. As such, he should be entitled to the same protection that the Act affords miners who are working for a mine owner.

The standard in question, 30 CFR 56.15-4, requires that "all persons" wear safety goggles "when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes." These rock pickers were breaking rocks with a hammer and were not wearing eye protection. I find that breaking rocks with a hammer creates a situation where eye injury could occur and since the Act was designed to protect miners and these rock pickers are miners, I find that a violation of the standard occurred. According to the inspector, the rock pickers do not speak English or at least do not admit speaking English. It would do little good, therefore, for the inspector to try to determine who their employer was in order to serve a citation on him. In some cases, the truck driver might be the employer, but in others, he might be an employee of someone else. If the Act is to be enforced under the circumstances, the inspector's only

recourse is to serve the mine operator. The mine operator may not have authority to

require the customers to wear protective glasses, but at least he could furnish the glasses and instruct the rock pickers to wear them. I am going to find the mine operator responsible for the actions of the rock pickers, but I find very little negligence involved in the violation. A penalty of $25 will be assessed.

Citation No. 159661 alleges that employees were observed riding on the outside running board of a dump truck in violation of 30 CFR 56.9-40(a). The standard cited prohibits men from being transported "in or on dippers, forks, clamshells, beds of trucks unless special provisions are made for their safety, or buckets except shaft buckets." At the commencement of the hearing, the attorney for MSHA moved to amend the citation so as to allege a violation of subsection (c) of 30 CFR 56.9-40 which prohibits miners from riding "outside the cabs and beds of mobile equipment %y(3)5C." The attorney for Respondent objected to the amendment and pursuant to Eastern Associated Coal Corporation, 5 IBMA 185 (1975), the motion was denied. The prayer for a penalty is accordingly DENIED and the citation is VACATED.

Citation No. 159662. The allegation here is that the outer edge of the second bench from the top of the quarry was not equipped with berms or guard rails as required by 30 CFR 56.9-22. The bench involved was clearly the type of roadway where a berm is required by the regulation and it is equally clear that there was no berm at the time of the inspection. While berms must be constructed after blasting since the blasted boulders are used to form the berms, and while Respondent had just recently finished blasting at the time of the inspection, it is nevertheless true that Respondent allowed haulage trucks to use the road before building the berms. While I cannot accept the inspector's testimony that the berms would stop a fully-loaded truck, they would serve as a visual warning as to the location of the edge of the bench where the 40-foot drop begins. Or, if the truck were a runaway, they might slow it down enough to give the driver sufficient time to jump. The gravity is high but the negligence, in view of the fact that the blasting had just been finished, is low. A penalty of $100 is assessed.

Citation No. 159663. The citation alleges a violation of 30 CFR 56.9-71 in that a traffic sign "was partially hidden in the berm and vehicles were observed going to the opposite pattern of the right-of-way." The mandatory standard states that "traffic rules including speed, signals, and warning signs shall be standardized at each mine and posted." There is no allegation that the traffic was not standardized nor is there an allegation that the traffic pattern was not posted. The allegation merely is that one of the signs (not the only sign) was partially hidden in a berm. The partially-hidden sign was 600 to 800 feet from a proper sign and according to the testimony, the drivers are told verbally that when driving a haulage truck they should drive on the lefthand side. In order to rule in MSHA's favor, I would have to interpret the standard to require a sign every so many feet or perhaps at every intersection. But the standard does not require that and I accordingly VACATE the citation.

Citation No. 159664 alleges a violation of 30 CFR 56.3-12 in that two employees loading rock by hand were between the truck and the quarry wall. The standard prohibits this practice because of the danger of rolling rocks trapping the miner against the truck or other piece of equipment leaving him with no escape route. Boulders were in fact coming down the slope wall and the miners were diverting them into the dump truck. As in a previous citation, these miners were non-English speaking rock pickers and essentially customers of Respondent. While it may seem harsh to require Respondent to control the activities of customers, I know of no other way that the purposes of the Act can be effectuated except to hold the mine operator accountable for the safety of these rock pickers. I hold the violation to be of moderate gravity and that it involves a low order of negligence. A penalty of $25 will be assessed.

Citation No. 159665. The allegation is that 30 CFR 56.9-87 was violated in that the automatic reverse alarm was inoperative on one of the company trucks. This was a 35-ton haulage truck and naturally could do serious damage if it were to back over another piece of equipment or a miner. But the evidence indicates that all such equipment is checked every morning and every night, and whenever the vehicle is backed up. The drivers are instructed to take any truck to the shop to be fixed by mechanics when a failure occurs. In the circumstances, I do not believe that the Act requires a mine operator to guarantee that a piece of equipment will not break down. His obligation is to check it often and repair it when it does break down and there is no proof in this case that the operator did not do just that. If the inspector had been able to determine when the horn became inoperative and that the miner operator should have known of it, a violation would be established. In the present circumstances, however, the citation is VACATED.

Citation No. 159666. The charge is that an employee was barring down loose rock on the lift of the third bench without a safety belt and rope in violation of 30 CFR 56.15-5. This is another "rock picker" violation and I have already held that the mine operator is responsible if a violation occurs. In this case, however, I am not convinced that there was a violation. The standard requires safety belts and lines "where there is danger of falling." The individual in this case was working on a slope that he could walk up and down, but the inspector did not know the angle or grade of the slope. MSHA has failed to carry its burden of proving that there was a danger of falling and the citation is accordingly VACATED.

Citation No. 159688. The citation alleges that loose unconsolidated rock on a quarry wall was not supported or barricaded as required by 30 CFR 56.3-5. The standard is somewhat general but prohibits men from working under or near dangerous banks and requires that overhangingbanks be taken down or barricaded and posted. The evidence is not clear as to exactly what the inspector was referring to in using the phrase "loose, unconsolidated rock." It could not have been "loose" in the sense of unattached at any point because the wall was

vertical and something was keeping the rock from falling. The inspector stated (Tr. 44): "Yes, sir, they were broken

on three sides and only secured by one end." He apparently made the judgment that they were not sufficiently secure and therefore decided to use the term "loose and unconsolidated." But in order to abate the citation, Respondent had to rent a crane and try to dislodge the rocks with a large steel wrecking ball sometime referred to as a "headache pill." Respondent tried the crane and headache pill for 2 weeks and could not dislodge the rocks. It ended up having to blast the rocks out of the wall. In the circumstances, I do not see how I could find that these rocks were loose and unconsolidated. The citation is VACATED.

Citation No. 159667. This citation alleges a violation of 30 CFR 56.9-71 in that proper traffic signs were not posted. The evidence clearly establishes that at an intersection near the No. 1 primary crusher there were no stop or yield signs present. The fact that the drivers were told that trucks actually hauling rock had the right-of-way is no substitute for the traffic signs required by the regulation. There was negligence on Respondent's part but the gravity was only moderate. A penalty of $50 will be assessed.

Citation No. 159668. The citation alleges a violation of 30 CFR 56.4-23 in that records concerning the inspection of fire extinguishers were not available on the mine property. There is no allegation here that the fire extinguishers were defective, but merely that the records of inspections were not kept. Respondent's evidence was that the inspections were made but it admitted that no records were kept. I find the violation occurred but the hazard and negligence involved were of a small order. A penalty of $50 will be assessed.

Citation No. 159669. The citation alleges a violation of 30 CFR 56.11-2 in that tools, bars, pulleys, etc., were stored on a platform and that the platform contained no toeboards. The inspector thought that the hazard was to people passing below the platform who might be injured by falling objects. The standard states: "Crossovers, elevated walkways, elevated ramps, and stairways, shall be of substantial construction provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided." The standard is obviously intended to provide safety for people working on the platform and toeboards would be required if a slipping hazard were present. The standard does not prohibit storage of materials in the absence of toeboards. The citation is VACATED.

Citation No. 159670. The citation alleges a violation of 30 CFR 56.15-5 in that the crusher operator climbed on top of the jaw crusher to break a boulder with a sledge hammer without using a safety belt and rope. The inspector actually saw the operator climb into a hazardous position, he saw that safety belts and ropes were available in the cab of-the jaw crusher but that the miner ignored them. The miner did not speak English and the inspector could not question him, but the only defense offered was that safety equipment had been supplied and the miner had been instructed to use it. I find there was a violation, that it was potentially hazardous and that Respondent was negligent in

not doing more than merely instructing the miners to use safety equipment. A penalty of $150 will be assessed.

Citation No. 159671. The allegation is that the work platform on the northwest side of the second No. 1 primary crusher tower was filled with 12 to 18 inches of spillage in violation of 30 CFR 56.20-3(b). The standard requires that the floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. There was no denial that this was a work place and there was no denial that the spilled rock was on the platform. The evidence did not establish when the spillage occurred and when the operator knew or should have known of its occurrence. The gravity is moderate and the negligence in the absence of the aforementioned possible evidence has not been established to be great. A penalty of $100 will be assessed.

Citation No. 159672. The citation alleges that the troughing pulleys under the feeder where metal sideboards protruded to create a pinch point were not guarded in violation of 30 CFR 56.14-1. The standard requires that gears, sprockets, chains, pickup pulleys, etc., which may be contacted by persons, and which may cause injury to persons, shall be guarded. A pinch point is such an area and there is no contention here by Respondent that the area in question was not a pinch point. The only question is whether the area is such that a person may contact the pinch point and be injured. It was the inspector's testimony that employees would be required to be in the area to clean around the tail pulley, and to service the pulleys. The Respondent's witness testified that the only time an employee would have any reason to go to the area in question would be to perform services when the pulley was not running. Stopping the machinery for maintenance is required by 30 CFR 56.14-29 "except where machinery motion is necessary to make adjustments." There is no evidence in this case that machinery motion would be necessary for the type of maintenance work described by the inspector. If the parties had submitted diagrams or photographs, they might have shown whether or not the area in question was such that a person might wander in and be injured by the unguarded pinch point. As long as the attorneys, however, are content, who hover around a blackboard drawing, and have a witness point and say such things as "in order to get from this point here over to that point, you have to pass by this point here" they will have to be content with not having a record that supports their contention. In such cases, I will rule against the party having the burden of persuasion and insofar as this violation is concerned, that party is MSHA. The citation is VACATED.

Citation No. 159673. The citation alleges a violation of 30 CFR 56.11-1 in that loose unsupported cement was hanging from the steel structure over the No. 3 tunnel conveyor travelways. The standard requires that safe means of access be provided to all working places. Inasmuch as employees are required to go into the tunnel involved to clean and repair, it is a work place within the meaning of the regulations. The particular piece of cement that the inspector considered loose and unsupported, had been in the same place and condition for 8 years at the time of the inspection. While the fact that the 1-1/2 inch thick piece of concrete had been in place for 8 years does not guarantee that it

will stay in place for an additional day. It does bring into question the inspector's judgment as to

whether it was in fact "loose, unsupported cement" the inspector's description of the violation was insufficient to support his allegation that the cement was in fact loose and unsupported or that a dangerous condition existed. The citation is VACATED.

Citation No. 159674. The citation alleges a violation of 30 CFR 56.16-5 in that two compressed gas cylinders were standing upright and not secured. The violation was established beyond question, as was the fact that Respondent was negligent. According to the inspector, however, there was very little chance that someone would be injured by the cyclinders falling on them. A penalty of $50 will be assessed.

Citation No. 159679. The citation alleges a V-belt and drive in the travelway was not enclosed as required by 30 CFR 56.14-1. The testimony regarding this violation was somewhat contrary to the citation, but the fact is that a V-belt, located in a travelway was not completely guarded. It was also established that there was nothing to prevent miners in the area of this V-belt during a working shift, and that a finger could be lost if caught in the V-belt. Respondent was negligent and the violation was hazardous. A penalty of $100 will be assessed.

Citation No. 159680. The citation alleges a violation of 30 CFR 56.14-1 in that the tail pulley of the No. 4 conveyor belt was not guarded. This citation is similar to the one immediately preceding it in this opinion, but involves a pulley rather than a V-belt. The hazard and negligence are about the same and accordingly, a penalty of $100 will be assessed.

Citation No. 159681. This citation also involves an unguarded pulley and alleged violation of 30 CFR 56.14-1. The evidence is essentially the same as that presented with respect to the two preceding citations. The gravity, negligence, and the violation itself were clearly established and a penalty of $100 will be assessed.

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Citation No. 160809 alleges a violation of 30 CFR 56.3-5 in that men were working drilling boulders at the toe of a 75-foot highwall with loose unsupported rock hanging on the wall. The standard states that men shall not work near or under dangerous banks. The inspector testified that the rock which he considered to be loose because he saw a crack on one side, was about halfway up the 75-foot wall, and that the men were working 30 or 40 feet from the toe of this vertical wall. In order to hit the men, the rock would have to fall away from the vertical face at an angle of approximately 45 degrees, and the testimony of the inspector did not convince me that this could happen. Also, the citation was abated by barricading the area, and the so called loose rock was left in place for approximately a year before it was taken down. In the light of these two factors, MSHA has failed to carry its burden of showing there was in fact a violation. The citation is VACATED.

Citation No. 159682 alleges a violation of 30 CFR 56.11-2 in that the handrails around a work platform had an opening approximately 2 feet wide. The platform in question was about 10 feet high, and the inspector could see from the tracks that workers had stepped through the opening onto a guard for a V-belt or pulley. He actually saw one worker step onto the guard. There was a falling hazard, and Respondent was negligent in allowing the hazardous situation to exist. A penalty of $50 will be assessed.

Citation No. 159683 alleges a violation of 30 CFR 56.11-1 in that an access ladder ended at an unguarded tail pulley. The inspector stated that if someone climbed the ladder, they could easily put their hand in the unguarded tail pulley. Instead of citing Respondent for having an unguarded tail pulley, the inspector chose to cite Respondent for failure to provide safe access to a working place. Inasmuch as there is a specific standard requiring that certain pieces of machinery be guarded, I do not believe the safe access standard was intended to cover the same type of condition. If the safe access standard can be stretched to cover unguarded pulley's, etc., it could also be stretched to cover everything from bad brakes to unsafe blasting caps. I do not believe that was the intent of the regulation and the citation is accordingly VACATED.

Citation No. 159684 alleges a violation of 30 CFR 56.14-1 in that a revolving counter balance wheel, next to a travelway was not guarded. Although this wheel was solid and did not have gears or sprockets, it was nevertheless a dangerous piece of exposed machinery in an area where it could injure a miner. Respondent was negligent in allowing the condition to exist and is assessed a penalty of $100.

Citation No. 159685 alleges a violation of 30 CFR 56.14-1 in that a revolving counter balance wheel, located in a travelway was not guarded. This violation is the same as the previous violation except in a different location. The hazard and negligence are the same and the same penalty of $100 is assessed.

Citation No. 159686 alleges a violation of 30 CFR 56.11-12 in that an opening under a wash tower along a travelway was not guarded. The evidence established is that there was a hole 4 feet long and 18 inches wide, along the walkway that was unguarded. A person falling through the hole would fall about 8 feet to a metal structure and be seriously injured. The violation is established and Respondent was negligent. A penalty of $100 is assessed.

Citation No. 159690 alleges a violation of 30 CFR 56.12-67 in that the fence enclosure around a transformer was torn and opened in one corner. The purpose of having a fence around a transformer, is to keep unauthorized people away from the dangerous high-voltage connections. The tear in the fence was 2 feet wide and easily big enough for a person to enter. The defense was that if a person wanted to get in, he could climb over the fence, but climbing over a 6-foot fence is obviously not as easy as walking through a hole in the fence. I found this to

be a serious violation, and

that Respondent was negligent in allowing the condition to exist. A penalty of $100 is assessed.

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Citation Nos. 159692, and 159699 were withdrawn by the Solicitor and no evidence was presented with the respect to them. They are accordingly, VACATED.

Citation Nos. 159675, and 159695 both allege a violation of 30 CFR 56.11-2 in that walkways where not equipped with toeboards. The inspector issued the citations because of that hazard to workers below the platforms here in question. The standard states: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

In my opinion, the requirement of toeboards is for the protection of the workers on the walkway, and not for protection of those underneath. 30 CFR 57.11-7-8 does provide that walkways and ramps be kept free of loose rock and extraneous materials, but that standard was not mandatory when the citations were issued. MSHA cannot enforce a nonmandatory standard by trying to stretch a mandatory standard to fit. The citations are VACATED.

Citation Nos. 159676, 159678, 159689, 159693, and 159694 all allege a violation of 30 CFR 56.14-1. They involve the failure to adequately guard balance wheels, and a V-belt. All were clearly unguarded and were accessible to workers. They all appeared to involve about the same degree of hazard and negligence, and I am assessing a penalty of $100 for each citation, or a total of $500 for this group.

Citation Nos. 159696, and 159697 both allege a violation of 30 CFR 56.14-1 in that head pulley's were not guarded and the pinch points were approximately 4 feet off of a work platform. The defense is that the only reason a miner would have for going in the area of these head pulley's, would be for maintenance, and that when maintenance is performed the machinery is shut down. That defense may reduce the likelihood of injury, but the standard is designed to protect anyone using that walkway whether he has any reason to be there or not. The required guards were missing, and Respondent was negligent. The gravity appears to be equal, and a penalty of $100 for each violation will be assessed, which is a total of $200 for this group.

Citation Nos. 160802, and 160803 both allege a violation of 30 CFR 56.14-1 in that pinch points of troughing rollers and side boards were not guarded, and were within 3 feet of the walkway. I had occasion to consider a similar condition, in Dravo Lime Company v. MESA, IBMA 77-M-1, October 28, 1977, and I ruled in that case that standard 56.14-1 does require guards in the vicinity of troughing rollers and sideboards. I am still of the same opinion, and the ruling here is the same. The required guards where missing, Respondent was negligent, and the gravity

is the same. A penalty of $100 each will be assessed, or a total of $200 for this group.

Citation Nos. 160801, 160804, and 160805, all allege violations of 30 CFR 56.11-12 in that openings in the floor through which men or material may fall were not protected by railings or covers. While the unguarded holes varied in size, the inspector thought that a man could fall through any of them, and would fall about 12 feet. He also thought objects could fall through the holes onto people below. The standard clearly requires guards or covers over such holes, and the fact that the inspector saw no one in the area is no defense to the allegations contained in the citations. I do not consider the possibility of a 12-foot fall through holes of a size involved here as serious as the unguarded belts, and pulley's, and fly wheel, etc., but the possibility of injury existed, and Respondent was negligent in not guarding these openings. A penalty of $50 each will be assessed, or a total of $150 for this group.

Citation No. 159691 alleges a violation of 30 CFR 56.12-68 in that the fence surrounding a transformer was not locked. While the evidence is far from conclusive, it appears likely that the citation here was issued within minutes of Citation No. 159690 involved in Docket No. DENV 79-140. It does appear that the inspector looked at the fence, cited Respondent because of the hole which a miner could walk through, and then cited the operator because there was no lock on the gate. If the fence is torn open, there is hardly any point in having the gate locked, and in my opinion, only one citation should have been issued. The instant citation is accordingly VACATED.

Citation No. 159698 alleges a violation of 30 CFR 56.12-8 in that a "conduit was broken and the connector box was missing, leaving the splice open on the No. 8 conveyor belt drive motor %y(3)5C." The evidence presented by the Secretary was somewhat confusing as to this alleged violation, and did not describe a situation where power wires pass into or out of electrical compartments. That is what this mandatory standard is concerned with. The citation is VACATED.

Citation NO. 159700 alleges a violation of 30 CFR 56.14-2 in that a travelway was not guarded against the whipping action of a broken overhead conveyor belt. The violation was clearly established, and injury could result from having a broken belt fall on a miner. Respondent was negligent, and a penalty of $100 is assessed.

Citation No. 160806 alleges a violation of 30 CFR 56.11-1 in that in order to gain access to a travelway at the top of the bend, miner's are required to climb through or over handrails, and through openings in the side of the building. There is a gap between 24 and 30 inches between the handrails in the side of the building. A 30- to 40-foot fall could result. The standard requires the operator of a mine to provide safe access to all working places, and Respondent has failed to do so in this instance. That failure was negligent, and a serious accident could result. A penalty of $200 is assessed.

ORDER

It is therefore ordered that Respondent pay to MSHA, within 30 days, a total penalty in the amount of $2,650.

Charles C. Moore, Jr.
Administrative Law Judge