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SOL (MSHA) V. RIVERSIDE CEMENT  
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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. WEST 79-94-M  
A/O No. 04-00010-05001

v.

Docket No. WEST 79-96-M  
A/O No. 04-00010-05003

RIVERSIDE CEMENT COMPANY,  
RESPONDENT

Docket No. WEST 79-138-M  
A/O No. 04-00010-05006

Crestmore Mine and Mill

Docket No. WEST 79-176-M  
A/O No. 04-00010-05008

Docket No. WEST 79-177-M  
A/O No. 04-00010-05009

Docket No. WEST 79-198-M  
A/O No. 04-00010-05007

Crestmore Plant

DECISION

Appearances: Alan Raznick, Esq., Office of the Solicitor, U.S. Department  
of Labor, San Francisco, California, for Petitioner, MSHA  
D. Marshall Nelson, Esq., Riverside Cement Company,  
Newport Beach, California, for Respondent, Riverside Cement  
Company

Before: Judge Merlin

The above-captioned cases are petitions for the assessment  
of civil penalties filed by the Mine Safety and Health  
Administration against Riverside Cement Company. A hearing was  
held on November 27, 1979.

At the hearing, the parties agreed to the following  
stipulations:

1. The operator is large in size.

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2. The operator has no history of prior violations.

3. The operator's ability to continue in business will not be affected by the imposition of any penalties herein.

4. There was good faith abatement with respect to the twelve alleged violations which involved an alleged violation of 30 CFR 57.14-1 (Tr. 2-3).

Citation Nos. 376299, 375252, 375253, 375254, 376341, 376347, 376348, 376305, 376309, 376313, 376327, 375285.

Each of these citations alleges a violation of 30 CFR 57.14-1. At the hearing, the Solicitor and the operator introduced documentary exhibits and testimony with respect to these citations (Tr. 1-53). Upon conclusion of the testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench (Tr. 53-54). After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 61-64):

Citation 00376299 involves a petition for the assessment of a civil penalty based upon an alleged violation of section 57.14-1 of the mandatory standards.

Section 57.14-1 provides as follows: "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 condition set forth in this citation is as follows: "The exposed moving machine parts (rollers) under the feed chutes where skirting is provided along the tail pulley area of crusher conveyor number eleven were not guarded. These rollers on the conveyor may be contacted by persons which may cause injury. This is located at the top deck of the secondary crusher."

Three MSHA inspectors testified, including the inspector who issued the subject citation. They all stated that Section 57.14-1 would be cited in a case such as this because it presented a very dangerous situation. The hazardous condition was presented because a skirt board was present, attached to the belt at this location to prevent spillage. Due to the skirt board there was no play in the belt so that if an individual got caught between the belt and the rollers, he would not have time or space to get out and would be

seriously injured. All the inspectors agreed that rollers along the belt where skirt boards are not present would not be cited under this mandatory standard.

I find there was no violation.

Section 57.14-1 talks of gears, sprockets, chains, drive pulleys, fly wheels, couplings, shafts, saw blades, fan inlets and "similar exposed moving machine parts". MSHA did not explain how or why rollers could be construed as similar to the enumerated items in the mandatory standard. Even more importantly, MSHA only cites rollers where skirt boards are present. As already stated, one of the inspectors specifically indicated that MSHA would not cite a roller where no skirt board was present, because if there was an injury from an individual touching a roller, it would not be a serious injury. I reject this argument. A mandatory standard simply cannot be administered on this basis. What constitutes or what might constitute a serious injury is so subjective that an operator would never know what was expected of it.

Moreover, if rollers fall within the definition of "similar exposed moving machine parts", then they are always within the definition and should be guarded everywhere. In other words, reference to this mandatory standard for this case either proves nothing for MSHA or it proves far too much. The Solicitor, during his oral argument, admitted that MSHA was selectively applying this mandatory standard to situations only where a serious injury would result. However, as I already have stated, a mandatory standard simply cannot be utilized in this way. Undoubtedly, a hazard is presented by the cited condition and by other such conditions, but it is unfair to the operator and to the inspector as well to attempt to use a standard which either goes nowhere or goes too far. The proper course would be for MSHA to amend the regulations to cover this situation.

I have neither the authority nor the inclination to substitute myself for the rule-making procedures set forth in the Act. The Secretary must realize that he cannot circumvent rule-making procedures regardless of how time-consuming they may be by attempting to persuade Judges of the Commission to interpret existing regulations in an unfair and unreasonable manner.

I note that in *Secretary of Labor v. Massey Sand and Rock Company*, Docket Number Denver 78-575-PM, dated June 18, 1979, Administrative Law Judge Koutras vacated ten citations under analogous circumstances. The reasons for my determination today are set forth herein.(FOOTNOTE 1)

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The parties have agreed that the interpretation adopted for citation 00376299 will govern eleven other citations involving this mandatory standard.

Accordingly, I hereby vacate the following citations:  
376299, 375252, 375253, 375254, 376341, 376347, 376348,  
376305, 376309, 376313, 376327, and 375285.

The foregoing twelve citations are vacated and no penalty will be assessed.

The bench decision is hereby affirmed.

Citation Nos. 375261, 376323, 376318, 376340, 376286, 376310, 376291.

The Solicitor moved to vacate these citations, stating that he did not feel there was sufficient evidence available to prove these violations. From the bench I granted this motion (Tr. 65). The granting of the Solicitor's motion to vacate is hereby affirmed.

Citation No. 376332.

The Solicitor moved to have a settlement approved for Citation No. 376332 in the amount of \$305, reduced from the original assessment of \$530. The citation involved the inspector's finding of material spillage on the top work deck of the No. 2 reclaimer, a violation of 30 CFR 57.20-3(b). The Solicitor stated that there was apparently some confusion on the operator's part concerning the existence of a violation, and that this might have caused a delay in the abatement of the condition. From the bench I approved the settlement, stating that \$305.00 was a substantial amount which would effectuate the purposes of the Act and that the original penalty seemed high, since the application of the Act to an operation such as this was very new (Tr. 66). Approval of this settlement from the bench is hereby affirmed.

Citation Nos. 375248, 375250, 375259, 375265, 375267, 376284,  
376301, 376302, 376330, 375278, 375280, 375286, 376315, 376319,  
375258, 375268, 376285, 376342, 379001, 376283, 376322, 376311,  
376336.

The Solicitor moved to have a settlement approved for these citations in the amount of \$1,826, (FOOTNOTE 2) which was the originally assessed amount. The Solicitor stated that ordinary gravity and ordinary negligence were involved in all of these citations. From the bench I approved these recommended settlements after having reviewed typewritten summaries of all the violations (Tr. 68). Approval of these settlements from the bench is hereby affirmed.

