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SOL (MSHA) V. SUPERIOR SAND & GRAVEL
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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. VINC 79-107-PM A.C. No. 20-01047-05001
v.	Docket No. VINC 79-191-PM A.C. No. 20-01047-05002
SUPERIOR SAND & GRAVEL, INC., RESPONDENT	Superior Wash Plant

DECISION

Appearances: Karl Overman, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Norman McLean, Esq., Houghton, Michigan, 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, 30 U.S.C. 820(a). The petitions for assessment of civil penalty were filed in VINC 79-107-PM on January 4, 1979, and in VINC 79-191-PM on February 15, 1979. Timely answers and a motion to consolidate the above proceedings were filed by the Respondent. A hearing was held in Houghton, Michigan, on September 27, 1979, at which both parties were represented by counsel.

VINC 79-107-PM concerns five alleged violations. VINC 79-191-PM concerns six alleged violations. Evidence was received as to each citation except for two that were settled and decisions thereon were rendered from the bench. These decisions as they appear in the record, with certain necessary corrections or changes, are set forth below. In some instances it has been necessary to slightly alter sentence structure for clarity. Also certain deletions and additions have been made which are generally indicated by appropriate markings.

VINC 79-107-PM

Citation Nos. 286419, 286420, 286821, 286825, issued September 7, 1978

The following is the bench decision on the above citations found at pages 94-103 of the transcript:

> I am deciding the issue presented here in Docket 79-107-PM with respect to four berm citations

numbered 286419; 286420; * * * 286821; and 286825. In each of these citations the inspector alleged a substantially similar practice or condition, except that each citation is related to a particular part of the pit or mine. I will read into the record only the allegation in the first citation which is 286419. "A berm of mid-axle height of the largest vehicle using the elevated roadway leading into the crusher area was not provided along the right side for a distance of approximately 100 feet marking this roadway. This roadway was being used by heavy-duty mobile equipment." This concerns a violation in each instance of 30 CFR 59.9-22, which states as follows: "Adequate berms or guards shall be provided on the outer banks of elevated roadways." Berms are defined as follows: Berm means "a pile or mound of material capable of restraining a vehicle." * * *

As to this fact of violation, it seems to me the evidence is reasonably clear that there were no berms as defined by the regulation. A berm means a pile or mound of material capable of restraining a vehicle. I believe it is quite clear from the inspector's testimony, and I rely on that, that there were some piles of dirt in at least three locations.

Other testimony indicates that due to apparent washouts, the piles or mounds were not continuous. It seems to be quite clear that that would create an opportunity for a vehicle to leave that roadway and those mounds would fail to prevent it from going over the side. I want to at this point make clear that at present, I am only talking about the first three citations. I am going to disregard for the moment, the last citation which is 286825 because I believe it is in a slightly different category. Furthermore, as to those first three citations it does appear that the berms, where they did exist, were neither substantial enough nor high enough to prevent or to deflect a vehicle of the size being used on the roadways.

That is not to say that the evidence as to washouts or other problems is not relevant and important and would be taken into account in an assessment of the penalties. However, as to the first three citations, based on the inspector's testimony, which I believed as far as the nature of the berms or the nature of the mounds was concerned, was not seriously contested. I find a violation of 56.9-22.

As to the last citation which is 286825, the circumstance is slightly different. The evidence indicates the road at the time was being widened and improved. There was a berm on the road, but part of the berm had been removed in the course of repairing or widening the road. The inspector's testimony is that he did not know and had no reason to know that the road was being widened or improved. There is

> some conflict about what he knew and what he said, however, I don't know that I have to consider that in making this decision. It seems to me on the basis of what we now know, which is that the road was being repaired, that had the inspector known this he might very well not have issued that citation.
>
> I am not finding fault with the inspector for issuing [the citation], however, on the basis of this whole record, we now know it was being repaired. It would be an unusually harsh interpretation to require the road, under those circumstances, to have a berm of the size and type set forth. Accordingly, I find that the last berm citation, 286825, is not a violation of the standard as charged. * * *
>
> My findings on the statutory criteria are as follows: The size of the company. The testimony was that there are [approximately] five employees, and in my judgment I think this is a small company. No evidence was presented as to history of past violations. There is a substantial amount of evidence, however, as to the company's safety record. They have had a good safety record and appear to be safety conscious. I will certainly take that into account. There is no evidence that the penalty to be assessed will restrict the operator's ability to continue in business. There is no evidence of any lack of good faith to achieve rapid compliance. So I assume that good faith compliance was achieved.
>
> I have taken into account all of the following various circumstances: * * * Only one man principally used this road or these roads. The road was generally or fairly wide and there is a relatively small chance [of] an accident; yet, if a truck did get into trouble or did go over these relatively high banks there could be a serious accident. So I find [these violations were] moderately serious in the circumstances mentioned.
>
> On negligence, the law requires proper berms. The evidence is clear that the company continued to operate without full berms after some had been washed out. In the circumstances, I find some degree of negligence for the assessment of these three citations.
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> The assessment officer has assessed various amounts, the lowest being $20. I believe for the most part the assessment officer has taken into account some of the [mitigating] factors that were here mentioned. * * * [I assess] $20 for each of the three violations for a total of $60. That will complete my decision on the berms.

The above bench decision is AFFIRMED.

Citation No. 286822, issued September 7, 1978

The following is the bench decision on the citation set forth at pages 128-131 of the transcript:

> This is the last citation in this docket. It is 286822. The inspector cited improper guarding for the drive coupling on the portable generator plant. * * * He alleged this to be a violation of 30 CFR 56.14-6. This standard reads as follows: "Except when testing the machinery, guards shall be securely in place while the machinery is being operated."
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> The first question is the fact of the violation. The inspector testified and there seems to be no question at all that the screen guard was in place, but not bolted. The issue is whether it was securely in place. There is also testimony that this screen is heavy, weighing something like 30 pounds. It would not be easily moved. If [the screen] were pushed, it would simply push into the coupling machinery. Based on all of the evidence on the probability of an accident, the nature of the conditions which existed and so forth, it seems to me that this would be no more than what might be described as a technical violation, if it is a violation at all.
>
> I don't know whether this particular law requires securing by bolting in every instance. In this case and under these circumstances, and based on the testimony here I am going to give the benefit of the doubt to the operator. [The screen] was standing on legs which were stuck into the floor. From the testimony * * * it seems to me almost impossible, if not impossible, that that screen could be moved so that somebody could come in and fall into the coupling. So, for the purpose of this machine, it was securely in place. * * *
>
> I find that there is no violation of [30 CFR 56.14-6] as charged in Citation 286822. Accordingly, the citation * * * is hereby vacated, and there will be no penalty assessed.

The above bench decision is AFFIRMED.

VINC 79-191-PM

Citation Nos. 286417 and 286418, issued September 7, 1978

The following is the bench decision on the above citations found at pages 158-163 of the transcript:

> This involves Citations 286417 and 286418. In 286417, the inspector found as the condition or practice that an automatic audible warning device was not provided on

a Michigan 175 front-end loader, serial 13AHG306. The loader was used to feed the rock crusher in the pit. An observer to

signal when it was safe to back up, was not present. In 286418, an audible automatic warning device was not provided on the Koering dumpster, D5711. The dumpster was used to haul material from the crusher loadout to a stockpile. An observer to signal when it was safe to back up was not provided as set forth in 30 CFR 56.9-87. * * *

In both instances it is clear from the inspector's testimony, [upon which I rely] that there was no automatic reverse warning device on the machines. * * * The mandatory standard involved which is 56.9-87, [requires] that heavy-duty mobile equipment shall be provided with audible automatic warning devices when the operator of such equipment has an obstructed view to the rear. The equipment shall have either an automatic reverse signal alarm audible above the surrounding noise level of the machine or a signalman to signal when it is safe to back up. In this instance, the inspector testified, and there was no contrary testimony, that the equipment was heavy-duty mobile equipment * * * and that there were no audible warning devices. That testimony is not contested. Accordingly, I find that in each of the two instances, violations of 56.9-87 occurred.

It is unnecessary to make findings on the criteria as to the history, size of the company, and ability to pay since these have already been made in this record. It appeared to me from the testimony that the company did use good faith efforts to achieve rapid compliance. So as far as the gravity is concerned, I think it is clear from the testimony and I believe experience in this area bears this out, that the lack of audible warning signals is a grave hazard. The mere fact that men might not always be behind the machines is not really too relevant because there is always that one rare instance where somebody would be in back of the machine and become gravely injured or die. I find that [these are] grave violations.

Now, as the first citation, namely 286417, witnesses for the Respondent testified that they had a [corrective] device ordered and that when they received and placed it on the machine, it failed to function properly. It was taken off the machine with the object of returning it [to the manufacturer]. I believe that this is a mitigating circumstance as far as the negligence is concerned. However, * * * somebody could have been injured when the device was not on the machine and I find some negligence [in 286417. In Citation 286418 I find ordinary negligence.]

> Taking into account the mitigating circumstances in 417, I will reduce that penalty by one-half which will make it $28. [In Citation 286418, I believe the proposed penalty is appropriate and I hereby assess $56 for it].

My bench decision is hereby AFFIRMED.

Citation Nos. 286823 and 286824, issued September 7, 1978

The following is the bench decision on the above citations found at pages 206-213 of the transcript:

> This part of the decision deals with two citations, numbers 286823 and 286824. The inspector charges the following: The stairway leading into the parts and lube van in the pit was not provided with handrails in violation of 30 CFR 56.11-27. In 824, the inspector cited as a condition or practice the following: elevated walkways on both sides of the Cedar Rapids Wash Plant were not provided with handrails. The walkways are approximately 10 feet above the ground level. That is charged as a violation of 30 CFR 56.11-27, a mandatory standard which [requires that] adequate 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 first violation to [which] I address myself is 823. The testimony demonstrates clearly that there was a stairway and that it had no handrails. There is some evidence to the effect that it is a relatively short stairway and also that it was not used except infrequently to obtain materials within the van. Nevertheless, the inspector testified, and there is no evidence to the contrary, that there was grease on the stairway. It is the type of situation that could provide the background for an accident even though it is a relatively small stairway. The men going in and out could easily slip and fall and be seriously hurt. * * *(FOOTNOTE 1)
>
> The next citation is 286824. * * * So far as the actual standard is concerned, it does, as I have interpreted it here, require a handrail for obvious safety reasons, so I therefore, find a violation in 286824.

> The violation in both cases, [concerns] standard 56.11-27. There being no evidence to the contrary, I find abatement in good faith was rapidly achieved. The gravity, I think, has already been referred to in part. There is a very good likelihood of injury from men stepping off or accidentally falling off such a walkway or stairway. Accordingly, I find that it is a serious violation. Insofar as negligence is concerned, the testimony demonstrates disgreement as to an absolute need for such handrails in both of these instances. The company honestly and in good faith apparently did not believe they were needed. However, the standard does require it and it is negligent not to comply with the standard. So I find * * * a slight degree of ordinary negligence.
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> It seems to me as far as assessments are concerned, the assessment officer's penalties took into account the factors I have been talking about. These are not high penalties. In the circumstances, I will assess those penalties * * *. For 286823 I assess the penalty of $36 and for 286824 I assess the penalty of $34.

The above bench decision is hereby AFFIRMED.

Citation No. 286826, issued September 7, 1978

Citation No. 286826 alleges a violation of 30 CFR 56.14-1 which requires that gears, sprockets, chains, drive, head, tail and takeup pulleys; flywheels, couplings, shafts, sawblades, fan inlets; and similar exposed moving machine parts which may be contacted by and cause injury to persons be guarded. The parties have agreed to settle this citation because there is a factual dispute as to whether the employees were actually exposed to the hazard. The proposed assessment is $66. The settlement is $14. Considering the circumstances, I approved this settlement and hereby incorporate it as part of my decision.

Citation No. 286400, issued September 8, 1978

Citation No. 286400 alleges a violation of 30 CFR 56.5-20 which sets forth permissible exposure to noise according to the American National Standards Institute (ANSI). The parties have agreed to settle for the proposed amount, $26. I approved this settlement and hereby incorporate it as part of my decision.

A summary of the dispositions in this case are as follows:

Citation	Action/Assessment
286419	$ 20
286420	20
286821	20
286825	vacated
286822	vacated

~2112

286417	28
286418	56
286823	36
286824	34
286826	14
286400	26
Total	$254

ORDER

IT IS ORDERED that Respondent pay the penalties totaling $254 within thirty (30) days of the date of this decision.

Franklin P. Michels
Administrative Law Judge

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FOOTNOTES START HERE

~FDOOTNOTE_ONE

1 The Respondent argued at the hearing that in abating the violation it installed two handrails and that as a result the door of the van could not be opened without removing the rails. The inspector testified that one handrail is sufficient (Tr. 176). This would permit the door to open. Accordingly, I held that only one rail was needed on the lube van (Tr. 210).