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SOL (MSHA) V. UNITED CEMENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. BARB 79-55-PM A.O. No. 22-00313-05001
v.		Artesia Quarry & Plant Mine
UNITED CEMENT COMPANY,	RESPONDENT	

DECISION

Appearances: Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Joe F. Canterbury, Jr., Esq., Smith, Smith, Dunlap & Canterbury, Dallas, Texas, for Respondent

Before: Judge Cook

I. Procedural Background

On October 24, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1978) (1977 Mine Act), against United Cement Company alleging violations of various sections of the Code of Federal Regulations. All of the subject citations were issued pursuant to section 104(a) of the Act. The Respondent filed its original answer on November 27, 1978, and filed an amended answer on December 14, 1978.

A notice of hearing was issued on February 22, 1979, setting the case for hearing on the merits beginning at 9:30 a.m., May 22, 1979. On March 1, 1979, counsel for the Respondent filed a request for a continuance. An order was issued on March 12, 1979, continuing the hearing to May 31, 1979, in Birmingham, Alabama.

The hearing was held as scheduled. Representatives of both parties were present and participated. A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing. Counsel for the Petitioner stated that he would not file a brief (Tr. 187-188). Respondent's posthearing brief was filed on July 16, 1979.

II. Violations Charged

Citation No. 80420, April 4, 1978, 30 CFR 56.9-87.(FOOTNOTE 1)

Citation No. 80421, April 4, 1978, 30 CFR 56.12-34.

Citation No. 80422, April 4, 1978, 30 CFR 56.16-5.

Citation No. 80423, April 4, 1978, 30 CFR 56.20-3.

Citation No. 80424, April 4, 1978, 30 CFR 56.11-2.

Citation No. 80425, April 4, 1978, 30 CFR 56.14-1.

Citation No. 80426, April 4, 1978, 30 CFR 56.9-12.

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, the parties entered into stipulations which are set forth in the findings of fact, infra.

B. Witnesses

The Petitioner called as its witness Clyde H. Gilliam, an MSHA inspector on April 4, 1978, and an assessment conference specialist with the Office of Assessments on the date of the hearing.

The Respondent called as its witness Darrell Price, the Respondent's production manager.

C. Exhibits

1. The Petitioner introduced the following exhibits into evidence:

M-1 is a copy of Citation No. 80420, April 4, 1978, 30 CFR 56.9-87.

M-1(a) is a copy of the inspector's statement pertaining to M-1.

M-2 is a copy of Citation No. 80421, April 4, 1978, 30 CFR 56.12-34.

M-2(a) is a copy of the termination of M-2.

M-2(b) is a copy of the inspector's statement pertaining to M-2.

M-3 is a copy of Citation No. 80422, April 4, 1978, 30 CFR 56.16-5.

M-3(a) is a copy of a modification of M-3.

M-3(b) is a copy of the inspector's statement pertaining to M-3.

M-4 is a copy of Citation No. 80423, April 4, 1978, 30 CFR 56.20-3.

M-4(a) is a copy of the inspector's statement pertaining to M-4.

M-5 is a copy of Citation No. 80424, April 4, 1978, 30 CFR 56.11-2.

M-5(a) is a copy of the termination of M-5.

M-5(b) is a copy of the inspector's statement pertaining to M-5.

M-6 is a copy of Citation No. 80425, April 4, 1978, 30 CFR 56.14-1.

M-6(a) is a copy of the inspector's statement pertaining to M-6.

M-7 is a copy of Citation No. 80426, April 4, 1978, 30 CFR 56.9-12.

M-7(a) is a copy of the inspector's statement pertaining to M-7.

2. The Respondent introduced the following exhibits into evidence:

O-1 is a photograph pertaining to Citation No. 80425.

O-2 is a photograph pertaining to Citation No. 80424.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Facts

A. Stipulations

1. The Administrative Law Judge has jurisdiction of the above-captioned proceeding (Tr. 4).

2. Clyde H. Gilliam was an authorized representative of the Secretary of Labor (Tr. 4).

3. The United Cement Company received copies of each of the subject citations (Tr. 4).

4. The United Cement Company was served a copy of the complaint in the above-captioned proceeding (Tr. 4).

5. The United Cement Company has been served all papers necessary for appearances at the hearing (Tr. 4).

6. There is no history of previous violations (Tr. 5-6).

7. The size of the Artesia Quarry & Plant is rated at approximately 250,000 man-hours per year (Tr. 7).

8. United Cement Company is a wholly-owned subsidiary of Texas Industries (Tr. 7).

9. The size of Texas Industries' combined mining operations (sand, gravel, cement and crushed stone) is rated at approximately 2 million man-hours per year (Tr. 9-10).

10. The size of United Cement Company is rated at approximately 250,000 man-hours per year (Tr. 9-10).

11. The amount of the proposed penalties will not affect the United Cement Company's ability to remain in business (Tr. 10).

B. Occurrence of Violation, Negligence, Gravity and Good Faith

MSHA inspector Clyde H. Gilliam, issued the subject citations on April 4, 1978, during an inspection of the Respondent's Artesia Quarry & Plant (Tr. 14, Exhs. M-1, M-2, M-3, M-4, M-5, M-6, M-7). He was accompanied on the inspection tour by Mr. Darrell Price (Tr. 15-16, 171). According to Inspector Gilliam, Mr. Price was the general mill foreman (Tr. 15-16). However, Mr. Price described himself as the production manager, but stated that his duties as production manager encompassed responsibility for safety at the plant (Tr. 167).

The findings with respect to the individual citations are set forth as follows:

1. Citation No. 80421, April 4, 1978, 30 CFR 56.12-34

The mandatory standard embodied in 30 CFR 56.12-34 provides that "[p]ortable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded."

Inspector Gilliam cited the following "condition or practice" as violating the regulation: "Three light bulbs located approximately 7 feet above the floor did not have a protective guard around them. Should a worker with a metal bar be working below the light bulbs accidentally break the glass, the filament could cause electrical shock" (Exh. M-2).

According to the inspector, the light bulbs were located in a structure used as a conveyor belt transfer station (Tr. 63) that measured approximately 20 feet in length by 20 feet in width (Tr. 70). One of the bulbs was located directly above the transfer point (Tr. 71-72). He testified that the lights were approximately 7 feet above the floor, but indicated that it could have been less (Tr. 69). He did not measure the height, but estimated it visually (Tr. 72). Mr. Price testified that the company measured the height and determined that it was less than 7 feet (Tr. 184).

The 7-foot figure, standing alone, would not be significant absent the so-called "7-foot rule" agreed upon amongst the inspectors during their meetings (Tr. 72-73). By Inspector Gilliam's own admission, 7 feet is "not in the law." He stated that "we" presumably the inspectors, "have to set some arbitrary figure," and indicated that 7 feet "is common sense." (Tr. 72). He stated that the "7-foot rule" is not applicable throughout the nation because "Washington would put out something to that effect and we have never seen nothing to that effect" (Tr. 73). Apparently, the "requirement" was devised after an individual in Georgia, employed by Vulcan Materials, was electrocuted when a bulb broke and his sweaty arm touched the two electrodes. According to the inspector:

> A. Since that time we have made it a point to put guards around light bulbs where it's possible that a man may have a rod in his hands or moving, say around 7-feet or less, where the light bulbs could be broken, and catch the two electrodes.

(Tr. 64).

The testimony of Inspector Gilliam, the description of the "condition or practice" contained in the citation and the comments contained in the document known as the inspector's statement reveal that the possibility of a worker receiving an electrical shock was the sole hazard that the inspector associated with the condition (Exhs. M-2, M-2(b), Tr. 64-66). Neither the documents nor his testimony associate a burn hazard with the condition.

According to the inspector, a metal object being carried by a worker could accidentally strike the bulb, break the glass and make contact with the filaments (Exh. M-2, Tr. 64-65). A sweaty individual could thus be electrocuted, while a dry individual could sustain a shock (Tr. 66).

The testimony as to the derivation of the "7-foot rule,"

when viewed in the light most favorable to the Petitioner, and the testimony as to the hazard posed by the three unguarded light bulbs, when taken alone and without

regard to the nature of the work actually performed in the transfer station, sets forth a plausible basis for finding a violation. However, the question as to whether the regulation has been violated can only be answered by giving due consideration to all of the evidence adduced. It is only through an appraisal of the nature of the actual work performed in the transfer station that a determination can be made as to whether the location of the lights presented a shock hazard to the workers within the meaning of the regulation.(FOOTNOTE 2)

According to the inspector, employees are not assigned to the transfer station on a continuous basis, but work there periodically to perform repair and maintenance functions (Tr. 63, 65, 73). It is not a regular work station, but merely houses some equipment (Tr. 70-71). The inspector stated that the area is visited by workers to remove blockages from the chute (Tr. 65). Pieces of wood or metal were identified as the possible obstructions (Tr. 75-76). He testified that removal of a blockage would definitely require the use of metal rods approximately 1 inch in diameter and 6 feet in length (Tr. 65, 71). The inspector stated that an individual wielding such a tool could accidentally shatter the bulb with the rod (Tr. 65), and achieve contact with the exposed filaments. It was the fear of this type of accident that cause him to issue the citation (Tr. 73-74). However, he admitted that he did not see anyone working in the area, that he could not recall seeing any metal bars in the transfer station (Tr. 71), and that he did not see anyone with a metal bar entering the room (Tr. 74).

The sole evidence as to how blockages are actually removed from the chute was provided by Mr. Price, who testified that a blockage would normally be one floor above the level on which the subject light bulbs are located and that picks and shovels would be used to alleviate the blockage (Tr. 178).

Thus, the sum total of all the evidence fails to establish that employees were exposed to an electrical shock hazard of the type alleged in the citation because there was no proof that employees used metal objects in the cited area to remove chute blockages.

Accordingly, I find that the evidence fails to establish a violation of 30 CFR 56.12-34 by a preponderance of the evidence.

2. Citation No. 80422, April 4, 1978, 30 CFR 56.16-5

a. Occurrence of Violation

The mandatory standard codified at 30 CFR 56.16-5 provides: "Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner." Inspector Gilliam cited the following condition as a violation of the standard: "The oxygen cylinder located in the welding area of the shop was not secured in an upright position by a chain, rope or other means" (Exh. M-3).

The inspector testified that the unsecured cylinder was full of oxygen, and testified as an expert that the pressure inside was approximately 2,000 pounds (Tr. 81). The Respondent offered no rebuttal evidence on this point.

The question of whether a violation occurred is simplified by the Respondent's admission that the cylinder was not secured, but that it should have been secured (Tr. 87).

Accordingly, it is found that a violation of 30 CFR 56.16-5 has been established by a preponderance of the evidence.

b. Negligence of the Operator.

The area in which the violation was observed was classified as a big storage area containing many oxygen cylinders (Tr. 88). Only one of the cylinders was unsecured (Tr. 88). Facilities were provided for tying down the cylinders (Tr. 88), although the witnesses differed as to the type of facilities provided. Inspector Gilliam testified that chains were provided (Tr. 83), while Mr. Price testified that ropes were provided (Tr. 178). The differences in their testimony on this point are immaterial, because both agree that adequate facilities were provided.

The inferences drawn from Inspector Gilliam's testimony indicate that it is more probable than not that an employee had been using the oxygen cylinder, but had replaced it in its proper location without securing it (Tr. 83). The inspector made a general observation to the effect that employees will often leave a cylinder unsecured with the intention of using it again within

approximately the next 30 minutes (Tr. 88). However, this

general observation is of no assistance in the instant case because the record does not contain any indication as to precisely why the cylinder was not secured.

According to Mr. Price, all employees had been instructed to secure the cylinders (Tr. 178). That this requirement was enforced effectively by the Respondent is attested to by the inspector's interpretation of his own observations as confirming that the Respondent enforced its safety rules (Tr. 91-92). Thus, the evidence in the record is inadequate to establish that the violation was anything other than an isolated occurrence.

Although the inspector testified that the unsecured cylinder was sufficiently conspicuous so as to be observable to an employee working in the area (Tr. 84), the evidence fails to establish that the Respondent or any of the Respondent's supervisory personnel knew or should have known of the condition. There is no indication that the Respondent had actual knowledge of the condition because the inspector did not know whether the operator, Mr. Price or a foreman actually observed the unsecured cylinder prior to the issuance of the citation (Tr. 90). The sole basis for imputing constructive knowledge to the Respondent is the inspector's statement that a foreman in the area would have known about the condition had it existed for 5 minutes (Tr. 89). However, he admitted not only that it could have existed for substantially less than 5 minutes (Tr. 89-90), but also that it was possible that the foreman was unaware of it (Tr. 89).

Therefore, the evidence is insufficient to establish anything other than the fact that the violation was an isolated occurrence of which the Respondent neither knew nor should have known.

Accordingly, it is found that the Petitioner has failed to establish operator negligence by a preponderance of the evidence.

c. Gravity of the Violation

The unsecured cylinder posed a danger of falling over and hitting the concrete floor, thus damaging the brass, hand-operated valve and causing an oxygen leak (Exh. M-3(b), Tr. 82, 85). The inspector classified an occurrence as probable and noted that one person was exposed to the hazard (Exh. M-3(b)).

The inspector's testimony points to an anticipated fatality as a result of a gas leakage providing sufficient thrust to propel the cylinder as a missile through the walls of the metal building (Tr. 81-84, 85).

Accordingly, it is found that an extremely serious degree of gravity has been established.

d. Good Faith in Attempting Rapid Abatement

The citation was issued at 11 a.m. on April 4, 1978, (Exhs. M-3, M-3(a), Tr. 81). Although the citation was not terminated

until 3 p.m. the same day,

i.e., 4 hours after issuance, the inspector testified that the condition was abated immediately (Tr. 85-86, 88). In fact, both his testimony and the inspector's statement reveal that the Respondent took extraordinary steps to gain compliance (Tr. 88-89, Exh. M-3(b)).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement of the violation.

3. Citation No. 80423, April 4, 1978, 30 CFR 56.20-3

a. Occurrence of Violation

The mandatory standard codified at 30 CFR 56.20-3 provides, in part, as follows: "Mandatory. At all mining operations: (a) Workplaces, passageways, storerooms and service rooms shall be kept clean and orderly." Inspector Gilliam cited the following condition as violating the mandatory standard: "There was loose paper, conduit, empty wire reel and a gallon glass jug in the floor and walkway of the electrical control room for the electro-static precipitator" (Exh. M-4).

The control room was approximately 14 feet long and 7 feet wide (Tr. 171). The inspector testified that it was not a work area (Tr. 107), the inference being that it was frequented periodically by employees recording the readings from the instrument panels (Tr. 102). No one was in the control room when the examination was made (Tr. 102).

According to the inspector, all of the debris was in front of the control panel (Tr. 106). He testified that the wire reel was 36 inches in diameter (Tr. 106), and 12 to 15 inches in height (Tr. 109). It was composed of wood (Tr. 106). The piece of conduit was composed of metal (Tr. 112), and, to the best of his recollection, was approximately 24 to 36 inches in length. The paper volume consisted of 12 to 18 sandwich bags and approximately 6 pieces of newspaper (Tr. 112). Based on these observations, the inspector deduced both that electrical work had been performed in the area (Tr. 111), and that employees had been using the control room as a lunch room (Tr. 113).

Although Mr. Price classified the area as sloppy by company standards (Tr. 172), his testimony differs from the inspector as to both the volume of refuse present and potential safety hazard arising from it. According to Mr. Price, a glass jug, a brown paper bag, a Frito bag and a Coke can were present (Tr. 172). He recalled the piece of metal conduit as being approximately 6 to 8 feet in length and leaning in a corner of the room (Tr. 172), not lying in front of the control panel. He recalled the reel as being approximately 6 to 8 inches in diameter and 8 to 12 inches in length (Tr. 172), which would make it much smaller than the inspector's recollection would indicate.

The resolution of this conflict in the testimony of the witnesses can be accomplished only by assessing their credibility. Although both witnesses

were completely honest and forthright in their testimony, the inspector's memory, in light of all the evidence, appears more accurate. Accordingly, I find that Inspector Gilliam's recollection of the nature, composition, extent and location of the refuse in the control room accurately reflects the conditions existing on April 4, 1978. Thus, it is found that the control room was was not being kept clean and orderly as required by 30 CFR 56.20-3.

Accordingly, it is found that a violation of 30 CFR 56.20-3 has been established by a preponderance of the evidence.

b. Negligence of the Operator

Although the inspector testified that the condition would be obvious to a foreman entering the area, he did not know whether a foreman actually saw it (Tr. 107-108). He had no actual knowledge as to when the debris was placed in the room (Tr. 108), an admission with particular significance as to the Respondent's actual or constructive knowledge of the presence of the sandwich bags, newspaper and glass jug. Since the conditions were observed at 1:20 p.m., i.e., shortly after the employees' lunch period (Tr. 108), there is a substantial basis for the inference that those materials had not been present for a sufficient period of time for a foreman to have observed them. In fact, the inspector testified that there was nothing upon which to base an opinion as to operator negligence except the presence of the reel and the conduit (Tr. 110-111). The presence of these two articles dictates the common sense conclusion that people had been working in the area (Tr. 110-111).

However, it is found that the evidence indicates a very minor degree of negligence.

c. Gravity of the Violation

Gravity must be assessed with reference to both the potential tripping hazards and the potential fire hazard posed by the refuse.

The inspector testified that it was unlikely that a person would trip over the reel, but noted that the conduit posed more of a hazard (Tr. 109, 112). The feared injuries, at most, ranged from a sprained ankle to a sprained back (Tr. 101, 103). A back sprain could result in lost workdays (Tr. 103).

No ignition sources were present on the front of the electrical panel, but an ignition source would be presented by a blown cable on the back of the panel (Tr. 113). However, the inspector could not recall any bare cables (Tr. 113).

Both the inspector's statement (Exh. M-4(a)) and the testimony reveal that an occurrence was improbable (Tr. 109), that the injury resulting from the violation could most reasonably be expected to result in no lost workdays, and that one worker was exposed to the hazard.

Accordingly, it is found that the violation was accompanied by moderate gravity.

d. Good Faith in Attempting Rapid Abatement

The Respondent abated the condition in the 40 minutes allotted (Exh. M-4, Tr. 103-104). In fact, the inspector begrudgingly admitted that the Respondent took extraordinary steps to gain compliance (Tr. 109).

Accordingly, it is found that the Respondent demonstrated good faith by attempting rapid abatement of the violation.

4. Citation No. 80424, April 4, 1978, 30 CFR 56.11-2

a. Occurrence of Violation

30 CFR 56.11-2 provides: "Mandatory. 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."

Inspector Gilliam cited the following condition as violating the mandatory standard: "There was no handrails around the platform nor on the steps at the kiln oxygen analyzer station. The platform was approximately 30 inches above the ground. A worker will visit this station once each shift" (Exh. M-5).

The kiln oxygen analyzer station was described as a small, isolated building atop a raised platform (Tr. 119).

The platform, more accurately characterized as an elevated walkway, was located outside the building. It was approximately 5 to 6 feet in width and approximately 15 feet in length (Tr. 115). It was reached by climbing four steps (Exh. O-2).

The fact that the platform was elevated approximately 30 inches above the ground, in conjunction with the fact that it provided access to the station, renders it an elevated walkway within the meaning of the subject regulation.(FOOTNOTE 3)

Accordingly, it is found that a preponderance of the evidence establishes that the Respondent violated 30 CFR 56.11-2 in that neither the elevated walkway nor the stairway were provided with handrails.

b. Negligence of the Operator

The Respondent's position with respect to operator negligence centers around the Respondent's alleged compliance with Occupational Safety and Health Administration (OSHA) regulations. According to the Respondent, the fact that the plant was constructed according to OSHA specifications demonstrates a lack of operator negligence. (Respondent's Brief, p. 6) (see also, Tr. 173, 183). I am in partial agreement with the tenor of the Respondent's argument, but I am unable to accept the implication that compliance with those standards, at the time the plant was constructed, necessarily requires a per se finding that negligence was not present. The controlling considerations when such a defense is raised are: (1) whether the subject area complied with the OSHA regulations at the time of construction, and (2) the amount of time intervening between the termination of OSHA inspections and the inspection by a Federal mine inspector giving rise to the subject citation. For purposes of the instant case, it is important to bear in mind that an absence of handrails was present on both the elevated walkway and the stairway.

The plant was completed by March of 1974 (Tr. 167). The OSHA standards in effect at that time pertaining to handrails around walkways and stairways, 29 CFR 1910.23(c) and 1910.23(d) (1973), provided:

> (c) Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,
>
> (i) Persons can pass,
>
> (ii) There is moving machinery, or
>
> (iii) There is equipment with which falling materials could create a hazard.
>
> (2) Every runway shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.

Runways used exclusively for special purposes (such as oiling, shafting, or filling tank cars) may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway of not less than 18 inches wide. Where persons entering upon runways become thereby exposed to machinery, electrical equipment, or other danger not a falling hazard, additional guarding than is here specified may be essential for protection.

(3) Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.

(d) Stairway railings and guards. (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in subdivisions (i) through (v) of this subparagraph, the width of the stair to be measured clear of all obstructions except handrails:

(i) On stairways less than 44 inches wide having both sides enclosed, at least one handrail, preferably on the right side descending.

(ii) On stairways less than 44 inches wide having one side open, at least one stair railing on open side.

(iii) On stairways less than 44 inches wide having both sides open, one stair railing on each side.

(iv) On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side.

(v) On stairways 88 or more inches wide, one handrail on each enclosed side, one stair railing on each open side, and one intermediate stair railing located approximately midway of the width.

(2) Winding stairs shall be equipped with a handrail offset to prevent walking on all portions of the treads having width less than 6 inches. [Emphasis added.]

In addition to the foregoing, the regulations prescribing the construction characteristics of fixed industrial stairs required standard railings "on the open sides of all exposed stairways and stair platforms." 29 CFR 1910.24(h) (1973) (emphasis added). Under 29 CFR 1910.24(b) (1973):

> Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such purposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is normally required....

As relates to the elevated walkway, the salient provisions of the above-quoted regulation are those requiring railings(FOOTNOTE 4) around runways(FOOTNOTE 5) and open sided floors or platforms(FOOTNOTE 6) 4 feet or more above floor or ground level. It will be recalled that the elevated walkway in the instant case was 30 inches above ground level.

As relates to stairways, the above-quoted regulations require standard stair railings or standard handrails for every flight of stairs having four

or more risers,(FOOTNOTE 7) and, as relates to industrial stairs, on the open sides of all exposed stairways and stair platforms. In the instant case, neither standard was complied with.

These standards remained in effect after the termination of OSHA inspections in 1975 (Tr. 183-184). 29 CFR 1910.23(c) and 1910.23(d), 1910.24(b) and 1910.24(h) (1975).

Based on the foregoing, I conclude that the elevated walkway complied with the OSHA regulations in effect both when the plant was completed in 1974 and when OSHA inspections of the plant ceased in 1975. Although permitting this condition to exist during the approximate 3-year time period between 1975 and 1978 would ordinarly constitute gross negligence, the reliance on the previously applicable OSHA requirements during that time period, under the facts presented herein, is sufficient to reduce the degree of negligence demonstrated by the Respondent. Accordingly, it is found that the Respondent demonstrated a high degree of ordinary negligence by failing to provide handrails around the elevated platform.

The stairway, however, presents a different problem because it did not comply with the OSHA requirements either in 1974 or at any time subsequent thereto. Therefore, permitting the condition to exist between 1975 and 1978 constituted gross negligence.

c. Gravity of the Violation

The fact that walkway was exposed to the elements indicates that rain or other weather conditions could render it slick (Tr. 116). Logically, the same consideration applies to the stairway.

According to the inspector, an individual could back off the walkway, fall 30 inches to the ground and sustain back injuries (Tr. 114-115). However, the inspector classified an occurrence as improbable (Tr. 126, Exh. M-5(b)), noting that how a person fell would determine whether an injury would be sustained (Tr. 125-126). One person would have been exposed to the hazard (Exhs. M-5, M-5(b), Tr. 114).

Accordingly, it is found that moderate gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

Inspector Gilliam allotted the Respondent 1 day to abate the condition (Tr. 118-119, Exh. M-5). According to Mr. Price, the installation of handrails commenced immediately and was completed the next day (Tr. 174). The citation was terminated when the inspector returned on April 11, 1978 (Tr. 120, Exh. M-5(a)).

Accordingly, it is found that the Respondent demonstrated good faith by attempting rapid abatement of the violation.

5. Citation No. 80425, April 4, 1978, 30 CFR 56.14-1

a. Occurrence of Violation

30 CFR 56.14-1 provides: "Mandatory. 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 persons, and which may cause injury to persons, shall be guarded."

Inspector Gilliam cited the following condition as violating the standard: "A guard was not installed around the rotating line shaft of the fan for the dust collector located in the bag house. A worker probably walked by the rotating shaft once during a shift" (Exh. M-6).

The Respondent does not contend that a guard was present on the drive shaft. Indeed, it contends in its answer that the condition existed in an isolated area with no employee exposure. Accordingly, it is found that the conditions described in the citation existed as alleged.

In view of the wording of the regulation it must be concluded that exposed moving shafts must be guarded if they may be contacted by persons and cause injury to such persons.

As set forth in Part V(B)(5)(c), infra, addressing gravity, the rotating line shaft could have been contacted by and caused injury to employees of the Respondent.

Accordingly, I conclude that the condition set forth in the citation constituted a violation of 30 CFR 56.14-1.

b. Negligence of the Operator

According to the inspector, anyone operating the equipment or working in the area should have observed the violation (Tr. 136). Although there is no indication as to precisely how long the Respondent had permitted the condition to exist, it can be inferred that the condition had existed since the plant was built.

Mr. Price did, however, state that throughout the plant numerous covers had been placed on pulleys, sprockets and shafts, although he did not know why a cover had not been placed on the subject shaft (Tr. 176). In fact, the chain drive adjacent to the subject shaft was guarded (Tr. 138-140, 177). Inferences drawn from this testimony indicate that at some point in time the Respondent undertook to provide guards for all exposed moving machine parts, but that, for some unexplained reason, the subject shaft was not provided with a guard. Accordingly, I find that the Respondent demonstrated a high degree of ordinary negligence.

c. Gravity of the Violation

The line shaft was mounted between two pillar blocks (Tr. 133, Exh. O-1), and was between 20 to 24 inches above the floor (Tr. 134, 184). The inspector estimated that the shaft rotated at 1,800 revolutions per minute and believed, based on experience, that the machine was powered by a 10-horsepower motor (Tr. 136, 147). Alamite fittings were present on each pillar block to permit lubrication (Tr. 147). According to the inspector, the shaft was accessible to all personnel walking in the area (Tr. 134).

The inspector indicated that a guard would prevent loose clothing from becoming wound around the rotating shaft (Tr. 133, 148), although he testified that for this to occur a burr would have to be present on the shaft (Tr. 136). There is no indication that a burr was present. Although he indicated that workers walking by the shaft were exposed to the hazard (Tr. 133), both the testimony and the inspector's statement reveal that the worker directly exposed to the hazard would be the one lubricating the bearings inside the pillar blocks (Exh. M-6(a), Tr. 140, 147). However, the testimony of Mr. Price reveals an employee would not be required to climb over any obstacles in order to reach the alamite fittings (Tr. 185). It is significant to note that the Respondent permitted lubrication of the equipment without requiring its employees to lock out the equipment (Tr. 176), a practice that could greatly facilitate injuries caused by accidentally starting the machinery.

Since an accident could result in the loss of a limb, the inspector classified the potential injury as permanently disabling (Exh. M-6(a), Tr. 136-137). However, he classified an occurrence as improbable (Exh. M-6(a)).

Accordingly, it is found that a high level of gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

The Respondent immediately commenced fabricating a guard following the issuance of the citation (Tr. 135, 176). Although the inspector gave the Respondent 1 day to abate the violation (Exh. M-6, Tr. 135), the guard was in place, and thus the violation was abated in 1-1/2 hours (Exh. M-6, Tr. 135-136).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

6. Citation No. 80426, April 4, 1978, 30 CFR 56.9-12

a. Occurrence of Violation

This citation was issued when Inspector Gilliam observed several pieces of refuse on the floor inside the cab of a water truck (Exh. M-7, Tr. 155, 158). The citation (Exh. M-7) describes the condition as follows: "There was loose papers and 2 Coke cans in the floor of the water truck cab. The Coke cans can roll under the brake pedal and prevent the operator from applying the brakes."

The cited standard, 30 CFR 56.9-12, provides: "Mandatory. Cabs of mobile equipment shall be kept free of extraneous materials."

The inspector's testimony dealt mainly with the presence of the two Coca Cola cans (Tr. 155-166). Mr. Price confirmed the presence of the two cans in the truck (Tr. 183).

Accordingly, it is found that a violation of 30 CFR 56.9-12 has been established by a preponderance of the evidence in that extraneous material in the form of two Coca Cola cans were present on the floor of the water truck's cab.

b. Negligence of the Operator

As relates to actual knowledge of the violation, Inspector Gilliam admitted that he did not know whether the Respondent knew of the condition (Tr. 160). The truck was stationary and nobody was in the cab (Tr. 158, 161). In fact, the inspector testified that it would be difficult for the Respondent to check each truck every time the driver got out (Tr. 160). Mr. Price did not know that the cans were present in the truck (Tr. 179).

The inspector's testimony indicates that in order to charge the Respondent with constructive knowledge, the Respondent would have to issue instructions to the drivers to keep the floorboards clear of such refuse and conduct spot inspections to assure that the instructions were being followed (Tr. 157). He admitted, however, that the Respondent would have to rely, to a certain degree, on the drivers following the instructions (Tr. 157). According to Mr. Price, all drivers had been instructed to keep all cabs free of debris (Tr. 179). Both Mr. Price and his supervisor conducted spot checks of the cabs (Tr. 179), presumably to assure that the instructions were being followed. The fact that at least five trucks were on the premises and that only the subject truck had rolling material on the floorboard (Tr. 159), tends to support the proposition that the Respondent effectively enforced its rule relating to debris in truck cabs.

Accordingly, it is found that the Petitioner has failed to establish negligence by a preponderance of the evidence.

c. Gravity of the Violation

The inspector did not recall whether there was a hump in the floorboard or whether the cans were on the driver's side or the passenger's side of the cab (Tr. 155-156). However, he recounted an incident in which an unnamed individual, presumably working for some unidentified company, was killed when a bottle rolled under his brake pedal, preventing him from applying his brakes (Tr. 156).

The "rolling bottle" example is not very material to the gravity of the violation in the instant case because an aluminum Coca Cola can is malleable (Tr. 156), whereas a glass bottle is not. The fact that the ends of a Coco Cola can are stiff (Tr. 156), does not, standing alone, establish that one or two mashed cans present a significant safety hazard of the type envisioned by the inspector (Exhs. M-7, M-7(a)). This is especially true in light of the fact that the cans were under the seat (Tr. 160) and that it was not established that they could roll under the brake.

Of greater significance is the fact that the truck was stationary with nobody in the cab when the violation was cited (Tr. 158, 161). The inspector never saw the truck move and did not know whether it had been operated with the Coke cans insider of it (Tr. 161-162).

In light of this, I am unable to accept the inspector's estimate that the occurrence of an accident was probable (Exh. M-7(a)). Based on all the facts, I must conclude that an occurrence was highly improbable. If, however, an accident did occur, one worker would have been exposed to the hazard and the resulting injury would most reasonably be expected to result in lost workdays or restricted duty (Exh. M-7(a)).

Accordingly, I find that de minimis gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

The inspector gave the Respondent 15 minutes to abate the violation, and abatement was accomplished within the prescribed time period (Exh. M-7, Tr. 163).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

C. History of Previous Violations

The Respondent has no history of previous violations (Tr. 5-6).

D. Size of the Operator's Business

The United Cement Company is a wholly-owned subsidiary of Texas Industries (Tr. 7). The size of Texas Industries' combined mining operations (sand, gravel, cement and crushed stone) is

rated at approximately

2 million man-hours per year (Tr. 9-10). The size of United Cement Company is rated at approximately 250,000 man-hours per year (Tr. 9-10). The size of the Artesia Quarry & Plant is rated at approximately 250,000 man-hours per year (Tr. 7).

E. Effect of Penalty on Operator's Ability to

Continue in Business

The parties entered into a stipulation that the amount of the proposed penalties will not affect the United Cement Company's ability to remain in business (Tr. 10). Any penalty proposal computed by the Office of Assessments is immaterial to the issues presented herein because civil penalty proceedings are de novo proceedings. The amount of the penalty is determined by the Judge solely with reference to the six statutory criteria contained in section 110 of the Act. In this regard, it has long been recognized that the Judge is empowered to assess penalties greater than those proposed by the Office of Assessments. Gay Coal Inc., 7 IBMA 245, 84 I.D. 99, 1977-1978 OSHD par. 21,662 (1977); Old Ben Coal Company, 4 IBMA 198, 82 I.D. 277, 1974-1975 OSHD par. 19,723 (1975); Buffalo Mining Company, 2 IBMA 226, 80 I.D. 630, 1973-1974 OSHD par. 16,618 (1973); 29 CFR 2700.27(c) (1978).

However, the Interior Board of Mine Operations Appeals (Board) has held that evidence relating to whether a penalty will affect the ability of the operator to stay in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find therefore, that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. United Cement Company and its Artesia Quarry & Plant have been subject to the provisions of the Federal Mine Safety and Health Act of 1977 at all times relevant to this proceeding.

2. Under the Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Former MSHA inspector Clyde H. Gilliam was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The violations charged in Citation Nos. 80422 through 80426 are found to have occurred as set forth in Part V, supra.

5. The Petitioner has failed to establish the violation charged in Citation No. 80421 by a preponderance of the evidence.

6. All of the conclusions of law set forth in Part V,

supra, are reaffirmed and incorporated herein.

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VII. Proposed Fingings of Fact and Conclusions of Law

The Respondent filed a posthearing brief, the Petitioner did not. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessment

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 CFR Standard	Penalty
80422	4/4/78	56.16-5	$ 75.00
80423	4/4/78	56.20-3	40.00
80424	4/4/78	56.11-2	150.00
80425	4/4/78	56.14-1	100.00
80426	4/4/78	56.9-12	25.00
			$390.00

ORDER

Accordingly, the oral determination made at the hearing granting the Petitioner's motion to dismiss the petition as relates to Citation No. 80420 is hereby REAFFIRMED, and the citation is herewith VACATED.

IT IS FURTHER ORDERED that the petition be DISMISSED as relates to Citation No. 80421, and the citation is herewith VACATED.

IT IS FURTHER ORDERED that the Respondent pay civil penalties in the amount of $390 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

~FOOTNOTE 1

The Petitioner moved, at the close of its case-in-chief, to dismiss the petition as relates to Citation No. 80420. The motion was thereupon granted (Tr. 60-61).

~FOOTNOTE 2

At the close of MSHA's case-in-chief, the Respondent moved to dismiss the petition as relates to Citation No. 80421 on two grounds: First, counsel for the Respondent argued that no

evidence had been presented to establish that any employee had ever used any type of metal bar in the transfer station. Second, the Respondent argued that the so-called "7 foot rule" was arrived at arbitrarily and that operators cannot be bound by unwritten requirements.

However, the evidence contained in the record at the time the motion was made established a prima facie case as to the alleged violation and was sufficient to withstand a motion to dismiss. The inspector testified as an expert witness that a metal rod, approximately 6 feet in length and 1 inch in diameter, would be required to remove a blockage from the chute at the transfer point. The existence of such expert testimony supported the inference that unguarded light bulbs located approximately 7 feet above the floor presented a shock hazard. On the basis of this, it was immaterial that an informal "7-foot rule" happened to exist because reliance on it was unnecessary to sustain the finding of a violation. Additionally, the fact that the inspector testified as an expert witness was sufficient at the stage of the case to support an unrebutted opinion that a metal rod of the specified dimensions would be needed to alleviate a blockage.

Accordingly, based on the evidence in the record when the motion was made, the Respondent's motion to dismiss is DENIED.

~FOOTNOTE 3

In this regard, the existence or nonexistence of the so-called "30-inch regional rule" (Tr. 123-125, 172-173), is immaterial to the finding of a violation. It is unnecessary to decide, assuming that such a rule had been developed informally amongst the inspectors, whether all walkways 30 inches above the ground require handrails per se. In the instant case, reliance on such an informal rule is unnecessary to find a violation because the height of the platform and the nature of its use dictate that handrails should have been present.

Additionally, the fact that toeboards were not provided (Tr. 117, 130) is immaterial since their absence is not alleged in the citation.

~FOOTNOTE 4

29 CFR 1910.21 (1973), sets forth the following definitions:

"(a) As used in 1910.23, unless the context requires otherwise, floor and wall opening, railing and toe board terms shall have the meanings ascribed in this paragraph.

* * * * * * *

(3) Handrail. A single bar or pipe supported on brackets from a wall or partition, as on a stairway or ramp, to furnish persons with a handhold in case of tripping.

* * * * * * *

(6) Standard railing. A vertical barrier erected along exposed edges of a floor opening, wall opening, ramp, platform, or runway to prevent falls of persons.

* * * * * * *

(8) Stair railing. A vertical barrier erected along exposed sides of a stairway to prevent falls of persons."

~FOOTNOTE 5

The term "runway," as used in 29 CFR 1910.23 (1973), is defined at 29 CFR 1910.21(a)(5) (1973), which provides the following:

"Runway. A passageway for persons, elevated above the surrounding floor or ground level, such as a footwalk along shafting or a walkway between buildings."

~FOOTNOTE 6

The term "platform," as used in 29 CFR 1910.23 (1973), is defined at 29 CFR 1910.21(a)(4) (1973), which provides the following:

"Platform. A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment."

~FOOTNOTE 7

The regulations contain no definition of the term "riser" applicable to 29 CFR 1910.23 (1973). Guidance as to its meaning under that section is provided by 29 CFR 1910.21(b)(7) (1973), which provides the following:

"(b) As used in 1910.24, unless the context requires otherwise, fixed industrial stair terms shall have the meaning ascribed in this paragraph."

* * * * * * *

(7) Riser. The upright member of a step situated at the back of a lower tread and near the leading edge of the next higher tread."