CCASE:
SOL (MSHA) V. RIVERSIDE CEMENT
DDATE:
19800415
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceedings Docket No. WEST 79-97-M A/O No. 04-00010-05004
v.		Docket No. WEST 79-319-M A/O No. 04-00010-05010
RIVERSIDE CEMENT COMPANY,	RESPONDENT	Docket No. WEST 79-320-M A/O No. 04-00010-05011
		Docket No. WEST 79-324-M A/O No. 04-00010-05012
		Docket No. WEST 79-95-M A/O No. 04-00010-05002
		Crestmore Mine & Mill

DECISION

Appearances: Malcolm Trifon, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner, MSHA Jerry Hines, Esq., Gifford-Hill and Co., Inc., Dallas, Texas, for Respondent, Riverside Cement Company

ORDER TO PAY

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 March 18, 1980.

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

(1) The operator is the owner and operator of the subject mine.

(2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) I have jurisdiction of these cases.

(4) The inspector who issued the subject citations was a duly authorized representative of the Secretary.

(5) True and correct copies of the subject citations were properly served upon the operator.

(6) Copies of the subject citations and terminations at issue in these proceedings are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any of the statements asserted therein.

(7) The imposition of any penalty in these proceedings will not affect the operator's ability to continue in business.

(8) All the alleged violations were abated in timely fashion.

(9) The operator is large in size.

(10) With respect to history of prior violations, the operator had no history at the time the violations in Docket No. WEST 79-95-M were issued.

The operator had nine violations issued against it at the time the first ten violations were issued in Docket No. WEST 79-97-M and sixty violations at the time the last two violations in that docket number were issued.

The parties agree and I find that with respect to Docket No. WEST 79-97-M, the foregoing statistics constitute a moderate history.

At the time the citations in Docket No. WEST 79-319-M were issued, ten violations had been issued against the operator which the parties agree and which I find constituted a low history.

At the time the citations in Docket No. WEST 79-320-M were issued, there had been 116 violations issued against the operator. These violations in this docket number were issued sometime later than those set forth in the previous docket numbers. The parties agree and which I find that for the purposes of Docket No. WEST 79-320-M, the operator has a moderate history.

At the time the citation in Docket No. WEST 79-324-M was issued, a total of 118 violations had been issued

against the operator which again the parties agree and I find constituted a moderate history of prior violations.

(11) The parties agree that the witnesses who will testify are experts in mine safety and health (Tr. 4-5).

Citation Nos. 376289, 376292, 376295, 375274, 376335, 376337, 375290, 376343, 376345, 376346, 376349, 379053

The Solicitor moved to have settlements approved for these citations for the originally assessed amounts, which total $1,010. The Solicitor stated that ordinary negligence and ordinary gravity were involved in each of these citations. From the bench, I approved these recommended settlements after having reviewed typewritten summaries of all of these violations (Tr. 7-18, 126). Approval of these settlements from the bench is hereby affirmed.

Citation Nos. 375275, 376316, 375256

The Solicitor moved to vacate these citations, stating that he did not believe there was sufficient evidence to prove the violations. From the bench, I granted these motions, stating that such a determination is within the Secretary's discretion (Tr. 9, 17-18). The granting of the Solicitor's motions to vacate is hereby affirmed.

Citations Nos. 376334, 376351, 376352, 371402, 379067

The Solicitor moved to have penalties approved for these citations for the originally assessed amounts, which total $942. In its answer to the complaint, the operator had stated it did not contest these penalty assessments. After stating that the operator's agreement not to contest a penalty does not mean automatic approval for that penalty, I approved these recommended settlements after having reviewed typewritten summaries of these violations (Tr. 10-11, 14-15, 19). Approval of these penalties from the bench is hereby affirmed.

Citation No. 376287

This citation involved a failure to guard the drive shaft motor on two fans, a violation of 30 C.F.R. 57.14-1. The Solicitor moved to have a settlement approved in the amount of $74, reduced from the original assessment of $84. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined, due to the fans being located at such a height that there was less chance of employee contact with the fans than had been originally determined. From the bench, I approved the settlement (Tr. 6-7). Approval of this settlement from the bench is hereby affirmed.

Citation No. 375273

This citation involved a buildup of materials around the electric motor located below the No. 3 bulk-loading station, a violation of 30 C.F.R. 57.12-30. The Solicitor moved to have a settlement approved in the amount of $62, reduced from the original assessment of $72. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined since the area was used mainly by maintenance personnel rather than regular personnel. From the bench, I approved the settlement (Tr. 8-9). Approval of this settlement from the bench is hereby affirmed.

Citation No. 375559

This citation involved a failure to guard a rachet-type brake on an inclined conveyor, a violation of 30 C.F.R. 57.14-1. The Solicitor moved to have a settlement approved in the amount of $300, reduced from the original assessment of $345. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined since this piece of machinery is in a more remote location than originally determined, and there would therefore be less employee exposure to any potential danger. From the bench, I approved the settlement (Tr. 16-17). Approval of this settlement from the bench is hereby affirmed.

Citation No. 376317

This citation was issued when large amounts of material spills were observed on the screw conveyor floor at the No. 1 bag house, a violation of 30 C.F.R. 57.20-3(b). The Solicitor moved to have a settlement approved in the amount of $100, reduced from the original assessment of $130. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined since there was an adjacent walkway area which could be used by employees. From the bench, I approved the settlement (Tr. 17). Approval of this settlement from the bench is hereby affirmed.

Citation No. 379059

This citation was issued when the walkway along an elevated conveyor belt was found not to be not equipped with emergency stop devices or guards, a violation of 30 C.F.R. 57.9-7. The Solicitor moved to have a settlement approved in the amount of $300, reduced from the original assessment of $325. As grounds for the settlement, the Solicitor stated that there was less gravity than originally determined as there was less employee use of this walkway than was originally thought. From the bench, I approved the settlement (Tr. 18). Approval of this settlement from the bench is hereby affirmed.

Citation No. 379054

This citation was issued when the cab and surrounding areas of the underground hydraulic scaler were not kept free of

extraneous materials, a

violation of 30 C.F.R. 57.9-12. The Solicitor moved to have a settlement approved in the amount of $300, reduced from the original assessment of $325. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined, since only one employee was exposed to this hazard. From the bench, I approved the settlement (Tr. 19). Approval of this settlement from the bench is hereby affirmed.

Citation No. 376296

At the hearing, counsel introduced documentary exhibits and testimony with respect to this citation (Tr. 20-72). Upon conclusion of the taking of evidence, 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 have a decision rendered from the bench (Tr. 73). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 81-84).

Bench Decision

The bench decision is as follows:

> This case is a petition for the assessment of a civil penalty. The alleged violation is of 30 C.F.R. 57.9-7 which provides as follows: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."
>
> The facts are not in dispute. No stop cord or device was present along the belt conveyor of the operator's secondary primary crusher.
>
> Respondent's Exhibit 1 is a photograph of the belt conveyor and walkway in issue. The circumstances set forth in the picture and the description based upon the picture given by the operator's plant manager are not challenged.
>
> The issue presented for resolution is whether the belt conveyor was guarded. If it was unguarded, then a stop device or cord was required. If, on the other hand, the belt conveyor was guarded, then no stop cord or device was necessary and no violation existed.
>
> Alongside the bottom edge of the belt itself was an angle iron labeled "D" on respondent's Exhibit No. 1. The operator's plant manager expressed the opinion that "D" served as a guard or handrail when the cover over the belt was lifted. The MSHA inspector first stated that the belt conveyor had no guards, but upon final recall to the stand stated that "D" would serve as a guard for the top portion of the belt conveyor.

Based upon the foregoing, I conclude that the angle iron "D" constituted a guard and that that part of the belt conveyor affected by "D" was in fact guarded so that to this extent no stop cord or device was necessary and no violation existed.

Directly under the belt conveyor are the troughing rolls which serve as supports and guides for the belt conveyor. Each troughing roll rotates on its own axis. The operator's plant manager who was a persuasive witness testified that troughing rolls are part of the belt conveyor. I conclude that the troughing rolls were not guarded. As the plant manager stated, the vertical angle irons described on respondent's Exhibit No. 1 as "A" were only for support and not for guarding. Therefore, this portion of the belt conveyor system was unguarded and a violation existed because there was no stop device or cord.

I am most certainly not unaware of the hazards that result from unguarded or inadequately guarded moving parts. However, it must be stated that the Solicitor's evidence was a welter of confusion with respect to whether MSHA's guarding requirements have ever been reduced to writing. From all that has been given me at this hearing, it appears that no such writing exists. What is clear from the testimony is that MSHA has failed to advise the operator what guarding is required and what guarding would be acceptable. It is no answer to say, as has been suggested here today, that "common sense" supplies the answer. The Act and the mandatory standards are far too complicated for such a simplistic approach. The inspector's testimony clearly sets forth what type of guarding MSHA would accept. Why then does not MSHA tell the operator?

From the testimony I have heard, it appears that MSHA has no written requirements regarding guarding and that operators are left to figure out for themselves what they should do. This approach to enforcement in a newly affected industry can only breed resentment and resistance. Certainly the Secretary can do better.

In addition, I would point out that I am not deciding that with respect to the top portion of the conveyor where I have found no violation, the angle iron "D" constitutes the most desirable form of guarding. However, if MSHA wants more, it should say so in writing and in a manner calculated to come to the attention of the operators.

Because a violation exists, a penalty must be assessed. In accordance with the stipulations entered into by the

parties which I have accepted, I find the operator large in size; the violation was abated in good faith; there is no history of previous violations; and the imposition of a penalty will not affect the operator's ability to continue in business. As already stated, I recognize that injury could result from lack of guarding for the trough rolls. Nevertheless, in determining the appropriate amount of a penalty, I must take into account the circumstances of this case already set forth herein, which indicate to me a very, very low level of negligence. The penalty amount which I have determined is calculated hopefully to bring about on the part of MSHA a change in the situation which presently exists.

A penalty of $1 is assessed.

The bench decision is hereby affirmed.

Citation No. 376298

At the hearing, counsel introduced documentary exhibits and testimony with respect to this citation (Tr. 84-116). Upon conclusion of the taking of evidence, the parties agreed to present oral argument and have a decision rendered from the bench (Tr. 116). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 122-124).

Bench Decision

The bench decision is as follows:

This case also is a petition for the assessment of a civil penalty. The alleged violation here also is of 30 C.F.R. 57.9-7. Thus, the issue presented is whether the cited portion of the belt conveyor was guarded. If it was unguarded, then a stop cord was required, but if it was guarded, then no such device was necessary and no violation existed.

Unlike the prior citation, the facts in this matter are in some dispute. There is a conflict over whether mesh screening existed except for the areas cited. The inspector testified that there was mesh screening which constituted adequate guarding, except for three portions where it was missing. According to the inspector, the missing portions were what he cited. However, the plant manager emphatically stated there was no such mesh at the time in issue. I find the plant manager more credible on this point and I accept his testimony.

An angle iron labeled "A" on respondent's Exhibit 2 was present just above the trough rollers. The inspector testified that this angle iron guarded the small portion of the trough roller which was behind the angle iron. The rest of the trough roller was exposed and in my opinion was unguarded. Moreover, as the plant manager admitted, a person could be injured if he struck himself on the area above the angle iron. For this reason also, I find the belt conveyor cited was unguarded and that therefore a violation existed.

The operator's counsel has argued that a walkway was not present here. I reject that argument. I accept the definition of "walkway" given by Judge Moore in Acme Concrete Company, Docket No. DENV 79-123-PM dated December 18, 1979, wherein he stated that a walkway meant a place where a miner could reasonably be expected to walk, even if he had no job-related reason for going to the area in question.

The stipulations regarding the statutory criteria of size, good faith abatement, ability to continue in business and history already have been set forth and apply here as well.

I recognize that injury could result from the situation presented. However, in this instance, as in the prior citation, it appears that the operator did not know at the time exactly what was required of it. Certainly, the testimony of the plant manager graphically demonstrates this. Indeed, I accept the plant manager's testimony that in the past the angle iron had been accepted as adequate guarding. This, of course, does not mean that MSHA could not require or indeed should not have required additional guarding. However, the circumstances do demonstrate to me that the level of negligence was very, very low. Under the circumstances, I find this absence of any significant negligence a most significant factor.

A penalty of $1 is assessed.

The bench decision is hereby affirmed.

Citation No. 376300

The parties stipulated that the facts in this citation were the same or similar to the facts presented in Citation No. 376296. I therefore adopted the findings and conclusions I made with respect to Citation No. 376296 to this citation, and imposed a penalty of $1 (Tr. 124-125). Approval of this assessment is hereby affirmed.

The parties stipulated that the facts in these citations were the same or similar to the facts presented in Citation No. 376298. I therefore adopted the findings and conclusions I made with respect to Citation No. 376298 to these citations, and imposed a penalty of $1 for each violation (Tr. 125). Approval of these assessments is hereby affirmed.

ORDER

It is hereby ORDERED that as set forth herein, the vacation of certain citations from the bench be AFFIRMED and that the imposition of penalties from the bench with respect to other citations, also as set forth herein, be AFFIRMED.

In accordance with the foregoing determinations, the operator is ORDERED to pay $3,093 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge