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SOL (MSHA) V. PHOENIX REDI-MIX
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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. WEST 79-13-M A/O 02-01070-05002
v.	
PHOENIX REDI-MIX COMPANY, INCORPORATED, RESPONDENT	Mine: Phoenix Redi-Mix Pit

DECISION

APPEARANCES: Mildred L. Wheeler, Esq., Office of the Solicitor, United States Department of Labor, San Francisco, California, for Petitioner
Steven H. Williams, Esq., Norling, Rolle, Osser, and Williams, Phoenix, Arizona, for Respondent

Before: Administrative Law Judge Vail

Statement of the Case

The proceeding arose upon the filing of a petition for the assessment of civil penalty (now called a proposal for a penalty, 29 CFR 2700.27) for 3 alleged violations of Mandatory Safety Standards contained in 30 CFR Part 56. The violations were charged in citations issued to respondent following an inspection of the Phoenix Redi-Mix Pit on November 28 and 29, 1978.

Pursuant to notice, a hearing on the merits was held in Phoenix, Arizona, on February 5, 1980. Federal Mine inspector Jack Sepulveda testified on behalf of petitioner. Robert Strom and Robert Prickard testified on behalf of respondent. Respondent filed a posthearing brief.

To the extent that the contentions are not incorporated into this decision, they are rejected.

The parties stipulated that the annual man hours of employment at respondent's facility was 45,744. Testimony established that there were between 15 to 18 employees present at the time of inspection. On the basis of these facts, I find that respondent is a medium-sized operator for the purposes of determining the appropriateness of the penalties to the size of the operator's business. There is no evidence that the penalties will effect respondent's ability to continue in business.

The record establishes that respondent, in the case of each violation found herein to have occurred, made a good faith effort to achieve rapid compliance after notification of the violation.

A review of respondent's history of previous violations shows that no increase of the penalties is warranted on that basis.

Findings are hereafter made with respect to the occurrence, gravity and attendant negligence of each violation.

Findings of Fact

1. Citation No. 378444 and 378447, issued on November 28, 1978, alleged violations of mandatory standard 30 CFR 56.12-32 which requires that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Citations 378444 and 378447 will be treated here together as the uncontroverted evidence at the hearing established that the alleged violations involved the same tunnel and the same electrical wire but at the opposite ends thereof.

Citation No. 378444 alleged the following condition or practice existed:

> Electrical covers were not in place at the crusher electrical shack and electrical wires were exposed.

Citation No. 378447 alleged that the following condition or practice existed:

> The 6 inch duct cover for the electrical switches by the tunnel was not in place, and electrical wires were exposed.

The issue here is whether, at the time the electrical and duct covers were not in place, the respondent was in the process of making repairs to the said electrical wire?

I find a violation existed. Section 56.12-32 requires that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs. The evidence shows, and is not in dispute, that the electrical covers were not in place at the crusher electric shack and a 6 inch duct cover for the electrical switches by the tunnel was not in place. The respondent argues that at the time of inspection, the electrical covers and 6 inch duct cover were not in place for the reason that repairs were in the process of being made of a short in the underground wiring to these two locations. In accomplishing the repair of this shorted wire, the respondent's employees had attached a temporary wire at the crusher shack by opening the door to the electrical box and connecting the wire to the terminals inside the box. The respondent's plant manager, Robert Strom, testified that the temporary set-up, referring to the wiring involved herein, was used in order to keep the plant operating. In the process of accomplishing these repairs, employees were digging a trench in the area for laying a new conduit for the shorted wire.

I find that the operator was negligent. The repair work being done at the time of the inspection involved digging a trench for the new wire and conduit and there was no actual work being done on the electrical boxes at the crusher shack or the electrical switches by the tunnel. In fact, temporary wiring connections were made to facilitate the plant's continued operation until the trench was completed for receiving the new wire. Until this trench was completed, a dangerous condition existed involving the two locations described in the citations which exposed employees to possible serious injury. I find the respondent abated in good faith.

2. Citation No. 378449 and Order of Withdrawal was issued November 29, 1978, which alleged a violation of 30 CFR 56.3-5 in that the front-end loader at the south pit was mining material under a dangerous bank. Respondent abated the dangerous bank and high wall by having a D-8 Dozer push the material from the high wall to a safe angle of repose and building a working bench for the front-end loader to work from.

The issue here is whether the front-end pit loader was operating under a dangerous bank?

30 CFR 56.3-5 provides that men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

The respondent argues that the conditions existing were neither dangerous nor unsafe and that the mine inspector failed to advise the respondent as to what is a safe height of a bank as involved herein.

The citation in this matter was written on November 29, 1978 as an Order of Withdrawal due to a front-end loader at the south pit mining

material under what the inspector termed a dangerous bank which was described in the Order to be about 45 feet high. The loader was stated to be 14 feet high with a maximum reach of about 25 feet. The inspector testified that he observed the loader on the day before, which would be November 28, 1978, working in the south pit under what he considered to be a dangerous bank. He advised the superintendent of the mine, later on in the day, that he thought they should bring the bank down to get a better angle of repose. The following day, November 29, 1978, while accompanied by his supervisor, a Mr. Day, the inspector again looked at the bank in the respondent's south pit and decided to issue the withdrawal order and citation involved herein. After the issuance of the Order, the respondent abated the condition by building a working pan at the bottom of the bank and pushing the side to what was considered a good angle of repose. The inspector testified that after the change in the condition of this bank, he measured it and found it was still over 45 feet. The respondent's mine superintendent, Robert Strom, testified that in his opinion the operation near the bank was being performed in a safe and non-dangerous manner.

I find a violation existed. Section 30 CFR 56.3-5 requires that men shall not work near or under dangerous banks. The thrust of the respondent's arguments relating to this citation appears to rest on their attempt to have the applicable standard or the inspector set a definite height which a bank could be before it became dangerous. This argument does not overcome the practical factors involved in various types of mining conditions. As testified to by the inspector in this case, and an obvious factor, would be the type of material or condition of the bank under which the man or men were working. If it were solid rock, the danger of it

falling would be less than loose or unstable sand or gravel. There was testimony, unrebutted by the respondent, that the front-end loader operator, a Mr. Young, had experienced some material coming down while digging there. Although the respondent's plant manager, Mr. Strom, and safety director, Robert Pickard, indicated that some sluffing was a common occurrence in such an operation, they opined that an experienced front-end loader operator would be able to recognize when the height of the bank became dangerous.

I am more persuaded by the fact that the inspector first recognized the danger at respondent's south pit on the 28th of November, 1978, and then on the following day, while accompanied by his supervisor, issued the Order of Withdrawal and Citation, which did not appear to be a snap judgement but rather a thought-out decision. Although his initial estimate of the height of the bank was 45 feet, it was later determined by actual measurement to have been considerably higher than that before abated. He testified that after the 10 foot working pan was created at the base of the bank, the bank was still over 45 feet high but had a good angle of repose and that he estimated the bank, before correction, had been 75 to 80 feet.

I find that a violation of the mandatory standard contained in 30 CFR 56-3 did occur. The violation was serious because of the possibility of injury and was due to respondent's negligence. The evidence shows that the condition was known or should have been known to the respondent. Respondent did, however, abate quickly and in good faith, after the issuance of the withdrawal order.

Section 110(i) of the Act directs that in assessing a penalty, I consider six criteria: the operator's history of previous violations, the size of the operation, whether the operator was negligent, the effect on the

operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. The petitioner's Exhibit Number 1 received in evidence shows that the respondent had a total of 15 violations assessed for a period from November 29, 1976 to November 28, 1978, covering a two year period. I do not consider this to warrant that the penalties should be increased. The operator's business is medium in size. There is no evidence that the penalties will have any effect on the operator's ability to continue in business and therefore, I conclude that they will not.

The violations involved herein with the electrical wiring, Citation No. 378444 and 378447, did occur. Respondent argues that it was in the process of repairs to the wiring involved and therefore not in violation. This argument is rejected as the facts show the repair work involved digging a trench to subsequently receive the new wire to replace the temporary wire in place at time of the inspection. The condition as it existed created a danger to employees and the respondent was negligent. However, the respondent abated in good faith in this matter. I find that the two citations relate to the same general area, that is both ends of the same wiring hookup and that the penalty assessed should consider this. I assess a penalty of $50.00 for Citation No. 37844 and a penalty of $50.00 for Citation No. 378447 for the violations found.

As to Citation No. 378449 alleging a violation of 30 CFR 56.3-5, there is apparently considerable difference of opinion as to what constitutes a violation here, particularly as to the height of a dangerous bank. The weight of the evidence persuades me that the violation occurred. However, in view of the stipulations regarding four of the six statutory criteria,

and the fact that there was good faith abatement and little negligence on the respondent's part, I assess a penalty of $250.00 for the violation found.

ORDER

It is therefore ORDERED that respondent pay to MSHA a civil penalty in the total sum of $350.00 within 30 days of the entry of this order.

Virgil E. Vail
Administrative Law Judge