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SOL (MSHA) V. NORTHERN AGGREGATES
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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 Proceedings Docket No. WILK 79-144-PM A.C. No. 30-01267-05003
v.	Docket No. WILK 79-145-PM A.C. No. 30-01267-05004
NORTHERN AGGREGATES, INC., RESPONDENT	Fulton Mine

DECISION

Appearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Department of Labor, Rm, 3555, 1515 Broadway, New York, New York, for Petitioner
Paul A. Germain, Esq., Germain & Germain, Syracuse, New York, for Respondent

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq., hereinafter referred to as the "Act"). In the case designated WILK 79-144-PM, Petitioner filed a proposal for assessment of civil penalties on September 10, 1979, and the Respondent, Northern Aggregates, Inc. (Northern), filed its notice of contest on September 20, 1979. In case No. WILK 79-145-PM, Petitioner filed its proposal for assessment of civil penalty on September 14, 1979, and Northern filed its notice of contest on September 20, 1979. The cases were consolidated for hearing which was held in Syracuse, New York, on February 20 and 21, 1980.

The issues in these cases are whether Northern has violated the provisions of the Act and implementing regulations as alleged in the petitions for assessment of civil penalties filed herein, and, if so, the appropriate civil penalties to be assessed for the alleged violations. In determining the amount of a 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.

I. Docket No. WILK 79-144-PM

The following eight citations charge violations of mandatory safety standard 30 C.F.R. 56.14-1 which requires that "ÕgÊears; 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.

Citation No. 210526 specifically charged that the return idler rollers on the main feed belt were not guarded. These rollers were located only 2 to 3 feet from the ground floor. MSHA inspector Robert Kinterknecht saw loose material and a partially filled wheelbarrow and shovel directly below an exposed roller. It is reasonable to conclude that a worker was cleaning up this loose material. He would have been directly below the belt and would have been exposed to the hazard. The operator's witness admitted that the rollers were unguarded and admitted that ordinarily two employees would be in that vicinity twice a day for 5 to 6 minutes to clean up around the belts. He claimed, however, that the same general area had been inspected before by another inspector who said nothing about the exposed rollers while citing an exposed tail pulley only 18 to 20 inches away. I do not, however, consider the failure of a previous inspector to have cited this condition, standing alone, as having any probative value.

Citation No. 210527 charged that the tail pulley on the "piggy-back" belt was not guarded. The tail pulley was at ankle or knee height from the ground. The south side of the tail pulley was exposed and the operator conceded that employees would be on that side of the pulley once a week to grease it. The operator contended, however, that a previous guarding violation on the north side of the pulley had been abated by a previous MSHA inspector and the inspector did not cite the south side. The contention is without merit and no reduction in the operator's negligence is warranted.

Citation No. 210532 charged that the idler rollers were unguarded the entire length of the feed conveyor. The two strands of No. 9 wire (about the thickness of a ballpoint pen) suspended by angle irons being used as a guard was felt to be inadequate to prevent someone from slipping or falling into the rollers or getting an arm or sleeve caught in the rollers. The operator admitted that the catwalk alongside the rollers was used by employees to grease, maintain, and inspect the operation of the belt, but asserted that this area had previously been cited by an MSHA inspector for having been unguarded and that that citation was abated by the same method found by inspector Kinterknecht to be a violation. While, if true, this assertion could have some bearing on the case I find that Northern has failed in its proof. Cf. Secretary v. Standard Building Material Co., 1 FMSHRC 702 at p. 703. (June 1979). In the absence of any corroborative evidence such as a copy of the earlier citation or testimony or an admission from the former inspector, I can give but little weight to the hearsay allegations. Inspector

Kinterknecht had, moreover, checked MSHA's records and found no evidence to support the assertion. Since the wire did provide some protection however, a slight reduction in penalty is warranted.

Citation No. 210534 alleged that the idler rollers on the secondary conveyor were not guarded and were exposed to people walking on an adjacent catwalk. The operator claimed that the two strands of No. 9 wire had been accepted as abating an earlier violation but failed to prove his claim. Since the wire provided some protection however, a slight reduction in the penalty is warranted.

Citation No. 210539 charged that the idler rollers in the wash plant house were not guarded. The rollers were located along a walkway on the floor. The operator admitted that one side of the roller was easily accessible, but claimed that the other side was not easily accessible and would expose only one employee once a week while he greased the rollers. I find the extent of the hazard to be accordingly slightly reduced.

Citation No. 210556 charged that the tail pulley on the sand conveyor from the wash plant to the stockpile was not guarded. The pulleys were 2 to 3 feet from the base of the catwalk and the belt was running at the time of the inspection. Ross Fox, the operator's representative, admitted that an employee would be in the area periodically to check the belt.

Citation No. 210555 charged that the idler rollers on the sand conveyor from the wash plant to the stockpile were not guarded. The full length of the sand conveyor was inadequately guarded with only two strands of No. 9 wire. The pinch points on the conveyor were about waist-high and adjacent to a catwalk where employees would pass. The operator claimed that the use of the No. 9 wire had been approved by the previous inspector, but failed to prove his claim. Since the wire provided some protection however, a slight reduction in the penalty is warranted.

Citation No. 210569 charged that the takeup pulley was unguarded under the feeder conveyor. The operator pointed out, however, that this was not in fact an area in which anyone worked. The backhoe was used to clean under that area and the backhoe operator would not be exposed to the hazard. I accept this testimony, but in light of the inspectors testimony that the pulley was in an area in which contact could be made, I find that a violation nevertheless occurred. Under the circumstances, the likelihood of injury was less than thought by the inspector and some reduction in the penalty is therefore warranted.

With respect to each of these previous violations, Kinterknecht testified that the particular hazard presented by the violations was the potential breakage, crushing or loss of limbs or breaking one's neck after being caught by the shirt sleeves and dragged into a pinch point. The inspector concluded that the operator should have noticed these violations on making his routine daily inspections. Few employees would have been exposed to the hazards and even then only infrequently. I accept the inspector's testimony in this regard.

Citation No. 210554 charged a violation of 30 C.F.R.

56.14-6 (guards shall be securely in place) in that the guard was
broken over the drive pulley on the electric motor operating the
sand conveyor thereby exposing

an area of about 6 inches by 2 feet. Contact could be made with the drive pulley and V-belt while the motor was running. The operator alleged that no one had brought the problem to his attention before this time, but I find that he was nevertheless negligent since he should have seen the broken guard on his daily inspection of the plant. It was readily visible. Resulting injuries could have been permanently disabling caused by a crushed or broken arm.

The following four citations relate to violations of mandatory standard 30 C.F.R. 56.9-2 (requiring that equipment defects affecting safety be corrected before the equipment is used).

Citation No. 210565 alleged that the backup alarm on a front-end loader was not working. Inspector Kinterknecht observed trucks dumping in the area in which the front-end loader was operating and saw others parked nearby. He opined that someone could have been run over because the operator could not see behind him, thereby causing disabling or fatal injuries. The machine operator told Kinterknecht that the alarm had not been working for a couple of days. In any event, the operator should have observed the defect in making his daily rounds. Northern did not deny the violation but alleged that it then had a procedure for correcting defective equipment whereby the equipment operator would write up a work order for any malfunction. There is no evidence that such a work order was filed with respect to this incident. Under the circumstances, I give but little weight to the alleged corrective procedures and no reduction of negligence.

Citation No. 210571 alleged that the backup alarm in dump truck No. 53 was not working. Kinterknecht could not recall whether any other personnel were in the area in which the truck was operating, but noted that the driver could not see behind him while backing up and that management should have known of the defect when making its daily rounds. The truck driver told Kinterknecht that he did not know of the malfunction. Since the malfunction could have occurred only moments before, I feel some reduction in negligence is warranted.

Citation No. 210572 charges that the backup alarm on the Terex front-end loader was not working. Kinterknecht observed that two other trucks were waiting in the pit area while another truck was being loaded and that the drivers of these trucks were standing around talking to each other. It was likely that the front-end loader could have run over someone, thereby causing injury or death. The alarm had been working a few days before. There is no evidence as to when it first malfunctioned. Some reduction in negligence is therefore warranted.

Citation No. 210573 alleges that the backup alarm on the No. 68 dump truck was not working. Although Kinterknecht could not recall precisely where it was operating, he testified that wherever it was operating, either at the stockpile or at the pit, there were always trucks around, thereby creating a potential

hazard to the drivers. Management should have known of this condition based on its routine daily examinations.

Citation No. 210568 charged a violation of 30 C.F.R. 56.9-22 which requires that berms or guards be provided on the outer bank of elevated roadways. The evidence shows that the area in question was actually a ramp variously described as from 12 to 20 feet long, 14 feet wide, and 5 to 7 feet high at the highest point. The evidence shows that it would only be used in the event of a breakdown in the primary crusher. It was a backup hopper used by payloaders only infrequently. It was likely that a truck might run off the outer edge of the bank and turn over, thereby causing fatal injuries. The condition should have been known to the operator from his daily routine inspections of the plant area.

Citation No. 210570 charged a violation of 30 C.F.R. 56.9-71 (requiring that traffic rules, including speed, signals, and warning signs be standardized at each mine and posted). It was specifically charged that there were no speed or warning signs posted anywhere in the mine area. Employees could have been seriously injured in an accident because of excess speed and obstructed vision.

Citation No. 210540 charged a violation of 30 C.F.R. 56.12-32 (requiring that inspection and cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairs). The operator admitted that the junction box cover was missing as charged and that the junction box was energized, but claimed that the switch was not then in use and that exposure was unlikely. The operator conceded, however, that screens were stored in the switchhouse and employees entered the area to remove the screens. Fatal injuries were probable because the area was dark and a person could stumble into the junction box. The operator should have observed this condition since it was plainly visible. A slight reduction in gravity is warranted, inasmuch as Kinterknecht was not aware that the junction box was not then in use as a switch.

Citation No. 210561 also charged a violation of 30 C.F.R. 56.12-32 alleging that the junction box on an air compressor was not covered. Although no wiring was exposed, the insulation could be knocked off or the electrical tape and "quick connectors" could become undone by vibration from the compressor. Permanent disability or fatal injuries could result from contact with exposed wiring. It was probable that such injuries could occur. The operator should have seen the defect on his daily routine inspection of the area.

Citation No. 210575 charged a violation of 30 C.F.R. 56.12-2 (requiring that electrical equipment and circuits be provided with switches or other controls). The citation alleged that in the same room as the compressor there was a light without a switch. In order to turn the light off, one had to unscrew the bulb from the socket. Injuries such as burning or shock were probable and employees would be exposed to that bulb two or three times a day. The operator should have known of this condition on his daily rounds.

Citation No. 210559 charged a violation of 30 C.F.R. 56.12-34 (requiring guarding of portable extension lights and other lights that by their location present a shock or burn hazard). The citation alleged that a bare light bulb in pump house No. 2 was not guarded. It was at face level upon entering the building. Injury was probable to the one or two employees who might enter the premises. The operator was negligent in that the problem was plainly visible.

Citation No. 210533 charged a violation of 30 C.F.R. 56.11-2 (requiring that toeboards be provided where necessary). The citation alleges that a toeboard was not installed around the platform on the No. 1 tower. Maintenance was performed at this location about 30 feet above ground level. With people walking beneath the platform, it was probable that they would be struck with falling rocks or tools. Resulting injuries could result in lost work days as a result of bruised shoulders or arms. The operator should have known of this condition. The operator conceded that no toeboard existed on the platform at the time of the inspection, but claimed the catwalk had just recently been extended and that they had insufficient time to erect the toeboard. The operator conceded, however, that the catwalk had been extended in the spring of 1978 and no explanation was given as to why toeboards had not been installed as of September 27, 1978, the date of the inspection.

II. Docket No. WILK 79-145-PM

Citation No. 210576 charges a violation of section 109(a) of the Act alleging that the citations that had been issued during the inspection on September 27, 1978, had not been posted on the mine bulletin board. Inspector Kinterknecht had informed the operator on September 27, 1978, the date the citations had been issued, that those citations had to be posted. The operator conceded that he failed to post the citations. The condition was abated immediately.

With respect to all the violations in both cases discussed herein, the Government concedes that the cited conditions were corrected within the time specified for abatement. It is also stipulated that the operator's business is small in size. I observe that the operator's history of previous violations prior to September 27, 1978, was minimal and therefore is given minimal consideration with respect to the violations cited on September 27, 1978. I note, however, that a more significant series of violations occurred on September 27, 1978, that have become final as of this date and for which I have given consideration in assessing penalties for violations that were cited on dates subsequent to September 27, 1978. There is no contention in these cases that the operator's ability to continue in business will be affected by the penalties.

Upon consideration of the entire record and the foregoing findings and conclusions, and in light of the criteria set forth in section 110(i) of the Act, I find that the following penalties are warranted:

I. Docket No. WILK 79-144-PM

Citation No.	Date	30 C.F.R. Standard	Penalty
210526	09/27/78	56.14-1	$195
210527	09/27/78	56.14-1	195
210532	09/27/78	56.14-1	150
210533	09/27/78	56.11-2	122
210534	09/27/78	56.14-1	150
210539	09/27/78	56.14-1	150
210540	10/18/78	56.12-32	95
210554	10/18/78	56.14-6	150
210555	10/18/78	56.14-1	150
210556	10/18/78	56.14-1	150
210559	10/18/78	56.12-34	114
210561	10/18/78	56.12-32	114
210569	10/18/78	56.12-34	100
210565	10/18/78	56.9-2	150
210568	10/18/78	56.9-22	150
210570	10/18/78	56.9-71	150
210571	10/18/78	56.9-2	125
210572	10/18/78	56.9-2	125
210573	10/18/78	56.9-2	150
210575	10/18/78	56.12-2	114

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Citation No.	Date	30 C.F.R. Standard	Penalty
210576	11/28/78	109(a)	$ 72

ORDER

Therefore, it is ORDERED that Northern Aggregates, Inc., pay civil penalties in the amount of $2,871 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge