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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. SE 79-88-M

Assessment Control  
No. 31-00435-05003

v.

B. V. HEDRICK GRAVEL AND  
SAND COMPANY,  
RESPONDENT

B. V. Hedrick Pit and Plant

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor,  
U.S. Department of Labor, for Petitioner  
Thomas C. Newman, Corporate Safety Director,  
Swannanoa, North Carolina, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 27, 1980, a hearing in the above-entitled proceeding was held on April 8, 1980, in Asheville, North Carolina, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 81-86):

This proceeding involves a Petition for Assessment of Civil Penalty filed in Docket No. SE 79-88-M on September 4, 1979, by the Mine Safety and Health Administration, seeking to have a civil penalty assessed for an alleged violation of 30 CFR 56.12-34 by B. V. Hedrick Gravel and Sand Company.

This proceeding raises the issues that are raised in all civil penalty cases, namely, whether a violation occurred, and, if so, what penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

I think that I should make some findings of fact upon which my conclusions will be based.

(1) On May 22, 1979, Inspector John Kerr made an examination of the facilities of the respondent and at that time he wrote Citation No. 105415 citing respondent for a violation of section 56.12-34, alleging that "low

hanging lights in the shop, refreshment stand at the laboratory were not guarded."

(2) The citation was written at 10:00 a.m. and at 4:30 p.m., Inspector Kerr wrote an action to terminate, stating that the low hanging lights were provided with guards.

(3) Inspector Kerr was accompanied on his inspection by Mr. David West, who is the mine superintendent at the plant and also by an inspector trainee, whose name is William J. Lowe. Inspector Kerr testified that he explained to Mr. West the location of the incandescent lights that were involved in his citation.

(4) Inspector Kerr drew a diagram of the area involved in his citation, which was received in evidence as Exhibit 3. Inspector Kerr explained that on the left side of that diagram there is a square which shows a shop area and that three of the light bulbs are in an office inside of that shop and the other light bulb was at a refreshment stand, which is shown also on the left side of Exhibit 3. Inspector Kerr stated in his citation and explained in reference to Exhibit 3 that the refreshment stand about which he was talking was situated near a laboratory.

(5) Mr. Lowe also testified in this proceeding and confirmed the testimony of Inspector Kerr by stating that he was with Inspector Kerr and that Inspector Kerr had correctly shown in Exhibit 3 the location of the places where they had found light bulbs which were approximately six feet four inches off the floor and which constituted a possible burn or shock hazard to tall people who might run into them or to people who might carry something on their shoulder and hit such a light bulb.

(6) Inspector Kerr stated that the light bulbs were in areas where the plant superintendent and other supervisors would have had reason to walk and they should have been aware of the fact that there were light bulbs sufficiently low to constitute a hazard without having guards on them.

Those are the primary findings of fact that I wish to make, but we still have to have a finding of whether a violation occurred. In that connection, respondent's witness in this proceeding was Mr. Newman, who is respondent's safety director, stated that he had been unable to determine after discussing Citation No. 105415 with Mr. West, just exactly where these light bulbs were located. And it was

his position that after he had walked around the area and the shops and in the refreshment stand that none of the light bulbs would have been close enough to the floor that he would have hit them if he had walked under them while wearing a safety helmet and that he also is 6 feet 1 inch in height.

I am supposed to base my findings of fact upon the preponderance of the evidence and I find that the testimony of an inspector and trainee who were present at the time Citation No. 105415 was written should be given greater weight than the testimony of Mr. Newman in this instance, because Mr. Newman was working from an adverse circumstance, in that he was not present on May 22, when the citation was written, and he necessarily was working and making an investigation on the basis of the abatement of the citation which had been written on a previous day when he was not present.

Therefore, I find that there was a violation of section 56.12-34, which provides that portable extension lights and other lights that by their location present a shock or burn hazard shall be guarded.

Having found a violation it is necessary for me to assess a penalty based on the six criteria. We have had some stipulations which first of all indicate and agree that the respondent is subject to the jurisdiction of the Commission and to the Act and Regulations promulgated thereunder. It has been stipulated that the payment of a penalty would not cause the company to discontinue in business. It has been stipulated that the company is a moderate-sized company, and it was stated that the company produces approximately 1 million tons of rock and sand a year, but that production figure, while apparently quite high at face value, reflects a digging operation as opposed to a crushing operation, and, therefore, the quantity of the production is not as indicative of a large company as would be the case if we had a crushing operation in connection with the production operation.

It was also shown that since these guards were placed on the lights within the period provided for by the inspector, that there was a good faith effort to achieve rapid compliance.

The remaining two criteria relate to the gravity of the violation and to negligence. Those are the ones that we primarily use for determining just how large a penalty should be assessed. In view of the fact that these lights were six feet four inches off the floor at a minimum, only tall people would have been likely to run into them and even then that is somewhat debatable, depending on the conflicting testimony of the witnesses on height, but I find that the light bulbs would not

constitute a really serious hazard that would be likely to kill anyone who might happen to bump into one of them.

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As to negligence, apparently the inspector considered a light bulb at seven feet off the floor as not a hazard and does not have to be guarded, so, we have a situation where there might have been at least a doubt in respondent's mind as to whether these light bulbs were low enough to require guarding, and, consequently, I find that there was a low degree of negligence associated with the violation.

In view of the fact that we have a moderate-sized operator, have a good-faith abatement, and have a moderately serious violation with a low degree of negligence, I think that a penalty of \$15.00 is reasonable under the circumstances.

WHEREFORE, it is ordered:

Within 30 days after the date of this decision, respondent shall pay a penalty of \$15.00 for the violation of 30 CFR 56.12-34 alleged in Citation No. 105415 dated May 22, 1979.

Richard C. Steffey  
Administrative Law Judge  
(Phone: 703-756-6225)