FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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20 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. CENT 79-152-M : A.O. No. 39-00049-05004
v.		
AMERICAN COLLOID COMPANY,	Respondent	: Mine: American Colloid Belle Fourche Mill

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Max Brooks, Corporate Manager for Industrial Relations, American Colloid Company, Belle Fourche, South Dakota, for Respondent.

Before: Judge Edwin S. Bernstein

STATEMENT OF THE CASE

In accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), I held a hearing in this case on May 8, 1980, in Rapid City, South Dakota. At the hearing, the parties stipulated and I find:

1. This case comes within the jurisdiction of the Federal Mine Safety and Health Act of 1977, and I have jurisdiction.

2. The citations here were properly served by duly authorized representatives of the Secretary of Labor.

3. Respondent is a medium size operator with approximately 90 employees.

4. There was good faith abatement of all citations.

5. The penalties proposed would not adversely affect Respondent's ability to remain in business.

6. Respondent has a medium to low history of previous violations.

FINDINGS AND DECISION FOR ORDER NO. 328549

Petitioner alleged that Respondent violated the mandatory standard at 30 C.F.R. § 55.15-5, which reads: "Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

Two witnesses testified for each party. The inspector: Guy Carsten, testified for Petitioner. Alfred Williams and Bill Reitz testified for Respondent. Keith Campbell testified for Petitioner as a rebuttal witness.

Petitioner's witnesses contended that at the time Inspector Carsten visited the facility, there were two men on Respondent's conveyor belt. One was on the belt about 10 to 12 feet above the ground; the other was in a hopper about four to five feet above the ground. Respondent's witnesses contended that the only man on the site was in the hopper.and since he was only four or five feet off the ground, there was very little danger of injury through falling.

Inspector Carsten testified that when he visited Respondent's facility on March 13, 1979 in the company of Keith Campbell, an MSHA trainee, he noted two men on Respondent's conveyor belt system. One was 10 to 12 feet off the ground on the conveyor belt itself, and the other man was in the hopper. The

man on the conveyor belt was not wearing a safety belt. The inspector verified this when he approached the belt, and immediately issued an imminent danger order under Section 107(a) of the Act. The violation was abated within 20 minutes by having the man put on a safety belt.

Mr. Carsten stated that the conveyor belt was approximately three feet wide, 40 feet long, and on a 40-degree angle. He was told that the conveyor belt was frozen and was in the process of thawing. There was some bentonite 1/ on the conveyor belt. Mr. Carsten testified that the bentonite was wet, making the belt slippery. He concluded that there was a great danger of the-man falling from the slippery conveyor belt. If this had occurred, the man would have fallen about 10 to 12 feet onto the frozen ground. Mr. Carsten felt that this could result in a fatality or serious injury, such as a head injury or a broken neck. He based this conclusion on a somewhat similar case where a man fell only seven feet and was killed even though he was wearing a hardhat. Mr. Carsten therefore concluded that this was an imminent danger situation. He also stated that Respondent was negligent because the conveyor could be seen from the windows of Respondent's office.

Alfred Williams, Respondent's plant manager, testified that he saw a man in the hopper, but he did not see a man on the conveyor belt when the inspector visited the office. He testified that from the hopper area, a man would have fallen approximately five feet into a soft unpacked pile of bentonite,

1/ Bentonite is a type of clay which Respondent produces.

and would not have been injured. He added that he was unaware at the time that a withdrawal order was being issued.

Bill Reitz, Respondent's maintenance superintendent, testified that he saw a man in the hopper, but not on the conveyor belt. He agreed with Mr. Williams that if a man fell from the hopper, he would fall only three to four feet into a pile of soft bentonite. In his opinion, there was very little danger of injury if the man had fallen from the hopper.

On cross-examination, however, Mr. Reitz stated that there could have been two men on the conveyor belt, and the 'second one may have been on the conveyor further up from the hopper. He stated that he would not contradict the inspector's testimony that he saw a man on the conveyor belt in addition to the man in the hopper. He further testified that because of Mr. Carsten's concern he immediately instructed the men to put on safety belts. He also stated that he did not remember whether he received the imminent danger order, but again he would not dispute Inspector Carsten's testimony.

Keith Campbell testified for Petitioner as a rebuttal witness. He stated that he accompanied Inspector Carsten on March 13, 1979, as an inspector trainee. Mr. Carsten told Mr. Campbell that he could run the inspection while Mr. Carsten observed. Mr. Campbell testified that he saw one man on the belt and one man on the hopper. He had no difficulty observing and he carefully watched the men on the conveyor belt for about a minute. He had no doubt that there were two men and that one man could have fallen approximately 12 to 15 feet.

I find that Respondent violated the mandatory safety standard at 30 C.F.R. § 55.15-5 and that the imminent danger order was proper in that there was a man on the conveyor belt between 10 and 15 feet above the ground who was in imminent danger of falling, was not wearing a safety belt, and did not have a line attached to him.

Although there seems to be a conflict between the testimony of Petitioner's two witnesses on the one hand, and Respondent's two witnesses on the other, I am persuaded there was a man on the conveyor belt in addition to a man in the hopper. The Government witnesses testified unequivocally and without inconsistencies, and I found them to be extremely credible. Mr. Reitz's testimony did not directly conflict with the inspectors' testimony. He indicated that although he-did not observe two men on the conveyor belt, this could have been the case and he would not contradict the inspectors' testimony to that effect. As for Mr. Williams, he indicated that he was approximately 250 feet away from the conveyor. There are two explanations for his conflicting testimony. Either his ability to observe was impaired and he observed incorrectly, or he testified falsely. It is not necessary to determine that he testified falsely. I prefer to give him the benefit of the doubt and conclude that his ability to observe was not as good as that of Petitioner's witnesses.

Additionally, it is important to remember that Mr. Campbell was a trainee who was being double-checked by Mr. Carsten. This substantiates their credibility, for it seems less likely that where one man was double-checking another, and they both testified that they observed the same thing, they would observe or testify to something that was incorrect.

I also find that the imminent danger order was properly served upon Respondent. I accept the Petitioner's witnesses' testimony on this point, which similarly was not contradicted by Mr. Reitz.

Turning to the criteria in Section 110(i) of the Act, I find that the risk of injury was extremely great. The conveyor belt was slippery and on a 40-degree angle. Had the man slipped and fallen, he probably would have been seriously injured or killed. Respondent was negligent because this situation was within view of its office. I assess a penalty of $900 for this violation.

FINDINGS AND DECISION FOR CITATION NO. 328552

Petitioner alleged a violation of the mandatory standard at 30 C.F.R. § 55.4-4, which reads: "Flammable liquids shall be stored in accordance with standards of the National Fire Protection Association or other recognized agencies approved by the Mine Safety and Health Administration. Small quantities of flammable liquids drawn from storage shall be kept in appropriately labeled safety cans."

Inspector Carsten testified that when he visited Respondent's facility on March 13, 1979, he found gasoline being stored in a plastic, one-gallon milk container. 2/ The container was unmarked, approximately one-half full, and located on a walk platform near an elevator. Mr. Carsten testified that he determined the contents of the container to be gasoline by smelling it.

2/ The parties stipulated that the milk container was not depicted as an appropriately labeled safety can in the National Fire Protection Association Handbook.

He stated that there were maintenance men in the area, and that even though the container was covered, it could have fallen and caused a fire or explosion.

Mr. Reitz, testifying for Respondent, stated that he had not seen the container before the inspector showed it to him, and that it was unusual for gasoline to be on that level; usually oil or diesel fuel would be used there. He stated that people traversed this area about once a day to grease some bearings. Mr. Reitz testified that the substance smelled like gasoline to him. Nevertheless, Respondent attempted to argue that the container held diesel fuel or oil, rather than gasoline.

Based upon the testimony of both Inspector Carsten and Mr. Reitz, I find that the liquid in the container was gasoline, and that there was a violation of the standard. Respondent's negligence was slight. Respondent's employees apparently were not in the area very often, and thus would not easily observe the container. I find the gravity to be slight, in that a closed container did not present a great risk of injury. I assess a penalty of $50 for this violation.

FINDINGS AND DECISION FOR CITATION NO. 328957

Petitioner alleged a violation of the mandatory standard at 30 C.F.R. § 55.12-18, which reads: "Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location."

Iver fverson, Petitioner's inspector, testified that on March 12, 1979, while making an inspection, he found a No. 2 dryer control panel with eight disconnect switches which were not properly labeled. There was dust covering some of the switches, and either the labeling could not be seen or was not legible. 3/

Charles Johnson, the electrical supervisor at Respondent's plant, testified that there was dust on the boxes, and that although the inspector might not have been able to read them, Johnson could read them. He stated that this was an out-of-the-way area, and most people in the area knew how the boxes were labeled.

I find that the standard was violated as alleged. I accept the inspector's testimony that the boxes were not properly labeled to show which units they controlled. If they were labeled, the labeling was illegible. Although Mr. Williams or someone who was extremely experienced as an electrician might have been able to read the labels, I believe that other workers who were in the area might not have been able to read them. I further find that the negligence and the gravity were slight. Therefore, I *assess* a penalty of $45 for this violation.

ORDER

The withdrawal order is AFFIRMED. Respondent is ORDERED to pay $995 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

3/ The Parties stipulated that the boxes were labeled, but that an issue remained as to their legibility.

Distribution:

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