FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

9 1 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 79-51-M A.C. No, 11-02666-05001
v.	:	
NORTH AMERICAN SAND AND GRAVEL COMPANY, Respondent	:	North American Pit

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Charles W. Barenfanger, Jr,, President, North American Sand and Gravel Company, Vandalia, Illinois, for Respondent.

Before: Judge Charles C. Moore, Jr.

The hearing in the above case was scheduled to commence at 10 a.m. on June 11, 1980, in the Fayette County Courthouse in Vandalia, Illinois, The contract court reporter did not arrive that morning as scheduled and it was not until noon that we were able to obtain a local court reporter and commence the hearing. I realize that this wasted time was a hardship on Respondent but I do not believe it would be proper to consider this inconvenience in mitigation of any assessed penalties.

It was stipulated that Respondent is a small operator but is able to afford the penalties assessed by the Assessment Office. Jurisdiction was also stipulated, There was no prior history of violation,

Normally, this mine is operated by two people who start the day by doing maintenance on various equipment and getting the screens and shaker conveyors, etc., running, Thereafter, these two employees operate front-end loaders and move the sand and gravel from place to place, Most of the time, no one is in actual charge of the operation. When present, however, Mike Themig does direct the operations of the pit, Neither of the two employees who worked at the pit during the time of the inspection in this case is still employed there and Mike Themig was out of town for several days during the inspection. Only Inspector Aubuchon was able to testify as to the conditions in the pit at the time of the inspection.

It was Mr. Themig's testimony that an important part of a machine was broken and that there could be no production pending the receipt of this piece of machinery. 'I have no reason to doubt the testimony, but the fact remains that Inspector Aubuchon did observe the machinery running and the bulldozers operating and regardless of whether there was any actual production, the equipment was operating. Whatever dangerous situations existed were just as dangerous whether or not there was production. In this connection, one of Respondent's arguments was that if it had completely shut down the plant during the inspection, no citations could have been issued. That is not a correct statement of' the law. While it is true that if an operator took a guard off of a sprocket or chain for the purpose of working in that area while the machinery was not running, there would be no violation, but shutting a piece of equipment down for the purpose of an MSHA inspection does not serve to avoid the issuance of a citation. I have heard a number of cases where the plant operator, as a courtesy, ceased operations to facilitate the inspector's investigation, but in no instance did the fact that the operation had ceased prohibit the inspector from issuing citations.

Because basically only two miners operate in this pit, the inspector thought, with respect to all nine citations that he issued, that the probability of an accident was very low, I agree with the inspector's judgment because, for example, it would be very unlikely that a front-end loader operator would be injured by an unguarded V-belt or that he would be injured because the other front-end loader failed to have the required backup alarm, The improbability of injury, however, does not establish that there was no violation of a safety standard.

The nine alleged violations here involve failure to have backup alarms, failure to provide berms at dumping locations, failure to provide guards at dangerous locations, failure to have a guard in place at such a location, and the failure to have a block-out system when electric-powered equipment is being repaired, These nine citations were issued during the very first inspection and, in fact, the first visit that any MSHA official had made to the mine. All of the citations issued by the inspector were abated promptly and in good faith,

Citation Nos. 367287 and 367295 both allege that front-end loaders were not equipped with audible backup alarms in violation of 30 C.F.R. § 56.9-87, The evidence clearly establishes that the two articulated and wheel-type front-end loaders were not equipped with backup alarms and the drivers were not provided with observers to signal when it was safe to back up. The only factual question is whether the driver's view to the rear was obstructed. The inspector testified that the operator could not see a man 15 feet behind the rear portion of the front-end loader, Respondent offered a picture taken from the driver's compartment with the camera facing the rear, but the picture is inconclusive as to the operator's visibility. I find that the rearward visibility was obstructed and that backup alarms were required for these two pieces of equipment, In view of the circumstances already described, however, I find the negligence and gravity to be of a low order. A penalty of $10 is assessed for each of these citations.

Citation No. 367288 alleges a violation of 30 C.F.R. § 56.9-54 in that berms were not placed at the side of a ramp leading up to a hopper. The standard alleged to have been violated requires berms or bumper blocks to prevent overtravel and overturning at dumping locations and does not require berms at the side of the ramp. The hopper would prevent overtravel in the dumping area. The inspector may have intended to cite section 59.9-22 but no mention of that section was made at the hearing. The citation is accordingly vacated,

Citation Nos. 367290 and 367291 allege guards were not provided as required by 30 C.F.R. § 56.14-1. The inspector testified that while the pinch points involved in these two citations were high, they were nevertheless within reach, Respondent's Exhibit 3, a photograph, shows both the chain and drive pulley involved in these citations and indicates that they are both out of reach. I think the photograph, together with Mr. Themig's testimony, rebutted the prima facie case made by the inspector and left the Government with the burden of putting on rebuttal evidence as to the photograph. The Government failed to do so and in my opinion, failed to establish that these two violations existed, The citations are accordingly vacated.

Citation No. 367289 alleges a violation of 30 C.F.R. § 56.14-l in that a chain drive and sprocket 4 to 5 feet off the ground was not guarded, Anyone shoveling in the area could have been injured, The violation was established and Respondent was negligent in allowing the condition to exist. Any injury caused would have been serious but as previously stated because of the way in which this mine was operated, the probability of an injury was low. A penalty of $10 is assessed.

Citation No. 367292 alleges a violation of 30 C.F.R. § 56.14-6 in that a chain drive pulley guard had been removed and not replaced before the machinery was started up, Again, the inspector was the only witness who observed the event and he testified that although the equipment was not running when he issued the citation, it was later operated without the guard in place. A violation was established but there was no evidence of negligence other than the fact that the violation occurred, The probability of injury was not high and a penalty of $10 is assessed,

Citation No. 367293 alleges a violation of 30 C.F.R. § 56.14-l in that a self-cleaning tail pulley 3 or 4 feet off the ground was not guarded. A self-cleaning tail pulley is hazardous in itself without regard to any pinch points and Respondent was clearly negligent in allowing such a condition to exist. I find the violation occurred, that Respondent was negligent but that the probability of an injury was low. A penalty of $15 is assessed.

Citation No, 367294 alleges a violation of 30 C.F.R. § 56.12-16 in that there was no lock-out procedure to insure that the one working on electrical equipment would not be-injured by someone else inadvertently starting the equipment. The inspector was told that when the equipment was being repaired, the fuses were taken out of the fuse box but when he looked at the fuse box while the equipment was down for repairs, the fuses were in place.. But even

if the fuses had been removed, this is not the type of foolproof system that the regulation requires. If the person working on the equipment carried in his pocket the only fuses available or if the breaker box had been locked open and the worker carried the **key,** the regulation would have been satisfied. The evidence clearly establishes a violation and the failure to have such a lock-out system did amount to negligence but again the probability of an injury was low because only two workers were in the plant, A penalty of $15 is assessed.'

ORDER

It is therefore ORDERED that Respondent pay to **MSHA,** within 30 days, a civil penalty in the total amount of $70.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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