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

7 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. VINC 79-153-PM A.C. No. 47-00587-05005
v.		Superior Lime Plant
CLM CORPORATION,	Respondent	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Thomas R. Thibodeau, Esq., CLM Corporation, for Respondent.

Eefore: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Duluth, Minnesota, on June 24, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered an opinion on the record. 1/ My bench decision containing findings, conclusions and rationale appears below as it appears in the record, other than for minor corrections in grammar and punctuation as originally supplied by the court reporter.

> This is a civil penalty proceeding which arises pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), and which was initiated by the Petitioner through the filing of a petition for penalty assessment on January 24, 1979, seeking assessment of penalties for four alleged violations of the safety standards promulgated in implementation of the Act. The parties were represented by counsel and evidence has been taken, and counsel have submitted arguments at the close of the hearing.
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> At the commencement of the hearing counsel for the Petitioner moved to vacate Citation Nos. 291613 and 291614,

1/ Tr. 64-71.

which motion was granted by me, and I hereby order that those citations be vacated. With respect to the two remaining citations the parties stipulated and I find that I have jurisdiction of this proceeding, that the operator is a small mine operator, and that the operator has no record or history of previous violations.

I would footnote that I recall at the outset of this proceeding that certain relief requested by the Respondent operator in the answer, to-wit, that if citations were found not to be valid, that is, that the conditions were not found to be in violation of the law, that Respondent be reimbursed for material and labor, presumably for the material and labor expended in abating the allegedly violative conditions described in the citations. I denied that request on the basis that the Act does not provide such a remedy and that ruling is affirmed here.

Turning now to the first citation involved here, No. 291665, dated April 17, 1978, involving an alleged violation of 30 C.F.R. § 56.9-7, in that, "The pebble lime belt conveyor to the Nos. 4, 5, and 6 storage bins was not guarded along its entire length nor was an emergency stop cord provided," the pertinent standard alleged violated, 56.9-7, provides that, "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length." This is a mandatory standard. Eased on the inspector's testimony, I find that the conveyor system which is depicted in three photographs, Respondent's Exhibits R-l, 2, and 3, was unguarded and it was not equipped with either emergency stop devices or cords along its full length.

The Respondent raised the issue whether or not a walkway exists along the side of the conveyor belt. The testimony in this proceeding indicates that an area of a width of approximately 7 to 8 feet does exist along both sides of the conveyor belt system. It is in this area that the one employee who works in this area stands and moves to clean the side along the rollers. I find a distinction between the word "walkway" and the words "travelway" or "pathway.". I do find that this is a walkway. This conveyor belt system is not one which is in a narrow area where there is no room for anyone to stand or walk through. If one employee uses the area in question as a walkway it is a walkway, and the fact that it is not a routinely or regularly used pathway from one point to another, used by other employees, is no basis for restricting the'definition of a walkway.

I would assume based upon all of the testimony in this case that if the equipment did break down and repairmen were

called that this area would be used as a walkway by those persons as well as the single employee who customarily works in the area in the afternoon cleaning along the side of the conveyor system which runs the length of a room which is approximately 150 feet long. This finding that the area alongside the conveyor belt system is a walkway is consistent with the long established principle that provisions of the Mine Health and Safety Act be liberally interpreted to promote and enhance safety. Based upon this finding, I conclude that a violation of the standard did occur.

The inspector testified that he "gave the operator the benefit of the doubt" with respect to his finding with respect to negligence, which is reflected in Exhibit P-2. In that exhibit, the inspector indicated that the condition or practice cited "Could not have been known or predicted; or occurred due to circumstances beyond the operator's control."

The inspector apparently felt that the operator was not negligent, and although negligence might normally be presumed from the occurrence of a violation of a safety standard, in these circumstances I find that there,was no negligence on the part of the operator with respect to the violation. I would note that the operator-Respondent does not contend that the imposition of any penalty would jeopardize its ability to continue in business. Thus, two of the remaining six statutory criteria which must be considered remain: the seriousness of the violation and the factor of good faith abatement.

With respect to seriousness, the evidence indicates that only one person was exposed to the hazard, the hazard being that the cleanup man could become entangled in the conveyor belt systrem and be pulled into it and strangled or suffocated. The inspector indicated that when he originally filled out the so-called inspector statement, Exhibit P-2, he was not as well versed in these matters as he is now and that is why he Indicated in that statement that the hazard involved was of permanently disabling injury such as "limb dismemberment, or the limb being amputated." The Respondent's evidence indicates that the cleanup person used a long-handled broom and that there was no need for him to come in close proximity to the conveyor belt system and that other employees would be subject to disciplinary action of a four-stage variety, i.e., warning, 3-day suspension, 7-day suspension, and finally discharge, if such other personnel whose duties would not normally bring them to the area were found to be in the area depicted on Exhibits R-l, 2, and 3.

I thus find that there was no hazard posed to employees other than the cleanup man, that one person was exposed to

the hazard, that the hazard was very grave, but that the probability or the possibility of it occurring was very remote in these circumstances. Accordingly, I find that this is only a moderately serious violation. The inspector testified that the Respondent proceeded to achieve compliance with the violated standard within the time period which he allowed for abatement and, accordingly, I find that the operator did proceed in good faith to achieve rapid compliance with the standard. In connection with good faith abatement, I note that on Exhibit P-2 the inspector indicated that the condition was corrected within the time specified.

Summing up then, I have found that this is a small operator, that it has no previous history of committing violations of the safety standards, that it proceeded in good faith to abate the conditions, and that the violation was committed without any negligence on the part of the operator, all of which militate for a lowering of the penalty which I normally would impose in such a case. And I do note that the penalty proposed by MSHA was $90. Considering these factors, a penalty of $50 is assessed for this violation since there is a small degree of seriousness attached to it and there is a hazard.

Turning now to Citation No. 291667, which was issued on April 17, 1978, the inspector, Leon Mertesdorf, testified that the belt involved again was not guarded and there was no emergency stop device or cord along its entire length. The condition cited in the citation, "The No. 6 belt conveyor in the storage building was not guarded or provided with an emergency stop cord the length of the conveyor." The distance for which an emergency stop cord or device was not provided was not shown. However, there is no question that it was not provided for the entire length of the conveyor. The evidence indicates that one man was exposed to this condition - again the cleanup man who worked in the area. As with the previous violation, there were no warning signs, and the cleanup man worked on the afternoon shift of this 24-hour, three 8-hour shift operation. The inspector saw no other personnel in the area at the time he observed the violation but he did see a shovel in the area, presumably to be used in cleaning the area up.

As with the preceding citation, I find there was no negligence, since the inspector took the position that there was none, and since this is also reflected *in* his completion of the inspector's statement, Exhibit P-4. Again, it appears that the operator abated the condition within the time allowed by the inspector and accordingly, I find that the operator proceeded in good faith to achieve compliance with the violated provision. With respect to the seriousness of the violation,

the same hazards, risks, and probabilities discussed with respect to Citation No. 291665 previously, are applicable to this violation.

I find that on the basis of the consideration of all of the statutory factors that a reduction in the penalty for this violation is in order and, again, a penalty of $50 is assessed.

It is ordered that the two $50 penalties previously imposed by me in this proceeding be paid to the Secretary within 30 days from the issuance date of my written decision which will be made out by me in the near future and which will incorporate my bench decision entered here today.

ORDER

Respondent, if it has not previously done so, is ORDERED to pay the sum of $100 to the Secretary of Labor within 30 days from the issuance date of this decision.

Michael A. Lasher, Jr., Judge

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