

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

AUG 27 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	
)	CIVIL PENALTY PROCEEDING
Petitioner,)	
)	DOCKET NO. WEST 79-150
v.)	
)	A/O NO. 35-02875-05001
APPLEGATE AGGREGATES,)	Mine: Applegate Aggregates Bar
)	
Respondent.)	

APPEARANCES:

Mildred L. Wheeler, Esq., Office of Daniel Teehan, Regional
Solicitor, United States Department of Labor, San Francisco,
California
for Petitioner

E. W. Mignot, President, appearing pro se, Grants Pass, Oregon
for the Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceeding, the Secretary of Labor, on behalf
of the Mine Safety and Health Administration (MSHA), charges respondent,
APPLEGATE AGGREGATES, failed to guard certain equipment thereby violating
safety regulations promulgated under the authority of the Federal Coal Mine
Health and Safety Act of 1969, (amended 1977), 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Grants Pass,
Oregon, on July 8, 1980. The parties waived their right to file post trial
briefs.

ISSUES

The issues are whether the violations occurred.

CITATION 349666

This citation alleges a violation of 30 **C.F.R.** 56.14-1. The cited standard provides:

GUARDS

56.14-1 Mandatory. Gears; 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.

The evidence is conflicting. I find the following facts to be credible.¹

1. A workman **could become** entangled in **APPLEGATE's** unguarded self cleaning tail **12** inch pulley which was located near ground level (**Tr. 8 - 11, 25, 39, P-11**).

2. The clean up man who removes the spillage was observed to be within 6 inches of the unguarded moving equipment (**Tr. 11, 42**).

DISCUSSION

APPLEGATE contends it constructed a guard suggested by the inspector: the equipment was later damaged. The guard obstructed the operator's view of a rock that split the belt (**Tr. 261**).

The inspector contends he suggested but did not direct **APPLEGATE** on how to abate the condition. In any event the guard he recommended was different from the **one** installed by **APPLEGATE** (**Tr. 39 - 40, P-1**).

While Applegate's president indicated the cleanup man uses a 5 **1/2** foot shovel to clean up the spillage, the inspector's testimony is uncontroverted. He observed the cleanup man hands within six inches of the unguarded pulley (**Tr. 42**). It is this type of close **promimity** that

^{1/} Credibility determinations favor MSHA since **APPLEGATE's** witness was not present at the time of the inspection (**Tr. 36**).

that necessitates guarding of the pulley.

The standard here requires the guarding of pulleys where workers in the normal course of their duties may contact the moving machine parts. To like effect see the decision of Administrative Law Judge George A. **Koutras** in Central Pre-Mix Concrete Company , 1 MSHC 2237 (1979).

I accordingly conclude that citation 349866 should be affirmed.

In considering the proposed assessment and in view of the statutory criteria ², it does not appear that **MSHA** has credited APPLEGATE with sufficient good faith for abating the defective equipment. I deem a penalty of \$25 to be appropriate for this violation.

CITATION 349867

This citation alleges a violation of 30 **C.F.R.** 56.14-1, cited in the previous citation.

The evidence is uncontroverted and the facts are as follows.

3. **APPLEGATE's** vibrator lacked a guard (Tr. 12 - 15, P-2).
4. Workmen pass within an arm's length of an unguarded equipment (Tr 13).
5. The pinch points on the equipment would be two to three feet from the maintenance **platform** (Tr. 13, 14, 22, 29, 30).
6. The platform has a 1 1/2 inch pipe guardrail (Tr. 22, 30).
7. The machinery is shut down if it requires maintenances (Tr. 31, 32).

DISCUSSION

The standard allegedly violated here requires that guarding of **equipment** if the condition may cause injury to persons. Injury to persons

^{2/} 30 U.S.C. § 820(i)

as contemplated by the standard involves a real, and not an illusory exposure to the hazard.

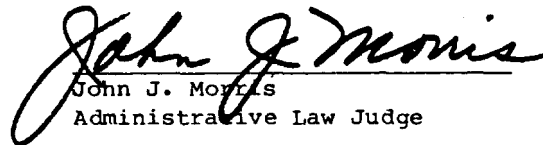
In this situation a workman would be no closer than two to three feet from the pinch points. A guardrail prevents ready access and the equipment is shut down when any maintenance is done.

MSHA has failed to establish the likelihood of injury as required by the regulation. Accordingly, I conclude that Citation 349867 should be vacated.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 349866 is affirmed and a penalty of \$25 is assessed.
2. Citation 349867 and all penalties therefor are vacated.


John J. Morris
Administrative Law Judge

Distribution:

Mildred L. Wheeler, Esq., Office of the Solicitor, United States Department of Labor, 11071 Federal Building, Box 36017, 450 Golden Gate Avenue, San Francisco, California 94102

Mr. E. W. Mignot, President, Applegate Aggregates, 2660 Vine Street, Grants Pass, Oregon 97526