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SOL (MSHA) V. ATLANTIC CEMENT
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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 Proceedings Docket No. YORK 79-10-M A.C. No. 30-00006-05002
v.		Docket No. YORK 79-76-M A.C. No. 30-00006-05005
ATLANTIC CEMENT COMPANY, INC.,	RESPONDENT	Ravena Quarry and Plant

DECISION

Appearances: William Gonzalez, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner Howard Estock, Esq., Clifton, Budd, Burke & DeMaria, New York, New York, for Respondent

Before: Judge Melick

These consolidated cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq., hereinafter the "Act"). The general issue in these cases is whether Atlantic Cement Company, Inc. (Atlantic) has violated provisions of the Act and its implementing regulations and, if so, what are the appropriate civil penalties to be assessed. An evidentiary hearing was held in Albany, New York, on April 8, 1980.

I. Docket No. YORK 79-10-M

A. Uncontested Citations

Petitioner moved to settle all citations in this case except Citation Nos. 205218, 205244 and 205252. MSHA supported the reductions in penalty for the reasons set forth below:

Citation No. 205219 charges one violation of 30 C.F.R. 56.12-8 (requiring the adequate insulation of power wires and cables where they pass into or out of electrical compartments). MSHA maintains that the condition cited, i.e., the wiring was not properly connected where it entered a junction box because a locking nut was missing, could not have been known or predicted and occurred due to circumstances beyond the operator's control. It further

contends that injuries were improbable in light of the fact that the junction box was not located where employees worked and that the possible hazard of electrical shock could not occur unless energized wires were actually pulled from the junction box and then contacted by an employee. A reduction in penalty from $48 to $26 is proposed.

Citation No. 205242 charges one violation of 30 C.F.R. 56.11-12 (requiring the guarding of openings near travelways through which men or material may fall). MSHA now claims that the probability of injuries due to the cited condition, i.e., the absence of a toeboard around a hoist platform, was remote in that the platform was rarely used. It further maintains that Atlantic exercised extraordinary good faith in abating the condition inasmuch as a repairman immediately installed a 4-inch toeboard around the affected area. A reduction in penalty from $60 to $38 is proposed.

Citation No. 205246 charges one violation of 30 C.F.R. 56.14-1 (requiring the guarding of exposed moving machine parts). MSHA now maintains that the operator was not negligent because it was unaware that an appropriate guard could be obtained for the radial arm saw in question. MSHA also asserts that Atlantic took extraordinary steps to gain compliance by immediately purchasing and installing a guard for the cited saw. A reduction in penalty from $90 to $44 is proposed.

Citation No. 205249 charges one violation of 30 C.F.R. 56.9-3 (requiring brakes on powered mobile equipment). MSHA now asserts that injuries from the cited condition, i.e., the existence of an inoperative emergency brake on a forklift truck, were unlikely since the footbrakes were functioning and the forklift traveled at only a slow rate of speed. A reduction in penalty from $60 to $38 is proposed.

Citation Nos. 205245, 205250, 205253, and 205256 each charge a violation of 30 C.F.R. 56.12-25 (requiring the grounding of metal-encasing electrical circuits). MSHA now maintains that in each instance Atlantic was not negligent since the conditions cited were essentially hidden in nature. MSHA also contends that Atlantic exercised extraordinary good faith in abating the violations by immediately removing the cited equipment from service. A reduction in penalty from $56 to $22, from $56 to $26, from $60 to $26, and from $60 to $22 is proposed for the citations, respectively.

Citation No. 205254 charges one violation of 30 C.F.R. 56.12-8 (requiring the adequate insulation of power wires or cables where they pass into or out of electrical compartments). MSHA maintains that injuries from the cited condition were improbable and that the broken conduit was not readily visible thereby reducing the operator's negligence. MSHA further claims that Atlantic immediately removed the defective equipment from service. A reduction in penalty from $48 to $24 is proposed.

Although I do not necessarily accept the rationale offered

by MSHA in support of the proposed settlement, I nevertheless conclude based on Petitioner's representations and the documentation submitted that the settlement is appropriate under the criteria set forth in section 110(i) of the Act.

B. Contested Citations

Atlantic contests both the existence of a violation and the penalty proposed for Citation No. 205252 but contests only the proposed penalty with respect to Citation Nos. 205218 and 205244.

Citation No. 205218 alleges that Atlantic violated the provisions of 30 C.F.R. 56.14-1 in that the troughing idlers on the west side of the No. 4 clinker feeder belt were not guarded. The cited standard provides that "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." According to MSHA Inspector Thomas Rezsnyak, the troughing idlers at issue here were located some 43 to 62 inches above floor level thereby creating pinch points at a location accessible to employees. He concluded that Atlantic was negligent in allowing this condition to exist because "they should have known of the condition." Since Atlantic abated the condition within 2 hours of the citation, however, Rezsnyak deemed the abatement effort as "extraordinary." While Atlantic does not deny the existence of the cited violation, Ralph Stresing, Atlantic's safety engineer, testified that the same condition had existed at the time of a previous MSHA inspection only 6 months before and that Atlantic had not then been cited. Stresing emphasized, moreover, that no walkway existed on the side of the belt cited and that no employees would actually be exposed to the hazard since a front-end loader known as a "Bobcat" was used to clean up spillage under the feeder belt.

The failure of a previous inspector to have cited this condition does reflect in my opinion upon the operator's negligence. If the condition was in fact as serious as claimed by Inspector Rezsnyak and one therefore that should have been known to the operator, I cannot understand why this hazard was not discovered on a previous inspection. Under the circumstances, I cannot conclude that the operator was so negligent as suggested by MSHA. Moreover, I accept Stresing's testimony that the area cited was one having only limited employee access. The gravity of potential injuries is accordingly greatly diminished. I accord greater weight to the testimony of Mr. Stresing in reference to this violation inasmuch as he demonstrated, and understandably so, a much more thorough and intimate knowledge of the operations surrounding the cited condition. A penalty of $25 is appropriate.

Citation No. 205244 also charges a violation of 30 C.F.R. 56.14-1. The cited idler rollers on the clinker belts were described as being only 31 inches off the ground and guarded only on the outside. According to Inspector Rezsnyak, at least one employee went into the area once a day and could suffer a broken hand or arm if caught in the exposed rollers. Stresing pointed out, however, that injuries were unlikely inasmuch as the exposed area was difficult to reach and that employees moving about the area would ordinarily use other protected cross-overs. Stresing

also maintained that injuries were unlikely because there would be little pressure between the roller and the belt and claimed that few, if any, sharp metal splices existed

in the belt. Stresing did admit, however, that there was some degree of hazard if an employee's arm did come in contact with the exposed rollers. I accept Stresing's testimony, for the reasons previously given, that employee exposure to the cited condition would be minimal. A penalty of $50 is appropriate.

Citation No. 205252 charges that temporary wiring for outside lighting on the No. 6 pier was in violation of 30 C.F.R. 56.12-30 since the ground wire was severed and wiring wa exposed outside of the conduit. The cited standard requires that when a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized. Atlantic admitted the facts as stated in the citation but according to Robert Masner, its chief electrician, the condition presented no hazard because the building was in fact grounded by its ironwork and ground rods located at various points. The conduit in question was in fact connected to the building ground and therefore, argued Masner, there was no danger. In this technical area, I must accord greater weight to the testimony of Masner than to that of the inspector because of Masner's clearly superior expertise as an electrician. Accordingly, I conclude that the cited condition was not in fact potentially dangerous. There is, therefore, no violation and Citation No. 205252 is therefore vacated.

II. Docket No. YORK 79-76-M

A. Uncontested Citations

At hearing, MSHA presented a proposal for settlement with respect to Citation Nos. 205307, 205308, 205311, 205312 and 205317. Citation Nos. 205307 and 205312 each charge one violation of 30 C.F.R. 56.14-1 (requiring that power wires and cables be adequately insulated where they pass through electrical compartments). MSHA now maintains that the condition alleged in Citation No. 205307, i.e., that the conduit carrying energized wiring for certain lighting circuits was broken in two locations, was located so that it afforded only minimal exposure of the hazard to employees. The area was checked only once a week and only for a brief period by one employee. MSHA therefore maintains that the gravity of the cited condition should be accordingly reduced. A reduction in penalty from $305 to $150 is proposed.

In Citation No. 205312, MSHA charged that a sealed tube carrying the energized wires for the light fixture located above the east side of the generator was broken where it left the junction box and where it entered the light fixture. According to the Secretary, an employee would be exposed only briefly to this condition once a week and therefore petitions for a reduction in the penalty from $305 to $150.

Citation Nos. 205308, and 205311 each charge one violation of 30 C.F.R. 56.14-1 (requiring the guarding of exposed moving machine parts). As to the former citation, MSHA now maintains that the subject return idler on belt No. 7 had previously been

guarded but that the guard had been knocked off and

was not discovered by the operator. MSHA also maintains that exposure to the hazard would have been quite brief to only one employee once a week. A penalty reduction from $345 to $170 is thus proposed.

With respect to Citation No. 205311, MSHA now maintains that although the cited equipment was not in fact guarded as required, the exposure of employees to the hazard was quite minimal. According to MSHA, an employee would pass the hazardous area at least once a day but only to make visual checks and would not make repairs unless the machine was shut down. A reduction in penalty from $345 to $170 is therefore proposed.

Citation No. 205317 charges one violation of 30 C.F.R. 56.16-5 (requiring that compressed and liquid gas cylinders be secured in a safe manner). While the cited condition did exist in that a propane cylinder used to supply fuel to a heater inside the cab of a yard locomotive was not secured to prevent accidental damage to the exposed regulator, the likelihood of injuries was considered improbable. The cylinder was laying on its side and the locomotive in question was not used for 2 or 3 months at a time. A reduction in penalty from $240 to $120 is proposed.

Although I do not necessarily accept the rationale offered by MSHA in support of the proposed settlement, I nevertheless conclude based on Petitioner's representations and the documentation submitted that the settlement is appropriate under the criteria set forth in section 110(i) of the Act.

B. Contested Citations

While Atlantic does admit that the violations in fact did occur as charged in Citation Nos. 205306, 205309, 205314 and 205318, it questions the amount of penalties assessed for each of these violations. Citation No. 205306 charges one violation of 30 C.F.R 56.4-24(c). The standard requires that fire extinguishers and fire suppression devices be replaced with a fully charged extinguisher or device or recharged immediately after any discharge is made. There is no question that the gauge on the cited portable fire extinguisher indicated that it was in a discharged condition. There is also no dispute that the extinguisher was located near a station used to unload coal and indeed that there had recently been a fire at that location that had in fact destroyed the unloading station. According to Rezsnyak, there would be a danger if an employee attempted to use the discharged extinguisher, from being too near a fire without effective means of extinguishing it. He thought the operator should have known of the condition of the fire extinguisher since it was located in plain view.

Atlantic does not deny these allegations but maintains that several factors should be considered to reduce the amount of penalty including: (1) the existence of a company policy requiring the reporting, and replacement, of discharged extinguishers and, (2) the company practice of having an outside

contractor service the fire extinguisher once a month. It is apparent, however, because of the violation in this case, that such procedures have not been adequate. I therefore reject Atlantic's claims of "no negligence,"

but I do find reduced negligence because of these procedures. Atlantic also speculates that temperature and humidity could have affected the gauge on the fire extinguisher. It offered no affirmative evidence to support the contention, however, and I therefore reject it as purely speculative. A penalty of $180 is appropriate.

Citation No. 205314 charges one violation of 30 C.F.R. 56.12-25 (requiring that all metal-enclosing electrical circuits be grounded or provided with equivalent protection). There is no dispute that the ground wire inside the power cable of the Black and Decker "nibbler" was broken and could cause electrical shock under certain conditions. Atlantic contends, however, that it was not negligent in that the cited tool had passed a continuity test within 1 month before the inspection and that the condition of the tool on the day of the inspection was such that continuity could be obtained by manipulating the molded plug of the "nibbler". In light of this undisputed evidence from Atlantic, I do consider that its negligence is somewhat reduced and the penalty therefore should accordingly be mitigated. A penalty of $180 is appropriate.

Citation No. 205309 charges one violation of 30 C.F.R. 56.9-88(a)(2) in that the Model D-8 Caterpillar bulldozer having a roll-over protective structure was not equipped with the required seat belt. Inspector Rezsnyak pointed out that should the bulldozer roll over, the operator could be killed by hitting the steel roll-over bar. Although he found the hazard to be "probable" since the equipment occasionally pushed up stockpiles and performed other work where a roll-over could occur, Rezsnyak subsequently conceded that the bulldozer was primarily operated on level or nearly flat ground, thereby making the necessity for seat belts less significant and the likelihood of injury more remote. The operator did not contradict Respondent's conclusion that it should have known of the violation. A penalty of $300 is appropriate.

Citation No. 205318 charges one violation of 30 C.F.R. 56.12-8 (requiring adequate insulation of power wires and cables where they pass through electrical compartments). The citation here charged that a conduit carrying electrical wiring had been pulled from the pull cord box located in the belt cross-over beneath the New York State Thruway. The wiring feeding the pull cord box was exposed and according to the inspector was subject to vibration and rubbing. The inspector thought that the operator should have known of the plainly visible condition inasmuch as the maintenance superintendent walked through the area at least once a week. The hazard was potential electric shock but the exposure potential was quite limited. While Atlantic admits the violation, it maintains that the conduit was broken by pressure from vibration from traffic on the Thruway above and that its negligence was therefore minimal. I reject Atlantic's argument, however, because it should have placed that particular area under closer surveillance if in fact it was subject to a higher risk of damage from the vibration. A penalty of $240 is appropriate.

With respect to Citation Nos. 205303, 205304, 205305, 205315 and 205316, Atlantic denies that any violation occurred. Citation No. 205303, charges one violation of 30 C.F.R 56.9-2 (requiring that equipment defects affecting

safety be corrected before the equipment is used). It is not disputed that the No. 5 Caterpillar Model 773 haul truck was operating on the date at issue with an inoperable automatic reverse signal alarm. There is also no dispute that the view to the rear from the truck cab was obstructed. The truck was controlled to some extent at the primary crusher where an operator directs trucks backing up by the use of red and green signal lights. There was no other means of communication, however, between that operator and the truck driver and the system could prove insufficient in an emergency. Rezsnyak testified that he had also seen similar trucks backing up in the locker room area to park and at the quarry face.

Even assuming, arguendo, that the use of a signal light system at the crusher provided a sufficient alternative to a reverse signal alarm at that location, the credible evidence is that the haul trucks also back up to park at the end of a shift and in the quarry area. I find that a violation of the cited standard has therefore been proven. In the absence of evidence to support the inspector's opinion that the operator should have known of the existence of the violation, I cannot however conclude that the operator was negligent. I also give consideration in determining the amount of penalty to the undisputed evidence that there was only minimal employee exposure to the described hazard. A penalty of $200 is appropriate.

Citation No. 205304 also charges a violation of 30 C.F.R. 56.9-2, for a defective automatic backup alarm on its "lube truck." The cited standard requires that equipment defects affecting safety shall be corrected before the equipment is used. Atlantic argues that the standard is so vague that it would be a violation of due process of law (presumably under the Fifth Amendment to the United States Constitution) to enforce it without interpretive reference to other MSHA standards, namely 30 C.F.R. 56.9-87 (relating to the use of backup warning devices but only on heavy-duty mobile equipment).

Clearly the cited standard does not involve First Amendment rights or criminal sanctions and therefore its facial constitutionality is not at issue. U.S. v. National Dairy Corporation, 372 U.S. 29, 83 S. Ct. 594, 9 L.Ed.2d 561 (1963); McLean Trucking Company v. Occupational Safety and Health Review Commission, et al., 503 F.2d. 8 (4th Cir. 1974). I will therefore consider the challenged vagueness of the standard only in terms of its application to this case. McLean Trucking Company, supra.

The regulatory standard cited herein is similar to the regulations considered in McLean, supra, and in Ryder Truck Lines, Inc., v. Brennan, 497 F.2d. 230 (5th Cir. 1974), in that "the regulation appears to have been drafted with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury". Also just as in the case of those standards, inherent in the standard at bar "is an external and objective test, namely, whether or not a reasonable person would recognize

[the cited hazard]". McLean, supra at p. 10. The "reasonable person" has recently been defined as a "conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable". General Dynamics Corporation v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

In this case, there is no dispute that the operator's lube truck did in fact have an automatic reverse signal alarm that was not functioning. It is described as a flatbed truck with tanks of fuel oil and lubricants mounted behind the cab. A photograph of the truck is in evidence as Exhibit E-5. I find that the view to the rear of the cab was obstructed and that the truck operated (sometimes in reverse) in areas of pedestrain traffic. I also find that the operator had other equipment on the premises which was equipped with reverse signal alarms and this equipment operated in the same areas of pedestrian traffic. It may reasonably be inferred that employees would come to rely upon reverse signal alarms to warn them of the dangers of equipment operating in reverse. An increased hazard would therefore exist because of employee reliance upon those alarms if a backup alarm should cease function.

Under the circumstances I conclude that "a conscientious safety expert seeking to prevent all hazards which are reasonably foreseeable", would easily recognize as reasonably foreseeable the hazard created by a non-functioning reverse signal alarm on equipment such as the lube truck in this case. The circumstances present herein were thus sufficient to convey to Atlantic a reasonable understanding that the non-functioning reverse signal alarm on its lube truck was a defect affecting safety within the meaning of the cited standard. Indeed it is disingenuous of Atlantic, which had installed the safety device on the subject lube truck to now claim that there would be no hazard to operate the truck without such a device. The evidence is such from which it may be concluded that Atlantic, indeed, had actual knowledge that a non-functioning back-up alarm on this type of equipment was a hazardous condition. Where such actual knowledge exists the problem of fair notice does not exist. Cape and Vineyard Division of the New Bedford Gas and Edison Light Co. v. OSHRC, 512 F.2d 1148 at 1152 (1st Cir., 1975). /*/

I find that the admitted existence of a non-functioning reverse signal alarm on the lube truck constituted a violation as charged. I also accept the essentially uncontradicted testimony of Inspector Rezsnyak that fatal or serious injuries were probable as a result of the defective alarm and agree that the operator should have known of the defect. A penalty of $350 is appropriate under the circumstances.

Citation No. 205305 also charges one violation of 30 C.F.R. 56.9-2 alleging that a guardrail located on the south side o the No. 1 belt was damaged thereby leaving a troughing idler exposed. MSHA was unable, however, to produce any affirmative evidence that any employees would be exposed to this condition. The credible testimony from the operator indicates that the splice shack where the alleged violation occurred was not in fact used, that the belt conveyor tender could only walk on the side opposite the damaged rail and that rollers were replaced only when the belt was shut down. Under

the circumstances, I find that no danger affecting safety existed and there was therefore no violation of the standard. The citation is therefore VACATED.

Citation No. 205315 charges one violation 30 C.F.R. 56.12-21, which requires that suitable danger signs be posted at all major electrical installations. In particular, it was charged that the transformer station which supplies power to the carpenter shop did not have a suitable danger sign posted on the fencing enclosure. Inspector Rezsnyak conceded at hearing that he could not recall whether there was any sign on any of the four walls or whether there may have been a sign and that he found that to be insufficient. In light of the testimony from Robert Mazner, Atlantic's chief electrician, that there was in fact a danger sign posted at or near the entrance to the transformer substation, that no guidelines are furnished the operators as to the "suitability" of such signs and that the MSHA inspector was not sure whether or not there was in fact a danger sign posted, I conclude that the Government has not met its burden of proving the violation as charged. The citation is therefore VACATED.

Citation No. 205316 charges one violation of 30 C.F.R. 56.14-1 (requiring the guarding of certain exposed moving machine parts). The testimony is undisputed that the center fans on the east and west walls of the precipitator building were not guarded to prevent employee contact. The blades were located approximately 44 inches above a walkway, and each fan was 30 inches in diameter. Serious injuries could clearly result if contact was made with a moving fan blade, but the credible evidence indicates that exposure to the hazard was quite limited. The fans were not used during the cooler months and according to the MSHA inspector an employee would only maintain the motor about twice a year. The operator did not contradict the inspector's conclusion that it should have known of the hazard because of fan location. A penalty of $200 is appropriate.

With respect to all violations cited, the Government concedes that the conditions were corrected within the time specified for abatement. Where Atlantic was extraordinarily diligent in correcting the cited condition or practice it has been specifically noted in this decision. There is no contention in these cases that the operator's ability to continue in business would be affected by any penalties imposed. Based on the submitted evidence, I find that Atlantic is a large size operator. It does not have a serious history of reported violations. These factors have been considered in arriving at the penalties imposed herein.

ORDER

Upon consideration of the entire record and the foregoing findings and conclusions and in light of the criteria set forth in section 110(i) of the Act, I hereby ORDER that the following penalties totaling $2,751 be paid within 30 days of the date of this decision.

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Citation No.	Penalty
I. Docket No. YORK 79-10-M	
205218	$25
205219	26
205242	38
205244	50
205245	22
205246	44
205249	38
205250	26
205252	vacated
205253	26
205254	24
205256	22
II. Docket No. YORK 79-76-M	
205303	$200
205304	350
205305	vacated
205306	180
205307	150
205308	170
205309	300
205311	170
205312	150
205314	180
205315	vacated
205316	200
205317	120
205318	240

Gary Melick
Administrative Law Judge

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Since the facts in this case demonstrate that the lube truck in question was in fact "heavy duty mobile equipment" and thus was required under 30 C.F.R. 56.9-87 to have a back-up alarm the "fears" cited by the court in Cape and Vineyard of turning company safety policies that exceed government requirements against the company thereby needlessly discouraging such desirable policies do not exist in this case. See, Cape and Vineyard, supra at p. 1154.