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SOL (MSHA) V. PENNSYLVANIA GLASS SAND
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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. WEVA 80-61-M A/O No. 46-02805-05002
v.		Docket No. WEVA 80-102-M A/O No. 46-02805-05003
PENNSYLVANIA GLASS SAND CORP.,	RESPONDENT	Docket No. WEVA 80-103-M A/O No. 46-02805-05004
		Docket No. WEVA 80-104-M A/O No. 46-02805-05005
		Docket No. WEVA 80-175-M A/O No. 46-02805-05006
		Berkeley Quarry & Mill

DECISION

Appearances: David E. Street, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner
Jeffrey J. Yost, Esq., Pennsylvania Glass Sand Corporation, Berkeley Springs, West Virginia, for Respondent

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110(FOOTNOTE 1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter, the Act). The hearing in these matters was held in Berkeley Springs, West Virginia, on March 18, 1980.

Stipulations

The parties entered into the following stipulations at the hearing:

Berkeley Works is a mine subject to the Federal Mine Safety and Health Act of 1977; and Pennsylvania Glass Sand Corporation, as operator of the mine, is subject to the Act.

The Federal Mine Safety and Health Review Commission has jurisdiction of these proceedings.

Prior to the inspection of June 22 and 23, 1979, the Berkeley Works history of previous violations consisted of one citation, No. 303092, which was issued for unsafe access caused by one step in a metal staircase being bent.

The Berkeley Works had between 300,000 and 500,000 annual hours worked, and Pennsylvania Glass Sand Corporation had between 900,000 and 3,000,000 hours worked at its 14 mines.

Assessment of the penalties proposed by the Federal Mine Safety and Health Administration will not materially affect the ability of the Berkeley Works or Pennsylvania Glass Corporation to continue in business.

The citations at issue in the proceedings, the termination orders and any modification orders which were issued to those citations are authentic.

Bench Decision

After the presentation of evidence and oral argument by the parties on each issue, a decision was announced orally from the bench. The decision is reduced to writing in substance as follows, pursuant to the Federal Mine Safety and Health Review Commission's Rules of Procedure, 29 C.F.R. 2700.65:

The record shows there are one hundred eighty-five (185) employees at the Berkeley Works. The record supports a finding that the Berkeley Works is medium in size and that the corporation, as it pertains to mining, is medium in size. In accordance with stipulation 5, it is found that the assessment of the penalty imposed by the Federal Mine Safety and Health Administration will not materially affect the ability of the Berkeley Works or Pennsylvania Glass Sand Corporation to continue in business.

Docket No. WEVA 80-102-M

Citation No. 310020

On Citation 310020, which was admitted as Exhibit P-3, the inspector stated the condition or practice to be as follows: Railing was not adequate around the walkway at the top of the jaw crusher. There was an opening of about eighteen inches to two feet where employees use a hook to dislodge chunks stuck in crusher. There was a drop of about six to eight feet to platform below. This citation alleged a violation of 30 CFR 56.11-27.

This regulation reads as follows: Mandatory. Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall be overloaded. Working platforms shall be provided with toeboards when necessary.

The record supports a finding that there was a space of approximately eighteen inches on the working platform where a handrail was not provided. The record also indicates that there was a drop of six to eight feet to the platform below. It is found that this is a violation of 30 CFR 56.11-27.

The record reflects that there was a handrailing around the crusher with the exception of a space of approximately eighteen inches into which it might be possible for an employee to fall. It would ordinarily be expected that only

one person would be affected. The nature of any such injury is indeterminate, ranging from no injury to a fatality. I find that the gravity is moderate.

The record supports a finding that the operator should have known of the existence of the condition and that it failed to exercise reasonable care to prevent or correct the condition. This is evidence sufficient to sustain a finding of negligence.

The record indicates that the citation was issued at 10:00 A.M. and that the condition was required to be abated by 4:00 P.M. on the same day. The condition was actually abated by 1:30 P.M. which demonstrates good faith on the part of the operator.

In view of the foregoing findings concerning the statutory criteria the penalty assessed for this violation is fifty dollars.

Citation No. 310023

Citation No. 310023 was admitted as Exhibit P-4. On this citation the inspector has listed the condition or practice as follows: There were unguarded electrical connections of 440 volts potential on the armature end of the Symon's crusher drive motor in the secondary crusher building. The motor was mounted alongside a work platform used by employees.

This citation cited a violation of 30 CFR 56.12-23. 56.12-23 reads as follows: Mandatory. Electrical connections and resistor grids that are difficult and impracticable to insulate shall be guarded unless protection is provided by location.

The record shows that the crusher drive motor was surrounded at the armature end by the housing. In this housing, there were four openings, approximately four to six inches in size, through which a person could reach--that is, through which a hand could extend. These openings were immediately adjacent to a walkway; therefore, protection was not provided by location. The record also supports a finding that the connections for the brush rigging were impractical to insulate. The record, therefore, shows that there was a violation of 30 CFR 56.12-23.

The record supports a finding that it would be improbable that injury would occur as a result of the conditions found by the inspector. This is due to the remote location

of the motor down the walkway and the small size of the openings. It is clear that only one person would be affected. However, if the person should be exposed to the shock hazard, it could result in electrocution or burns. The record supports the finding that overall gravity is slight.

Based on the stipulation(FOOTNOTE 2) of the parties it is further found that the negligence of the operator in regard to this violation was low.

Based on the stipulation of the parties it is found that, due to the rapid abatement of the condition, there was above normal good faith exhibited by the operator.

In view of the aforementioned findings with respect to the statutory criteria concerning Citation No. 310023, it is found that the penalty of forty-five dollars is a proper assessment.

Citation No. 310024

Citation No. 310024 has been admitted as Exhibit P-5. In that exhibit, the inspector listed the condition or practice as follows: There was an unguarded opening in the work platform on the third level of the secondary crusher building. This opening was around the feed roll of the Symon's crusher where employees travel.

The citation alleges a violation of 30 CFR 56.11-12 which states as follows: Mandatory. Openings above, below or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed. 30 CFR 50.2 defines travelways as follows: Travelway means a passage walk or way regularly used and designated for persons to go from one place to another.

The record is adequate to demonstrate that the area around the unguarded opening is a way regularly used by persons to go from one place to another while cleaning the area and maintaining the equipment. The record establishes that

the opening is adequate to allow a person to fall through that opening at least "leg length." The record, therefore, establishes a violation of 30 CFR 56.11-12.

Pursuant to the stipulations(FOOTNOTE 3) by the parties, it is found that the gravity is low, the negligence on the part of the respondent was low and the operator exhibited above normal good faith in correcting the conditions found by the inspector.

It is found that, in view of the aformentioned findings concerning statutory criteria, the assessment for violation Citation 310024 is seventy-five dollars.

Citation No. 310026

Citation No. 310026 was admitted as Exhibit P-6. In this citation, the inspector noted the condition or practice to be as follows: The guards were not in place on the head pulley of the transfer belt to the south shuttle conveyor of the wet processing. The head pulley was bordered on both sides by a walkway used by the employees.

The inspector cited a violation of 30 CFR 56.14-6 which reads as follows: Mandatory. Except when testing the machinery, guards shall be secured in place while machinery is being operated.

The testimony of both the witness for petitioner and the witness for the respondent shows that the wire guard was missing from the head pulley as alleged. Without regard at the present time to the gravity of the failure to have this guard in place, the record does indicate that one of these guards was rusted away and was in the vicinity of the head pulley but not in place. The record, therefore, establishes that there was a violation of 56.14-6.

As to the issue of negligence, it is found that the condition was in a remote area and in the wet processing section where there is an atmosphere which produces rust. The time during which the guard had been missing or at least the part which had rusted away has not been established, therefore, it has not been determined that the operator should have known

that this condition existed or that he had failed to take reasonable action to correct the condition. Therefore, I find that there is no negligence on the part of the operator. Pursuant to the stipulation(FOOTNOTE 4) of the parties it is found that the gravity was low, that there was above average good faith on the part of the operator, and that the condition was corrected prior to the time that it was required to be corrected by the citation. A penalty of seventy-five dollars is assessed for this violation.

Docket No. WEVA 80-103-M

Citation No. 310605

Citation No. 310605 has been admitted as Exhibit P-6. In that citation, the inspector alleged the following condition or practice: A hazardous condition existed in tank car cleaning operations due to one person entering the enclosed tanks of the cars without having an additional person in the vicinity to monitor his activity in case of an accident. The cleaning operations are done away from the immediate plant area. The tanks are entered from the hatch on the top of the car and this is approximately a fifteen (15þ) foot drop to the bottom of the tank. The internal ladder is situated back from the hatch.

The evidence establishes that the condition or practice alleged by the inspector existed with the exception that the car was not a tank car as that term is ordinarily used, i.e. a railroad car carrying liquids, and the evidence does not establish that the operation was done away from the immediate plant area. The citation alleges a violation of 30 CFR 56.15-5 which states: Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline where bins, tanks, or other dangerous areas are entered.

Although the evidence does not establish that the tank cleaner failed to wear a safety belt, it does establish that lifelines were not utilized and it established that a second person did not tend a lifeline. The evidence establishes that the compartments of the covered hopper cars which were

being cleaned were in the nature of bins, tanks or other dangerous areas encompassed by the language of Section 56.15-5. Since the lifeline was not attended by a person in the immediate area the record establishes a violation of 56.15-5. Although there were persons in a building near the area where the compartments were being cleaned, there is no evidence that these persons were actively engaged in tending the lifeline as required by the regulation. The testimony of the inspector establishes that the injury to the cleaner could vary from bruises to broken bones in the event he should fall. The record supports a finding that the gravity is moderate. The record does not support a finding that the cleaner on the occasion of the inspection was subjected to toxic substances. It is found that only one person would be affected by the injury and that the gravity was moderate.

The evidence establishes that the operator either knew or should have known that the tank cleaner was cleaning the bin or the compartments by entering them without lifelines instead of cleaning them from outside by the high pressure hose. Although facilities had been provided for cleaning with a high pressure hose, the cleaner did, in fact, enter the tanks. Since the supervisory personnel were located in the general area where the cleaning operations were being done, they should have been aware of the methods that were used in cleaning tanks. The record establishes that the negligence of the operator was moderate.

It is found that the operator exercised above normal good faith in abating the condition after the citation was issued. In consideration of the statutory criteria, a penalty of sixty dollars is assessed for Citation 310605.

Settlements

The following settlements and dispositions were submitted by motion at the hearing and approved by the Administrative Law Judge at that time:

Docket No. WEVA 80-61-M

Citation No. 302026

Petitioner submitted a motion for approval of settlement with regard to Citation No. 302026. The parties proposed settlement in the amount of $150. This citation had originally been assessed at $160. In support of the settlement, counsel for Petitioner asserted the following:

With regard to the negligence, the Assessment Officer had proposed a point total which reflected ordinary negligence. The parties would submit that under the circumstances of the

> case ordinary negligence would be an appropriate finding. * * * It was probable that an accident could occur. If there were injury, there could be a fatal accident and one person would be affected by the violation. The respondent demonstrated above normal good faith in rapidly abating the violation.

Docket No. WEVA 80-102-M

Citation Nos. 310032 and 310035

The parties agreed to settle these proceedings with respect to three of the citations alleged in Docket No. WEVA 80-102-M. Petitioner proposed to withdraw its petition with respect to Citation Nos. 310032 and 310035. In support of its motion for withdrawal, Petitioner asserted that Petitioner would be unable to meet its burden of proof to show that a standard had been violated and that it was unable to prove a violation.

Citation No. 310601

In support of the settlement proposed regarding Citation No. 310601, counsel for Petitioner asserted the following:

> The originally proposed penalty for Citation 310601 was sixty-six dollars. The parties would move for approval of a settlement for the penalty amount of sixty-six dollars for that citation. As the government proposal would reflect, the respondent demonstrated negligence and it was probable that an accident would occur. The gravity of injury is indeterminate; it's a twelve foot drop and one person would be affected by the violation. Respondent demonstrated above normal good faith in its rapid abatement of violation.

Docket No. WEVA 80-104-M

Citation No. 310018

Citation No. 310018 was issued on July 10, 1979, by inspector Stanley Andrzjewski pursuant to section 104(a) of the Act. The inspector alleged a violation of 30 C.F.R. 56.4-2 and described the pertinent condition or practice as follows:

> A sign for warning against smoking or open flame was not provided for at the permanent oil storage area in the primary crusher building. The oil storage area was between two doorways that employees use to enter and exit the building.

The cited mandatory standard reads as follows:

> Mandatory. Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.

It was established at the hearing that the flashpoint of the lubricating oil observed by the inspector was 605 degrees Fahrenheit. The oil did not, therefore, present a fire or explosion hazard. At the conclusion of testimony, counsel for Petitioner moved to withdraw the citation. This motion was granted at the hearing. The granting of this motion is approved at this time. The proceeding with respect to Citation No. 310018 is hereby dismissed.

Citation No. 310040

In support of the settlement proposed regarding Citation No. 310040, counsel for Petitioner asserted the following:

> The penalty as proposed by the assessment office is sixty dollars. The parties move for an approval of settlement of sixty dollars. Respondent's negligence regarding the violation is ordinary. The probability of an accident occurring was low. The gravity of an injury resulting from the violation is high. It is a violation having to do with berms not being provided at a couple of locations on a railing about a mile long. The number of persons affected would be one and, as with the other citations, respondent demonstrated above normal good faith in the rapid abatement of these violations.

Docket No. WEVA 80-175-M

Citation No. 310603

The parties proposed to settle the proceeding with respect to Citation No. 310603 for the full amount as originally assessed. In support of this settlement, counsel for Petitioner asserted the following:

> As the assessment office recognized, * * * Respondent demonstrated ordinary negligence regarding the violation of a moderate level. The number of persons which would be affected by the violation is one. The type of injury could be serious injury or death. The probability of injury is very low. As with the other citation which has been in issue in these proceedings, the respondent demonstrated above normal good faith in compliance.

Based on the information furnished and an independent review and evaluation of the circumstances, the proposed settlements and motions for withdrawal were found to be in accord with the provisions of the Act and the motions were granted. At the conclusion of the hearing, the following order was entered: "It is ordered that the sum of six hundred seventy-one dollars

~2940
be paid to petitioner by the respondent within thirty days of the date of this order." By a letter filed March 24, 1980, counsel for Respondent asserted that Respondent paid the entire $671 as ordered.

ORDER

It is ORDERED that the approval of settlements and dispositions as well as the bench decision rendered at the hearing are hereby AFFIRMED.

In view of Respondent's statement that he has paid the agreed-upon sum, the above-captioned proceedings are hereby DISMISSED subject to the receipt of payment by Petitioner.

Forrest E. Stewart
Administrative Law Judge

~FOOTNOTE_ONE
1 Sections 110(i), (j) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

~FOOTNOTE_TWO
2 After findings were made regarding the existence of a violation as alleged in Citation No. 310023 and the gravity of the violation, the parties stipulated that the record supported a

finding that the negligence in this case was low and, in view of Respondent's rapid abatement of the violation, above-normal good faith was demonstrated.

~FOOTNOTE_THREE
3 After the finding was made that the condition cited in Citation No. 310024 existed as alleged, the parties stipulated that the record as regards this citation showed that the gravity of the violation was low, the Respondent's negligence was low and that above normal good faith was shown in effecting compliance.

~FOOTNOTE_FOUR
4 After the finding was made that the condition cited in Citation No. 310026 existed as alleged, the parties stipulated that the gravity of the violation was low and that Respondent demonstrated above-average good faith in abating the violation because it was abated before the time set for abatement.