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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 Proceeding Docket No. SE 79-86 A.O. No. 40-0229-03002
v.		Moon Tipple
BILLY MOON TRUCKING COMPANY, INC.,	RESPONDENT	

DECISION

Appearances: William F. Taylor, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner
Billy W. Moon, pro se, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with four alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest and a hearing was convened at Chattanooga, Tennessee, on September 30, 1980. The parties waived the filing of posthearing proposed findings and conclusions, were afforded an opportunity to present arguments in support of their respective positions on the record, and agreed to a bench decision which is herein reduced to writing as required by Commission Rule 65, 29 C.F.R. 2700.65.

Issues

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

The citations in this case were issued by MSHA inspector Billy C. Layne on November 1, 1978, during the course of a regular inspection of the respondent's mining operation. The citations and the conditions or practices cited by Mr. Layne are as follows (Exhs. P-1 through P-4):

Citation No. 240757, November 1, 1978, 30 C.F.R. 77.410: "An automatic warning device was not provided for the 530 end-loader that was being operated at the tipple. The warning device shall give an audible alarm when the equipment is put in reverse."

Citation No. 240758, November 1, 1978, 30 C.F.R. 77.400(a): "A guard was not provided over the bottom part of the two sprockets in the bottom of the hopper."

Citation No. 240759, November 1, 1978, 30 C.F.R. 77.400(c): "A guard was not provided around the tail pulley under the coal hopper."

Citation No. 240760, November 1, 1978, 30 C.F.R. 77.400(b): "A guard was not provided over the (V) belt on the shaker line.

Petitioner's Testimony and Evidence

Inspector Layne testified to the circumstances surrounding each of the citations which he issued. He observed the front-end loader in operation in reverse and heard no backup alarm sound when the loader was operated in that mode. The loader was approximately 12 feet long and 7 feet wide and he discussed the matter with the operator of the loader who advised him that he would have the alarm repaired. Mr. Layne indicated that the respondent should have been aware of the inoperable alarm because the equipment is supposed to be checked out before it is operated

and it was obvious that the alarm was not operating when the loader was in reverse. He did not know how

long the device was inoperable, no one was in the area where the loader was operating, and he believed the possibility of any injuries in these circumstances was remote, and the condition was abated in good faith (Tr. 8-19).

With regard to the lack of guards on the hopper sprockets, Mr. Layne sketched a diagram of the device (Exh. P-2(a)), and indicated that while the device was partially guarded, the guard did not cover the bottom sprocket parts which were exposed and which presented a hazard of someone being accidentally caught in them. The lack of guards was visually obvious, and an employee told him that the guards were taken off to facilitate the cleaning of the hopper and were never put back on. He did not know how long the guards were off the equipment, but no one was working in the area at the time. Further, the hopper operator operates it by means of a control panel located some 10 or 12 feet away from the sprocket location, and when he leaves his work station he usually shuts the controls down. Mr. Layne considered the lack of guards as serious if someone were designated to work in the area near the sprockets. However, in view of the fact that no one was assigned to work there on the day the citation issued, he believes it was nonserious (Tr. 19-28).

With respect to the lack of a guard at the hopper tail pulley, Mr. Layne indicated that it is located some 15 to 18 feet from the control panel and since no one was near it at the time, he believed the violation was nonserious. However, men do go near the area to perform maintenance or to grease the pulley and they could be exposed to a hazard. The pulley is usually guarded by a piece of plywood which is adequate as a guard. However, on the day in question the plywood guard was not in place and was lying nearby, and he had no reason to dispute Mr. Moon's statement that the guard was taken off to facilitate cleaning of the pulley and someone forgot to put it back in place (Tr. 38-45).

Regarding the failure to guard the shaker line V-belt, Mr. Layne stated that a man was working on the belt picking slate off the belt by hand, but this task in and of itself is not a violation. While located some 12 to 14 feet from the unguarded belt, the man would have ocassion to go near the unguarded belt to grease the motor or to check it for icing conditions, and if the belt broke, he would be exposed to a hazard from the whipping action of the broken belt (Tr. 47-50). The belt was an overhead belt located some 12 to 15 feet off the ground, and it was never guarded in the past (Tr. 51). He believed the violation was nonserious because any injury resulting from the lack of guard would be a "freak accident" (Tr. 52, 56-57).

Respondent's Testimony and Evidence

Mine operator Billy Moon was given an opportunity to cross-examine the inspector, and he also testified as to the circumstances surrounding each of the citations. He did not dispute the conditions cited by the inspector, but rather, offered explanations and clarifications concerning the

circumstances surrounding each of the citations. Regarding the lack of an alarm

on the loader, he stated that it was a new loader which was delivered to the mine a day before the inspection and the supplier checked it out and found the alarm was defective but did not notify him (Tr. 21).

Regarding the lack of a tail pulley and sprocket guards on the hopper, Mr. Moon testified that the guards are installed in such a manner as to facilitate their easy removal so that the belts can be cleaned on the afternoon of each day when the plant is shut down for this purpose. It is not normal practice to operate the tipple without the guards in place, and he conceded that they were not replaced after the cleanup operations were completed. He was not present when the citations were issued, and Mr. Layne agreed with his explanations concerning the lack of guards when he observed the violations (Tr. 29-37, 42).

With respect to the lack of a guard on the shaker V-belt, Mr. Moon stated that it was never guarded because he believed it was rather isolated by its position some 15 feet off the ground, and the belt moves at a relatively slow rate of speed. There was a coal storage bin directly under the belt location and no one would be in that area. However, he did not dispute the inspector's assertion that the belt was located on a platform and that there was a work access near the belt. He conceded the remote possibility of the belt breaking and flying off and that a "freak accident could happen" (Tr. 53-57).

Findings and Conclusions

I conclude and find that the testimony and evidence adduced by the petitioner in this proceeding establishes the fact of violations as to each of the citations issued by Inspector Layne. While a backup alarm was installed in the loader in question, it was not in operation when the inspector observed the equipment operating in reverse and respondent conceded this fact. As for the hopper-guarding violations, it is clear that while guards are normally in place on the equipment, they were not installed when the inspector viewed the equipment, and the V-belt was not guarded at all. All of the citations are AFFIRMED (Tr. 67-69).

Size of Operations and Jurisdiction

The testimony adduced in this proceeding reflects that respondent operates a very small mining operation consisting of a tipple operation where coal is sized and prepared for sale to customers, including several textile mills, schools, and others. Respondent employs two or three employees to operate the tipple, and he also owns five trucks which are used to haul coal to and from the tipple operation. During 1978, the tipple operated on an intermittent basis, and at the current time, it operates at 50 percent capacity. Respondent mines no coal as such, but purchases coal as needed to fill customer orders. Coal is purchased from strip and underground mines located in Tri-cities and Alabama, including the Black Diamond Coal Company and Russell Mining Company. Sales of the processed coal are made within the state of Tennessee as well as to several textile mills in the

State of

Georgia, and the volume of coal processed at any given time is dependent on customer requirments, and range from 300 to 500 tons a day, or as much as 1,000 tons a week. While Mr. Moon himself is not at the tipple site at all times, he is there on an intermittent basis and the operation is supervised by a certified mine foreman.

Respondent conceded, and I conclude and find that respondent is subject to the Act and to MSHA's enforcement jurisdiction (Tr. 65). Petitioner stipulated that respondent is a small operator and I adopt this as my finding in this matter.

History of Prior Violations

Petitioner asserted that respondent has no prior history of any particular consequence, that it received three or four previous citations, and Inspector Layne testified that respondent has always timely corrected any violations brought to its attention. I conclude that respondent has a good record of prior citations and this has been taken into consideration by me in the penalties assessed in this matter (Tr. 4).

Good Faith Compliance

Inspector Layne testified that each of the citations issued in this case were abated by the respondent within the time fixed by him for that purpose. Although he actually terminated the citations on November 29, 1974, he did so at that time because that was the next opportunity he had to visit the tipple when it was actually in operation. In the circumstances, I find that respondent exercised good faith compliance in timely abating the conditions cited in each of the citations.

Gravity

Petitioner stipulated and agreed that based on all of the circumstances which prevailed at the time the conditions were noted by the inspector, all of the citations here were nonserious (Tr. 15, 28, 39), and I adopt these conclusions as my findings concerning the question of gravity (Tr. 69-74).

Negligence

I conclude and find that each of the citations resulted from respondent's failure to exercise reasonable care to prevent the conditions cited. An examination of the loader before it was placed in service would have detected the defective backup alarm, and failure to reinstall the guards taken off to facilitate cleaning is an indication of carelessness which could have been prevented by a supervisor checking the belts. As for the V-belt, while the respondent did not believe a guard was required, he nonetheless conceded that the lack of guard did present a hazard, although remote. I find each of the citations resulted from ordinary negligence (Tr. 76).

Effect of Penalties on Respondent's Ability to Remain in Business

Respondent conceded that the payment of the assessed civil penalties in this case will not adversely affect his ability to remain in business, and I conclude that this is in fact the case (Tr. 76).

Penalty Assessments

On the basis of the foregoing findings and conclusions, I believe that the following civil penalties are reasonable and appropriate in the circumstances and they are imposed by me for each of the citations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
240757	11/1/78	77.410	$ 50
240758	11/1/78	77.400(a)	45
240759	11/1/78	77.400(c)	35
240760	11/1/78	77.400(b)	30
			$160

Order

Respondent IS ORDERED to pay civil penalties in the amount of $160 as indicated above within thirty (30) days of the date of this decision, and upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras
Administrative Law Judge