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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 79-9-M A.C. No. 30-00589-05003
v.		Docket No. YORK 79-16-M A.C. No. 30-00589-05004
N. L. INDUSTRIES, INC.,	RESPONDENT	MacIntyne Development Mine & Mill

DECISION

Appearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Secretary of Labor, Mine Safety and Health Administration, Petitioner William R. Bronner, Esq., Office of General Counsel, N. L. Industries, Inc., Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

These are proceedings filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), to assess civil penalties against N. L. Industries, Inc. (hereinafter N. L.) for violations of mandatory safety standards. A hearing was held in Burlington, Vermont, on June 3 and 4, 1980. MSHA inspector John Rouba testified on behalf of MSHA. Merrell Arthur and Walter Chapman testified on behalf of N. L.

ISSUES

Whether N. L. violated the mandatory standards as charged by MSHA and, if so, the amounts of the civil penalties which should be assessed.

APPLICABLE LAW

Section 110(i) of the Act, 30 U.S.C. 820(i) provides in pertinent part:

> 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.

30 C.F.R. 55.5-5 provides in pertinent part:

> Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal of exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment.

30 C.F.R. 55.9-2 provides: "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

30 C.F.R. 55.11-1 provides: "Mandatory. Safe means of access shall be provided and maintained to all working places."

30 C.F.R. 55.11-16 provides: "Mandatory. Regularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable."

30 C.F.R. 55.12-32 provides: "Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

30 C.F.R. 55.14-1 provides: "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."

30 C.F.R. 55.14-6 provides: "Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated."

30 C.F.R. 55.17-1 provides: "Mandatory. Illumination sufficient to provide safe working conditions shall be provided in an on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

30 C.F.R. 55.20-3 provides in pertinent part: "Mandatory. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable."

STIPULATIONS

The parties stipulated the following:

1. The facility known as MacIntyre Development Mine and Mill located in Tahawus, New York is a mine within the meaning of Section 3H of the Act.

2. N.L. Industries is the operator of the said mine within the meaning of Section 3(d) of the Act.

3. The products of said mine enter and affect commerce within the meaning of Section 4 of the Act. Accordingly, the operator is subject to the provisions of this Act.

4. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

5. Any penalty that may be assessed in this proceeding will not affect the ability of the respondent to continue in business.

6. The inspector who issued the citations was a duly authorized representative of the Secretary of Labor.

7. The concentrations alleged in citations number 212026 and 212028 directly reflect the concentration levels to which these two employees named herein were exposed to on the date of the initial sampling.

DISCUSSION

Docket No. YORK 79-9-M

Citation Nos. 212026 and 212028 both allege violations of 30 C.F.R. 55.5-5. To establish these violations, MSHA must show (1) exposure to dust exceeded permissible levels and (2) there existed feasible methods to control employee exposure to dust which were not utilized. At the hearing, the parties first stipulated, "that the concentrations alleged in Citation Nos. 212026 and 212028 directly reflect the concentration levels to which these two employees named herein were exposed to on the date of the initial sampling." N. L., on cross-examination, questioned the method of taking samples.

MSHA objected, stating that N. L. had stipulated to the validity of the test. N. L. answered that it had not intended to make such a broad stipulation. N. L. did not wish to contest the validity of the samples (i.e., whether the analyses of the samples accurately reflected the amount of dust which MSHA contends they did); rather, N. L. apparently wished to contest whether the conditions which were measured should have been measured to determine employee exposure to dust. This distinction was not contained in the stipulation, but N. L.'s Answer and the questions asked at the hearing make clear that N. L. was not conceding this issue. Under these circumstances, N. L. is not bound by the strict wording of the stipulation. Moreover, MSHA was not prejudiced in any way since it had notice and an opportunity to rebut N. L.'s evidence.

N. L. contends that the sampling procedure was invalid because the inspector did not remove the sampler while the miner was performing certain tasks. These tasks were part of the miner's job duties. N. L. does not explain why the sampler should be removed while the miner was performing this part of his job. The samples accurately reflect the conditions to which the miner was exposed in performing his job; they show that the miner was exposed to a greater amount of dust than is acceptable. N. L. has not shown that the sampling procedure was invalid.

MSHA has the burden of proving that feasible methods to control exposure to dust existed but were not utilized. For the crusher operator (Citation No. 212026), MSHA presented evidence that extending the control booth and requiring the use of a vacuum when cleaning would control exposure to dust. I find that these methods were feasible but not adopted. N. L. therefore violated 30 C.F.R. 55.5-5 as alleged in Citation No. 212026.

N. L. was chargeable with ordinary negligence. Miners were exposed to a greater amount of dust than is acceptable because of this violation. Abatement was timely. I find that a penalty of $78 should be assessed for this violation.

For the millwright (Citation No. 212028), MSHA presented evidence that his exposure to dust could be controlled by spraying the conveyor belt with water. Although N. L. claimed that the use of a water spray under freezing conditions might present a slip and fall hazard to those who worked near the conveyor, I note that this violation was timely abated. I find that N. L. has failed to rebut MSHA's evidence that feasible methods for controlling dust existed but were not adopted. N. L. therefore violated 30 C.F.R. 55.5-5 as alleged in Citation No. 212028.

N. L. was chargeable with ordinary negligence. Miners were exposed to a greater amount of dust than is acceptable because of this violation. Abatement was timely. I find that a penalty of $78 should be assessed for this violation.

N. L. contends that Citation Nos. 212185 and 212187, Citation Nos. 212026 and 212028, and Citation Nos. 212188 and 212183 should be merged because, in all three instances, the violations were abated by one remedial measure. The citations refer to distinctly separate violations. The fact that the same kind of remedial measures were taken by N. L. to abate the conditions does not make them a single violation. I therefore hold that the citations shall not be merged.

Citation No. 212180

Citation No. 212180 alleged a violation of 30 C.F.R. 55.11-16 which requires that regularly used walkways be sanded, salted or cleared of snow and ice as soon as practicable. The evidence establishes that there was an accumulation of 6 inches of snow and ice on a walkway along a conveyor which had not been cleared. The snow and ice had been there for up to 3 days. I find that this regularly used walkway was not cleared as soon as practicable. I reject N. L.'s contention that this regulation is unconstitutionally vague because I find that this regulation gives operators a reasonable warning of proscribed conduct. N. L. therefore violated 30 C.F.R. 55.11-16 as alleged in Citation No. 212180.

N. L. was chargeable with ordinary negligence. A person could slip and fall up to 50 feet because of this violation. Abatement was timely. I find that a penalty of $210 should be assessed for this violation.

Citation No. 212181

Citation No. 212181 alleged a violation of 30 C.F.R. 55.12-32 which requires that inspection and cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairs. The evidence establishes that two panel doors of cabinets which housed electrical equipment were open 2 to 3 inches. No repairs or testing were being done. I therefore find that N. L. violated 30 C.F.R. 55.12-32 as alleged in Citation No. 212181.

N. L. was chargeable with ordinary negligence. A person could be shocked or burned because of the violation. The possibility of occurrence was slight. Abatement was timely. I find that a penalty of $75 should be assessed for this violation.

Citation No. 212182

Citation No. 212182 alleged a violation of 30 C.F.R. 55.17-1 which requires that "illumination sufficient to provide safe working conditions shall be provided." N. L. contends that MSHA can establish a violation of this section only through objective measurements of the lighting. I conclude that MSHA can show a violation through evidence other than by objective measurement of lighting. See, Clinchfield Coal Company v.

Secretary of Labor, MSHA, No. 79-1306 (4th Cir., April 8, 1980). Here, the inspector's

testimony was that two of three lights in a room 10 by 15 feet were burned out and that the remaining light bulb was covered by dust. He stated that there were steps in the area which could hardly be seen because of the lack of light. Part of the area was almost totally dark. The area was used as a travelway and maintenance had to be performed around a tail pulley in the area. I find that the inspector's testimony establishes that sufficient illumination to provide safe working conditions was not provided. I reject N. L.'s argument that this regulation is vague for the reason stated in my discussion of Citation No. 212180. N. L. therefore violated 30 C.F.R. 55.17-1 as alleged in Citation No. 212182.

N. L. was chargeable with ordinary negligence. A person could trip and fall because of the lack of light, possibly into the pinch point of a conveyor. Abatement was timely. I find that a penalty of $80 should be assessed for this penalty.

Citation No. 212183

Citation No. 212183 alleged a violation of 30 C.F.R. 55.14-6 which requires that guards be securely in place when machinery is operated. The evidence establishes that the head pulley of a conveyor was not guarded while the conveyor was operating. N. L. contends that the machinery was guarded by location in that the pinch point of the pulley was not readily accessible and that there was therefore no violation. However, the evidence shows that an employee is within 18 inches of the pinch point at least once a shift without there being a guard between him and the pinch point. I therefore find that the pinch point was not inaccessible. N. L. has violated 30 C.F.R. 55.14-6 as alleged in Citation No. 212183.

N. L. was chargeable with ordinary negligence. Because of the violation, a person could come into contact with the pinch point and be killed or severely injured. Abatement was timely. I find that a penalty of $305 should be assessed for this violation.

Citation No. 212184

Citation No. 212184 alleged a violation of 30 C.F.R. 55.11-1 which requires that a safe means of access be provided and maintained to all working places. The evidence establishes that a catwalk which extended for approximately 100 feet along the tops of bins was partially covered with spilled material. Work was occasionally performed on this catwalk. The spilled material increased the danger of using the catwalk. I find that N. L. did not maintain the catwalk as a safe access to working places. N. L. therefore violated 30 C.F.R. 55.11-1 as alleged in Citation No. 212184.

N. L. was chargeable with ordinary negligence. A person could trip and fall into the bin because of this violation. Abatement was timely. I find that a penalty of $180 should be assessed for this violation.

Citation No. 212185

Citation No. 212185 alleged a violation of 30 C.F.R. 55.20-3 which requires that the floors of working places be maintained in clean and, as far as possible, dry condition. The evidence establishes that 75 percent of a work place floor with an area of 400 square feet was covered by a wet, slippery material varying in depth from 1 to 6 inches. The condition had existed for 2 days. I reject N. L.'s argument that the floor was kept as "dry as possible" because N. L. management decided to utilize its personnel, who could have cleaned up the material, elsewhere. I also reject N. L.'s argument that the regulation is unconstitutionally vague for the same reason as in my discussion of Citation No. 212186. I find that the evidence establishes a violation of 30 C.F.R. 55.20-3 as alleged in Citation No. 212185.

N. L. was chargeable with ordinary negligence. A person could slip and fall, possibly over a railing with a 25-foot drop because of this violation. Abatement was timely. I find that N. L. should be assessed a penalty of $180 for this violation.

Citation No. 212186

Citation No. 212186 alleged a violation of 30 C.F.R. 55.11-1 which requires that a safe means of access be provided to all working places. The evidence establishes that in an area where a spill of wet, slippery material had occurred, the portable steps to a work platform had been replaced by a ladder. The ladder was leaning at an angle against the platform and the foot of the ladder was in the wet, slippery material. I find that this was not a safe means of access to the working platform. N. L. therefore violated 30 C.F.R. 55.11-1 as alleged in Citation No. 212186.

N. L. was chargeable with ordinary negligence. A person could have fallen off the ladder because of this violation. Abatement was timely. I find that a penalty of $100 should be assessed for this violation.

Citation No. 212187

Citation No. 212187 alleged a violation of 30 C.F.R. 55.20-3 which requires that the floors of working places be maintained in clean and, as far as possible, dry condition. The evidence establishes that there was a spillage of wet, slippery material on three working place floors. Approximately 500 feet of each floor was covered by the material to a depth of 2 to 6 inches. The condition had existed for 2 days. I reject N. L.'s argument that the floor was kept "as dry as possible" because N. L. management decided to utilize its personnel, who could have cleaned up the material, elsewhere. Therefore, I find that N. L. violated 30 C.F.R. 55.20-3 as charged in Citation No. 212187.

N. L. was chargeable with ordinary negligence. A person could slip and fall, possibly 25 feet, because of the violation.

Abatement was timely. I find that a penalty of $160 should be assessed for this violation.

Citation No. 212188

Citation No. 212188 alleged a violation of 30 C.F.R. 55.14-1 which requires that pulleys be guarded. The evidence establishes that an adequate guard was not provided for the head pulley of a conveyor belt. N. L.'s argument that a guard was provided which, even if inadequate, would prevent this from being a violation, is rejected. I therefore find that N. L. violated 30 C.F.R. 55.14-1 as alleged in Citation No. 212188.

N. L. was chargeable with ordinary negligence. A person could be caught in the pinch point of a pulley because of this violation. Abatement was timely. I find that N. L. should be assessed a penalty of $210 for this violation.

Citation No. 212189

Citation No. 212189 alleged a violation of 30 C.F.R. 55.9-2 which requires that equipment defects affecting safety shall be corrected before equipment is used. The evidence establishes that a front-end loader which had an inoperable backup alarm was being operated by N. L. N. L.'s argument that there was no violation of 30 C.F.R. 55.9-2 because another, more specific regulation could have been cited, is rejected. I therefore find that N. L. violated 30 C.F.R. 55.9-2 as alleged in Citation No. 212189.

N. L. was chargeable with ordinary negligence. A person could be struck by the front-end loader because of the violation. Abatement was timely. I find that N. L. should be assessed a penalty of $100 for this violation.

Citation No. 212190

Citation No. 212190 alleged a violation of 30 C.F.R. 55.9-2 which requires that equipment defects affecting safety be corrected before the equipment is used. The testimony establishes that there were several broken wires in one or more lays in the wire rope used on a crane in the machine shop. N. L. presented evidence that the rope was, at the time the citation was issued, more than strong enough to hold any load which would be placed on it. The MSHA inspector did not know how many strands were broken or how it would affect safety. MSHA did not present evidence to rebut N. L.'s evidence and has not addressed the citation in its briefs. I find that MSHA has not shown that there was a defect affecting safety. Therefore, MSHA has not proved a violation of 30 C.F.R. 55.9-2 as alleged in Citation No. 212190. The citation is therefore vacated.

ORDER

IT IS ORDERED that Citation No. 212190 be VACATED.

IT IS FURTHER ORDERED that N. L. pay the above assessed civil penalties in the sum of $1,756 within 30 days of the date of this decision.

James A. Laurenson
Judge