

CCASE:

SOL (MSHA) V. J.P. BURROUGHS & SON

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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. LAKE 80-173-M
A.C. No. 20-00741-05003

v.

Docket No. LAKE 80-189-M
A.C. No. 20-00741-05004

J. P. BURROUGHS & SONS, INC.,
RESPONDENT

Holly Sand and Gravel Plant

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S.
Department of Labor, Detroit, Michigan, for Petitioner
Robert J. Krupka, Esq., Cook, Nash & Deibel, Saginaw,
Michigan, for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above cases were commenced by the filing of petitions for the assessment of civil penalties for alleged violations of mandatory safety standards promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801. Three violations were alleged in Docket No. LAKE 80-173-M; four were alleged in Docket No. LAKE 80-189-M, one of which was vacated prior to the hearing as having been issued in error.

Pursuant to notice, the cases were called for hearing on the merits on August 4, 1980, in Midland, Michigan. By order issued on the date of hearing, the cases were consolidated for the purposes of hearing and decision, since they involved the same mine and the same witnesses. Robert L. Polkinghorne, a Federal mine inspector, testified for Petitioner; Wayne Michelson testified for Respondent. Both parties have filed posthearing proposed findings and legal briefs. To the extent that the proposed findings and contentions are not accepted in this decision, they are rejected.

REGULATIONS

30 C.F.R. 56.14-29 provides: "Mandatory. Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is

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blocked against motion, except where machinery motion is necessary to make adjustments."

30 C.F.R. 56.4-29 provides: "Mandatory. When welding or cutting, suitable precautions shall be taken to ensure that smoldering metal or sparks do not result in a fire. Fire extinguishing equipment shall be immediately available at the site."

30 C.F.R. 56.9-87 provides:

Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

30 C.F.R. 56.9-22 provides: "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways."

30 C.F.R. 56.17-1 provides: "Mandatory. Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times pertinent to this case, Respondent was the operator of a sand and gravel plant in Oakland County, Michigan, known as the Holly Sand and Gravel Plant.

2. There is no direct evidence in the record as to the size of Respondent's business, either in terms of production or the number of employees. There is evidence that at the Holly Sand and Gravel Plant, Respondent mines, washes and sizes sand and gravel. It has front-end loaders, a primary wash plant and other secondary plants (Tr. 8). It has a conveyor and a crushed stone feed tunnel. It has other plants in addition to Holly (Tr. 34). From these facts, I can infer that it is at least a medium-sized operation.

3. Between September 1, 1977, and August 31, 1979, there were 22 paid violations of mandatory safety standards at the subject mine. None involved 30 C.F.R. 56.14-29; none involved 30 C.F.R. 56.4-29; one involved 30 C.F.R. 56.9-87; one involved 30 C.F.R. 56.9-22, none involved 30 C.F.R. 56.17-1. I do not regard this history of prior violations to be such that penalties otherwise appropriate should be increased because of it.

4. In each case involved herein, Respondent abated the alleged violations promptly and in good faith.

5. Citation No. 298066 issued on September 13, 1979,

alleged a violation of 30 C.F.R. 56.14-29 in that an employee
was welding at a discharge

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chute without blocking the chute in an open position. There is conflicting testimony as to whether the power to the shaker screen to which the discharge chute was attached was on or off. Since the citation did not allege that the power had not been turned off, it is unnecessary to resolve the conflict. Was the chute blocked against motion before repairs were begun? The chute was hinged at the bottom and resting on a handrail at an angle of about 35 degrees which blocked it from falling "downward." It could fall "backward" only if someone deliberately lifted it (it weighs approximately 300 pounds) and tipped it toward the closed position. It could not have occurred accidentally. In view of the facts, I conclude that the standard does not apply to the situation described in the citation. The citation will be vacated.

6. Citation No. 298067 issued on September 13, 1979, alleged a violation of 30 C.F.R. 56.4-29 in that employees were welding and cutting without a fire extinguisher at the site. The employees were welding and cutting on a platform at the discharge chute. The nearest fire extinguisher was on a maintenance truck about 50 feet away down a ladder and around or under a conveyor. The standard requires a fire extinguisher to be "immediately available at the site." Respondent argues that this standard is "vague and ambiguous, since it is subject to various interpretation." A work site may, of course, vary in its dimensions, but safety standards can hardly be expected to be so tightly drawn that an inspector (or an operator) would not have to use judgment in their application. The term "working site" is not vague, nor is the term "immediately available." The facts are clear here: A fire extinguisher which is on a truck on a level below the area of work which could be reached by going down a ladder, traveling 30 or more feet around or under a conveyor, is not "immediately available." The citation described a violation. It is moderately serious, and was the result of Respondent's negligence.

7. Citation No. 298068 alleges a violation of 30 C.F.R. 56.14-29 in that an employee was performing maintenance in a chute above a conveyor belt without turning off the power to the belt. The inspector believed that the employee might fall through the opening at the bottom of the chute on to the running belt. The evidence establishes, and I find, that it would not have been physically possible for the employee to fall through the opening which measured 12 inches by 14 inches. The evidence does not establish a violation and the citation will be vacated.

8. Citation No. 298065 charges a violation of 30 C.F.R. 56.9-87 in that a front-end loader did not have an audible backup alarm. The evidence establishes that the operator of the front-end loader in question had an obstructed view to the rear. The loader had a bell-type alarm on its wheel. The inspector stated it was not audible above the surrounding noise when the loader was in operation. He was standing approximately 30 feet from the machine as it backed up, and could not hear the alarm. Mr. Michelson stated that he could hear the alarm. I accept the testimony of the inspector and find that the backup alarm was not

audible above the surrounding noise and therefore a violation of the standard was established. The violation was moderately serious. Petitioner did not establish that it resulted from negligence.

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9. Citation No. 298073 charges a violation of 30 C.F.R. 56.9-22 in that a guard or berm was not provided on an elevated roadway in the pit area on September 13, 1979. The evidence establishes that the area in question was not a roadway but an area being mined out. It was not a place of vehicular travel and the standard cited does not apply. The citation will be vacated.

10. Citation No. 298089 charges a violation of 30 C.F.R. 56.17-1 in that the crushed stone feed tunnel did not have sufficient light to work safely. The tunnel housed a conveyor belt and employees enter it periodically to perform cleanup work. There is a dispute between Inspector Polkinghorne and Mr. Michelson as to the amount of light and the difficulty in seeing. There were one or two light bulbs in the tunnel. I reject Respondent's argument that the standard is impermissibly vague. I reject its contention that a measuring device or a scientific test is required to establish insufficient illumination. Respondent cited Freeport Kaolin Company, 1 FMSHRC 2343 (1980), and Kaiser Steel Corporation, 1 FMSHRC 2367 (1980), but failed to cite Secretary of Labor v. Clinchfield Coal Company, Docket No. NORT 78-417-P issued March 12, 1979, review denied by the Commission in April 1979, affirmed sub nom. Clinchfield Coal Company, v. Secretary of Labor, unpublished opinion issued April 8, 1980 (4th Cir.). The Court of Appeals upheld a finding of insufficient illumination based upon the "informed judgment [of the inspector] of what constituted sufficient illumination." In this case, I rely on the judgment of the inspector that the illumination in the tunnel was not sufficient to provide safe working conditions. A violation was established. It was not serious, but was the result of Respondent's negligence.

ADDITIONAL CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

2. Respondent is subject to the provisions of the Mine Safety and Health Act of 1977 in its operation of the Holly Sand and Gravel Plant.

3. Based upon the evidence introduced at the hearing, the contentions of the parties, and a consideration of the criteria in section 110(i) of the Act, I determine that the following penalties are appropriate for the violations found to have occurred:

| Citation No. | 30 C.F.R. Standard | Penalty |
|--------------|--------------------|---------|
| 298067 | 56.4-29 | \$100 |
| 298065 | 56.9-87 | 100 |
| 298089 | 56.17-1 | 50 |

ORDER

Therefore, IT IS ORDERED (1) Citation Nos. 298066, 298068, and 298073 are VACATED and no penalty is imposed. IT IS FURTHER ORDERED that Respondent

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shall, within 30 days of the date of this decision, pay \$250 for the violations found herein to have occurred.

James A. Broderick
Chief Administrative Law Judge