

CCASE:
SOL (MSHA) V. JOHN PETERSON
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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. WEST 79-300

v.

A/O NO. 35-02479-05001

JOHN PETERSEN, AN INDIVIDUAL,
D/B/A TIDE CREEK ROCK PRODUCTS,
RESPONDENT

MINE: Tide Creek Pit

Appearances:

Ernest Scott, Jr., Esq., Office of the Solicitor, U. S.
Department of Labor, 8003 Federal Office Building, Seattle,
Washington 98174,
for the Petitioner

Agnes Petersen, Esq., Vannatta and Petersen, Attorneys at Law,
222 South First Street, St. Helens, Oregon 97051,
for the Respondent

Before: Administrative Law Judge Virgil E. Vail

DECISION AND ORDER

This proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The petition for assessment of civil penalty (now called a proposal for penalty, 29 C.F.R. 2700.27) was filed on September 14, 1979 alleging two violations of mandatory safety standards contained in 30 C.F.R. Part 56. The violations were charged in citations issued to the respondent following an inspection of the Tide Creek Pit on March 22, 1979.

Pursuant to notice, a hearing on the merits was held in Portland, Oregon on June 10, 1980. Federal Mine Inspector Robert W. Funk testified on behalf of the petitioner. John Allen Petersen, owner of the Tide Creek Pit Mine, testified for the respondent.

FINDINGS OF FACT AND CONCLUSIONS

Findings of Fact are enumerated 1 through 9.

1. At all times relevant to these proceedings, Respondent operated an open pit rock crushing operation near Deer Island, Oregon (Tract 12).

2. Respondent has not had a significant history of prior violations (Tr. 60).

3. The Respondent's business consists of about 100,000 cubic yards of bulk rock per year. There are two employees besides the owner who works with the employees, and the pit usually operates 8 hours a day, 5 days a week (Tr. 13, 20).

4. The proposed penalties are appropriate for the size of the operator's business and will not affect Respondent's ability to continue in business.

5. The Respondent promptly took steps to abate the citations and demonstrated good faith in achieving rapid compliance with the relevant standards.

Citation Number 347916

This citation alleges a violation of 30 C.F.R. 56.12-30.(FOOTNOTE 1)

6. The drive motor of the conveyor below the shaker screen did not have a weather head (Tr. 39).

7. There was a danger of the wiring shorting out against the frame, which could cause anyone coming in contact with the frame to be electrocuted (Tr. 43 - 44).

This citation should be vacated. The issue is whether a potentially dangerous condition existed in the wiring running to the electrical motor on the conveyor below the shaker screen. The inspector testified that he could not remember whether the wiring had been insulated with anything, such as tape or rubber (Tr. 40). He testified that, according to the law, a weather head must be installed on the drive motor (Tr. 39). He could not remember the relationship of the wires to the frame (Tr. 40).

The Respondent testified that placing the wires inside a box caused the covering on the wires to rub against the box, due to the shaking of this machine, which would eventually expose the wires and cause an electrical short. He had wrapped the wires coming out of the motor with friction tape and then with rubber from an innertube. The 3 wires were then wrapped again in rubber from an innertube to keep out water (Tr. 22).

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A review of standard 30 C.F.R. 56.12-30 is not particularly helpful in determining what is required in an electrical hookup of the type involved herein. The situation to which the standard is directed does address what potentially could be a very dangerous and possibly a fatal accident. However, the Petitioner has not sustained his burden by proving that the type of electrical attachment used by the Respondent did not satisfy the requirements of the standard. Inspector Funk testified that the electrical hookup should have had a weatherhead installed on the motor, according to the law (Tr. 39). I am unable to determine where the standard that was cited, or other relevant law supports his statement. Therefore, I find that the reason he gave for issuing the citation is unfounded.

Citation Number 34917

This citation alleges a violation of 30 C.F.R. 56.14-01.(FOOTNOTE 2)

8. The tail pulley of the return conveyor to the L J shaker screen did not have a guard (Tr. 45).

9. Persons could come into contact with the tail pulley while cleaning up spillage around the conveyor and could be injured (Tr. 46).

This citation should be affirmed. The Respondent testified that there is a trail or pathway alongside the equipment where the pulley involved herein is located. However, he testified that persons would not walk by the pulley while the plant was operating because they would get splattered with water and mud, and that the plant would normally be shut down if one of the employees was going to clean out around the pulley (Tr. 57, 66).

The standard, 30 C.F.R. 56.14-1, is very explicit in stating that guards are required where moving machine parts may be contacted by persons. I am persuaded by the evidence that the facts in this case present a situation where an employee cleaning up around the pulley, walking by the pulley or a visitor to the plant walking by the pulley could become entangled therein. It is not a sufficient defense to prove that the likelihood of such an accident is remote. Rather, it is important to consider that the risk of such an injury exists, and the seriousness of the consequences are such that guarding is required. In order to abate this citation, a guard was installed on the pulley.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding. At all times relevant to this proceeding, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.

The testimony of the Respondent, on questions of his business operations, convinces me that the Respondent does operate a mine titled the Tide Creek Pit and that the products from said mine enter commerce or affect commerce within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 803. The mines subject to the Act are those whose products enter commerce or those whose operations or products affect commerce. This provision is to be given a very broad interpretation. *Marshall v. Kraynack* 614 F. 2d 231 (3rd. Cir. 1979). Congress has found that health and safety accidents in mines disrupt production and cause loss of income to operators which in turn impedes and burdens commerce. 30 C.F.R. Section 801(f). Accordingly, even if a mine's products remains solely within a state, any disruption of its operations due to safety hazards affects interstate commerce. *Marshall v. Kilgore*, 478 Supp. 4 (E. D. Tenn 1979); *Marshall v. Bosack* 463 F. Supp. 800 (E.D. Pa. 1978).

2. Respondent did not violate the standard cited in Citation number 347916.

3. Respondent violated the standard cited in Citation number 347917.

4. Respondent, in its answer to the Petitioner's petition for assessment of penalty, requested a jury trial, attorney fees of \$1,000.00 and court costs.

In an analogous situation involving the Occupational Safety and Health Act, which is similar to the Federal Mine Safety and Health Act of 1977, the United States Supreme Court concluded that the Seventh Amendment to the U. S. Constitution, providing for jury trials in certain cases, does not prevent Congress from assigning adjudication of newly created statutory "public rights" to administrative agencies in which jury trials would be incompatible. The Court concluded that, "Congress found the common law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefore, unknown to the common law, and placed their speedy and expert resolution of the issues involved. The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law." *Atlas Roofing Company, Inc. v. OSAHRC*, 430 U.S. 442 (1977). Further, request for attorney fees and court costs are not warranted in this case.

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ORDER

Citation number 347916 is hereby vacated. Based upon the criteria set forth in section 110(i) of the Act, the penalty of \$44.00 is determined to be the proper amount for Citation number 347917. It is ordered that the Respondent pay the amount of \$44.00 within 30 days of this Decision.

Virgil E. Vail
Administrative Law Judge

~FOOTNOTE_ONE

1 56.12-30 Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

~FOOTNOTE_TWO

2 56.14-1. 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.