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SOL (MSHA) V. JAQUAYS MINING
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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

v.

JAQUAYS MINING CORPORATION,
RESPONDENT

CIVIL PENALTY ACTION

DOCKET NO. WEST 80-1-M

A/O CONTROL NO. 02-00954-05003

MINE: JAQUAYS MILL

APPEARANCES:

Mildred L. Wheeler, Esq., Office of the Solicitor, United States
Department of Labor, San Francisco, California,
for the Petitioner

H. R. Gannan, Esq., Tucson, Arizona,
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Jaquays Mining Corporation with several violations of regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. Respondent denies the violations and contests the appropriateness of the penalty. Jaquays also moves for an order of dismissal on the grounds that the Secretary did not propose a penalty within a reasonable length of time, and that the attachment of the MSHA assessment form to the proposal for assessment of civil penalty was unduly prejudicial to respondent.

ISSUES

1. Whether the attachment of the MSHA assessment form to the proposal of a civil penalty is prejudicial to respondent.
2. Whether the lapse of time between the issuance of the citation and MSHA's proposal of a penalty was unreasonably long and, therefore, warrants the dismissal of the case.
3. Whether respondent violated the Act.
4. The determination of a penalty, if a violation is found.

DISCUSSION OF RESPONDENT'S MOTIONS TO DISMISS

The attachment of the MSHA proposed assessment form to the proposal of assessment of civil penalty filed by the Secretary is not prejudicial to respondent. The Secretary is required to include a proposed penalty for every citation in issue. 29 CFR 2700.27(c). The MSHA form is merely an attachment to the proposal of a civil penalty which explains the criteria considered by MSHA in making its penalty determination. The Secretary must still prove at trial the six criteria which must be considered by the Commission before it assesses a penalty. The Commission is not bound by the Secretary's proposal, nor is it required to follow the formula for assessing penalties established by the Secretary.

29 CFR 2700.29(b). *Sec. of Labor v. Co-op Mining Co.*, FMSHRC Docket No. DENV 75-207-P (1980), 1 MSHC 2356.

As to Respondent's second ground for dismissal, the Act requires the Secretary to propose a penalty for an alleged violation within a "reasonable time", 30 USC 815(a). The penalty assessments in this case were transmitted to the respondent approximately 5 months after the mine was inspected.

It was not the intention of Congress that any delay should prevent the execution of the Act by the Secretary.

To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding. Senate Report 95-181, 95th Cong., 1st Sess. 34 (1977)

Courts have held that the necessity for enforcement of safety and health standards outweighs any procedural deficiencies concerning filing requirements, unless the operator is prejudiced by such delays. *Todd Shipyards Corp. v. Sec. of Labor & OSHRC* 566 F.2d 1327 (9th Cir.), *Stephenson Enterprises, Inc. v. Sec. of Labor & OSHRC* 578 F.2d 1021 (5th Cir. 1978); *Jensen Construction Co. v. OSHRC & Sec. of Labor* 597 F. 2d 246 (10th Cir. 1979). Respondent failed to present any evidence that it was prejudiced by the delay in the proposal of the penalty by the Secretary.

For the reasons stated above, I conclude that respondent's motions to dismiss should be denied.

FINDINGS OF FACT

Citation No. 379251

The Secretary alleges that respondent violated 30 CFR 57.9-22 (FOOTNOTE 1) by failing to provide a berm on an elevated roadway. I find the following facts are supported by the evidence.

1. A roadway 12 feet wide and 50 feet long gradually rose to a height of 12 feet; it did not have a berm on its west side (Tr. 21, 22, 34, 100).
2. The roadway is used by dump trucks to feed the main hopper (Tr. 22).
3. The roadway is on mill property (Tr. 101).
4. The hazard is that a truck could roll off the roadway if its brakes failed or if the truck was not driven properly (Tr. 22, 37, 48, 100).
5. If a truck rolled off the side of the road, the driver could be fatally injured (Tr. 23).

The standard requires that berms be provided on the outer bank of all elevated roadways with no exceptions. Respondent failed to comply with the standard.

Citation 379252

The Secretary contends that Jacquays did not have a proper guard over the pinchpoint of the number 1 roll motor, contrary to 30 CFR 57.14-1. (FOOTNOTE 2) I find the following facts to be supported by the evidence:

1. A pinchpoint located where the v-belt rolls over a pulley of the number 1 roll motor was not adequately guarded (Tr. 24, 25, 107, 120, 123, P-2)
2. The pinchpoint was approximately 2 - 3 feet from a platform and 3 feet above the floor of the mill (Tr. 24, 45).
3. The walkway was not used frequently by miners, but anyone had access to the area where the pinchpoint was located (Tr. 86, 102).
4. At times, miners are in the area to do maintenance work or to observe the operation of the roll motor (Tr. 25, 41, 87, 89).

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5. The hazard is that a miner could be seriously or fatally injured if they fell into the pinchpoint.

Respondent argues that the area near the roll motor was not a working area or near a frequently used walkway. This fact, however, does not eliminate the possibility that a miner in the area doing maintenance work or for any other reason, could fall into the pinchpoint and be severely injured.

Accordingly, I affirm the citation.

Citation 379253

Petitioner charged respondent with another violation of 30 CFR 57.14.1. The evidence was conflicting. I find the following facts to be credible:

1. The v-belt pinchpoint on the number one willow motor was not guarded (Tr. 26).

2. The willow motor is located 15 feet above the floor and 10 - 12 feet above a workdeck (Tr. 88).

3. To get to the pinchpoint a miner would have to climb up the frame that holds the motor and onto the motor itself (Tr. 88, 89).

The standard requires that moving machine parts be guarded if they can be contacted by someone. It is difficult to visualize how a miner could come in contact with a pinchpoint that is at the very least ten feet above the floor. Petitioner failed to prove that a miner could be exposed to this unguarded pinchpoint. Accordingly, the citation should be vacated.

ASSESSMENT OF PENALTY

Respondent contests the amount of the penalties as proposed by MSHA. Having reviewed the Secretary's criteria upon which the penalty was proposed and the record, I find that there is no evidence to support MSHA's calculation of respondent's history of violations. Accordingly, the penalties for citation nos. 379251 and 379252 should be reduced. Further, considering all the criteria in 30 U.S.C. 820(i) I assess a penalty of \$ 75 for each violation.

ORDER

Based on the foregoing findings of fact and conclusions of law, I enter the following order:

Respondent's motion to dismiss is denied. Citation No. 379253 and the proposed penalty are vacated. Citation Nos. 379251 and 379252 are affirmed and a penalty of \$75.00 is assessed for each.

John J. Morris

Administrative Law Judge

~FOOTNOTE_ONE

1 57.9-22 Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

~FOOTNOTE_TWO

2 57.14-1 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.