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SOL (MSHA) v. TEXAS LIME
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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. CENT 79-392-M
v.	A/O NO. 41-00072-05004 F
TEXAS LIME COMPANY, DIVISION OF RANGAIRE CORPORATION, RESPONDENT	MINE: Texas Lime Plant No. 2

APPEARANCES:

Eloise Vellucci Esq.
Office of the Solicitor
United States Department of Labor
555 Griffin Square Building, Suite 501
Dallas, Texas 75202,

For the Petitioner

William R. Anderson, Jr. Esq.
Anderson & Anderson
P. O. Box 486
Cleburne, Texas 76031,

For the Respondent

DECISION

BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

The Petitioner filed a complaint proposing that a penalty be assessed against the Respondent for its alleged violation of 30 CFR 56.14-1.(FN.1) The cited regulation was issued under authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978). Attached and incorporated into the complaint was a copy of the citation dated February 19, 1979, in which the following was written:

> "There was a 72-inch section of steel cover missing from over the feed conveyor head pulley for the No. 5 storage bin, and an employee was fatally injured when he was caught in the conveyor."

In its answer, the Respondent denies that there was a violation of the Act as alleged. It further affirmatively alleges, inter alia, that the deceased employee, on his own, and in violation of specific instructions, climbed to the area of the conveyor during inclement weather consisting of ice and sleet, and may have removed the 72-inch section of steel cover from over the conveyor belt and head pulley in order to get to the area where the conveyor belt was blocked.

FINDINGS OF FACT

1. In the course of the operation of its business, Respondent's employees operate a vertical bucket elevator which carries crushed limestone used for the purpose of making quicklime and hydrate lime. The bucket travels vertically for a distance of approximately 60 feet, to a point where the material drops onto a horizontal conveyor belt. The conveyor belt then carries the material for a distance, to where it drops from the end of the conveyor belt into a large surge bin or tank.

2. Access to the top of the surge bin, where the conveyor belt delivers the rock, is by means of an attached metal ladder which extends down to ground level.

3. At the time of the accident, the entire length of the horizontal conveyor belt was covered by a rounded metal cover attached to the metal framework which supports the conveyor belt itself, except for the last section, which was 72 inches in length, extending from the head pulley back to the last metal cover over the conveyor belt.

4. On the night of the accident, February 16, 1979, the decedent told two fellow workers that he was going up to the surge bin in order to throw some dry dust on the head pulley because the conveyor belt was slipping during a rain and sleet storm.

5. The decedent's body was later discovered on its back on top of the conveyor belt with the left arm caught between the belt and the head pulley. The decedent's skull was fractured when it came into contact with the rounded metal rim located over the head pulley. The metal rim was a support for the 72-inch section of the conveyor belt cover, which was not in place at the time of the accident.

6. There were no eye witnesses to the accident.

7. After the accident, the metal cover or guard was found tied to a corner post on the work platform surrounding the head pulley and conveyor belt area where the accident occurred.

8. If the 72-inch section of the rounded conveyor belt cover or guard had been in place, decedent could not have been pulled in and on top of the belt the way he was, even if his arm had been caught in the belt.

9. The Respondent promptly abated the citation the day it was issued, February 19, 1979, by replacing the cover and welding it on over the conveyor belt. An extra open grill grid was installed across the bottom of the welded cover so that no one could reach into the conveyor belt.

10. The Respondent has a history of 14 assessed violations in the twenty-four month period preceding February 1979.

11. The Respondent employs approximately 100 persons, who collectively work approximately 814,472 man hours per year.

12. A monetary penalty would not impair Respondent's ability to continue in business.

ISSUES

Three issues are presented:

1. Was the head pulley a moving part that might be contacted by persons and might cause injury?

2. If the head pulley should have been guarded and if the deceased employee himself removed the metal cover causing the head pulley to be unguarded just prior to the fatal accident, is the Respondent responsible for a violation of the cited regulation?

3. If the Respondent is found to have violated the regulation, what amount of penalty assessment should be ordered to be paid by the Respondent?

DISCUSSION AND CONCLUSIONS

The head pulley is specifically mentioned in the cited regulation. It must be guarded if, while in motion, it might be contacted by persons and might cause injury. Admitted into evidence were photos and a drawing of the location where the fatality occurred. They show a work platform surrounding the area where the employees could walk once the area was reached by means of climbing the vertical metal ladder attached to the surge bin tank from ground level. Since workers would be expected to be in the area on the platform, it would be expected that they might come into contact with the head pulley and be injured thereby, unless the head pulley was guarded. Accordingly, I conclude that the head pulley should have been guarded.

The evidence is undisputed that the guard or metal cover was not in place when the accident occurred. The evidence is inconclusive as to whether the metal cover was off or in place when the decedent reached the area of his subsequent death. The MSHA inspector testified that he assumed the metal cover was not in place over the head pulley and conveyor belt before the decedent climbed to the area, because if the cover had been in place, the head pulley would not have gotten "so wet" from the rain and sleet, and thus would not have been slipping. On the other hand, the Respondent's witness testified that even with the

belt cover in place there had been problems in the past with the belt slipping during extreme weather

conditions, such as freezing rain. Therefore, I find the evidence inconclusive as to the point of whether the metal cover guard was or was not in place before the decedent climbed to the conveyor belt on February 16, 1979. The decedent may have removed the cover himself in an attempt to get the conveyor belt to move properly. However, regardless of whether or not the guard was in place when the decedent arrived, it nevertheless was not in place when he died. Thus, the head pulley, for whatever reason, was not guarded in compliance with the cited regulation at the time of the decedent's death. The evidence also shows that it was very easy to remove this particular last 72-inch section of metal cover. As originally installed, the cover was bolted into position by four bolts, one on each corner. However, by the time of the accident, the cover was merely wired on and the bolts were no longer being used. Also, the decedent's supervisor admitted that he knew of the practice of employees in throwing dry dust or calcium on the pulleys to "get the belt going."

The Respondent argues in its post hearing brief that the decedent went to the platform area on his own and against the specific instructions of the supervisor. The decedent's station of work was at ground level and his duties did not require him to go to the top of the tank or to the belt conveyor where it emptied into the tank. Thus, the Respondent argues that there was no violation of the cited regulation because the decedent's own misconduct or negligence was the proximate cause of the accident. Respondent's argument overlooks the fact that the Federal Mine Safety and Health Review Commission has held that an operator's liability is not conditioned upon fault. The operator is required to see that violations do not occur, and if violations do occur, he is held liable. Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Eaton Sand and Gravel Company, (Docket No. PIKE 79-119 PM, June 25, 1980, Final Order August 4, 1980).

It is undisputed in the evidence that the decedent climbed to the top of the surge tank on his own and without the approval of his superior. His supervisor testified at the hearing that he instructed the decedent not to climb to the surge tank because it was dangerous and the ladder was frozen over with ice. I find that Respondent's evidence supports its pleading which affirmatively alleged employee misconduct, and I find this evidence mitigating in regard to the penalty to be assessed.

The citation should be affirmed.

ORDER

The citation alleged herein is AFFIRMED and the Respondent is ordered to pay a civil penalty of $2,500 within 30 days of the date of this Decision for the violation of 30 CFR 56.14-1, as alleged.

Jon D. Boltz

Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 Mandatory. Gears; sprockets; chains; drive, head, tail, and take-up 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.