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SOL (MSHA) v. RIVERSIDE CEMENT
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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 80-20-M A/O No. 04-00010-05014 V
v.	
RIVERSIDE CEMENT COMPANY, RESPONDENT	Crestmore Mine and Mill

DECISION

Appearances: Theresa Kalinski, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner, MSHA;
Jerry E. Hines, Esq., Gifford-Hill and Company, Dallas, Texas, for Respondent, Riverside Cement Company

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the government against Riverside Cement Company. A hearing was held on Tuesday, December 16, 1980.

The alleged violation was of section 57.14-1 of the mandatory standards. Section 57.14-1 provides that: "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." The citation, which was issued on May 9, 1979, provides the following:

> An area approximately 5 foot by 4 foot due to a material spillage buildup below conveyor belt No. 104 was used as a passageway near an unguarded take-up pulley with the pinch point of the bend pulley accessible. The return area (lower) of the conveyor belt was not covered or guarded to protect employees when using this area as a passageway.

At the hearing, the parties entered into the following stipulations (Tr. 23):

> 1. The operator is the owner and operator of the subject mine.

2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The administrative law judge has jurisdiction of this case.

4. The inspector who issued the citation was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation was properly served upon the operator.

6. Copies of the subject citation and termination of the violation in issue are authentic and may be admitted into evidence for the purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements therein.

7. The imposition of a penalty will not affect the operator's ability to continue in business.

8. The alleged violation was abated in good faith.

9. In overall terms, the operator has a moderate history of violations. In addition, the operator has a sizable history regarding this particular standard, but the interpretation of this standard has been a matter of honest dispute between the parties, and on some occasions in the past, the presiding judge, after hearing, has vacated citations based upon the standard, which decisions were not appealed, but rather were accepted by MSHA. Finally, there has been no citation at the Crestmore Mine and facility of this standard for the past year.

10. The operator's size is large.

Testimony was given by the inspector who issued the citation and by the operator's safety engineer. The inspector testified that on the day of the inspection he saw that both the take up and the bend pulleys were unguarded while the belt was running (Tr. 5-6). He observed that the bend pulley was approximately 4-5 feet above the ground and that to cross underneath this pulley a person would have to bend over and could become entangled in the pulley (Tr. 7). The inspector believed the area under the conveyor and bend pulley had been used as a passageway because he had seen footprints in the area (Tr. 6). He stated that he generally cited all unguarded pulleys unless employees could not become entangled in the pulley because of height or other circumstances. The decision to cite a particular condition is based upon his individual judgement and not on any pre-existing guidelines (Tr. 14-15).

The safety engineer who accompanied the inspector testified that the area under the belt and pulley is not used as a walkway;

the footprints in

the area were due to the fact that the belt had been replaced less then one week prior to the inspection (Tr. 18-19). He stated that approximately 70 feet from the pulley assembly there was a crossover, and that the belt itself ended approximately 80 feet from the pulley assembly (Tr. 21-22). The engineer acknowledged that there was no barrier to prevent employees from going under the belt at the cited area (Tr. 21). At the close of his testimony, he stated that a recent change in management has led to an improved attitude towards safety at the company and to improved relations between MSHA and the operator (Tr. 24-25). When recalled to the stand, the inspector stated that the walkway over the belt was not in place on the date of the inspection and that no other way existed for crossing the belt (Tr. 16).

I find that a violation of the mandatory standard occurred.

Both pieces of equipment are clearly covered by the cited standard. Take up pulleys are specifically mentioned in the standard and the bend pulley is a "similar exposed moving machine part." Furthermore, the testimony given at the hearing by both the inspector and the operator's witness demonstrates that these parts may be contacted by persons and consequently may cause injury. As I have stated before, "[i]t is not necessary under this mandatory standard to establish precisely the probability of injury or of contact by individuals. It is enough that there may be contact and that there may be injury." Magma Copper Company, DENV 79-320-PM et al. (August 9, 1979).

Although a serious violation occurred, the parties have agreed that the interpretation of this particular standard has been a matter of dispute between the parties. As already set forth I myself have, in the past, vacated citations issued to this operator based upon this standard. Furthermore, at the hearing the parties stipulated that there have been no citations based upon this standard at this facility in the past year. I believTOPhese factors reduce the elements of negligence and fault that might otherwise be present.

Based upon the foregoing and taking into account all the statutory criteria a penalty of $100 is assessed.

ORDER

The operator is ORDERED to pay $100 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge