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SOL (MSHA) v. MIDWEST MINERALS,
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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 80-86-M A/O No. 34-00598-05001
v.	
MIDWEST MINERALS, INC., RESPONDENT	#30 Quarry & Plant

DECISION

Appearances: Eloise Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner; Richard Atkinson, Midwest Minerals, Inc., Pittsburgh, Kansas, for Respondent

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (hereinafter the Act), (FN.1) to assess civil penalties against Midwest Minerals, Inc., (hereinafter Midwest). A hearing was held at Miami, Oklahoma, on November 3, 1980. Petitioner called one witness. Respondent called two witnesses. At the outset of the hearing, the parties entered into the following stipulations on the record:

> The parties stipulate and agree that the number of man hours for the company, Midwest Minerals, is 141.401. The man-hours for the particular mine in question were 9,029. We have stipulated and agree that these figures represent a small-sized mine. There is no history of violations for the particular mine in question for the 24 months preceding the citation. The proposed penalty would not have any effect on the operator's ability to continue in business.

The decision rendered orally from the bench at the hearing is reduced to writing below as required by the Rules of Procedure of the Federal Mine Safety and Health Review Commission, 30 C.F.R. 2700.65.

> The stipulations being that the man hours for the company are 141,101, and the man hours for the particular mine are 9,029 and that these figures represent a small-sized mine, I so find that the size of the operator is small.
>
> There being no history of prior violations, I find that the history of Respondent is good.
>
> In view of the Respondent's concession that the proposed penalty would have no effect on the operator's ability to continue in business, I therefore find that the penalty in this case will have no effect on the operator's ability to continue in business.
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> Citation No. 167323 was issued on August 7, 1979, by MSHA inspector Smith. The condition or practice noted on this citation states, "The stacker tail pulley has no guard. Two employees work near the area daily." The citation cited a violation of 30 CFR 56.14-1, which reads as follows: 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."
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> The evidence has shown that the equipment in question is a tail pulley; one of the specific types of equipment that is required to have a guard by the mandatory standard. The evidence has also established that the tail pulley may be contacted by persons and that the contact may cause an injury to persons. Respondent has introduced five photographs, marked Exhibits 1 through 5, showing in general the condition of a piece of equipment. The photographs were taken approximately one year after the citation. Exhibits 1 through 3 show that the drive pulley is guarded but that there is no guard at the tail pulley. Inspector Smith has acknowledged that the drive

pulley guard was in place at the time of the inspections, but he testified that there was no guard around the tail pulley. Respondent's witness has testified that these photographs shown in Exhibits 1, 2 and 3, were taken at a time when the tail pulley guard on the inby side was temporarily removed for the purpose of taking the photographs. It was then replaced on the tail pulley. Respondent's Exhibit No. 2 shows a guard in the nature of a piece of belt on the outby or far side of the frame of the equipment as the equipment is viewed from the direction shown in Exhibit 2. The inspector has testified that this guard was not in place at the time he issued the citation and there has been no other testimony refuting this statement. Therefore, I find that the guards were not in place on the tail pulley at the time of the inspection as alleged by inspector Smith. The respondent has asserted that many inspections had been made by inspectors by the Bureau of Mines, by MESA and by MSHA and this condition had never be cited previously. Inspector Smith has testified that he is unable to venture a statement as to why no citations were previously issued. While this may be material to the issue of negligence it is not controlling on the issue as to whether or not there was a violation. It has been established that the tail pulley was not guarded on August the 7th, 1979, that the pulley could be accidentally contacted by persons working in the area and that the conditions might result in an injury. I therefore find that a violation of 30 CFR 56.14-1 has been established.

The testimony has shown that the pinch point is at the bottom of the pulley and that the bottom of the pulley is about six inches above the buildup of material. The inspector has testified that a person working or walking in the area within two or three feet of the belt itself could very easily slip and fall into this pinch point. The Respondent's argument that the area is guarded by location has been fully considered. While there is some protection from the location, it is still evident that it is possible for a person to accidentally be injured by the belt at its pinch point with the pulley. The frequency and amount of shoveling that must be done in this area has not been established by the testimony. Nevertheless, two persons work in this area and it is possible for them to be injured by the unguarded pulley. I will accept the statement in closing argument that belt dressing is no longer applied and that belts are prevented from slipping by a friction type material placed on the pulley. Since it has not been established by the testimony that belt dressing need be frequently applied, I will find that it is improbable that a person would be seriously injured or that death would result as a result of the unguarded pulley.

The testimony of inspector Smith has established that the absence of the guard on the tail pulley was open and obvious. Respondent has acknowledged and the testimony has established that the operator knew that there was no guard at this point. The operator was of the opinion that the tail pulley was adequately guarded by location and by components of the equipment. It has established that the equipment has run in this condition for many years and that it has not previously be cited for this violation. Although it has been established that an injury could occur, I will give the operator credit for good faith in this respect for not placing a guard around the equipment and find that any negligence on the part of the operator is slight.

The Secretary stated for the record that the employer exercised extreme good faith and had done everything in its power to correct the violation for which it was cited. In view of MSHA's concession that the operator exercised good faith in abating the citation, I find that the operator did exercise good faith in attempting to abate the violation after notification of that violation.

In view of the foregoing findings of fact and conclusions of law, I find that an appropriate assessment for this violation in consideration of the six statutory criteria is the amount of $30.00.

ORDER

The bench decision assessing a penalty of $30 is affirmed. Respondent is ordered to pay Petitioner the sum of $30 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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~FOOTNOTE_ONE

1 Sections 110(i) of the Act provides:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, wehther the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."