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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),	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-50-M
PETITIONER	DOCKET NO. WEST 79-197-M
v.	A/O NO. 04-04075-05002
KAISER CEMENT AND GYPSUM CORPORATION,	A/O NO. 04-04075-05003
RESPONDENT	MINE: Permanente Cement Plant

Appearances:
Andrea Robinson Esq.
Office of the Solicitor
United States Department of Labor,
For petitioner

Cora Lewis Esq.
Kaiser Cement Corporation
800 Lakeside Drive
Oakland, California,
For respondent

Before: John A. Carlson
Administrative Law Judge

DECISION

These consolidated cases, tried in San Francisco, California, arose from a December, 1978 inspection of respondent's Permanente Cement Plant. The petitioner Secretary issued twelve citations charging violations of various mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act").

At the outset of the hearing the parties stipulated to several of the facts relevant to assessment of appropriate penalties. It was agreed that respondent is a large company; that the Permanente operation is large; that its prior history of violation is good; and that assessment of the proposed penalties would not impair the ability of respondent to remain in business. These stipulations were approved and will be considered in assessing penalties where violations are affirmed. The parties further stipulated to the Commission's jurisdiction to decide these cases.

The Secretary then moved to dismiss citations 374869, 374870, 374872 and 374881, representing that further investigation and consultation of counsel with enforcement personnel had shown that petitioner lacked sufficient proof to establish violation. The motion was orally granted at trial, and that action is reaffirmed here. Those citations will be vacated and the attendant proposals for assessment of penalty are dismissed.

Respondent, at the same time, moved under Commission Rule 11 to withdraw its contest of the penalties proposed for citations 374874, 374876, and 374877. Following representations made upon the record concerning the gravity, good faith, and abatement elements of these citations, the motion was granted. The penalties will be assessed in the amounts proposed by the Secretary.

Review and discussion of the evidence presented on the remaining five citations follows.

CITATION 374882 -- Unguarded Wall Opening

On December 19, 1978, inspector Sarja issued a citation for violation of the standard at 30 U.S.C. 56.11-12 which provides:

> Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

In the third level of respondent's number 6 mill inspector Sarja noted an exterior wall opening, approximately 4 feet wide and 5 feet high. The bottom of the opening was approximately 2 feet above floor level, and according to Sarja, would allow a worker to drop some 30 feet should he fall into the opening. The inspector maintained that anyone servicing the large blower situated on the third level would pass by and work close to the opening. These assertions were nowhere directly disputed.

Respondent limited its defense to testimony that the separator (on which most maintenance would be required) was situated much farther from the opening than the blower; that the blower itself required a filter change only every

other week; and that workers, to get added air, had removed the louvres which were intended to cover the opening.

The evidence establishes violation. The floor in the vicinity of the blower served as a travelway to the blower whenever it required filter replacement or other maintenance. A misstep by any worker near the blower could have resulted in a long fall through the wall opening.

The matters raised by respondent -- duration of worker exposure and lack of direct operator negligence in removal of the louvres -- are relevant to penalty determination, but do not bear upon violation. These factors were presumably considered by the Secretary in proposing a modest penalty of $90.00 where an accident, had one occurred, would have been most likely fatal.

Upon the whole record, including the stipulated penalty elements discussed previously, I am convinced that the proposed $90.00 penalty is appropriate. This is chiefly so because of the brief and infrequent presence of workers near the opening, and the evidence that respondent intended that the opening be covered.

CITATION 374871 - Ball Mill Walkway Guardrail

On December 12, 1978, inspector J. Sarja issued a citation charging that a section of guardrail was missing on an elevated walkway adjacent to the drive end of a ball mill. The mandatory standard allegedly violated, 30 C.F.R. 56.11-2, provides:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

Inspector Sarja testified that he issued the citation because of a gap in a metal guardrail protecting the edges of the elevated walkway leading to the ball mill (Tr. 13-16). As the hearing continued, however, considerable controversy arose concerning the physical facts. A photograph taken by and introduced through Donald Schultz, respondent's regional safety supervisor, contributed substantially to that controversy (respondent's exhibit 1). Schultz testified that he took the photograph at "the time of the citation" (Tr. 47); and that two chains shown hanging at approximate railing height across the walkway were "already in place at the time of the inspection" (Tr. 71).

Sarja, in rebuttal, suggested that a portion of the rail shown in the photograph was missing at the time of inspection, and said he could not "remember those chains exactly." He also acknowleged that the chain "may have

been there before" (Tr. 89). At another point the inspector became confused between photographs of the ball mill and an alleged unguarded armature which was the subject of another citation (Tr. 91).

The question then becomes whether any violation occurred if the entrance to the walkway was blocked by chains. I conclude that none did. Careful review of the evidence shows that the permanent guardrails did not extend all the way to the ball mill; a short open space existed on the left-hand side where the walkway meets a small concrete platform. Respondent's witness conceded as much (Tr. 42). (In this regard the photograph [respondent's exhibit 1] can be misleading because a metal portion of the mesh guard over the mill appears to be an extension of the guardrail.)

Respondent's safety supervisor testified without contradiction that the walkway had no function except to allow access to the ball mill for repair. No repair could take place, he said, unless the large mesh guard was removed, and to accomplish this carpenters must build a temporary wooden platform (which presumably would have its own perimeter guarding), beyond the rails on the walkway. (Tr. 48-49).

When all the inspector's testimony is considered together, it becomes clear that he lacked firm independent recollections of the physical facts. His notes on the citation itself were introduced without objection. These, however, provide no greater certainty. As originally issued, the citation itself made no mention of either chains or guardrails; instead it refers to a missing section of "walkway." As amended two days later, it referred to missing "guardrail." The inspector's notes include a drawing showing a removable chain across the entrance to the walkway with this notation: "12-20-78 removable chain provided here."

In view of respondent's evidence that the chains were present at the time of inspection, and the inspector's admitted uncertainty as to that fact, one must conclude that the chains were across the walkway (FN.1).

Inspector Sarja appears to have ultimately accepted the chains as adequate abatement, noting in his "subsequent action" on the citation that a removable chain was accepted with the "reservation" that when the chain was unfastened violation would occur unless workers on the walkway wore safety lines.

He thus acknowledged, and correctly so, that the chained-off walkway presented no actionable present hazard to employees. He further acknowledged that methods other than fully extended guardrails could provide adequate protection when the chain was down and the walkway was in use. Because there is no affirmative evidence, direct or circumstantial, that such additional precautions were not taken when the chains were down, no violation is established and there can be no penalty.

CITATION 374875 - Guarding of 4B Finish Mill Motor

On December 12, 1978, inspector Sarja issued a citation for violation of the standard at 30 C.F.R. 56.14-1 which provides, as here pertinent, that

> ... exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded.

Specifically, the evidence shows that a wedge-shaped opening existed in the screen covering the armature of a large drive motor for a finish mill. This opening, at the edge of a walkway paralleling the motor and enclosed driveshaft, was ordinarily barricaded by two chains suspended at the height of standard guardrails (photograph respondent's exhibit 2). Sarja testified, however, that at the time of his visit one chain was missing and the other was on the floor (Tr. 88). Mr. Schultz admitted that this may have been so (Tr. 72-73).

The opening, extending from floor to knee height, did expose employees on the adjacent walkway to injury from the rotating armature when the chains were not in place.(FN.2) Consequently, the standard was violated.

The chains protected no one when not in place. Respondent chose that means of protection; it was therefore respondent's duty to insure that the chains were up. (FN.3) Otherwise, as the Secretary contends, a screen or other guard was necessary.

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We now consider penalty. Significant injury, while possible, was not likely since the unprotected part of the armature was at knee level. It therefore offered little hazard to a passing worker unless he should be unfortunate enough to stumble or fall while traversing one short segment of the walkway. Even then, he would have to fall in but one of several possible directions to strike the armature.

On the other hand, the exposed area of the armature was obvious, and respondent should have known that the barrier chains were not in place.

Considering these factors along with the findings of size, and other statutory matters stipulated at the outset of the decision, I determine that a civil penalty of $114.00 should be assessed.

CITATIONS 374883 and 374884 -- Guarding of Electrical Components

On December 19, 1978, inspector Sarja issued two citations for alleged violations of the mandatory electrical standard published at 30 C.F.R. 56.12-23. That standard provides:

> Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded unless protection is provided by location.

The inspector was concerned that several direct current generators and a number of bus bar panels in an electrical room were unguarded.

The generators, some located on the floor and some on an elevated platform, had openings in their covers which exposed the armatures and brushes. Inspector Sarja maintained that these were "connections" and could transmit a lethal shock. (FN.4)

The bus bars, by design uninsulated, carried 480 volts. The inspector testified without contradiction that an inadvertent touching of a bar could be fatal, and I so find.

The principal issue presented is whether, as respondent contends, protection was provided by location.

The generators and the bus bar panels were in an enclosure formed by floor-to-ceiling chain link fencing. Entrance to this enclosure, which was inside an electrical workshop, could be gained only through one of two chain link doors. Beside each was a large sign displaying this notice: "Restricted Area, Danger, High Voltage, Qualified Personnel Only." These facts are undisputed. The inspector conceded that the doors were latched, and respondent's safety director agreed that they were not kept locked.

Respondent emphasized, however, that the room is within its electrical workshop and is used only by electricians (its own employees or those of contractors). Its safety director acknowledged that the enclosure is also used for some storage. He maintained, however, that the storage use did not constitute an invitation for workers other than electricians to enter the enclosure since only electrical items were stored there, and no other workers would have occasion to be in the building, let alone the enclosure (Tr. 63).

The evidence makes clear that the bus bars and generators are not the types of electrical components which are customarily covered with insulation. No evidence dealt with possibilities for individual guarding of the devices. On the contrary, the approach taken by witnesses for both parties embodied an apparent sense that a fenced enclosure provides an acceptable way of isolating workers from unintended contact with such equipment. But the inspector insisted that compliance with the standard further requires that the enclosure be locked at all times and that only electricians possess keys. Respondent's safety director was content that the enclosure, latched gates, and warning signs were enough.

I must agree with respondent. The inspector appeared satisfied that electricians, cognizant of the hazards inherent in the uninsulated devices, could be trusted to work safely within the fence. His real concern was that the doors be kept not only closed but also locked to keep out unauthorized and unskilled employees. The evidence persuades me, however, that there was virtually no possibility that anyone other than an electrician would enter the enclosure. The area contained nothing of concern to anyone except electricians, and was clearly marked as a restricted location by fencing and signs. (FN.5)

Moreover, and most important, the phrase "protection ... provided by location" as used in the standard would scarcely imply to the most prudent and safety-conscious mine operator that a lock was essential. Perhaps the inspector's insistence on a lock was somehow associated with his understanding of another electrical standard, 30 C.F.R. 56.12-68, which provides:

> Transformer enclosures shall be locked against unauthorized entry.

That standard lends no support to the Secretary's position. Instead, it shows that the draftsmen of the extensive electrical

rules had not overlooked locks as a precautionary measure. It also shows that they were fully capable

of articulating a locking requirement where necessary. The enclosure here contained no transformers, so far as we know; and it would be palpably unfair to engraft a specific locking requirement onto the cited standard.

I hold that the phrase "protection ... provided by location," because of its generality, must be construed to require only that degree of protection reasonably calculated to insure against worker injury under all the circumstances. What respondent has done in the present case is sufficient. The proposals for penalty will therefore be vacated for failure to prove violation.

ORDER

Accordingly, it is ORDERED that:

(1) Citations 374871, 374883 and 374884 are vacated;
(2) Citation 374875 is affirmed and a penalty of $114 is assessed therefor; and
(3) Citation 374882 is affirmed and a penalty of $90 is assessed therefor.

It is further ORDERED, pursuant to the motions for withdrawal and dismissal granted at the outset of the hearing, that:

(1) Citations 374869, 374870, 374872 and 374881 and the corresponding notices of proposed penalties are vacated and dismissed;
(2) Respondent's contest of the penalties proposed in connection with citations 374874, 374876 and 374877 are withdrawn and that the proposed penalties are affirmed as follows:

Citation 374874	$ 38.00
Citation 374976	$150.00
Citation 374877	$ 38.00

It is finally ORDERED that respondent shall pay the aggregate of $430.00 of assessed penalties no later than 30 days from the date of this order.

John A. Carlson
Administrative Law Judge

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~FOOTNOTE_ONE
1 Respondent's witness used the phrase "in place." This is not as precise as it might be since it leaves open a possibility that the chains were attached at one end, but not the other. The burden of showing violation is, however, upon the Secretary; and given the lack of any credible evidence that the chains were not actually hung across the walkway's entrance, we are obliged to assume that they were.

~FOOTNOTE_TWO
2 The inspector maintained that the unguarded area posed an electrical hazard as well as a mechanical one. Respondent denied this, contending that the armature was insulated. That issue need not be decided. The armature clearly posed a threat of mechanical injury and therefore required some form of guarding.

~FOOTNOTE_THREE
3 The inspector seemed unsure whether chains, when in place, constituted an adequate protection, and suggested that only a fixed guardrail would suffice (Tr. 92-93). The implication appeared to be that chains are not enough because they may be removed with ease. That position lacks merit. Under the circumstances here the double chain was a barrier substantially as effective as a rail. Even a mesh screen could have been removed.

~FOOTNOTE_FOUR
4 Respondent's safety director questioned whether these components were "connections" within the meaning of the standard, and insisted that the armature of 240 volt direct current generators did not, in any event, present an electrical hazard. Respondent's electricians, he claimed, routinely replaced brushes on these units without turning them off (Tr. 62). Because of the dispositions ultimately made of these citations, this conflict will not be resolved.

~FOOTNOTE_FIVE
5 See photograph, respondents exhibit 3.