

CCASE:
SOL (MSHA) v. TOPEKA SAND
DDATE:
19810429
TTEXT:

Federal Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

TOPEKA SAND COMPANY,
RESPONDENT

CIVIL PENALTY ACTION

DOCKET NO. CENT 80-52-M
A.C. NO. 14-00546-05001

DOCKET NO. CENT 80-119-M
A.C. NO. 14-00546-05002 R

DOCKET NO. CENT 80-373-M
A.C. NO. 14-00546-05003

TOPEKA SAND & GRAVEL PIT & PLANT

DECISION

Appearances: Robert J. Lesnick Esq., Office of the Solicitor
United States Department of Labor Room 2106, 911
Walnut Street, Kansas City, Missouri 64106,
for the Petitioner
Helen Winter Topeka Sand Company Route 4, Topeka,
Kansas 66605, pro se.

Before: Judge Jon D. Boltz

The above cases, involving petitions proposing assessment of civil penalties pursuant to provisions of the Federal Mine Safety and Health Act of 1977 (hereinafter the "Act"), 30 U.S.C. 801 et seq., were consolidated and a hearing on the merits was held in Kansas City, Missouri, on March 17, 1981. Respondent was not represented by counsel, however, Helen Winter, who jointly owns the sand and gravel business with her husband, appeared and testified on behalf of the respondent.

At the conclusion of all of the evidence, the parties agreed to waive the filing of briefs and agreed to have a decision rendered from the bench. Accordingly, the decision was made from the bench disposing of all issues in the consolidated cases.

The question of jurisdiction had been raised by the respondent in correspondence contained in the hearing file. I included this correspondence as pleadings in the case since the respondent had not filed any formal pleadings.

BENCH DECISION

The Bench Decision is as follows:

Jurisdiction

The business activities of the respondent in the mining and sale of sand or gravel constitute "commerce" within the meaning of the Act. Section 3 of the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States," et cetera. The word commerce is extremely broad and covers any transaction involving trade or anything similar to traffic. I conclude that the activities conducted by the respondent in the sale of sand or gravel and in the loading of the material onto trucks on respondent's property constitutes "commerce" within the meaning of the Act.

CENT 80-119-M
Citation No. 183375

The petitioner alleges a violation of section 103 (a) of the Act. The petitioner alleges in Citation No. 183375 that the owner of Topeka Sand Company refused to allow an authorized representative of the Secretary entry into the sand and gravel pit and plant for the purpose of conducting an inspection pursuant to section 103 (a) of the Act.

The wording in section 103 (a) which would be pertinent to the evidence in this case is that "authorized representatives of the Secretary ... shall make frequent inspections and investigations ... in mines" Then, going on to subparagraph 2 of that section, it states, "gathering information with respect to mandatory health or safety standards," which, of course, can mean gathering any information in regard to the enforcement of these regulations. It also states in the same section, "in carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person"

In this case, I find that the inspector was an authorized representative of the Secretary and that he did go to respondent's mine and was refused entry. This refusal was temporary, but nevertheless it constituted a violation of section 103 (a) of the Act.

In regard to any penalty, I find that the respondent is a small operator, has no outside employees, and is a family business that has been operated by the respondent for approximately 20 years. The respondent also operated a junkyard in connection with this sand and gravel business. Although the inspector testified that he considered that there was a lack of good faith on the part of Mr. Winter, and I gather this may have been because of a comment from Mr. Winter to the inspector stating that the inspector could inspect the mine if he knew the difference between a junk yard and a gravel and sand operation, I do not find that there was bad faith on the part of Mr. Winter.

I must take into consideration in this case that this is a small operator who may or may not have been totally aware of the implications of the Act. I realize that the mine inspector explained the Act's requirements to him, but I have concluded that this was a technical violation. I am affirming the citation involved and assessing a penalty of \$10.00.

~1134

CENT 80-52-M

Citation No. 183378.

This citation alleges a violation of 30 C.F.R. 56.14-1. The cited regulation states in pertinent part, "Mandatory ... head, tail, and takeup pulleys ... which may be contacted by persons, and which may cause injury to persons, shall be guarded." It is alleged in the citation that the tail pulley on the south stacker belt was not guarded. The exposed pinch point was about 4 feet from the ground.

I find there was no guard on the take-up pulley.

However, the testimony that I find most persuasive in this case is that of Mrs. Winter. She testified that the takeup pulley is located in an area in which it would not be contacted by any person and thus a person would not be subject to getting caught in the takeup pulley. The equipment was never energized unless Mr. Winter turned it on, and, as owner of the sand company, he was the only one in the area who could have been exposed to the takeup pulley. I find under these circumstances that evidence is lacking which would show that the takeup pulley might be contacted by persons and that they might be injured thereby. Therefore, Citation No. 183378 is vacated.

Citations No. 183379 and 183380.

These two citations allege a violation of 30 C.F.R. 56.12-8. The regulation mandates that "power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the hole shall be substantially bushed with insulated bushings."

The evidence is uncontradicted that the power cables or wires did not have bushings. The cables themselves had deteriorated and the outer jackets were not intact, but were hanging in pieces. In such an instance, the metal frame could become energized, even if Mr. Winter was operating it from a distant location. He might have come into contact with it himself at some time or other and it did present a hazard.

I find that these violations were abated in good faith by Mr. Winter and that the gravity was not great under the circumstances of this particular case, this being an operation not involving any employees other than the owner. There are no previous violations in the record. I affirm Citations 183379 and 183380 and the penalty assessment is set at \$20.00 for each of those violations.

Citation No. 183382:

This citation alleges a violation of 30 C.F.R. 56.12-2, which states as follows:

"Mandatory. Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed."

~1135

I conclude that the particular switch referred to by the mine inspector did allow one area to still be energized even though the switch had been turned off. However, the cited regulation uses the words "switches or other controls." The testimony is undisputed that Mr. Winter uses the controls at the generator for controlling the power and not the switch referred to by the mine inspector. As a matter of fact, the testimony was that the switches were always open. Mr. Winter controlled the electricity directly from the power source itself. He followed this method invariably and was the only person involved in the operation of the equipment. Under the circumstances, I find that the electric equipment and circuits were provided with controls in conformity with the cited regulation. Consequently, Citation No. 183382 is vacated.

CENT 80-373-M
Citation No. 183377.

This citation alleges a violation of 30 C.F.R. 56.12-8. I will not reread the regulation since it has already been stated in this decision in regard to the violation alleged in Citations No. 183379 and 183380.

I find the testimony of the inspector persuasive since the wiring which entered the motor was not in conformity with accepted standards in that there were no proper fittings as required, it being a power wire or cable. Although this motor was taken out of service at a later date, nevertheless, at the time it was inspected there was a violation of the regulation. The inspector testified that a junction box, or some other method, could have been used which would have satisfactorily accomplished the purpose of bringing the equipment into conformity with the cited regulation. There was also testimony in regard to the fact that this violation was not abated for some time after the citation was issued and that extensions were given in order to allow the owner to abate the violation. As a matter of fact, the evidence is that the inspector used considerable restraint in extending the time and it wasn't until several months after the violation that the citation was abated. Mrs. Winter testified that when the motor, which was subsequently taken out of service, was purchased it did not have a junction box connected to it.

I find there was a violation of the cited regulation and affirm Citation No. 183377 and assess a penalty of \$72.00.

Prior to this hearing, there were two motions pending, one by the respondent requesting a continuance and the other motion was by the petitioner requesting an order allowing him to amend his petition. The motion to amend the petition is granted and the motion for continuance is denied.

~1136

ORDER

The foregoing Bench Decision is hereby AFFIRMED. The respondent is ordered to pay, within 30 days of the date of this decision, penalty assessments as follows:

CENT 80-119-M, Citation No. 183375	\$ 10.00
CENT 80-52-M, Citation No. 183379	\$ 20.00
Citation No. 183380	\$ 20.00
CENT 80-373-M, Citation No. 183377	\$ 72.00
	\$122.00

Further, in regard to CENT 80-52-M, Citations No. 183378 and 183382 are vacated.

Jon D. Boltz
Administrative Law Judge