

CCASE:
SOL (MSHA) v. J.L. SIMPLOT
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.

J. R. SIMPLOT COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-376-M

A/O NO. 1-00094-05002

MINE: Conda Mine & Mill

DECISION

APPEARANCES: Ernest Scott, Jr., Esq., Office of the Solicitor,
United States Department of Labor, 8003 Federal
Office Building, Seattle, Washington 98174, for
the Petitioner

Blair D. Jaynes, Esq., Assistant General Counsel,
J.R. Simplot Company, One Capital Center, 999 Main
St., Suite 1300, P.O. Box 27, Boise, Idaho 83707,
for the Respondent

Before: Judge Virgil E. Vail

I. PROCEDURAL BACKGROUND

The above-captioned civil penalty proceeding was brought pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The proposals for penalties allege fifteen violations of safety standards.

Pursuant to notice, a hearing on the merits was held in Boise, Idaho, on March 25 and 26, 1980. John M. Moore and Frank W. Clary, Jr., Federal Mine Inspectors, testified on behalf of the petitioner. Lloyd Phelps, Gayland Archibald and Paul Hooper testified on behalf of the respondent. The parties waived filing post hearing briefs.

II. STIPULATIONS

During the course of the hearing, the parties entered into the following stipulations:

1. That respondent operated a mine and mill, the products of which affect Commerce.

~1144

2. That the Mine Safety and Health Review Commission has jurisdiction of the proceedings identified as Docket No. WEST 79-376-M.

3. That between June 19th and 27th Mine Safety and Health Administration inspectors, John M. Moore and Frank W. Clary, Jr., conducted a series of inspections at respondent's mine and mill located at Conda, Idaho. The inspectors had jurisdiction to conduct the inspections.

4. Respondent does not have any previous violations.

5. Respondent has approximately 218 employees working in its mine and mill operations.

6. The imposition or assessment of the proposed penalties will not effect the respondent's ability to continue in business.

7. The size of respondent's company is 791,399 production tons or man hours per year.

8. The size of Conda Mine and Mill is 39,190 production tons or man hours per year.

9. Respondent, J.R. Simplot, is a corporation with its principal office located at Boise, Idaho.

10. Copies of the 15 citations issued in this case were received by respondent, and respondent filed a timely notice of contest as to each of the citations and proposed penalties.

11. The citations were abated in good faith.

III. Counsel for the petitioner moved that Citation no. 351414 be dismissed on the grounds that there is not sufficient evidence to establish the violation charged by the citation. Said motion was unopposed by the respondent and Citation no. 351414 was vacated. This left fourteen citations remaining to be litigated.

IV. The issues in this case are (1) whether the respondent was "operating" a mine at Condo, Idaho between June 19th and 27, 1979, when the inspection was conducted by representatives of the Mine Safety and Health Administration, and (2) did violations of safety standards occur and, if so, what is the appropriate civil penalty for each violation.

The Legality of the Inspection

Respondent conceded that it "operates" a mine and mill at Condo, Idaho, as defined by the Act. However, respondent argues that for three (3) weeks prior to and during the inspection of this mine and mill, the operation had been shut down for extensive maintenance and repairs and that operations had not yet commenced when the subject citations were issued.

~1145

Further, respondent contends that it was engaged in testing, adjusting and modifying the equipment related to its operation of the mine and did not attain full operation until one (1) day after the inspection was conducted.

The evidence supports the respondent's contention that prior to the inspection the Condo mine and mill had been shut down for maintenance and repairs and that during the inspection, it was in the process of starting up. Section 103(a) of the Act provides in part:

"Authorized representatives of the Secretary * * * shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided * * *."

After a careful review of the pertinent parts of the Act relating to inspections, I find no provisions which would prevent an inspection of a mine during periods when it was shut down or in the process of starting up. It must be recognized that such a situation does present special problems for both the operator and the inspectors and those problems should be considered in contemplating the issuance of a citation. A review of the testimony presented at the trial indicates that the inspectors in this case were aware of the situation and considered it when issuing their citations (Tr. 111). However, the fact that the mine and mill were not in full operation does not support Respondent's position that the citations should be vacated. Rather, if the alleged violations occurred, the fact that the mine and mill was in the process of starting up may be taken into account in considering the gravity, negligence and good faith of abatement efforts in assessing appropriate penalties under section 110(i) of the Act. Secretary of Labor v. Van Mulvehill Coal Company, Inc., FMSHRC Docket No. SE 79-127 (February 25, 1980).

Citation No. 350132

This citation involved an alleged violation of 30 C.F.R. 55.9-7. (FOOTNOTE.1)

~1146

The inspector issued the citation because a walkway alongside a conveyor belt was unguarded on the portion outside the mill building. The conveyor belt involved in this part of the operation was a reject conveyor belt which carried oversized material from inside the grinding mill to the outside. It was the portion of the conveyor belt outside the building which was allegedly unguarded. There was a walkway adjacent to the conveyor belt which was constructed from the framework of the conveyor.

The respondent contended that the conveyor belt had been out of service for a period longer than a year as the process of handling the material had changed and this belt was no longer used. The respondent abated the citation by placing a lockout device on the power switch to the belt.

This citation should be vacated. The uncontradicted evidence shows that the conveyor belts involved herein had been out of service for over a year due to a change in the process of handling the material (Tr. 207-208). Further, the evidence shows that the area of the conveyor that was unguarded was a part of the belt outside the building approximately 20 feet in length. The sole purpose of the walkway was for maintenance work, involving the pulley at the end of the belt. I find that there was no safety hazard here by reason of the conveyor belt having been out of service for over a year. Further, the location of the unguarded walkway was not a regularly travelled walkway but had been used only for servicing the pulley by employees for maintenance purposes and therefore afforded no risk of injury to employees in the area of this building should the conveyor belt have become activated again. The standard violated in this case requires that unguarded conveyors with walkways be guarded. It is not that the walkway involved herein was used infrequently, which causes me to vacate this citation, but rather that the equipment had been out of service for such a long period of time so as to make it unlikely that the belt would be started up without considering the safety factors.

Citation No. 350133

This citation involved an alleged violation of 30 C.F.R. 55.12-8. (FOOTNOTE.2) The inspector issued the citation alleging that the flexible conduit containing electrical wires to a motor was broken. The conduit involved herein was located on top of storage silos at the respondent's mine. The electric motor, served by the wiring in the conduit, operated a shuttle conveyor that travelled back and forth to direct the discharge of materials to the proper silo.

~1147

The mine inspector testified that he observed that the conduit containing the wiring to the motor was broken by being separated at a point where it entered the junction box on the motor (Tr. 53). He further testified that there was considerable vibration and stress involved here and that the electrical wire contained in the conduit could sustain damage to the insulation covering the wire and cause an electrical shock. The inspector admitted that not many people go into this area where the conveyor was located but that maintenance people do go to the area.

The respondent's safety coordinator, Mr. Archibald, testified that he observed that the conduit was separated approximately three fourths to a half an inch (Tr. 214). The respondent argued that the electrical wiring in the conduit was covered with insulation and that the insulation was not damaged.

I find that there was a violation of the standard involved herein. The standard, 55.12-8, requires that power wires be adequately insulated where they pass into or out of electrical compartments. I find that the broken conduit presented a potential hazard of an electrical short occurring due to the movement occasioned by the operation of the shuttle conveyor. The fact that the area was not frequented often by employees does not diminish the potential for a serious injury should a short occur to those employees who are required to visit this area from time to time. This citation is affirmed.

Citation No. 350134

This citation involved an alleged violation of 30 C.F.R. 55.14-1. (FOOTNOTE.3) The inspector issued the citation because the head pulley on the shuttle conveyor belt located on top of the storage silos was unguarded. This is the same area referred to in Citation no. 350133 and to which the testimony of the inspector was to the effect that it is an isolated area where only maintenance and clean up employees would go (Tr. 28).

The respondent's witness, Mr. Archibald, testified that he did not know why the guard was off the head pulley but that no one was to go to this area while the mill was operating due to dust exposure.

I find that the evidence is uncontroverted that the pulley was not guarded and a violation of the mandatory safety standard occurred. However, the gravity of the violation is not great in that it would be unlikely an employee would be in the area while the belt is running. There is a risk here, even though remote, in that maintenance people could be in the area when the equipment is being operated or tested. This citation is affirmed.

Citation No. 350135

This citation also involved an alleged violation of 30 C.F.R. 55.14-1. The citation was issued because the calcinder feed head pulley adjacent to a travelway was not provided with a guard. The inspector testified that this is an induced belt near a walkway where a person could be injured in a pinch point between the head pulley and the belt (Tr. 33). He stated that there was framework around the belt, but that a gap existed where a person could be injured if drawn into the pulley. The inspector stated that the walkway along the belt was also induced and that a dusty condition existed in the area. That condition could contribute to a fall or injury due to a person walking by slipping and falling into the belt and being drawn into the pinch point. The inspector conceded that the company had considered the framework of the conveyor around the area of the pulley as an adequate guard, but stated that he disagreed with this and believed someone could be drawn into the pinch point (Tr. 35). The evidence, particularly a photograph admitted as Exhibit 17, showed that the actual pinch point on the head pulley is located behind a plate which would protect this area from direct contact by a person. However, the inspector indicates that he issued a citation on this alleged violation believing that someone could fall, trip, or slip and place his hand on the belt and be drawn into the pulley (Tr. 68).

I find that the inspector's observations and concerns regarding this pulley are persuasive and that his decision that a person might have suffered an injury in this area meets the description of what is intended by the standard involved herein and that a violation occurred. The gravity was slight as there was some protection and all the inspector required was for additional protection to be applied in the form of a screen. This citation is affirmed.

Citation No. 350136

This citation involved an alleged violation of 30 C.F.R. 55.11-1.(FOOTNOTE.4) The inspector issued the citation because a safe access was not provided to the valve on the slurring line located approximately 10 feet above the floor. This was abated by removal of the slurry line valve. The evidence established that this was part of a new installation and that none of the respondent's employees accompanying the inspector on his inspection knew how often the valve would be used and how a person would get to the valve to turn it off or on. It was subsequently learned that the valve would be used to remove the rod mill from the system which could be once every three or four months. (Tr. 223). The testimony of the respondent's safety coordinator was that the valve had been operated from a step ladder, which in his opinion was adequate for the number of times the valve was operated.

I find that this citation should be vacated. It is apparent from the evidence that the valve was not operated on a regular basis and that a ladder would constitute a safe access to the

valve on occasions when it was used.

Citation 351404

This citation also involved an alleged violation of 30 C.F.R. 55.14-1. The citation was issued because there was approximately one-half inch clearance between the skirting and conveyor belt on a continuous conveyor belt from the rod mill which needed guarding. The inspector testified that he found no negligence on the part of the respondent. Additionally, he stated that he did not believe a serious accident would occur, but that someone could get their finger in the pinch point during clean up (Tr. 84).

The respondent's safety coordinator did not view the pinch point as a safety hazard. He felt anyone catching a hand in this area would not be pinched, but rather the belt would go up and over the pulley due to the flexibility of the belt (Tr. 232-233).

The evidence indicates that the reason for possible injury here is due to the stiffness of the belt. In viewing the photographs (Exhibits 8, 9, 10 and 11) and other evidence relating to this violation, I find a danger existed in this area but that if an injury would occur it would be minor as testified to by the inspector. The citation is affirmed.

Citation 351405

This citation also involved an alleged violation of 30 C.F.R. 55.14-1. The citation was issued because the return troughing idler for the rod mill feed belt was not guarded. This return idler was approximately 5 feet high and in an area not usually travelled, but where clean up and maintenance people would be. The inspector testified that there was no negligence involved on the part of the respondent, but if someone was caught in this belt the injury could be serious.

The respondent's witness did not refute the fact that it would be possible to get caught in the return idler involved herein, but wasn't sure the guard applied would prevent such an occurrence. Further, it was felt that this was not a travelway or area used by persons, as a crossover existed here to cross the belt (Tr. 240).

I find that a violation of the standard occurred. There was little or no negligence but that an injury, if it occurred, could be serious. The citation is affirmed.

Citation 351406

This citation involved an alleged violation of 30 C.F.R. 55.14-6.(FOOTNOTE.5) The inspector stated the citation was issued because the head pulley guard for the number 275 conveyor belt was removed to replace a bearing and was not replaced. The inspector testified that the pulley

~1150

was approximately 4 to 5 feet above the floor near a walkway and that when the belt was observed it was moving, but there was no material being carried on it (Tr. 89-90). The inspector stated that he knew the plant was in the process of being "started-up" after repairs had been made, but that in his opinion the guard should have been on this pulley to protect anyone coming into the area and contacting the pulley.

The respondent's safety coordinator testified that the guard was off this pulley and standing against the wall while the newly replaced bearing was being tested. The standard provides that guards shall be in place except during testing. The inspector confirmed that he had been told that the guard had been removed to replace a bearing by the maintenance superintendent and that this was part of the start up of the plant (Tr. 131-132).

I believe the evidence here supports the respondent's contention that the guard was removed for testing the new bearing, and falls within the exception in the standard that guards shall be in place on moving machinery except when testing. The preponderance of the evidence shows that the plant had been down for repairs and was being put back into operation when the inspection was conducted. For the reasons stated above, I vacate this citation.

Citation 351407

This citation involved an alleged violation of 30 C.F.R. 55.14-1. The inspector testified he issued the citation because the pinch point on the head pulley for the calcinator mill feed conveyor belt was not fully guarded. The pulley was guarded by a 6 inch piece of metal with approximately an 18 inch gap exposing a switch gear assembly. The inspector stated that there were steps near this location where a person going by could trip and fall, putting his arm in the pinch point of the pulley. The guarding of the pulley in this location was similar to the pulley in Citation no. 350135 and respondent argued that the guard utilized in this location was adequate.

I find the evidence supports the inspector's position that additional guarding was needed at this conveyor as it was near a walkway with steps near the pulley. A possibility of a fall created a condition that warranted a further guarding of the area where a person's arms or clothing might come in contact with the belt. There was little negligence here as the pulley was guarded to some extent and the respondent apparently thought this was adequate. However, the inspector's observations and views in this case persuade this writer that the pulley was not fully guarded and the citation is affirmed.

Citation 351408

This citation involved an alleged violation of 30 C.F.R. 55.12-20.(FOOTNOTE.6) The inspector issued the citation because dry wooden platforms, insulated mats, or other non-conductive materials were not provided for the power control switch gear located in the pump house. The inspector testified that upon entering the pump house containing electrical equipment switches he observed one to two inches of water standing on the floor (Tr. 96).

The respondent's safety coordinator testified that when the pumps controlled by these switches are operating the area is normally dry (Tr. 267).

I find a violation of the mandatory safety standard occurred. Although it may not be normal for the area to be wet, the possibility of such an occurrence is always present and anyone who is required to go into this area to operate the switches is exposed to a danger of an electrical shock. The citation is affirmed.

Citation 351409

This citation involved an alleged violation of 30 C.F.R. 55.11-1. The inspector issued the citation because a safe means of access was not provided to the number ten (10) calcinder fresh water valve located in the pump house. The testimony was that this was in the same pump house as described in the prior citation and that the valve was approximately nine feet above the pump floor. From foot prints on an electrical motor below the valve, the inspector concluded that someone had stood or had been standing on the electrical motor to operate the valve (Tr. 99). The inspector testified that there was water on the floor in this area and that an electrical hazard existed to anyone standing on the motor, besides a possible slip and fall condition in reaching to operate the valve (Tr. 100). The respondent argues again, as he did in the situation involving the overhead valve in the slurry line, that it was not frequently used and that safe access was provided with portable ladders.

I find that the same condition does not exist here as in citation 330136, as the access is apparently more difficult, as displayed in a photograph of the area (Exhibit 21). Citation no. 351409 is affirmed.

Citation 351412

This citation involved an alleged violation of 30 C.F.R. 55.4-33. (FOOTNOTE.7) The inspector stated he issued the citation because there was a compressed gas cylinder on a portable truck located on the third

~1152

floor landing in the mill that had the valves opened on the cylinder while not in use. He stated the hoses were strung down the stairs to the second floor landing with the torch assembly hung on a hand rail. It was explained that the valves in question control the passing of oxygen and acetylene through two separate hoses which terminate at the torch to become mixed into a highly volatile and explosive gas (Tr. 103-104).

The respondent's safety coordinator testified that this is one of the areas which the respondent has stressed in their safety training. However, he stated that it is difficult to achieve compliance even though the employees are warned that continued violations could jeopardize their jobs (Tr. 259).

It is apparently a common violation often found in safety inspections throughout the industry inspite of the efforts on the part of safety trainers to have employees comply with the standard. However, the Act imposes a duty upon the operators to see that the employees comply with all mandatory safety and health standards and the citation is affirmed.

Citation No. 351413

The citation also involved an alleged violation of 30 C.F.R. 55.14-6, which is similar to citation 351406. The citation was issued because the guard for the dryer trunnion roller had been left off after starting the dryer up. The inspector testified that he realized that periodic adjustments had to be made to the dryer. However, during the two hours he was on the property, prior to the start up, no adjustments had been made. He felt that the guard should be replaced between the times when adjustments had to be made (Tr. 106). He testified that there was an elevated work platform around the dryer trunnion roller and with the guard off a person's arm could get caught in the pinch point located there (Tr. 108).

Again, the respondent's safety coordinator testified, as in the case of the prior violation described in Citation no. 351406, that the plant was in the process of "starting up" after a complete shut down, that it was necessary to remove the guard here in order to make periodic adjustments on the bearing; that the platform around this area is only used by maintenance employees, and for the purpose of working on this specific equipment (Tr. 263-264). The inspection involved herein occurred during the night shift and that there was not a maintenance or mill superintendant on that shift.

Again, the question presents itself as to whether there was a violation of the safety standard when the guard was left off or was this within the exception providing that guards shall be securely in place except when testing. The evidence does not support the respondent's position in this instance as there were no present "testing" such as "adjusting" the roller being done here. Further, apparently the guard had been off for sometime and it cannot be argued with any degree of logic that safety guards can be removed and left off for extended periods of time while

the plant is being started up. The negligence here is not great, nor is the gravity, as the area is not frequented by employees other than maintenance personnel. However, good safety practice would dictate that the guard be on while this potentially dangerous equipment is running, except when actual work is being performed on it. The citation is affirmed.

Citation No. 351415

This citation also involved 30 C.F.R. 55.14-6. The citation was issued because half of the guard was left off of the classifier screw located on the upper floor of the mill. The inspector testified that this involved an auger type screw approximately 20 feet long and located 3 to 3 1/2 inches off a walkway. The upper half of the guard covering this screw was off (Tr. 109-110).

The respondent's safety coordinator testified that he was in the inspection party and observed the guard off in this location and that he didn't know exactly why it was off. However, he again stated that the plant was in the process of starting up after being shut down and he assumed that the guard was off for some "valid reason" relating to the start up (Tr. 265-266).

Although guards may be removed under the safety standard for purposes of testing, there is no evidence here that this is what was occurring when the inspection was made at this location. The inspector stated that there was a man described as the upper floor operator on the inclined walkway adjacent to the screw looking into the exposed area. The inspector testified that he realized it was start up time and asked questions if any adjustments were being made. Apparently he was not given a satisfactory answer (Tr. 109). With this uncontradicted testimony the only conclusion is that the guard was removed and allowed to remain off in violation of the standard. The inspector further testified that there was reason to believe a persons clothing could be caught in the moving screw drawing a person in and could cause an injury (Tr. 110). The citation is affirmed.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of the proceeding. At all times relevant, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The inspection of Respondent's mine and mill was a proper and legal inspection under section 103(a) of the Act.

3. The Respondent did not violate the regulations cited in Citations nos. 351414, 350132, 350136 and 351406.

4. The Respondent violated the regulations cited in Citation nos. 350133, 350134, 350135, 351404, 351405, 351407, 351408, 351409, 351412, 351413, and 351415.

ORDER

Citation nos. 351414, 350132, 350136 and 351406 are hereby VACATED. Based upon the criteria set forth in section 110(i) of the Act, the penalties determined proven are as follows:

CITATION NUMBER	AMOUNT
350133	\$ 34.00
350134	40.00
350135	40.00
351404	40.00
351405	40.00
351407	40.00
351408	90.00
351409	40.00
351412	44.00
351413	40.00
351415	90.00
	\$538.00

It is further ordered that the respondent pay the above penalties in the total amount of \$538.00 within 30 days from the date of the decision.

Virgil E. Vail
Administrative Law Judge

AA

~FOOTNOTE_ONE

55.9-7 Mandatory. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

~FOOTNOTE_TWO

55.12-8 Mandatory. 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 holes shall be substantially bushed with insulated bushings.

~FOOTNOTE_THREE

55.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup 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.

~FOOTNOTE_FOUR

55.11-1 Mandatory. Safe means of access shall be provided and maintained to all working places.

~FOOTNOTE_FIVE

55.14-6 Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated.

~FOOTNOTE_SIX

55.12-20 Mandatory. Dry wooden platforms insulating mats, or other electrically non-conductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, noncurrent-carrying parts of the power switches to be operated may be used.

~FOOTNOTE_SEVEN

55.4-33 Mandatory. Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used.