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SOL (MSHA) v. ASSONET SAND  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATIVE (MSHA)  
PETITIONER

Civil Penalty Proceeding  
Docket No. YORK 80-123-M  
A.O. No. 19-00283-05005

v.

ASSONET SAND & GRAVEL CO.,  
RESPONDENT

Assonet Mine & Mill

DECISION

Appearances: David L. Baskin, Attorney, U.S. Department of Labor,  
Boston, Massachusetts, for the petitioner;

Before: Judge Koutras

Statement of the Case

This proceeding was initiated by the petitioner against the respondent through the filing of a proposal for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing civil penalties for five alleged violations of certain mandatory safety standards promulgated pursuant to the Act. A hearing was held in Providence, Rhode Island, on April 1, 1981, and while the petitioner appeared pursuant to notice, respondent did not.

Issues

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues are identified and disposed of in the course of this decision.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

I consider the respondent's failure to enter an appearance at the hearing to be a waiver of any further rights to be heard in this matter. In the circumstances, I ruled that respondent was in default, the hearing proceeded as scheduled, and petitioner presented testimony and evidence in support of the citations which were issued in this case as well as its proposal for assessment of civil penalties.

With regard to the failure by the respondent to enter an appearance in this case, the record reflects that the notices of hearing in these proceedings were mailed to the parties by registered mail on February 5 and March 20, 1981, and the return postal service registered mail receipts reflect that both the petitioner and the respondent's counsel received actual notice of the hearing. Although the starting time of 9:30 a.m., was delayed until 10:30 a.m., at the request of petitioner's counsel, respondent's counsel was notified of the one-hour delay through telephone calls made to his office on the afternoon of Tuesday, March 31, 1981, the day before the scheduled hearing, both by petitioner's counsel as well as my secretary. Additional calls were made on the morning of April 1, 1981, both by petitioner's counsel as well as my secretary in an effort to ascertain the whereabouts of respondent's counsel. His answering service confirmed that counsel had received the previous messages concerning the one-hour delay in the starting time of the hearing, but efforts to ascertain his whereabouts were to no avail. Further, petitioner's counsel stated that prior attempts by him to contact respondent's counsel for the purpose of discussing the case in preparation for the hearing and exploring possible stipulations were unsuccessful.

I was present at the hearing room from 9:00 a.m. on April 1, 1981, until the conclusion of the hearing at approximately 1:00 p.m., and at no time did respondent's counsel appear. The hearing began at 10:30 a.m., and concluded at approximately 1:00 p.m. In view of the foregoing circumstances, I can only conclude that respondent's counsel never intended to enter an appearance, and his failure to do so has resulted in respondent's being held in default. I conclude that respondent has been given more than an adequate opportunity to be heard, and I conclude that respondent has waived its right to any further hearing and that the issuance of any show-cause order would be a fruitless gesture. I have considered this case de novo and my decision in this regard is made on the basis of the evidence and testimony of record as presented by the petitioner in support of its case at

the hearing.

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The citations issued in this case, exhibits P-1 through P-4, and P-8, are as follows:

Citation No. 222590, 5/14/80, 30 CFR 56.14-6

A section of a guard that was provided for the tail pulley on the 3/8" conveyor was removed and not replaced. There was one man in the area. The pinch points were exposed.

Citation No. 222591, 5/14/80, 30 CFR 56.14-6

A guard that was provided for the tail pulley of the 3/5" stone conveyor was constructed of light weight expanded metal. A plant employee bent the side of the guard up to a right angle to the conveyor frame which exposed the tail pulley pinch point. There was one man in the area.

Citation No. 222592, 5/14/80, 30 CFR 56.14-6

The top section of a guard that was provided for the V-belt drive on the scalping screen was removed and not replaced. The pinch points were exposed. There was one man in the area.

Citation No. 222593, 5/14/80, 30 CFR 56.14-6

A guard that was provided for the fly wheel on the scalping screen was removed and not replaced. There was one man in the area.

Citation No. 222537, 5/20/80, 30 CFR 56.11-2

A hand railing that was provided for the elevated walkway around the tail pulley of the upper swing sand conveyor was removed and not replaced. One man works in the area. The height is approximately 20 feet.

#### Testimony and Evidence Adduced by the Petitioner

MSHA inspector Earl Giovanni confirmed that he conducted an inspection of respondent's mining operation on May 14, 1980, and was accompanied by plant foreman Frank Ferriera. The mine in question is a sand and gravel operation, was in operation at the time of the inspection, and the mine employs approximately five individuals. The plant was in production at the time of the inspection, and he confirmed the existence of the conditions and practices which he cited in each of the citations which he issued on May 14, and confirmed that they were violations of the cited mandatory safety standards (Tr. 17-47); exhibits P-1, P-2, P-3, and P-4). He also confirmed the conditions cited in a citation which he issued on May 20, 1980, and testified that the conditions were in violation of mandatory safety standard section 56.11-2 (Tr. 47).

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With regard to citation no. 222590, Mr. Giovanni testified that the guard which had been installed at the tail pulley location which was cited had been cut away with an acetylene torch to facilitate access to the tail pulley bearing. The opening was large enough for a person to place his hand through, and in doing, he would have contacted the pulley pinch points. He also stated that a plant laborer admitted cutting out the hole so that he could service or oil and grease the bearing (Tr. 18-19). Although he observed no men in the immediate area during the inspection, he observed some foot prints on the ground around the tail pulley location, and the tail pulley was adjacent to a walkway. He believed that anyone walking by with loose clothing would be in danger of contacting the exposed pinch point, and he believed the condition was dangerous (Tr. 21-22).

With regard to citation no. 222591, the inspector testified that the guard installed for the tail pulley in question was marginal in that it was constructed of very light mesh wire. The guard had been bent up at a right angle, thereby completely exposing the entire end of the tail pulley. He believed that someone had bent the guard in such a fashion to facilitate greasing and Mr. Ferriera confirmed that this was true. The pulley was running at the time of the inspection, the cited condition was obvious, and persons had to walk by the location to reach a nearby walkway (Tr. 27-28).

Mr. Giovanni testified that citation no. 222592 was issued because a guard which had been provided for the V-belt drive and scalping screen had been removed and was lying within six feet of the screen in the walkway and had not been replaced. Mr. Ferriera admitted that someone forgot to put the guard back on the equipment, and the inspector believed it had been taken off to change a belt and had been off for four days (Tr. 32-33).

Inspector Giovanni testified that citation no. 222593 was issued after he observed that a guard which had been provided for the flywheel on a scalping screen had been removed and left lying on an adjacent walkway. The screen was the same one previously cited in citation no. 222592, but the flywheel in question was on the opposite side of the screen drive pulley previously cited (Tr. 37). There was evidence that the guard weld had broken and that the guard had never been replaced. The condition was obvious and someone could have been injured if their hand or arm were caught in the unguarded flywheel (Tr. 39). The scalping screen, flywheel, and V-belt were all running when he observed the conditions (Tr. 44).

Citation No. 222537 was issued after the inspector observed that the plant operator had removed the hand railing on an elevated walkway around the tail pulley of a swinging sand conveyor, and the plant laborer admitted that he did so because it was in his way (Tr. 47-48). The railing citation was the second one he issued for the same location, and the previous one was issued on August 21, 1979, for the very same condition (Tr. 48). The platform location was some 20 feet off the ground, and he observed a laborer working on the platform cleaning sand off

the platform at the time of his inspection (Tr. 49).

## Findings and Conclusions

### Fact of violations

I conclude and find that the testimony and evidence adduced by the petitioner establishes the fact of violation as to each of the citations issued in this case. Accordingly, all of the citations are AFFIRMED.

### History of prior violations

Inspector Giovanni testified that during prior inspections which he conducted on August 21, 1979, he issued 19 citations, and that another inspector issued eight prior citations during an inspection conducted on May 4, 1978. Included among these are six prior citations for violations of section 56.14-4 6, and eight prior citations for violations of section 56.11-2 (Tr. 15-16). Petitioner's counsel stated that a computer print-out is not available, and that petitioner has no way of knowing whether the violations alluded to by Mr. Giovanni are in fact valid for purposes of establishing a prior history of violations (Tr. 16). One of the prior section 56.11-2 citations was a repeat of the very same handrail citation issued by the inspector. Under the circumstances, I accept the inspector's testimony as credible evidence of respondent's prior history of violations, and have considered this in assessing the penalties in this case.

Size of business and effect of penalties on respondent's ability to continue in business.

The inspector testified that the plant employed five individuals, and he believed it is a medium-sized operation in terms of comparison with similar plants he had inspected (Tr. 62). I conclude and find that the plant in question is a small-to-medium sized operation, and absent any showing to the contrary, I further find that the penalties assessed for the citations in question will not adversely affect the respondent's ability to continue in business.

### Gravity

The inspector's testimony supports a finding that all of the citations issued in this proceeding were serious (Tr. 27-28, 33-34, 39, 44, 49). The equipment which was unguarded was running, the locations were near or in close proximity to walkways where men obviously passed closely by, and the inspector observed a man working on the elevated platform where the handrail had been removed.

### Good faith compliance

The inspector's testimony, as well as the abatement notices, reflect that all of the conditions cited were corrected and abated within the time prescribed by the inspector either by replacing or repairing the guards in question, as well as the missing handrail, and I have considered this in assessing the



penalties for the citations which I have affirmed (Tr. 26, 28, 36, 39, 50).

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Negligence

The testimony presented by the inspector reflects that the guards which were installed at two locations, citations 222590 and 222591, were deliberately cut away and bent back to facilitate maintenance or greasing. In these circumstances, I conclude and find that these two citations resulted from the respondent's reckless disregard of the mandatory safety standards cited, and that the citations amount to gross negligence. As for the remaining citations, I conclude that the evidence adduced supports a finding of ordinary negligence in that the respondent failed to exercise reasonable care to prevent the conditions cited.

#### Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalties are appropriate and reasonable for each of the citations which I have affirmed:

Citation No.	Date	30 CFR Section	Penalty Assessment
222590	5/14/80	56.14-6	\$ 250
222591	5/14/80	56.14-6	250
222592	5/14/80	56.14-6	195
222593	5/14/80	56.14-6	195
222537	5/30/80	56.11-2	210
Total			\$ 1100

#### Order

The respondent IS ORDERED to pay civil penalties in the amounts shown above, totaling \$1,100 within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras  
Administrative Law Judge