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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. WEST 80-332-M A/O No. 45-02140-05004-A
v.	
FRANK L. MILES, RESPONDENT	DOCKET NO. WEST 80-333-M A/O No. 45-02140-05005-A
BEN LEILER, RESPONDENT	Miles Sand & Gravel Company Upper Dickey Pit Silverdale, Kitsap County, Washington

DECISION

APPEARANCES:

Edward R. Fitch Esq.
Office of the Solicitor
United States Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203,
for the Petitioner

Mr. Frank L. Miles, pro se
P.O. Box 130
Auburn, Washington 98002

Mr. Ben Leiler, pro se
Miles Sand & Gravel Company
P.O. Box 130
Auburn, Washington 98002,
for the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

The above two cases, which were consolidated for hearing, involve alleged violations of section 110(c) of the Federal Mine Safety and Health Act of 1977. (FOOTNOTE.1)

The president of Miles and Sand and Gravel Company and the plan superintendent are alleged to have "knowingly authorized, ordered, or carried out" the alleged violation of 30 C.F.R. 56.11-1 cited in Withdrawal Order No. 351863, issued May 1, 1979. The cited regulation requires that a safe means of access shall be provided and maintained to all working places. The withdrawal order alleged that an employee was observed walking the reject conveyor belt with a grease gun in his hand. It further alleged tha the reject conveyor is 300 feet long and approximately 30 feet above the ground at its highest point. Both respondents filed written statements denying the allegations of the petitioner.

FINDINGS OF FACT:

1. On May 1, 1979, Miles Sand & Gravel Company was a corporation and its president was Frank L. Miles, respondent, and the plant superintendent was Ben Leiler, respondent. (Exhibits 4 and 5).

2. The mine where the alleged violation took place is a surface sand and gravel mine with seven employees. (Exhibit 5).

3. Miles Sand & Gravel Company has more than one plant location and is a medium sized sand and gravel operation located in the State of Washington. (Tr. 42).

4. Miles Sand & Gravel Company paid a penalty assessment of $150.00 for the violation of 30 C.F.R. 56.11-1 alleged in Withdrawal Order 351863, issued May 1, 1979. (Exhibit 8).

5. The corporate operator has a history of seventeen paid violations and the respondents have no previous violations (Exhibit 8, Tr. 47).

6. The violation alleged in Withdrawal Order No. 351863 was abated promptly and in good faith by the corporate operator. (Tr. 145, Exhibit 1).

7. At the time of the inspection on May 1, 1979, the MSHA inspector observed and photographed an employee of the corporate operator walking up the reject conveyor toward the head pulley with a grease gun in his hand. (Tr. 25, Exhibit 7).

8. The conveyor is approximately 300 feet long and 30 to 40 feet above the surface of the ground. The conveyor belt itself is approximately 30 inches wide. (Tr. 71).

9. On the day of the inspection, May 1, 1979, the means of access provided to an employee in order to grease the head pulley of the conveyor belt was to either walk up the conveyor belt or to climb up the reject rock material which falls off the end of the conveyor and forms a pile on the ground. (Tr. 37).

10. The accumulation of rock material from the end of the conveyor builds in height until it is sufficiently high enough to allow an employee to walk up the refuse pile and grease the head pulley at the end of the conveyor belt. (Tr. 37).

11. In order to abate the withdrawal order for the alleged failure to provide a safe means of access to a working place, the employees of the corporate operator lowered the elevated grease fittings to a safe lubricating location. (Exhibit 2).

12. On February 5, 1979, at another gravel pit owned by the corporate operator and located in the State of Washington, an employee was injured, after greasing the head pulley on the elevated end of a conveyor, when his foot slipped on the conveyor belt and he fell approximately 15 feet into a sand pile. The conveyor was protected with a walkway and railing. (Exhibit 6).

ISSUES:

1. On May 1, 1979, did the corporate operator fail to provide and maintain a safe means of access to the working area, thus violating 30 C.F.R. 56.11-1 as alleged in the withdrawal order?

2. If so, did the respondents knowingly authorize, order, or carry out such violation within the meaning of section 110(c) of the Act?

DISCUSSION:

Respondent Ben Leiler made admissions which go to the unsafeness of the access to the head pulley and also go to his knowledge of unsafeness. He stated to the inspector that it was very "taboo" to grease conveyors in the manner being used, but that they did not have the manpower to install greasing locations. (Tr. 39). At the time of the inspection, he also stated to the inspector that a few months prior to the inspection on May 1, 1979, an employee had been injured at their other plant when he fell approximately 15 feet into a sand pile from a conveyor belt while greasing the head pulley. That conveyor was equipped with a walkway and railing, but the conveyor observed by the inspector on May 1, 1979, was not so equipped.

There were two options mentioned as access open to employees who were maintaining and greasing the head pulley and any other parts connected with the conveyor. One was the method observed by the MSHA inspector, with the employee walking up the conveyor, and the other method was to climb up the reject pile at the end of the conveyor after the pile was of sufficient height.

Witnesses for the respondents gave the opinion that it was safe to climb the reject pile in order to service the head pulley. However, even if this were true, if there is no reject pile at the time, the only means of access would be for an employee to walk up the conveyor belt.

Mr. Leiler agreed that it was hazardous to walk up the conveyor belt and that he had intended to correct the situation by lowering the grease fittings to ground level. This was his intention after the employee fell from the conveyor belt several months earlier, and was injured. The reason given for the failure to install the lowered fittings was a lack of time, since all available men were on production. It is significant that there are other reasons why an employee might have to climb up the reject pile other than to grease the head pulley. Rollers have to be changed periodically on the conveyor and a motor or the V-belt drives might have to be changed.

Under the circumstances, there was no consistent and safe means of access to the work area provided by the corporate operator. According to the employee who was observed walking up the conveyor belt, this was a regular method of access to the area which was to be greased. Thus, the petitioner has shown by a preponderance of the evidence that a safe means of access to the working area was not maintained and provided and that there was a violation of 30 C.F.R. 56.11-1.

The next question was whether or not respondents knowingly authorized, ordered, and carried out such violation within the meaning of section 110(c) of the Act.

The Commission has found that Congress did not intend that "knowingly" should be synonymous with "willfully". It has also supported a judge's finding that "knowingly" as used here means "knowing or having reason to know". Secretary of Labor, Mine Safety and Health Administration v. Kenny Richardson, BARB 78-600-P, (Jan. 19, 1981).

Respondent Ben Leiler, by his own admissions, knew that access to a working place by walking up the conveyor belt was unsafe or hazardous prior to the date of the inspection on May 1, 1979. He told the MSHA inspector that he had wanted to move all grease locations down to ground level since the earlier experience of the employee falling off of the conveyor belt. However, no changes were made until after the withdrawal order was issued on May 1, 1979. By the following day, the work of lowering the grease fittings was accomplished. Thus, no action was taken until an MSHA inspector happened along and observed the violation taking place. I conclude from his own admission that respondent Ben Leiler knew or had reason to know of the continuing violation on or before May 1, 1979, and, as superintendent for the corporate operator, that he did nothing about it. Accordingly, he violated section 110(c) of the Act as alleged by petitioner.

The evidence does not show that respondent Frank L. Miles knew or had reason to know that a safe means of access was not provided and maintained to the working place on or before May 1, 1979, that being the date that the withdrawal order was issued and the cited regulation was violated. There

was hearsay testimony from respondent Leiler indicating that Miles may have been aware of the fact that employees were walking up the conveyor belt to grease the head pulley, but this evidence is neither conclusive nor substantial.

CONCLUSIONS:

1. The undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter.

2. The Miles Sand & Gravel Company is a corporation and on May 1, 1979, it violated 30 C.F.R. 56.11-1 as alleged in Withdrawal Order No. 351863 in failing to provide and maintain a safe means of access to a working place.

3. Respondent Ben Lieler violated section 110(c) of the Act as alleged in the complaint of the petitioner.

4. Petitioner has failed to prove that respondent Frank L. Miles violated section 110(c) of the Act as alleged.

ORDER

The petition filed in DOCKET NO. WEST 80-332-M, Frank L. Miles, respondent is hereby dismissed. In DOCKET No. WEST 80-333-M, Respondent Ben Leiler is found to have violated section 110(c) of the Act and is ordered to pay a penalty assessment of $250.00 within 30 days of the date of this decision.

Jon D. Boltz
Administrative Law Judge

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~FOOTNOTE_ONE
Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation ... shall be subject to the same civil penalties, fines, ... that may be imposed upon a person under subsections (a) and (d).