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SOL (MSHA) v. MISSOURI GRAVEL
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Federal Mine Safty and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. LAKE 79-215-M A.C. No. 11-01176-05002
v.	Barry Plant No. 8 Dredge and Mill
MISSOURI GRAVEL COMPANY, RESPONDENT	

DECISION

Appearances: Janet M. Graney, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
James A. Burstein, Esq., and Thomas S. Foster, Esq., for Respondent.

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., for assessment of civil penalties for an alleged violation of a mandatory safety standard. The case was heard at Springfield, Illinois. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Missouri Gravel Company, operated a plant known as the Barry Plant No. 8 Dredge and Mill in Pike County, Illinois, which produced sand and gravel for sales in or substantially affecting interstate commerce.

2. Material was transported through the plant by a conveyor belt that was powered by a motor-driven pulley. The belt traveled about 350 feet per minute. The plant operator, Leslie Perrine, controlled the head pulley by a main switch panel at the lower level of the plant.

3. The head pulley was about 30 inches in diameter and consisted of a motor, a feed belt drive and a gear reducer. It was surrounded by a work platform and was about 30 feet above the plant's surface. A 50-foot walkway ran parallel to the belt between the tail pulley on the plant surface and the head pulley and provided the only access to the work platform. A small stairway led to the walkway at the lower end. A "no entry" sign was at the top of the stairs, on a detachable chain that went across the landing. This was put there to keep out unauthorized personnel.

4. A waist-high handrailing extended along the perimeter of the work platform and the outside of the walkway. There was no rail between the conveyor belt and the walkway or between the work platform and the pinch point, where the belt revolves around the head pulley. The walkway and work platform were constructed of metal grating and exposed to the weather.

5. Robert Rohs, the plant superintendent, traveled on the platform about twice a week for a visual inspection of the head pulley while the conveyor was running. It was his practice not to move closer than 20 to 24 inches from the pulley. If he needed to get closer, he would first notify the plant operator to shut down the conveyor. The plant operator went up on the platform about twice a week to grease the head pulley and, as needed, to perform repairs and maintenance. The evidence indicates that the operator went on the platform only when the conveyor was not running. The above two personnel were the only ones authorized to detach the chain and go onto the platform. However, in the absence of the plant superintendent, another employee would be required to inspect the head pulley.

6. On May 24, 1979, Inspector Richard J. Ogden inspected the plant including the conveyor belts, the dredge, mobile equipment and the shop and maintenance areas. He was accompanied by Mr. Rohs and Mr. Perrine.

7. The inspector observed that, at the head pulley, the pinch point between the belt and head pulley was unguarded.

8. On May 24, 1979, Inspector Ogden issued Citation No. 363006 to Respondent, reading in part: "The head pulley of the main belt conveyor was not guarded." The cited condition was abated on June 5, 1979, by installing a perforated screen as a guard.

9. At the time of the inspection, there was no emergency switch at the head pulley and no stop cord on the conveyor. It was the inspector's opinion that, without a railing between the work platform and the pinch point, an employee could be severely injured by becoming caught in the moving machinery parts.

10. He considered such an injury was unlikely because work was seldom performed in the cited area while the belt was operating. He saw no one using the walkway during the inspection.

11. Inspector Ogden also believed that Respondent could not have predicted the alleged violation. The plant had been inspected by MESA and MSHA

inspectors. Before the instant inspection, Harvey Osborne, a MESA inspector, apparently told Respondent that a "no entry" sign and chain would be adequate compliance, but cautioned that, in the future, enforcement policy would probably be changed and the chain and sign would not be allowed. However, after that there were five or six inspections before the instant one and Respondent was not told that the chain and sign were inadequate; also no violation was cited for a missing guard at the head pulley prior to the instant charge.

12. After the instant inspection, Mr. Rohs and Mr. Wolfmeyer, Respondent's general superintendent, notified Mr. Fierke of the citation. Mr. Fierke called the MSHA office and spoke with Mr. Stan Smith, who said that there was an internal memo from MSHA that provided that detachable chains and signs were no longer acceptable. MSHA had not circulated this memo to the owner-operators.

13. On May 24, 1979, Inspector Ogden issued Citation No. 363005 to Respondent, reading in part: "The return idlers on the No. 1 belt conveyor were not guarded." On december 9, 1980, the Secretary moved to dismiss the petition for assessment of civil penalty as to that citation.

DISCUSSION WITH FURTHER FINDINGS OF FACT

Based on the citation issued on May 24, 1979, the Secretary has charged Respondent with a violation of 30 C.F.R. 56.14-1, which provides: "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."

The Secretary contends (1) that the chain and sign across the stairs, about 50 feet from the pinch point, was not a guard within the meaning of the cited standard, and (2) that the events in prior inspections do not estop the Secretary from charging Respondent with a violation of the cited standard.

The Secretary proposes a penalty of $26.

The Respondent argues that the detachable chain and sign provided adequate protection against injury from the moving parts of the head pulley because the walkway provided the only access to the head pulley and no employees, except the plant superintendent, were authorized to remove the chain and travel on the platform while the conveyor belt was running. The operator was the only other person authorized to travel on the platform and he traveled it only when the belt was not running. Respondent contends that, when the superintendent traveled on the platform to inspect the head pulley, he would perform only a visual inspection no closer than 20 to 24 inches from the pinch point and was, therefore, in no danger of injury.

Respondent also argues that the Secretary is estopped from

bringing this action because of Respondent's good-faith reliance on the representations--

express and implied--of prior inspectors who indicated that use of the chain and sign was adequate compliance.

I find that the detachable chain and "no entry" sign that limited access to Respondent's head pulley at the Barry Plant No. 8 Dredge and Mill were not an adequate guard within the meaning of the cited standard. Two employees were authorized to detach the chain and travel on the work platform. Other employees heeded the warning of the "no entry" sign; however, the two authorized employees were not protected from the dangers of becoming caught in the head pulley and severely injured. Mr. Rohs testified that he has never slipped on the surface of the work platform, even when the surface was wet. However, I find that the possibility of slipping on a wet or icy platform, or of simply stumbling, was not so remote as to excuse Respondent from providing a guard around the moving machine parts.

I also find that earlier statements made by inspectors as to what constitutes a suitable guard are not binding upon the Commission. However, Respondent's good-faith reliance on the express and implied representations of prior inspectors, and MSHA's failure to notify Respondent of a change in enforcement policy before the instant inspection, show that Respondent was not negligent.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceeding.

2. Respondent violated 30 C.F.R. 56.14-1 by failing to provide a guard around the head pulley at its Barry Plant No. 8 Dredge and Mill, as alleged in Citation No. 363006. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of $1 for this violation.

3. Petitioner's motion to dismiss the petition for assessment of civil penalty as to Citation No. 363005 is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that (1) Respondent shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $1, within 30 days from the date of this decision and (2) the petition for assessment of civil penalty as to Citation No. 363005 is DISMISSED.

WILLIAM FAUVER JUDGE