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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

v.

CEMENT DIVISION, NATIONAL  
GYPSUM COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. VINC 79-154-PM  
A.C. No. 20-00044-05001

Alpena Stone Quarry and Mill

DECISION ON REMAND

Appearances: William B. Moran, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia,  
for Petitioner;  
Anthony J. Thompson, Esq., and Charles E. Sliter, Esq.,  
Hamel, Park, McCabe and Saunders, Washington, D.C.  
for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

On April 7, 1981, the Commission remanded this case for a determination as to which of the violations found to have occurred were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The determination that the violations occurred and the amount of the penalties assessed are no longer issues in this proceeding.

Commission review was not sought concerning my findings on citations No. 288721 and 288722. Consequently, these are not before me on remand.

Following remand, both parties have filed briefs setting forth their positions on the issues of fact and law.(FOOTNOTE.1) Based on their arguments and on my review of the record, I make the following decision.

ISSUES

The issues with respect to each citation are whether the inspector found it to be significant and substantial, and whether the evidence supports his findings.

The Secretary concedes that citations No. 288294, 288295, 288298, and 288567 are not significant and substantial violations, under the Commission standard. Based on the inspector's testimony, I agree and so find.

COMMISSION STANDARD

The Commission laid down the following test to determine whether a violation is "significant and substantial": "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature." 3 FMSHRC at 825. The Commission criticized the "mechanical approach" followed by MSHA and stated that "the inspector's independent judgment" in making significant and substantial findings "should not be circumvented." Findings that a violation is significant and substantial are important in that they may result in withdrawal orders under section 104(d) because of an operator's unwarrantable failure to comply, or under section 104(e) if they are part of a pattern of violations.

The Commission's test has two aspects: the probability of resulting injury, and the seriousness of resulting injury. The Commission gave special weight to the judgment of the Inspector.

CITATION 288296

This citation charged that an electrical junction box was not covered by a plate, in violation of 30 CFR 56.12-32. The injury which might result is electrical shock to an employee coming in contact with the box. This is an injury of a reasonably serious nature. However, the box was located at the end of a walkway and, according to the inspector's statement, the occurrence of an injury was improbable because the only employees who would be in the area were maintenance and repair personnel who would deenergize the equipment before working on it. Therefore, I find there was not a reasonable likelihood that an injury would occur, and despite my previous finding that the violation was serious, I now conclude that it was not significant and substantial.

CITATION 288297

This citation was issued because of spillage of limestone up to 24 inches deep on an elevated walkway in violation of 30 CFR 56.11-1. Should an employee trip on the spillage, he could fall over a low railing to the ground, 30 or 40 feet below. This obviously would cause an injury of a reasonably serious nature. Though the walkway was infrequently used, it was a walkway and there was a reasonable likelihood that the hazard would result in injury to an employee using the walkway. The walkway was out of doors and the elements added to the likelihood of injury. The violation was significant and substantial.

CITATION 288826

This citation charges a violation of 30 CFR 56.12-34 in failing to provide a guard for a light bulb located over a table saw in the carpenter's shop. The likelihood of an injury was slight, and any injury occurring would not be reasonably serious. Therefore, the violation was not significant and substantial.

CITATION 288566

This citation was issued for an accumulation of debris on a walkway next to a conveyor belt in violation of 30 CFR 56.11-1. This violation is similar to the one described in Citation No. 288297. The difference is that the walkway here is about 10 feet off the ground. I find that there is a reasonable likelihood that the hazard (a fall) would result in injury of a reasonably serious nature. The violation was significant and substantial.

CITATION 288827

This citation was issued because valves on oxygen and acetelyne tanks were left open while the tanks were not in use in violation of 30 CFR 56.4-33. There were sources of ignition in the area which could result in an explosion and serious injury. Whether the evidence shows a reasonable likelihood of an explosion is more difficult. The inspector's statement indicates that the probability of an explosion was slight unless a hose began to leak or the tanks were upset. No leaks were found. On the other hand, the inspector testified that leaving the valves open when not in use was a dangerous practice, and that an accident was not unlikely. I conclude on the basis of the entire record that there was a reasonable likelihood that a serious injury would result from the violation. Therefore, the violation was significant and substantial.

ORDER

The parties did not challenge my penalty assessments in my decision of December 26, 1979. Therefore, if the penalties ordered paid in that decision have not been paid, they are ordered paid immediately.

James A. Broderick  
Chief Administrative Law Judge

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~FOOTNOTE\_ONE

The United Mine Workers of America sought party status on May 6, 1981. I denied the motion to intervene. On review, my order was affirmed by the Commission. Leave to file an amicus brief was granted by the Commission, but Counsel for the UMWA stated she did not wish to file such a brief.