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SOL (MSHA) V. METRO ASPHALT  
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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.

METRO ASPHALT COMPANY,  
RESPONDENT

Civil Penalty Proceedings

Docket No. CENT 81-200-M  
A.O. No. 41-02664-05003

Docket No. CENT 81-201-M  
A.O. No. 41-02664-05004

Leyendecker Paving Pit & Plant

DECISION

Appearances:

Eloise Vellucci, Esq., Office of the Solicitor, U.S.  
Department of Labor, Dallas, Texas, for the Petitioner  
Mr. Burney T. Sullinger, Corpus Christi, Texas, for  
the Respondent

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (hereinafter the Act), (FOOTNOTE 1) to assess civil penalties against Metro Asphalt Company. The hearing was held in Laredo, Texas on September 29, 1981.

The parties stipulated in regard to the history of previous violations by Metro Asphalt that the number of violations found in the two years previous to the inspection were few and that the size of Metro Asphalt can be considered small. In the absence of evidence to the contrary it is found that the penalties assessed will not affect the ability of Metro Asphalt to continue in business.

Citation No. 171466 (Exhibit P-1)

The inspector noted in the citation that:

"The parking brakes on the 950 front end loader at the pit were inoperable. The front end loader operator is continuously loading haul trucks and employees were observed out of the haul trucks. The front end loader could roll forward or backward when the operator was not on the loader, and the loader could roll over an employee and seriously injure him.

30 CFR 56.9-3 provides that:

"Powered mobile equipment shall be provided with adequate brakes."

The inspector checked the parking brakes by having the operator put the brakes on and then try to go forward. The loader kept on going forward indicating that the parking brakes were not operable. The terrain was on a slight incline. Putting the machine in gear will not stop the machine from rolling while parked because if hydraulic pressure is lost it can roll without the brakes being on.

The normal operating foot brakes were functioning properly but the parking brakes did not operate. 30 CFR 56.9-32 requires that dippers buckets, scraper blades and similar moving parts shall be secured or lowered to the ground when not in use. They may be either lowered to the ground or secured to prevent injuries in the event these moving parts should fail. Although it is safer and the equipment is not so likely to roll when the bucket is down the lowering of the moving parts to the ground is not an alternative to the parking brakes.

The equipment operator testified that he put the bucket down and pulled the hand (parking) brake when the equipment was parked. He does not get off the front end loader while the machine is still running. He parks it on level ground and puts it in first gear. At the time of the inspection the machine was on an incline and had to go on an incline to get to the stock pile.

Five persons (independent contractors) were congregated in the shade of the stock pile behind the machine where it would have to go backwards to unload. It is probable that the machine could roll over a person resulting in a fatality.

The operator (Metro Asphalt) should have been aware of the condition if the foreman, a competent designated person, or Mr. Leyendecker (President of Leyendecker Materials Inc., who was there most of the time)

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were doing their normal check ups as required but the condition was not obvious. It was necessary to check the brakes to discover the defective parking brakes. The negligence of the operator was therefore slight.

Metro Asphalt demonstrated good faith in achieving rapid compliance after notification of the violation. The loader was removed from service immediately to get it repaired. The citation was terminated by another inspector.

Citation 171467 (Exhibits P-2)

The inspector noted in the Citation that:

"The head pulley on the No. Seven conveyor was not guarded. The pulley was approximately about four feet above ground level where persons servicing or doing maintenance could get entangled and receive serious injuries. There was one person in the area who does maintenance and service and clean-up."

30 CFR 56.14-1 provides that:

"Gears: sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; saw-blades; 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 head pulley did not have a guard and a person could get entangled by falling or tripping. A shovel could get caught between the belt and the pulley and drag the workman in. The pulley was positioned about four feet above the ground. Inspector Herrera believed that it was a self cleaning pulley with ten or twelve wings extending from the hub creating multiple pinch points. Mr. Richard Leyendecker testified that it was not a self cleaning pulley. Since self cleaning pulleys were installed only at the tail end of conveyors the testimony of Mr. Leyendecker is accepted as more credible; however the head pulley still should have been guarded since it posed a hazard. The head pulley was a drum-type roller with the ends closed which resulted in fewer pinch points.

There were one or two persons in a "shack" about 40 feet from the head pulley. They clean up and do service maintenance in the area but were not observed actually working at the time of the inspection. The hazard existed only when the equipment was in operation.

The loader operator and the control operator are usually in the area. The plant equipment is electrically controlled by the operator who is not physically next to the equipment while the plant is in operation. Company policy is that all equipment is shut down for maintenance, servicing, and clean up. The probability is slight that one of the two

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persons in the general vicinity could become entangled in the pulley resulting in the loss of an arm or a fatality.

The record establishes that the operator was negligent since he should have known that the head pulley had no guard. The condition was obvious and in plain sight. The inspector had discussed head and tail guards since 1977 with Mr. Leyendecker, who was often in the area.

Metro Asphalt demonstrated good faith in achieving rapid compliance after notification of the violation. Mr. Leyendecker had the welder start working on the guards immediately. The citation was terminated by another inspector.

Citation 171468 (Exhibit P-3)

The inspector noted on the citation that:

"The guard on the feed conveyor to the No. 3 shaker was not extended sufficient to prevent reaching behind guard and becoming entangled and receiving serious injuries. There was one employee in the area who did maintenance and service and cleanup."

The inspector was unable to remember this particular condition and no other evidence sufficient to prove a violation was adduced. The citation is accordingly vacated.(FOOTNOTE 2

Citation 171469 (Exhibit P-4)

The inspector noted on the citation that:

"The V-belt drive on the Telesmith shaker was not provided with a guard. There was an elevated travel way next to the drive where persons could fall against and become entangled and receive serious injuries. There was one person who did service and maintenance on equipment."

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The record establishes a violation of 30 CFR 56.14-1. The V-belt drive was exposed in such a manner that a person could fall against it and get entangled. The V-belt drive was about one foot off the walkway platform.

The one person who did service and maintenance on the equipment was not on the walkway at the time of the inspection. The hazard existed only when the equipment was in operation. The walkway is approximately 10 feet off the ground with a loader going to it.

There had been a recent fatality in a limestone mine where a person was caught in the tail pulley while another person was attempting to remove a rock.

The pit is about three miles from the asphalt plant. The inspector inspects only the pit and crushing portion of the operation.

It is unnecessary to stop the equipment to oil or grease it or to clean-up. Stopping the equipment is not a requirement if it is guarded. Although no one is supposed to go on the walkway for servicing the machinery while it is in operation, the experience of the inspector is that an employee will sometimes clean up with the equipment in operation.

The probability is slight that an employee will be injured in the area where the machinery is exposed.

The operator, Metro Asphalt, was negligent in that it should have known of the exposed V-drive belt. The condition was obvious and could be seen from the ground level.

Metro Asphalt demonstrated good faith in achieving rapid compliance after notification of the violations by putting a bar across the ladder going up to the elevated traveling and a sign reading "Do Not Enter." The operator also testified that the operator had welders start work on the guards immediately.

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Citation No. 171470 (Exhibit P-5)

The inspector noted in the Citation that:

"The guard on the tail pulley of the crusher feed conveyor was not extended sufficient to prevent person from reaching behind guard and becoming entangled and receiving serious injuries. There was one person who did service and maintenance and cleanup."

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30 CFR 56.14-3 provides that:

"Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley."

The record establishes a violation of 30 CFR 56.14-3. The guard on the tail pulley was not extended sufficiently. The back portion of the tail pulley was partially guarded up to a certain place but it was not guarded adequately. If a person were to trip he could put his hand where it would be caught between the tail pulley and the inadequate guard. MSHA recommends an expanded metal guard completely surrounding the tail pulley. The pulley is visible through the expanded metal yet it protects persons from being injured by the pulley.

Although it was normal company policy to shut down while doing clean-up, servicing or maintenance there is a slight probability under the circumstances existing that a person would be injured as a result of the unguarded tail pulley if the equipment should be started up accidentally or if a person did not abide by the company policy.

MSHA had previously required a guard to be installed in 1977 when 30 CFR 56.14-3 was not a mandatory requirement. Although the guard should be further extended, as now required by MSHA under the mandatory standard to reduce the hazard, the negligence of the operator under the circumstances was slight.

Metro Asphalt demonstrated good faith in achieving rapid compliance after modification of the violation by installing a guard on the tail pulley of the crusher feed conveyor. Welders started work on the guard immediately.

ORDER

An assessment of \$40 is ordered for each of the four citations found proved. Respondent is ordered to pay petitioner the amount of \$160 within 30 days of this date of this order.

Forrest E. Stewart  
Administrative Law Judge

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~FOOTNOTE\_ONE

1 Section 110(i) of the Act provides:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's

ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

~FOOTNOTE\_TWO

2 Where asked to explain the circumstances the inspector testified:

"I can read here, but I cannot recall this particular incident. A feeder conveyor, I mentioned the whole feeder conveyor; now, I did not mention the head or the tail pulley and this kind of throws me off." When asked what the guard on the pulley looked like he testified: "This is where my memory fails me, because this is talking about guarding a whole feeder and not a tail pulley or a head pulley. So I've been trying to picture in my mind what it was, but I can't. I can't recall." He also stated in a forthright manner that he did not put information on the citation that could refresh his memory.