

CCASE:
SOL (MSHA) V. ATLANTIC CEMENT
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TTEXT:

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

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

v.

ATLANTIC CEMENT COMPANY, INC.,
RESPONDENT

Civil Penalty Proceeding

Docket No. YORK 80-101-M
A.C. No. 30-00006-05009

Ravena Quarry and Plant

DECISION

Appearances: Jithender Rao, Esq., Office of the Solicitor, U.S. Department
of Labor, New York, New York, for Petitioner
Richard K. Muser, Esq., Clifton, Budd, Burke & DeMaria, New
York, New York, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et seq., the "Act," alleging violations of mandatory standards. The general issues are whether Atlantic Cement Company, Inc. (Atlantic), has violated the regulations as alleged in the petition filed herein, and, if so, the appropriate civil penalties to be assessed for the violations. A full evidentiary hearing was held with respect to Citation No. 206226. A proposal for settlement was submitted with respect to the remaining citations and was amplified with testimony and documentary evidence. Petitioner also requested to withdraw one citation (Citation No. 205400) for insufficient evidence and that request was approved on the basis of an adequate proffer by counsel. Petitioner also requested to withdraw its determination that the violations in Citation Nos. 205397 and 205399 were "significant and substantial" as defined in the Act and as interpreted in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). The Secretary proffered sufficient information from which it could be determined that such withdrawal was appropriate and the request was accordingly approved at hearing. The parties agreed in the proposal for settlement to specific penalty amounts as to the remaining citations and submitted evidence only concerning the disputed question of whether those violations were "significant and substantial" under the National Gypsum standard.

Contested Citation

Citation No. 206226 charges a violation of the mandatory standard at 30 C.F.R. | 56.11-12. That standard provides in relevant part that "[O]penings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers." The citation herein specifically alleged in relevant part as follows:

. . . that the storage area for filters at the top of the steel rack was not provided with a railing or barrier to keep a person from falling over the edge to the concrete floor approximately 9 feet below. The supervisor stated that a person used this area approximately once per week to obtain filters. This steel rack was located in the storage room.

The essential evidence is undisputed and the factual allegations set forth in the citation are not contested. Atlantic contends only that those facts do not support a violation of the cited standard. Alva Shear, an employee of Atlantic for 19 years, admitted that filters and screens were indeed stored on the cited platform. He emphasized however that most of the filters were stored so they could be identified and removed while standing on a steel safety ladder without the necessity of climbing on to the cited platform itself. Approximately once a week however, it would be necessary for someone to step onto the cited platform to obtain other types of filters. In the 13 years Shear had worked at Atlantic no one had ever fallen off the platform.

The issue here presented is whether this storage platform constituted a "travelway" within the meaning of the cited standard. Inasmuch as it is admitted that at least occasionally workmen did in fact walk or travel on this platform in order to locate and remove at least some of the filters, it is clear that those portions of the platform over which the men must travel are "travelways." I am bound by the plain meaning of that term. Since the "opening" or drop-off along the edges of the platform were not protected by "railings, barriers, or covers" it is apparent that the violation existed as charged.

In determining whether the violation was "significant and substantial," I must consider whether the violation could be a major cause of a danger to safety and health and whether there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. National Gypsum, supra. The evidence in this case shows that miners could be working on the exposed steel platform some 9 feet above a concrete floor as often as once a week. These miners were accordingly exposed with some frequency to a serious hazard. There is little doubt that if someone fell from that height to the concrete floor, he could suffer serious if not fatal injuries. Accordingly, I find that the violation herein was "significant and substantial." For similar reasons, I also find a high degree of gravity. The hazard was also obvious but

apparently no injuries had ever resulted from the condition. I find accordingly that Atlantic is

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chargeable with simple negligence in failing to have protected against it. The condition here cited as with all the conditions listed in this case were appropriately abated. The operator had received 31 assessed violations in the previous 24-month period. The plant here at issue worked 700,000 man hours per year. Under the circumstances I find that a penalty of \$200 is appropriate for this violation.

Partially Contested Citations

Respondent does not dispute that violations existed as charged in Citation Nos. 207687, 207688, 207689, 206227, and 206228, but disputes the "significant and substantial" findings made by the Secretary in connection therewith. Accordingly, evidence was submitted at hearing with respect to that issue.

Citation No. 206227 This citation alleges a violation of the mandatory standard at 30 C.F.R. | 56.9-22 charging that "a berm was not provided for approximately 500 feet along the northeast side of the elevated roadway to the waste dump water pump." The allegations in the citation are not contested. It is undisputed that the height of the roadway varied from 1 to 10 feet and that an ice-covered lake was situated adjacent to the bottom of the slope. It is also undisputed that the roadway was infrequently used, perhaps once a week, by an empty front-end loader having an axle height of approximately 2 to 3 feet and by a pickup truck. At the time of the citation, there also existed on the roadway patches of ice, one as large as 8 feet by 12 feet in size. According to Ed Tompkins, a union representative who accompanied the MSHA inspector, the road in question was used almost exclusively by maintenance pickup trucks travelling at only 5 to 8 miles an hour. A small berm of 6 to 12 inches and clumps of trees along the roadway afforded some protection but the trees were spaced from 10 to 50 feet apart. Within this framework of evidence, I find that indeed injuries would be reasonably likely to occur from the absence of an adequate berm along the cited roadway and that if the injuries were sustained they would be reasonably serious, and possibly fatal to the driver and passengers of a truck or front-end loader falling down the unprotected sections of slope. Under the circumstances, the admitted violation is "significant and substantial." National Gypsum, supra.

Citation No. 206228 This citation charges a violation of the standard at 30 C.F.R. | 56.12-30 and alleges that "the 480-volt exposed leg wires for the waste dust water pump were not enclosed to keep a person from coming into contact with them." The allegations in the citation and the factual representations by MSHA inspector Gary Kettlekamp are not in dispute. Kettlekamp testified that the wires were exposed for several inches. A telephone was located only 6 inches beneath the junction box thereby placing an individual using the telephone in close proximity to the exposed wiring. There was a "danger" sign on the door to the building in which the wires were exposed and the wire was not energized at the time of the citation. Kettlekamp pointed out, however, that whenever the dust pump was in

operation the wires would be energized.

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According to Union Representative Tompkins, only electricians were permitted to use this building. Its use was even further restricted to cases of pump failure occurring usually no more than twice a month. It is undisputed however, that contact with the exposed energized wiring could be fatal. Within this framework of evidence, I conclude that there was indeed sufficient opportunity for exposure to the hazard that injuries would have been reasonably likely to occur from the violative condition and that if an individual would have contacted the exposed wiring, the injuries would have been reasonably serious and quite possibly fatal. The violation was therefore "significant and substantial."

Citation No. 207687 This citation alleges a violation of the standard at 30 C.F.R. | 56.14-1 charging that the "motor drive coupling (approximately 4 inches in diameter) for the north shale feeder located on the addative floor of the mill was not provided with a guard." Again the allegations in the citation are undisputed. Moreover, there is no dispute that the exposed coupling at issue was located directly adjacent to a belt crossover and about 3 and 1/2 feet off the floor. The evidence shows that an individual would have to fall to the east side and then extend his arm in order to come into contact with the exposed coupling. The mill helper customarily used the crossover only three times a day.

Within this framework of evidence, I do not find the violation to be "significant and substantial." The possibility of injury was indeed quite remote because of the infrequent use of the catwalk, the distance from the catwalk to the exposed coupling, and the combination of unusual circumstances required for exposure to occur.

Citation No. 207688 This citation alleges a violation of the standard at 30 C.F.R. | 56.14-6 charging that "the guard provided for the 12-inch diameter Torus coupling on the slurry pump located in the mill building slurry pumphouse was not in place while the machinery was in operation." The allegations in this citation are not disputed. The slurry pump room was 14 feet by 25 feet in size. The exposed area of the coupling was approximately 12 inches square and was located about 3 feet from the ground. The mill helper was the only employee even working in the vicinity of the exposed part and his exposure was limited to a visual examination made some distance from the exposed part only once or twice a shift. Under the circumstances, I do not find that the violation was "significant and substantial." The possibility of exposure of employees to the hazard was extremely limited. Injuries were therefore highly unlikely.

Citation No. 207689 This citation alleges a violation of the mandatory standard at 30 C.F.R. | 56.14-1 charging that "there was no guard provided for either of the two operating sprocket drive motor couplings atop the dust bucket elevator." The allegations in the citation are not disputed. The couplings were located about 10 inches from a ladder and an employee was exposed only while greasing the dust bucket. Both couplings were

smooth and rotated at approximately 400 revolutions per minute.
Even though exposure to the hazard was limited to one person--an
oiler who climbed the ladder only

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once a week--I find that the close proximity of the hazard to that worker made the possibility of injury likely. Under the circumstances, I am convinced that injuries would have been reasonably likely to occur and that such injury from clothing, tools or a limb contacting the moving couplings could be reasonably serious. Accordingly, the violation is "significant and substantial."

Amount of Penalty

In light of the above findings and the stipulations agreed to by the parties and considering all the criteria under section 110(i) of the Act, I find that the following penalties are appropriate:

| Citation No. | Amount of Penalty to be Paid |
|--------------|---------------------------------|
| 205397 | \$150 |
| 205399 | 145 |
| 205400 | (vacated) |
| 207687 | 92 |
| 207688 | 92 |
| 206226 | 200 |
| 207689 | 92 |
| 206227 | 92 |
| 206228 | 122 |

ORDER

Atlantic Cement Company, Inc., is ORDERED to pay civil penalties of \$985 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge