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SOL (MSHA) V. ALLEN KELLER
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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.

ALLEN KELLER COMPANY,
RESPONDENT

Civil Penalty Proceedings

Docket No. CENT 81-224-M
A/O No. 41-02821-05002

Docket No. CENT 81-231-M
A/O No. 41-02821-05003

Keller Crusher and Pits

DECISION

Appearances: Ron Howell, Esq., Office of the Solicitor, U.S. Department
of Labor, Dallas, TX, for Petitioner
Mr. Michael Eilers, Mr. Al Farest, Allen Keller Company,
Fredericksburg, TX, for 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 Allen Keller Company.

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The parties stipulated that:

1. Twenty-one thousand, eight hundred and fifty six (21,856) tons per year were worked at the Keller Crusher and Pits and that it was a small mine;
2. There were 4 violations in the previous 24 months, and that
3. The assessed penalties would have no effect on Respondent's ability to remain in business.

The citations herein issued by Mr. Charles E. Price, MSHA Inspector, for alleged violations of mandatory safety standards in Part 56 of Title 30, Code of Federal Regulations, were served on Mr. Herbert Kelone at Keller Crusher and Pits. This was the only inspection of this mine made by Mr. Price.

Citations 162343 and 162349

On Citation No. 162343, issued February 26, 1981, the inspector noted: "The work platform where the generator was mounted was not provided with hand rails. (Trailer) work platform was approximately four foot off the ground. Employee was on the platform at least two times a day."

In terminating the citation the inspection noted: "The elevated work platform where the generator was mounted was provided with hand rails."

30 C.F.R. 56.11-27 provides: "Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary."

On Citation No. 162349, issued on February 26, 1981, the inspector noted: "The K406 haul unit was not provided with a fire extinguisher. Employee drove the unit eight hours a day."

In terminating the citation the inspector noted: "The K406 haul unit was provided with a fire extinguisher."

30 C.F.R. 56.4-24(c) provides: Fire extinguishers and fire suppression devices shall be (c) replaced with a fully charged extinguisher or device or recharged immediately after any discharge is made from the extinguisher or device.

The parties entered into a settlement agreement to reduce the \$30 assessment for Citation 162343 to \$22 and to reduce the \$44 assessment in Citation 162349 to \$32. Based on the information furnished by the parties and an independent review and evaluation of the circumstances, I find the settlement proposed is in accord with the provisions of the Act. The settlement agreement is approved. An assessment of \$22 is entered

for Citation 162343 and an assessment of \$32 is entered for
Citation 162349.

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Citations 162351 and 162354

On Citation 162351, issued on February 26, 1981, the inspector noted: "The cab of K405 haul unit was not kept clear of extraneous materials. Three soda pop cans were rolling around in the cab. Unit was operated eight hours a day."

In terminating the citation the inspector noted: "The cab of K405 haul unit was cleaned of all extraneous materials."

30 C.F.R. 56.9-12 provides: "Cabs of mobile equipment shall be kept free of extraneous materials."

On Citation 123454, issued February 26, 1981, the inspector noted: "Employee was observed using compressed air to blow out a filter, and was not using safety glasses or other suitable protective devices to protect his eyes from flying particles. Employee was stopped until eye protection could be provided."

In terminating the citation the inspector noted: "Employee works on service truck which is used on a road job most of the time. Employee not on property."

30 C.F.R. 56.15-1 provides: "All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

Pursuant to a motion that these two citations be vacated because Petitioner could not meet its burden of proof. Citations 162351 and 162354 are vacated and the proceedings in regard to these two citations are dismissed.

Citations 162277, 162278, 162279, 162280, and 162344.

These five citations, issued on February 26, 1981, alleged a violation of 30 C.F.R. 56.14-1 which provides: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

In regard to each of these five citations it was established by the evidence that there were five different physical locations on the work site with tail pulleys or tail rollers at each separate location, and none of them had a guard on either side. The inspector stated that he calls the equipment referred to as a tail pulley in the regulations a tail roller and that he used that designation in his citations. Since the conveyor belts were not numbered at this mine the inspector identified the equipment in his citations by the names given him by the foreman. Although the five tail pulleys were separate equipment they were in close proximity.

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It was probable that an accident might occur resulting in loss of limb or life. Two employees doing clean up work in the vicinity of the unguarded tail pulleys were shovelling spillage.

The inspector acknowledged that Respondent exercised good faith in achieving rapid abatement after notification of the violations in each of the citations.

Allen Keller Company had taken steps to insure that all pinch points were guarded and guards had been installed on tail pulleys in locations other than those in which the citations were issued. The mine had been inspected three times previously and no citation had been issued by another inspector regarding pinch points. The inspector issuing the citations was not aware of the prior inspections. The conditions noted, which were near the office, were open and obvious. The equipment was partially, but not sufficiently, guarded by its location. Although the conditions existing were violations of the mandatory standard the negligence of Respondent was slight.

On Citation 162277 the inspector noted: "Tail pulley for contractor conveyor belt located approximately one foot from the ground was not guarded. Two employees do clean-up work in the area eight hours a day."

In terminating the citation the inspector noted: "The tail pulley for contractor conveyor belt was guarded."

The evidence established that the pinch points on the bottom between the belt and the pulley were protected to some extent by the frame but that a possible pinch point existed between the pulley and the frame.

An assessment of \$44 is entered for this violation.

On Citation 162278 the inspector noted: "The tail pulley for screen conveyor belt located approximately one foot from the ground was not guarded. Two employees work in the area eight hours a day."

In terminating the citation the inspector noted: "The tail pulley for the screen conveyor belt was guarded."

An assessment of \$50 is entered for this violation.

On Citation 162279 the inspector noted, "The tail pulley for the return conveyor belt was not guarded. Two employees work in the area eight hours a day." In terminating the citation the inspector noted, "The tail pulley for the return conveyor belt was guarded."

An assessment of \$50 is entered for this violation.

On Citation 162280 the inspector noted, "The tail pulley for the loading conveyor belt was not guarded. Two employees work in the area eight hours a

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day." In terminating the citation the inspector noted, "The tail pulley for the loading conveyor belt was guarded."

At the hearing, the inspector stated that the loading conveyor belt came out from under the finished product bin which loaded the trucks and that the tail pulley was set more in less in a hole. There was quite a lot of spillage of the finished product requiring clean up work.

An assessment of \$50 is entered for this violation

On Citation 162344 the inspector noted, "Tail roller for the short conveyor belt mounted on elevated work platform was not guarded. Two employees worked in the area eight hours a day." In terminating the citation the inspector noted, "The tail roller for the short conveyor belt was guarded."

At the hearing, the inspector stated that the short conveyor belt was mounted, along with a generator, on a flat-bed truck.

An assessment in the amount of \$50 is entered for this violation.

Citation No. 162347

On Citation 162347, the inspector noted, "Berms or guards were not provided on the outer banks of the elevated ramp going to the primary hopper." Elevation on both sides was 0 to 20 feet. Two R 22 Euclid haul units backed onto the ramp all day. In terminating the citation on February 26, 1981, the inspector noted, "Berms were built on the outer edges of the elevated ramp." The citation alleged a violation of 30 C.F.R. 56.9-22 which provides: "Berms or guards shall be provided on the outer bank of elevated roadways."

The evidence established that the elevated ramp was in effect an extension of the roadway and as such was part of the roadway. It allowed the haul unit to back up to the primary crusher and make its dump. The ramp was 20 feet wide and 40 to 50 feet long with a slight upward incline. The top of the ramp was 8' to 10' from the ground. Since there were no berms or guards on the elevated roadway the operator was in violation of 30 C.F.R. 56.9-22.

Although the speed of a haul units on the ramp was only 3-4 MPH it could roll off the roadway and turn over in the absence of berms or guards. The inspector's uncontradicted testimony was that a fatality was a possibility. The evidence established the probability of serious injury to the operator of the vehicle. The inspector observed two haul units with a driver in each of them. One of them was backing up on the roadway.

The inspector testified that the condition was "out in the open." The evidence established that Respondent should have known that the condition existed. Although inspectors in the past had not required berms in such locations this particular

elevated ramp was not there at the time of those inspections.
Under the circumstances the negligence of Respondent was
moderate.

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The inspector acknowledged that Respondent demonstrated good faith in rapidly abating the condition after the citation was issued.

An assessment in the amount of \$50 is entered for this violation.

Citation No. 162348

On Citation 162348 the inspector noted "Access to the cab of K 430 haul unit was not maintained in a safe condition. Bottom step was bent and broke loose on one side." In terminating the citation the inspector noted "Access to the cab of K 430 haul unit was repaired in good condition."

The citation alleged a violation of 30 C.F.R. 56.11-1 which provides that "Safe means of access shall be provided and maintained to all working places."

The step was bent and completely broken on one of the haul units. There were two means of access to the unit. The defective step was at the front of the haul unit. The step on the side was in good condition. The haul unit was not running at the time of the citation but it had previously been operated and remained available for use. Since one of the means of access to the haul unit was not maintained in a safe condition and there was nothing to prevent the step from being used the condition was in violation of 30 C.F.R. 56.11-1. Equipment need not be actually in use for there to be a violation: See Eastern Associated Coal Corporation, 1 FMSHRC 1473, 1979; CCH OSHD par. 23,980 (1979).

The probability that the driver of the truck, the only person exposed to the unsafe condition, would be injured is established by the evidence. The inspector testified that if the other end of the rung about 18 to 20 inches off the ground came loose it could result in an injured leg perhaps causing lost time.

The haul unit operates in rocky areas and the stock pile can readily break or damage the steps. The inspector acknowledged that there was a possibility that the Respondent did not know of this condition under the circumstances even though there was a requirement that the equipment operator inspect self-propelled equipment before it is operated. Negligence on the part of the operator was established.

The inspector acknowledged that the operator demonstrated good faith in abating the condition by rapidly repairing the steps after the citation was issued.

An assessment in the amount of \$36 is entered for this violation.

Citation No. 162350

On Citation 162350 the inspector noted "Fire extinguisher in the cab of K 405 haul unit was not replaced with a fully charged extinguisher after

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being discharged. Employee drove the unit eight hours a day." In terminating the citation the inspector noted "The K 405 haul unit was provided with a fully charged fire extinguisher." The citation alleged a violation of 30 C.F.R. 56.4-24(c) which provides:

Fire extinguishers and fire suppression devices shall be (c) replaced with a fully charged extinguisher or device or recharged immediately, after any discharge is made from the extinguisher or device.

The inspector found the fire extinguisher discharged but he testified that he did not remember how he determined that the fire extinguisher was in a discharged condition. He also stated that he would not have issued a citation if there had been a record showing that the extinguisher had been inspected recently. Mr. Eilers testified for Respondent that the device was a 5 pound fire extinguisher with a gauge. Although the inspector did not remember the gauge or how he determined the discharged condition his testimony was adequate to establish the existence of the condition. The evidence was not rebutted. Since the record establishes that the discharged extinguisher was not recharged or replaced as required, the operator is in violation of 30 C.F.R. 56.4-24(c).

One employee was exposed to a burn hazard resulting from the condition. There were other fire extinguishers in various locations around the crusher site easily accessible to the haul unit operators. It is improbable that a person would be injured as a result of the condition.

The inspector testified that the operator should have known of the condition if the required safety checks were made. Mr. Eilers testified that the extinguishers become discharged by vibration of the haul units. He requires haul unit operators to report discharged fire extinguishers and he makes personal inspections of the fire haul units and extinguishers. The foreman told the inspector that undoubtedly in morning they had left some of the fire extinguishers behind and that they would be on the operation shortly. Moderate negligence is established by the record.

The operator demonstrated good faith in abating the condition after issuance of the citation.

An assessment in the amount of \$20 is entered for the violation.

Citation No. 162353

On Citation 162353 the inspector noted "Fire extinguisher on K 479 service truck was discharged. Truck carried approximately 250 gallons of diesel fuel, 100 gallons of gasoline, 100 gallons of transmission fluid and grease. Truck was operated eight hours a day. In terminating the citation the inspector noted "The K 79 service truck was removed from the property. Company alleged the

truck was provided with a fully charged fire extinguisher."

~FOOTNOTE_ONE

1 Sections 110(i) and (k) 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.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."