

CCASE:  
SOL (MSHA) V. M&H ROCK  
DDATE:  
19821207  
TTEXT:

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

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

Civil Penalty Proceeding

Docket No. WEST 81-272-M  
A.O. No. 35-02875-05005

v.

Applegate Aggregates Bar

M & H ROCK, INC., D/B/A  
APPLEGATE AGGREGATES, INC.,  
A CORPORATION,  
RESPONDENT

DECISION

Appearances: Faye Von Wrangel, Attorney, U.S. Department of Labor,  
Seattle, Washington, for the petitioner Ernest W. Mignot,  
Grants Pass, Oregon, pro se, for the respondent

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for two alleged violations of certain mandatory safety standards. Respondent filed a timely answer and notice of contest and a hearing was convened in Medford, Oregon, on October 28, 1982 and the parties appeared and participated fully therein. The parties waived the filing of posthearing proposed findings and conclusions. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 20 C.F.R. 2700.1 et seq.

### Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

### Discussion

The citations issued in this case were served on the respondent by MSHA Inspector George A. Gipson pursuant to Section 104(a) of the Act during the course of an inspection of the mine site on March 18, 1981, and they are as follows:

Citation No. 345579, 30 CFR 56.14-1:

The ralls crushing V-Belt drive unit was not completely guarded. The exposed pinch point was within easy contact being located four feet above ground level and near the walkway leading to the ladder to the feed crusher operations platform.

Citation No. 345580, 30 CFR 56.11-2:

The elevated walkway around the wet plant was not provided with adequate handrails. Handrails had been installed but was not maintained in good condition. The corner post was broken off at the base causing the cable railing to be one foot above the floor level. The walkway floor was 8 1/2 feet above ground level.

Petitioner's testimony and evidence

MSHA Inspector George A. Gipson, testified as to his background and experience and confirmed that he inspected the respondent's sand and gravel plant on March 18, 1981, and plant foreman Bruce Ogden and owner

~2167

Bill Mignot were with him at that time. Inspector Gipson described the crushing plant operation, and he observed three people at the plant on the day of his inspection. One was working in the pit area with a loader, another was operating a loader in the crusher area, and a foreman was in the area. Mr. Ogden accompanied him on the walk-around inspection of the entire plant, and Mr. Gipson confirmed that he inspected the ralls crusher, and he described its operation. He identified a photographs of the crusher and described the area which he believed was not guarded (Tr. 9-14, exhibit C-1).

Mr. Gipson described an area on the crusher labeled as "side guard" on exhibit C-1 as a metal screening cloth which was on the crusher when he observed it. The area which was not guarded, including the alleged "pinch point" is labeled on the exhibit and he identified it as the area which was not guarded. Mr. Gipson believed that an employee could come in contact with the pinch point area between the belt and the pulley. He identified a corner of a ladder in the lower right-hand corner of exhibit C-1, and he believed that an employee walking up to that ladder next to the piece of plywood shown on the exhibit could somehow come in contact with the exposed pinch point. Mr. Gipson indicated that an employee usually was stationed on a platform at the top of the ladder observing the crusher operation, but that he would also clean-up under the pulley. On the day of the inspection he observed an employee cleaning up (Tr. 19).

Mr. Gipson testified that he measured the distance from the pinch point to the ground, and that it was four feet or waist high to a person walking by (Tr. 20). The hazard associated with the unguarded pinch point was someone catching their finger or hand in the moving unit, and at the time he observed the condition it was in operation and moving (Tr. 20). The operation was immediately shut down, and a guard was fabricated and installed (Tr. 17).

Mr. Gipson identified exhibit C-2 as a photograph of the handrail around the elevated screener area which he cited in citation 345580. He described the post which had been knocked down and stated that it "was dangling low within about a foot of the actual walk platform (Tr. 20). Mr. Gipson stated that the walkway area was elevated some eight and one-half feet from ground level, and a conveyor belt ran out from under the elevated area (Tr. 22). Mr. Gipson testified that the condition of the handrail was a hazard because it could not be used for grasping to prevent anyone from falling over the edge. It also posed a tripping hazard for anyone attempting to walk around the posts and cable which had fallen over (Tr. 23). The post was immediately put back in place and welded, and the respondent did a good job in this regard (Tr. 23).

On cross-examination, Mr. Gipson confirmed that the primary reason for anyone going back and forth by the unguarded area would be to go up and down the ladder, and he believed that an employee would be "within arm's reach of this pulley to get to the ladder" (Tr. 25). However, he

~2168

conceded that he did not measure the distance from the edge of the ladder to the exposed pinch point, and he also conceded that there would be no hazard while climbing the ladder. However, he believed there would be a hazard "as you walk by here or trip or whatever and extended a hand into that pinch point" (Tr. 26). The area around the bottom of the ladder was all open area, and he believed that the piece of plywood shown in the exhibit C-1 was there to provide protection for a conveyor belt running under the pulley area in question. Mr. Gipson also indicated that someone walking to the ladder could trip or extend a hand out and come into contact with the pinch point (Tr. 27).

With regard to the handrail citation, Mr. Gipson stated that he measured the distance from the top of the cable where it "dips" in the exhibit C-2, to the platform floor and that the distance was approximately 12 inches (Tr. 30). The cable is a metal type used for hoisting, and it is very substantial once it is in place. The work platform around the screening is normally used for maintenance work, and no one is there when the crusher machine is operating. Although the inspector did not measure the width of the walkway, Mr. Mignot indicated that it was eight feet wide and seven feet long, and this was the "service area" from which any maintenance would be performed, and normally, one or two men would be on the platform at any given time (Tr. 34). Mr. Gipson confirmed that his concern was that someone could fall over the edge of the platform, and he conceded that the "elevated walkway" was not an area where miners normally would pass going and coming from their work stations, and that the only time anyone would go there would be to perform some specific maintenance work (Tr. 36).

#### Respondent's testimony and evidence

Ernest W. Mignot, owner and operator of the mine in question, testified as to his operation during the time the citations were issued. He indicated that his approximate annual production was 100,000 tons of crushed rock. He also testified that some of his trucks and equipment were manufactured out of state, that he sells his product to a number of customers, including the State of Oregon for use in road construction, and to the Federal Bureau of Land Management and the Department of Agriculture. Other customers include local road and paving contractors (Tr. 37-41).

Mr. Mignot argued that the photographs taken by the inspector, exhibits C-1 and C-2, were in fact photographs of the conditions cited by the inspector in the two citations in question.

With regard to the guarding citation concerning the crusher V-belt drive (345579), Mr. Mignot testified that the distance from the ladder as shown in exhibit C-1 to the pinch point in question was approximately 6 1/2 feet. He indicated that the distance from the ladder to the edge of the steel frame in front of the belt drive was four feet, and from that point the distance to the pinch point was 2 1/2 feet.

Mr. Mignot testified that the normal route for one to take when approaching the ladder to get to the platform above, or to climb off the ladder when descending from the platform, was directly in front of the ladder. He identified the piece of plywood which appears in the photographic exhibit C-1 as a guard for a chute which runs under the

~2169

belt in question. He also indicated that no one would have any reason to be in the corner area adjacent to the belt area and at the edge of the platform, and he believed that the only way one could get their hand caught in the pinch point was to deliberately reach in. He also indicated that any maintenance work which would have been performed in that area would only be done after the crusher plant was shut down.

With regard to the handrail citation (345580), Mr. Mignot stated that the distance between each of the cables as shown in the photographic exhibit C-2 was 18 inches, and that the distance between the platform floor and the first cable was 18 inches. He conceded that these distances were when the entire handrail and supports were upright, and he further conceded that the handrail was in the condition shown in the photograph at the time the citation was issued (Tr. 41-44).

Mr. Mignot testified that the handrail cables and support posts were of steel construction and he confirmed that the support post shown to the right in the photograph was dislodged when a loader struck it when it was raising a screen from the ground-level to the platform. He also conceded that men were required to be on the platform area from time to time while performing maintenance work, but he did not believe they would be exposed to any danger of falling over the edge of the platform because the total work area of the platform is eight feet by seven feet, and any maintenance work would be performed closer to the crusher rather than the edge of the platform. He indicated further that the crusher would be shut down for maintenance, and he believed that the handrails as shown in the photograph would protect anyone from falling or tripping over and that one would have to be drunk to fall over the cable (Tr. 44-46).

#### Findings and Conclusions

##### Jurisdiction

In its answer to the proposal for assessment of civil penalties filed by the petitioner, the respondent admitted that it has been "operating a mine, a worksite and place of employment for miners". However, it denied the assertion made by the petitioner that its mining operation is subject to the Act. Based on all of the evidence and testimony now of record in these proceedings, it seems clear to me that the respondent's sand and gravel operation is a "mine" within the meaning of the Act, and that the respondent is in fact subject to the Act as well as to MSHA's enforcement jurisdiction. The mine has been regularly inspected by MSHA's inspector force, and the nature of the mining activities as stated in the record of testimony during the hearing clearly establishes jurisdiction, and any arguments to the contrary by the respondent are rejected.

##### Fact of Violation - Citation No. 345579

This citation charges the respondent with a violation of mandatory safety standard 30 CFR 56.14-1, for failure to

completely guard an exposed



~2170

pinch point which the inspector alleged was "within easy contact". The standard provides as follows:

56.14-1 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.

In this case, the facts show that the inspector measured the distance from the pinch point to the ground, which he found to be four feet or "waist high". Coupled with his belief that a waist high pinch point "near the walkway leading to the ladder" constituted a hazardous area which was required to be guarded, the inspector issued the citation. However, the respondent has established through credible testimony that the distance from the edge of the ladder to a steel frame running along the pulley in question was four feet, and from that area to the pinch point there was another two and one-half feet. In short, the respondent has established that if someone were to fall from the ladder and reach out, he would be some six and one-half feet from the pinch point. Given these circumstances, it is highly unlikely that anyone would get caught in the pinch point as a result of tripping or falling while going up or down the ladder in question to reach a platform above the machine in question.

The photographic exhibit C-1, reflects that the front of the pinch point area which concerned the inspector was guarded with a wire mesh screen. A piece of plywood, which the inspector found to be an adequate guard, protected anyone from falling into a conveyor belt which ran under the machine in question, and the steel framing of the machine running alongside the pinch point provided a measure of protection and was some two and one-half feet from the pinch point itself. The inspector indicated that his primary concern was that someone going or coming from the ladder could reach into the pinch point if he were to trip or stumble. I find this highly unlikely since a person would have to fall six and one-half feet horizontally to get his hand into the pinch point. As for anyone getting caught while cleaning up, I find this to be highly unlikely also. Based on the position of the pinch point, I believe that one would have to make a conscious effort to stick his hand into the pulley area which apparently troubled the inspector.

Mr. Mignot testified that no one has any business or reason to be near the pulley in question and that when maintenance is performed the whole plant is shut down (Tr. 43). Mr. Mignot also established to my satisfaction that anyone approaching the ladder for the purpose of climbing up to the platform would approach it from the front, and he would have no reason to walk back to the corner of the machine where the pulley was located inside the steel framing of the machine, and then walk back and over to the ladder. Given all of the prevailing circumstances, I conclude and find that the exposed pulley area which was cited in this case was not required to be guarded, and the citation IS VACATED.

~2171

Citation No. 345580

This citation charges the respondent with a violation of mandatory safety standard 30 CFR 56.11-2, for failure to provide an adequate handrail around an elevated walkway. The standard provides as follows:

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

It seems clear to me in this case that the cited handrail was not of substantial construction or maintained in good condition at the time the inspector observed the condition. Mr. Mignot candidly admitted that the handrail had apparently been dislodged when struck by a loader, and he did not dispute the fact that it was in the condition shown in the photograph, exhibit C-2. Most of his testimony in defense of the citation goes to the question of gravity and the likelihood of someone falling over the edge of the platform. Insofar as the fact of violation is concerned, I conclude and find that the petitioner has established a violation of section 56.11-2, and the citation IS AFFIRMED.

#### Good Faith Compliance

The record establishes that the respondent promptly abated the condition cited by immediately shutting down and repairing the defective handrail and posts in question. Although the inspector fixed the abatement time as the next morning, March 19, 1981, respondent voluntarily shut down at some cost and interruption to production to weld and secure the support posts and cable back into an upright position. I find that respondent exhibited rapid compliance and this fact has been considered by me in the assessment of a civil penalty for the violation which has been affirmed.

#### History of Prior Violations

Respondent's history of prior violations is reflected in petitioner's computer print-out, exhibit C-3. This print-out reflects three paid citations for the 24 month period preceding the issuance of the citations in question. I find this to be a good safety record and have taken this into consideration in the assessment of the civil penalty.

#### Negligence

Mr. Mignot candidly admitted that the handrail post shown in exhibit C-2 was dislodged by a loader. Therefore, he knew of the condition cited, and his failure to exercise reasonable care to see to it that it was promptly repaired constitutes ordinary negligence.

~2172  
Gravity

The elevated platform in question was some 8 1/2 feet off the ground. Although the dislodged post and cable handrail may have provided some protection to restrain someone from falling over the platform, the inspector stated that his measurement from the top of the cable at its lowest point as shown in exhibit C-2 was twelve inches. Mr. Mignot was not there at the time, and he could not rebut this fact. The inspector believed that someone could possibly trip or stumble and fall over this cable in the position which he found it. I accept this testimony, and find that the condition cited was serious.

Size of Business and Effect of Civil Penalty on the Respondent's ability to Remain in Business.

I conclude and find that the respondent is a small-to-medium size sand and gravel operator. Mr. Mignot stated that his business has fallen off since 1981 and that his production has been cut by 50% due to general economic industry conditions. Although he indicated that the payment of a civil penalty "will hurt", I cannot conclude that it will put him out of business or have an adverse impact on his ability to continue in business. However, I have taken his testimony into account in the penalty assessment made by me in this case.

#### Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of \$25 is appropriate and reasonable for the citation which has been affirmed.

#### Order

Respondent IS ORDERED to pay a civil penalty in the amount of \$25 within thirty (30) days of the date of this decision for Citation No. 345580, March 18, 1981, 30 CFR 56.14-1, and upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras  
Administrative Law Judge