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SOL (MSHA) V. BELCHER MINE
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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	CIVIL PENALTY PROCEEDING Docket No. BARB 79-56-PM A.C. No. 08-00729-05001
v.	Belcher Mine
BELCHER MINE, INC., RESPONDENT	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner
Warren C. Hunt, President, Belcher Mine, Inc., Aripeka, Florida, for Respondent

Before: Judge Gary Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et - seq., the "Act," for alleged violations of regulatory standards. The general issue before me is whether Belcher Mine, Inc., has violated the cited regulatory standards and, if so, the amount of civil penalty to be assessed for the violations. A bench decision was rendered following hearings on these issues. That decision, which I now affirm, is set forth below with only nonsubstantive modifications.

I am prepared to render a bench decision at this time. In light of the Secretary's request for withdrawal of Citation No. 93605 and my acceptance of that request to withdraw, Citation No. 93605 is of course vacated. In addition, for the reasons already given, and I incorporate those reasons into this bench decision, Citation No. 93802 is also vacated.(FOOTNOTE 1)

That leaves us with six citations to consider. Four of those citations are not disputed in the sense that the operator concedes that there was a violation. In those cases, he contests only the amount of penalty proposed. The remaining citations are contested both as to the fact of the violation and the amount of penalty.

Under section 110(i) of the Federal Mine Safety and Health Act of 1977, certain criteria are to be considered by me in determining the amount of any penalty assessed. Those criteria are as follows: the operator's history of previous violations. In this case, I note that there is no prior history of violations. The appropriateness of the penalty to the size of the business of the operator charged. I note in this case that the operator had 20 employees at the relevant time and therefore was a small business. The third criteria is whether the operator was negligent. I will consider that element separately with respect to each of the citations in this case. The fourth is the effect of the proposed penalty on the operator's ability to continue in business. There has been no allegation in this case that any penalty that I might impose would adversely affect the operator's ability to continue in business. Fifth, the gravity of the violation. I will also consider this element separately with respect to each of the citations. Finally, the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

I am also considering in assessing penalties in this case, the fact that the Mine Safety and Health Administration has since the date of these violations modified its policy for initial inspections to what it calls "C A V" visits. The policy, which according to the evidence has been in effect for about a year and a half, allows the operator to have one advisory inspection wherein no penalties will be assessed. In this case, the inspection on March 16, 1978, leading to the citations herein, was the first inspection following the enactment of the 1977 Act.

Let me now proceed then to the specific citations. With respect to Citation No. 93601, the alleged violation was that a supervisory employee on the second shift was not trained in first aid. The standard cited, 30 CFR 56.18-10, requires as follows:

> Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees.

I do not find that the standard cited was violated in this case. The standard only requires that selected supervisors be trained in first aid. The evidence as presented by the government does not support a finding that selected supervisors had not been trained in first aid. The only violation cited was that a supervisory employee on the second shift was not trained in first aid. No such requirement is found in the standard and therefore I find no violation. Citation No. 93601 is accordingly vacated. It is in fact to the credit of the mine operator, however, that he did have someone trained in first aid on the second shift, and apparently many times only that one person was working on that second shift.

The violation alleged in Citation No. 93602 is that the drive belt on the feeder motor on the portable crusher was not guarded. The standard cited is 30 CFR 56.14-1. This was one of the citations that the operator argued did not charge a violation. The standard reads as follows:

> Gears, sprockets, chains, drive heads, tail, and take-up pulleys, couplings, flywheels, shafts, saw blades, fan inlets, and similar exposed moving machine parts which may be contacted by persons and which may cause injuries to persons shall be guarded.

The credible and substantially undisputed testimony of MSHA Inspector Russell Morris was that indeed the drive belts on the portable crusher (as depicted in Exhibit R-1 and Court Exhibit No. 1) did create two pinch points that were within reach of an individual who would be walking or working about on the walkway of the crusher. The undisputed testimony of Inspector Morris was that an individual who might have been passing those exposed drive pulleys and belts (for example, to inspect a hot bearing or to check on vibration in the equipment) beyond the location of the drive pulleys could expose his hand, thereby creating a further possibility of broken bones or loss of fingers or a hand. The inspector testified that the pulleys were located some three to four feet from the walkway at a height which would make the exposure not unlikely.

The seriousness of the violation is attenuated somewhat, however, in that the inspector thought that it was improbable and only a "slight chance" that a man could get his hand caught in the pulley pinch points. He observed, however, that such injuries have in fact occurred in similar circumstances. I accept Inspector Morris' assessment of negligence. The condition was one, in my opinion, that should have been known because of the reasonably close proximity of the exposed pulley to the walkway. I note that abatement was completed within the time specified in the citation. Under all the circumstances, I assess a penalty of $25 for that violation.

The next citation under consideration is Citation No. 93603. It also charges a violation of the standard at 30 CFR 56.14-1. Drive pulleys were also exposed on the other side of the crusher and two pinch points were located within three to four feet of the walkway. An employee could pass within two feet of those pinch points, exposing hands or fingers and causing broken bones or the loss of the hand or fingers.

The inspector opined that the hazard here was also "improbable" since it was unlikely that employees would be in the vicinity of these pinch points. I accept the inspector's opinion that the operator should have known of these violations since they were in plain view. I therefore find the operator negligent. The same penalty of $25 should be imposed here. Obviously, I am also finding that there were violations with respect to these two citations because of the danger of exposure to moving machine parts, namely, a drive pulley.

Citation No. 93604 charges a violation of the regulation at 30 CFR 56.11-2. That standard requires that crossovers, elevated walkways, and elevated ramps and stairways be of substantial construction, provided with handrails, and maintained in good condition. In this case, it was charged that a handrail on the outer side of the walkway of the crusher was broken in two places. The uncontradicted testimony of the inspector is that the upper handrail located about belt height would give way approximately six inches. I note, however, that there was also a midrail located about two feet above the walkway that was in sound condition. I also note the testimony of the inspector that, in his opinion, injuries were improbable because the rail would expand only about six inches, that a person would not likely fall through the rail, and that it was therefore unlikely to cause injury. I also accept the testimony of the inspector that the negligence of the operator was very low, since this condition was not very obvious. Under the circumstances, I would assess a penalty fo $10 for that violation.

Citation No. 93606 charges a violation of the regulation at 30 CFR 56.9-87. That standard requires that heavy duty mobile equipment be provided with certain audible warning devices. When the operator of such equipment has an obstructed view to the rear, the standard requires

that the equipment must have an automatic reverse signal alarm which is audible above the surrounding noise level or an observer must be present to signal when it is safe to back up.

The undisputed testimony in this case is that the 966 C Caterpillar front end loader, No. 339, had a defective automatic reverse signal alarm when cited on the 16th day of March 1978. It is undisputed that it was customary for truck drivers to be walking in the vicinity of that operating front end loader, thereby being exposed to the hazard of the equipment backing into them with possible fatal injuries. The testimony is somewhat attenuated, however, by the fact that the inspector did not precisely recall where the front end loader was working and could not testify as to seeing any people actually walking in the vicinity of that loader. His testimony was based strictly upon experience and opinion that truck drivers have a tendency to walk around where their trucks are being loaded.

I accept the inspector's testimony concerning negligence and I believe that the operator should have known of the faulty condition. Equipment operators are indeed required by regulation to check equipment before operation, and since the machine operator could have heard the alarm working or, conversely, could have been aware that the signal alarm was not working and had a duty to report that to his supervisory personnel I believe that there was some negligence involved in this particular violation. I note, however, again, that abatement was made within the time specified. Under the circumstances, I feel that a penalty of $10 is appropriate.

The last citation at issue is Citation No. 93801. That charges a violation of the standard at 30 CFR 56.12-30. That standard states as follows:

> When a potentially dangerous condition is found, it shall be corrected before equipment or wiring is energized.

The undisputed testimony is that the stationary half of the plug on what is known as the "S-O cord" extending to the product conveyor motor located on the B Mine portable crusher control box was broken off, and indeed that is the condition that is cited. There is accordingly no dispute that the violation did occur. In determining the appropriate penalty, I also consider that the inspector admitted that it would be unlikely that an employee or individual would be exposed to the hazard. However, should an individual be exposed to that hazard, the extent of the hazard was quite serious and indeed the individual could be subjected to shock or electrocution by exposure to up to 277 volts.

The testimony of the inspector concerning negligence was somewhat ambivalent. On one hand, he testified that the condition was readily observable, but on the other hand he testified that it would be readily

observable to someone performing a very close inspection of the area cited. Since the operator has an obligation to make a thorough inspection of the equipment before operating it, I conclude that some degree of negligence existed. The violation should be assessed at $25.

Order

Citations No. 93601, 93605, and 93802 are vacated. The following penalties are to be paid by Belcher Mine, Inc., within 30 days of the date of this decision:

Citation No. 93602 - $25, Citation No. 93603 - $25, Citation No. 93604 - $10, Citation No. 93606 - $10, Citation No. 93801 - $25.

Gary Melick
Assistant Chief Administrative Law Judge

FOOTNOTE START HERE-

1 The citation was vacated at hearing in the following ruling from the bench:

> The particular standard cited, 30 CFR 56.12-32, provides as follows: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs." The thrust of the standard is to the requirement that when you have a junction box, you will keep its inspection and cover plates in place at all times. The standard cannot, in my opinion, be construed, as the solicitor suggests, to require the existence of junction boxes themselves. No such inference can be drawn from the plain meaning of the standard. If MSHA wants to require junction boxes and deems the existence of junction boxes to be that important, then a standard should be precisely drawn to cover that particular problem. This does not mean to say that a violation might not have existed under a different standard, but the standard cited, in my opinion, is inapplicable. Citation No. 93802 is accordingly vacated.