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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. WEST 80-90-M
v.	
	MSHA CASE NO. 02-01154-05001
MOHAVE CONCRETE & MATERIALS COMPANY INC., RESPONDENT	MINE: Havarin Ranch Pit & Mill

DECISION

Appearances:

Marshall P. Salzman Esq. Office of the Solicitor
United States Department of Labor
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450 Golden Gate Avenue
San Francisco, California 94102,
For the Petitioner

Mr. Quinto Polidori
Mohave Concrete & Materials Co., Inc.
4502 Highway 95N
Lake Havasu City, Arizona 86403,
For the Respondent

Before: Judge Virgil E. Vail

PROCEDURAL HISTORY

This case arose from an inspection of respondent's sand and gravel operation at Havarin Ranch Pit & Mill, Lake Havasu City, Arizona. A representative of the Secretary issued four citations, charging violations of various mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). Petitioner seeks an order affirming the citations and proposed civil penalties.

After notice to the parties, a hearing on the merits was held in Phoenix, Arizona. Respondent's president appeared pro se on behalf of the company. No post trial briefs were filed.

ISSUES

1. Did respondent's activities during "set-up" at the sand and gravel operation mandate compliance with safety regulations promulgated under the Act, and justify issuance of citations for violations?

2. If so, what are the appropriate civil penalties that should be assessed against the respondent for the violations, based upon the criteria set forth in section 110(i) of the Act?

STIPULATIONS

At the outset of the hearing, the parties stipulated to several facts relevant to the assessment of penalties. It was agreed that respondent: 1) is a small business; 2) abated the conditions cited as violations quickly; and 3) had no history of violations prior to the ones assessed in this case. The parties further agreed to the Commission's jurisdiction to decide this case.

SUMMARY OF EVIDENCE

Respondent is owner and operator of a sand and gravel operation at Havarin Ranch Pit and Mill. In late 1978, respondent started the process of setting up a new plant which included installing and testing a recently-purchased rock crusher. This was completed in September 1979.

During January and February of 1979, Inspector Robert Hall of the Mine Safety and Health Administration (MSHA) made two visits to the non-operational facility. Hall visited the plant again on March 27, 1979. At that time, he noted gravel material being loaded onto trucks, hauled to the crusher, dumped into the crusher feed bin, and being processed and stockpiled. Under the authority of section 104(a) of the Act(FOOTNOTE 1), he issued four safety violation citations regarding such crusher operation.

EVALUATION OF EVIDENCE

1) Citation No. 371765 - Failure to wear a hard-hat.

Petitioner contends that failure of the crusher operator to wear a hard hat, as noted in citation No. 371765, violates 30 C.F.R. 56.15-2 which provides as follows:

> Mandatory. All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

Petitioner contends that during the operation of the crusher, as observed by the MSHA inspector, the operator was not wearing a hard hat or any other head protection. Petitioner maintains that such an omission represents a hazard to the crusher operator's safety, and thus constitutes a violation of federal regulation. Potential hazards include head injury to an operator caused by falling rock as it is dumped in the crusher bin, and flying rock from the crushing process. The inspector testified that such hazards should have been visually evident to respondent (Tr. 11).

The respondent does not deny that the employee failed to have any head protection, but challenges issuance of the citation on several other grounds. First, respondent argues that the sand and gravel facility was still in a "set-up" status which was not completed until September, 1979. Further, the crusher was not being operated for commercial production but instead, was being run for test and mechanical adjustment purposes only. Finally, the respondent testified that the crusher "operator" was not a true operator, but a man hired and paid only to install and test the equipment (Tr. 13).

I find that the evidence of record shows that the crusher was being operated by an employee, for whatever purpose, and that crushed rock was being produced and stockpiled. The stockpile on the date the citation was issued was ten feet high, a size consistent with on-going operations (Tr. 25).

The threshold issue to be decided, then, is whether the respondent's "set-up" activities required compliance with the Act's safety regulations. "Set-up" activities in this case involved operation of the rock crusher, and exposure of an operator without head protection to obvious hazards such as falling rock and potential head injury. Considering such hazards, I see no justifiable reason to distinguish between such "set-up" activities and those of a commercially productive operation. The mandatory regulatory provision requiring hard hats was therefore properly applied to the respondent's activities, and Citation No. 371765 is affirmed.

2) Citation No. 371766 - Failure to protect eyes.

On the same day, Hall issued a second citation charging that the crusher operator was not wearing any type of eye protection. The standard allegedly violated, 30 C.F.R. 56.15-4, provides:

> Mandatory. 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.

Hall testified that at the time of his inspection, he observed the crusher in operation processing material. The employee operating the crusher wore no eye protection (Tr. 10-11). The hazard involved in such a situation is the potential injury to an operator's unprotected eyes due to flying rock particles produced during the mechanical crushing process.

While the respondent does not deny the failure of the employee to wear any type of eye protection, it again contends that the sand and gravel facility was only in "set-up" stages, and seems to suggest that an employee hired only for machinery installations and testing purposes should be outside the control of such safety regulations. Despite the "set-up" status of respondent's facility and the temporary duration of the employee's work, I again find the hazards of such on-going "set-up" activities sufficient to warrant issuance of a citation for failure to wear eye-protection. Accordingly, I affirm Citation No. 371766.

3) Citation No. 371767 - No working platform on crusher.

A third citation was issued when Hall observed that a platform had not been provided on the crusher for the operator. Instead, as noted in the citation, "[t]he operator had to climb upon feeder frame to perform his duties." The standard allegedly violated, 30 C.F.R. 56.11-1, provides

> Mandatory. Safe means of access shall be provided and maintained to all working places.

Hall testified that on the day of the citation's issuance, he observed the crusher operator climb up the crusher, and balance on a 2 1/2 to 3 inch beam over the conveyor belt to do his work (Tr. 41). The operator was observing the feed and removing trash as it passed on the conveyor belt at the time of Hall's inspection (Tr. 42). A loss of balance by the operator would have resulted in either a fall forward onto the conveyor belt, or backwards onto the ground (Tr. 41). To minimize such hazards, the inspector recommended provision of a ladder and platform for easy and safe access.

The respondent did not deny lack of such access, and had corrected the situation with a ladder and platform by the next day. However, in rebuttal,

it claimed that such access to the operating crusher would not be required once all testing of the machinery had been completed. An individual, respondent stated, would need to be in a position over the machine, in order to remove debris, only during "set-up" (a period of about five months) (Tr. 44). In contrast, normal operating procedure would require the operator to stand approximately fifty feet from the machine, and shut down the crusher if a problem developed (Tr. 43).

Despite such testimony as to the temporary nature of difficult and unsafe access, I find that the employee's precarious working position over the operating conveyor belt and the long period of time involved in respondent's "set-up" activities are sufficient to mandate compliance with the Act's safety regulations requiring safe access. Therefore, Citation No. 371767 was properly issued for respondent's failure to provide a working platform, and is affirmed.

4) Citation No. 371768 - No fly-wheel guard.

Citation No. 371768 was issued during the same inspection when Hall observed an unguarded fly-wheel on the crusher. While the crusher had two fly-wheels, one was guarded by location; the one on the operator-side of the crusher was not. The standard allegedly violated by such a condition, 30 C.F.R. 56.14-1, provides:

> 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.

Hall testified that the dangerous condition created by the unguarded flywheel at respondent's facility was the possibility of a person falling into or getting clothing caught in the flywheel and hence being drawn into the machinery (Tr. 14).

While the respondent does not deny that the flywheel was unguarded at the time of the inspection, it again challenges the citation on grounds related to plant "set-up." First, respondent claims that the crusher machine had a flywheel guard, but that it had been removed to make necessary adjustments. Such adjustments require insertion of a tachometer between the flywheel and a shaft on the flywheel to measure running speed which is affected by the hardness of the rock being crushed (Tr. 20). Visual checks on the action of the flywheel, when the crusher is loaded and operating, are also claimed to be necessary (Tr. 21).

Similar violations of safety standard 56.14-1, committed during set-up operations, have been discussed in previous cases.

Fauver ruled that no "testing" exception to requirements of guarding moving machine parts is expressly included or implied in standard 56.14-1. Union Rock and Materials Corp., 2 FMSHRC 645 (March 1980) (ALJ). In Erie Blacktop, Inc., 3 FMSHRC 135 (January 1981) (ALJ), Judge Koutras found that a respondent's defense that a plant was not yet at full production, when a citation was issued for an unguarded flywheel on a crusher, does not excuse the operator's failure to guard exposed and moving machine parts. In contrast, a conveyor belt that has been shut down and locked out for repairs has no need for guards. The Standard Slag Co., 2 FMSHRC 3312 (November 1980) (ALJ).

Therefore, I find that the danger to the crusher operator's safety during respondent's "set-up" activities was sufficient to justify the issuance of a citation for failure to guard a flywheel. As was suggested by Hall, tests on the moving flywheel could still have been conducted if a hole had been drilled in the guard cover, allowing insertion of a tachometer and limited observation. Accordingly, I affirm Citation No. 371768.

PENALTIES

Since violations have been established, the next issue is the proper amount of civil penalties to be assessed for such violations. Section 110(i) of the Act sets forth six criteria to be considered in determining the amount of the civil penalty:

> 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.

The Secretary's proposed civil penalties for each of respondent violations are as follows:

Citation No.	Standard Violation	Amount
371765	56.15-2	$ 40.00
371766	56.15-4	40.00
371767	56.11-1	38.00
371768	56.14-1	66.00
	Total	$184.00

As stipulated by the parties, respondent's mine had no history of previous violations, and would be considered a small business. No argument was advanced by the respondent that payment of a reasonable penaly would impair its ability to continue in business. Therefore, I presume that no such adverse effect will be suffered through the payment of penalties I assess in this case.

Respondent's failure to enforce head and eye protection requirements, provide safe access to machinery, and use flywheel guards, where such practices are mandated by the Act's safety regulations, constitutes negligence. Negligence is defined in the Act's regulations (30 C.F.R. 100.3 [d]) as "committed or omitted conduct which falls below a standard of care established by law to protect persons against the risk of harm."

The standard of care established under the Act requires a mine operator "to be on the alert for conditions and hazards in the mine which affect the health or safety of the employees and to take the steps necessary to correct or prevent such conditions or practices." 30 C.F.R. 100.3(d). Under the facts of this case, the operator failed to exercise reasonable care in preventing or correcting the practices and conditions (creating safety regulation violations) which were known or should have been known to exist, and constitutes ordinary negligence. See 30 C.F.R. 100.3(d)(2).

In determining the gravity of the violations, consideration must include the following: 1) probability of injury; 2) gravity of potential injury; and 3) the number of workers exposed to such potential injury. 30 C.F.R. 100.3. In the present case, while potential injuries could have been serious or even fatal, the probability of such injury is moderate. In considering the gravity of the violations, I have recognized that the facility was still at a "set-up" stage, with machinery being operated for test purposes and that only one worker was exposed to the risks cited in these four citations. Therefore, I consider the gravity to be less than originally assessed by the representative of the Secretary.

Upon notification of the violations, respondent abated all four violations within one day. Such prompt abatement demonstrated the good faith of respondent in attempting to achieve rapid compliance despite a belief that operations had not yet reached a point where compliance was necessary or practical.

Based upon the stipulations entered into by the parties, the evidence of record, and the criteria for assessing civil penalties as set forth in the Act, I conclude that the civil penalties for each violation should be reduced and assessed as follows:

Citation No.	Reduced Penalty
371765	$20.00
371766	20.00
371767	20.00
371768	20.00
Total	$80.00

ORDER

WHEREFORE IT IS ORDERED that citations Nos. 371765, 371766, 371767 and 371768 are affirmed and respondent shall pay the above-assessed penalties totaling $80.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

FOOTNOTE START HERE-

1 Section 104(a) provides in pertinent part:
If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.