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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.

KENNECOTT MINERALS COMPANY,
UTAH COPPER DIVISION,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 81-342-M
A.C. No. 42-00712-05020
Docket No. WEST 81-343-M
A.C. No. 42-00712-05021

Arthur Concentrator

DECISION

Appearances: James H. Barkley, Esq., Peggy Miller, Esq., Office
of the Solicitor, U.S. Department of Labor, Denver,
Colorado,
for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle &
Latimer, Salt Lake City, Utah,
for Respondent.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the
Act), arose from an inspection of respondent's worksite. The
Secretary of Labor seeks to impose civil penalties because
respondent violated a safety regulation promulgated under the
Act.

Respondent withdrew its notice of contest to the underlying
violations but contests the amount of the proposed penalties (Tr.
2, 3).

After notice to the parties, a hearing on the merits was
held in Salt Lake City, Utah on September 20, 1983.

Respondent filed a brief at the hearing.

Issues

What penalties are appropriate for these violations?
Stipulation

The parties stipulated that the imposition of a penalty of
\$2,964 would not affect respondent's ability to continue in
business (Tr. 22, 23).

Citations

The two cases here involve 26 separate violations of Title 30, Code of Federal Regulations, Section 55.14-1.

For these violations the Secretary, in his proposed assessment, seeks penalties in the total amount of \$2,736. There are two citations for the same defective conditions but for these violations the Secretary seeks no penalties.

The regulation violated by respondent provides as follows:

Guards

55.14-1 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.

Summary of the Evidence

On December 12, 1980 MSHA Inspector William W. Wilson inspected respondent's Arthur Concentrator (Tr. 6, 7). He issued citations for the violation of 30 C.F.R. 55.14-1 when he found 26 unguarded ball mills (Tr. 7, 8, P1-P4). A series of steel balls in the machines grind ore inside a cylindrical drum. Ore concentrate is the resulting product. The drum itself has a five foot diameter and it is 2 1/2 feet above ground level (Tr. 9). The wheel turns inside a stationary drum holder at 600 revolutions per minute (Tr. 9, 10).

On these primary ball mills there were numerous pinch points between the drum holder and its supporting concrete frame. There are additional pinch points between the drum and the rotor (Tr. 8, 10; P1, P2).

A pinch point is that area located between two moving parts or between a moving and a stationary point. An object or material can become caught, pulled, torn, or entangled at a pinch point (Tr. 7, 8).

Photographs show a coke bottle, gloves, a rag and a grease can on the bottom of the steel ball machine frame (Tr. 11; P3, P4).

Workers maintain the machines by pouring grease into a cup on the top. At that point the maintenance worker is six feet off of the ground. He could slip and fall into the moving wheel (Tr. 12). The operators of the machines also use the walkway located to the left (Tr. 13, P4).

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The twenty six ball mills, a football field in length, are adjacent to a walkway (Tr. 13). A person on the walkway could trip or fall into a moving wheel. In the winter a worker's heavy clothing could be caught in the machines (Tr. 14).

On the day of the inspection almost all of the unguarded 26 ball mills were running (Tr. 16, 17). The inspector later modified the citation as to two non-operating machines (Tr. 17, 18). But in the inspector's opinion all 26 violations existed. The machines that were not running that day were still capable of operating (Tr. 17, 18).

In the past the inspector had seen guards on similar machines at other concentrators (Tr. 20).

The condition here could cause a serious injury or a fatality. An accident would be likely to occur (Tr. 20). Respondent has 5,000 workers. A computer printout at the Arthur Concentrator shows an prior history of 26 violations of safety regulations, excluding the violations in contest in the instant cases.

An MSHA memorandum of October 3, 1979 deals with a situation where the same violations exist in the same area of a mine. The memorandum requires that one citation be issued (Tr. 26).

At the hearing the judge indicated he would take official notice of the MSHA memorandum (Tr. 28).

Discussion

Respondent's brief filed at the hearing raises two issues. Initially it is asserted that MSHA may not impose twenty four separate penalties as the result of issuing a single citation. As a secondary issue respondent claims that the penalties are excessive and unfair.

The Act provides that civil penalties may be imposed for the violation of mandatory safety standards. Further, "each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense" 30 U.S.C. 820(a).

It appears on this record that there were 26 separate offenses since all of the machines were unguarded. I find nothing in the Act or in the legislative history that would prohibit MSHA from issuing a single citation for these separate violations.

Respondent's reliance on the MSHA policy memorandum is misplaced. The memorandum states that where the same area of the mine is involved any multiple violations should be treated as one

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violation and one citation should be issued. It does not necessarily follow from the memorandum that only one penalty must be proposed.

In any event the Commission is not bound by any method of assessment used by MSHA. Co-op Mining Company, 2 FMSHRC 784 (1980); the Commission can make de novo assessments. Shamrock Coal Company, 1 FMSHRC 469 (1979). The United States Court of Appeals for the 7th Circuit recently concluded that the Commission, as an independent adjudicative body, was required to follow the six criteria in 30 U.S.C. 820(i) in assessing a civil penalty. Sellerburg Stone Company v. FMSHRC et al. No. 83-1630, 2 MSHC 2010, 3 MSHC 1385, June 11, 1984.

Following the statutory criteria I find on this record that the Arthur Concentrator has a history of 26 violations in the two years prior to December 27, 1980 (Exhibit P5). This would not appear to be an excessive number of violations considering the large size of respondent's facilities. I find the operator was negligent in that the unguarded conditions were apparent. The imposition of a penalty will not affect the operator's ability to continue in business. The gravity, in my view, is somewhat less than claimed by Inspector Wilson. The pinch points, apparently located between the rotator and the assembly frame, do not appear to be as readily accessible to miners in the immediate area as the inspector claims. Accordingly, I do not find that an injury is as likely as the inspector contends (Tr. 8; P1). The operator demonstrated good faith in installing guards after being notified of the violation.

On balance, I consider a penalty of \$50 to be appropriate for each unguarded ball machine at the site. I am further assessing penalties for the two unguarded machines that were not operating on the day of the inspection.

Respondent failed to offer any evidence that these particular machines had been removed from service. In sum, a total civil penalty of \$1,300 (26 x 50) should be assessed.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. In WEST 81-342-M and WEST 81-343-M respondent's motion to withdraw its notice of contest as to the validity of the citations is granted.

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2. The following citations are affirmed and a penalty of \$50 is assessed for each such violation.

WEST 81-342-M

Citation	Penalty
583705 A	\$ 50.00
583705 B	50.00
583705 C	50.00
583705 D	50.00
583705 E	50.00
583705 F	50.00
583705 G	50.00
583705 H	50.00
583705 I	50.00
583705 J	50.00
583705 K	50.00
583705 L	50.00
583705 M	50.00
583705 N	50.00
583705 O	50.00
583705 P	50.00
583705 Q	50.00
583705 R	50.00
583705 S	50.00
583705 T	50.00

3. The following citations are affirmed and a penalty of \$50 is assessed for each such violation.

WEST 81-343-M

Citation	Penalty
583705 U	\$ 50.00
583705 V	50.00
583705 W	50.00
583705 X	50.00
583705 Y	50.00
583705 Z	50.00

4. Respondent is ordered to pay the sum of \$1,300 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge