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SOL (MSHA) V. FERNDALE MIX
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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.	CIVIL PENALTY PROCEEDING Docket No. WEST 82-58-M A.C. No. 45-02582-05002 Pole Road Pit No. 1 Mine
FERNDALE READY MIX & GRAVEL, INC., RESPONDENT	

DECISION

Appearances: Ernest Scott, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Mr. William A. VanWerven, President, Ferndale Ready Mix & Gravel, Inc., Ferndale, Washington, appearing Pro Se.

Before: Judge Morris

This case, 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 surface sand and gravel operation. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated various safety regulations promulgated under the Act.

After notice to the parties, a hearing on the merits was held in Bellingham, Washington on January 9, 1984.

The parties did not file post trial briefs.

Issues

The threshold issue is whether a Congressional funding resolution prevents MSHA from proceeding with this case.

The secondary issues are whether respondent violated the various regulations; if so, what penalties are appropriate.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. Respondent, Ferndale Ready Mix & Gravel, Inc., a corporation, is the owner and operator of the Pole Road Pit No. 1 Mine, a sand and gravel operation located at Everson, Whatcom County, Washington.

2. Respondent was the owner and operator of Pole Road Pit No. 1 Mine, at all times material to this case.

3. Respondent's business affects commerce, and the Mine Safety and Health Review Commission has jurisdiction to hear this case.

4. Respondent admits paragraph III, of the petition filed in WEST 82-58-M.

5. As a result of an inspection of the Pole Road Pit No. 1 Mine, Everson, Washington, by Federal Mine Safety and Health Inspector James Broome on July 28, 1981, Citations Nos. 588681, 588682, 588683, 588715, 588716, 588717, 588718, 588719, and 588720, were issued to Respondent.

6. Copies of the aforesaid citations are contained in Exhibit "A" to the Petition for Assessment of Penalty filed in this case by petitioner, and may be admitted into evidence for the sole purpose of showing they were issued.

7. Orders of Withdrawal Nos. 587071, 587058, 587059, 587060, 587141, 587142, 587143, 587144, and 587145, copies of which are contained in Exhibit "A" to the petition for assessment of penalty filed in this case, were issued to respondent on September 2, 1981, by Federal Mine Safety and Health Inspector David Estrada.

8. Copies of the aforesaid Orders of Withdrawal may be admitted into evidence for the sole purpose of showing they were issued.

9. As of the date (September 2, 1981) Inspector David Estrada issued the aforesaid Orders of Withdrawal, respondent had not yet corrected the conditions identified in the citations referred to in numbered paragraph No. 5 above.

10. Respondent corrected the conditions referred to in numbered paragraph No. 5, herein above and came into compliance with the Federal Mine Safety and Health Act of 1977, and applicable regulations on or about September 10, 1981.

11. During the two year period ending July 28, 1981, respondent did not have any history of violations under the Act.

12. Payment of the proposed penalties ($613) will not affect respondent's ability to continue in business.

13. The Pole Road Pit No. 1 mine produced 15-20 thousand tons of wash materials during 1980.

14. The Pole Road Pit No. 2 mine produced 9-10 thousand tons of wash materials during 1981.

15. Respondent's annual dollar volume of business done or sales made during 1980, 1981, and 1982 are set forth below:

1980 - $60,000
1981 - $40,000
1982 - $50,000

16. Respondent had approximately the following number of production employees during the following years:

1980 - One part time
1981 - One part time
1982 - One part time

17. At the commencement of the hearing it was further stipulated that Mr. VanWerven and his son do not contest the factual allegations contained in the nine citations issued by James Broome (Transcript at pages 5 and 6).

MSHA's fiscal authority

A threshold issue concerns MSHA's authority to expend funds in this case. The evidence on this issue is uncontroverted.

MSHA inspected this sand and gravel operation and issued citations on July 28, 1981. Orders of withdrawal were issued on September 2, 1981. On December 18, 1981 respondent filed its notice of contest.

On December 15, 1981 President Reagan signed H.R.J.Res. 370, Pub.L. No. 91-92, 131, 95 Stat. 1183, 1199 (1981). The foregoing Congressional funding resolution prohibits MSHA from enforcing the Mine Safety Act provisions with respect to various operations including sand or gravel activities (Exhibit J-1).

On January 4, 1982 MSHA wrote to respondent and indicated that the foregoing funding resolution restricted the agency from enforcing the Act. MSHA's letter further indicated that

respondent's case would "not be referred to the Federal Mine Safety and Health Review Commission and no further action will be taken at this time" (Exhibit R-1).

The above prohibition which arose from the funding resolution did not continue in effect. Jurisdiction over sand and gravel was returned to MSHA when President Reagan signed the fiscal 1982 supplemental appropriations bill on July 18, 1982 (Exhibit J-1).

On this record it does not appear that MSHA expended any funds on this case during the time the funding prohibition was in effect. Once jurisdiction was returned to MSHA, in July 1982, the agency could legally proceed with the prosecution of this action. The case was not presented until January 1984, long after the funding prohibition had been dissolved.

On a related case deciding jurisdiction in relation to the same Congressional funding resolution see the Commission decision of Secretary on behalf of Cooley v. Ottawa Silica Company, 6 FMSHRC 516, 525 (1984).

MSHA is not in violation of the funding resolution, accordingly, the agency complied with the law in presenting its evidence in this case.

Citation 588681

This citation proposes a civil penalty of $34. Respondent does not contest the factual allegations in the citation. These allegations are, in part, as follows:

> The elevated walkway around the wash screen was not kept clear of rocks and dirt on the drive side of the screen. The buildup presented a tripping hazard to person walking on the walkway.
> (Exhibit E-1).

The citation allegedly violated is contained in Title 30, Code of Federal Regulations, Section 56.11-2, which provides as follows:

> 56.11-2 Mandatory. 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.

MSHA Inspector James B. Broome indicated that he inspected respondent's mine on July 28, 1981. (Tr. 7, 9).

The walkway cited by the inspector was eight to nine feet above ground (Tr. 11). The wash screen was in operation and one person was exposed to the loose rocks on the walkway. Injuries that could be sustained would range from a minimal injury to a fatality (Tr. 11, 12; Exhibit E10). The inspector concluded that management was not aware of this condition (Tr. 10-11).

Respondent presented no evidence concerning this citation.

Discussion

The Commission previously affirmed a violation of this regulation in a factual setting where there were tools, hooks, wire rope and rocks lying near the edge of the elevated walkway. In addition, there was no toeboards around the edge of the platform to prevent the loose material from falling over the edge and striking employees below. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 39. The writer is bound by the above Commission precedent.

For these reasons Citation 588681 should be affirmed.

Citation 588682

This citation proposes a penalty of $72 and it reads, in part:

> The V-belt drive for the lead pulley of the wash screen feed conveyor was not guarded. It was about 5 1/2 feet above the level of its wash screen walkway and readily accessible to a person on the walkway.
>
> (Exhibit E-2).

The citation allegedly violated, 30 C.F.R. 56.14-1, provides:

Guards

> 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.

Inspector Broome, supplementing the factual allegations in the citation, testified that this violative condition was in plain sight. It should have been known to respondent. In addition, the inspector had previously advised the company that it was not in compliance concerning the V-belt. No citation had been previously issued for this condition because the plant was not then operating (Tr. 12-14).

The same wash screen appears in this citation as in the previous citation (Tr. 13-14). The V-belt drive is 5 1/2 feet from the walkway; the pulley itself is directly in the center of the walkway (Tr. 15; Exhibit E-11).

This condition could cause injuries ranging from bruised fingers to the loss of a hand (Tr. 14-15).

Respondent's witness Larry William VanWerven testified that inspectors on previous occasions had not required guards for the conditions cited here (Tr. 35-38).

Discussion

The facts establish a violation of Section 56.14-1. On the facts of the case see the Commission decision of Missouri Gravel Company, 3 FMSHRC 2470 (1981).

Respondent's defense is generally asserted as to all the guarding citations. It is in the nature of a collateral estoppel against MSHA because the inspectors did not previously issue citations for these same violative conditions.

The fact that citations were not previously issued for violations of the guarding standard does not invoke the doctrine of collateral estoppel. The inspectors have different areas of expertise and it may well be that for some particular reason a violative condition is (or is not) brought to an inspector's attention. The doctrine cannot be invoked here to deny miners the protection of the Mine Safety Act. I have previously refused to apply the doctrine in similar circumstances. Servtex Materials Company, 5 FMSHRC 1359 (1983); Kennecott Minerals Company, WEST 82-155-M (August 1984); see also the Commission decision in King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

Respondent generally raised this issue and this ruling applies to Citation 588716, 588717, 588718, infra.

The citation should be affirmed.

Citation 588683

This citation proposes a penalty of $36 and it reads, in part:

> The plant operator did not have a method of communication to summon help in case of an emergency. (Exhibit E-3).

The citation alleges respondent violated 30 C.F.R. 56.18-13 which provides:

> 56.18-13 Mandatory. A suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency.

In addition to the factual allegations in the citation, Inspector Broome testified there was no means to summon help if a worker was injured. But no employee was exposed to this hazard since this was a one man operation (Tr. 16-17).

Larry VanWerven testified that there was a private business located about 750 feet from the walkway. The business was open six days a week from 9 a.m. to 5 p.m. (Tr. 34, 35).

Discussion

The facts establish a violation of the regulation. The availability of a business telephone 750 feet from the walkway is not a "suitable" communication system. It is both too remote and under the control of another.

Citation 588715

This citation proposes a penalty of $195 and it reads, in part:

> The 966 Cat front end loader, which was feeding the plant and loading customer trucks did not have the automatic backup warning alarm in working order. The large muffler prevented the operator from having a clear view to the rear. (Exhibit E-4)

The citation alleges respondent violated 30 C.F.R. 56.9-2. The correct standard would be 30 C.F.R. 56.9-87. Inasmuch as respondent does not dispute the factual allegations in the citation, pursuant to the Federal Rules of Civil Procedure, the

citation is amended to read 30 C.F.R. 56.9-87. Fed.R.Civ.P, Rule 15(b), Usery v. Marquette Cement Manufacturing Company, 568 F.2d 902 1977 (2nd Cir).

30 C.F.R. 56.9-87 provides as follows:

> 56.9-87 Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Witness Broome observed that at the time of his inspection only one worker was present. Hence, there was no exposure to employees. But customers who were loading at the time were exposed to this hazard (Tr. 16-18).

Mr. VanWerven told the inspector that he didn't know the truck lacked a backup alarm (Tr. 18).

Respondent offered no evidence in connection with this violation.

The facts establish a violation. The citation should be affirmed since the lack of knowledge of this defect does not constitute a defense.

Citation 588716

This citation proposes a penalty of $60 and it reads, in part:

> The tail pulley of the pea gravel conveyor did not have a guard to prevent someone from getting caught in the moving machinery.
>
> (Exhibit E-5)

The standard allegedly violated regarding guards, 30 C.F.R. 56.14-1, is set forth, supra.

The MSHA inspector testified that he had informally advised Mr. VanWerven 2 to 6 months before the inspection that the conveyor, which was in plain sight, needed a guard (Tr. 19).

The operator of the conveyor was the only worker exposed (Tr. 19).

Discussion

The facts establish a violation of the regulation. The defense of collateral estoppel has been previously discussed and it is without merit.

Citation 588717

This citation proposes a penalty of $60 and it reads, in part:

> The tail pulley of the 7/8" rock conveyor did not have a guard over the pinch points to prevent a person from getting caught in the moving machinery.
> (Exhibit E-6)

The standard allegedly violated, 30 C.F.R. 56.14-1, is set forth, supra.

Inspector Broome indicated he had notified Mr. VanWerven about this condition. One worker was exposed to the violative condition which could cause injuries ranging from fractured hands to a fatality (Tr. 19-21).

This tail pulley, about knee high, was near a footing at the exit end of the screen (Tr. 21).

Respondent's evidence generally indicated that other inspectors failed to require guards (Tr. 35-36).

Discussion

The testimony and the photographs (Exhibit E-13) establish a violation of the standard. Respondent's defense has been previously discussed and found to be wanting.

The citation should be affirmed.

Citation 588718

This citation proposes a penalty of $60 and it reads, in part:

> The tail pulley of the 1 1/2" rock conveyor did not have a guard to prevent someone from getting caught in the pinch points of the moving machinery.
> (Exhibit E-7)

The standard allegedly violated, relating to guards, 30 C.F.R. 56.14-1, is set forth, supra.

Inspector Broome testified that one worker was exposed to this hazard. The frequency of his exposure would depend on the number of times it would be necessary to shovel out the debris at the tail pulley.

The same type of an accident could occur as with other unguarded tail pulleys. An accident could range from a bruised hand to the loss of an arm to a fatality (Tr. 23).

The tail pulley was in plain sight. In addition, the inspector had informally advised the company about this condition (Tr. 22-23).

Discussion

The facts establish a violation of the standard. The same ruling applies to the defense of collateral estoppel.

Citation 588719

This citation proposes a penalty of $44 and it reads, in part:

> The walkway around the wash screen had an opening on the sand screw end through which a man could fall or step into the worm of the sand screw.
> (Exhibit E-8)

The standard allegedly violated, 30 C.F.R. 56.11-12, provides:

> 56.11-12 Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The inspector saw one employee exposed to this condition. Each time the employee walked around the walkway he had to step over the hole in the screen. The hole, about two feet by two feet was in plain sight (Tr. 24). A person could fall 2 1/2 to 3 feet if he fell through the hole (Tr. 25).

Discussion

The facts and the photograph (E-14) clearly establish a violation of the regulation. Respondent's defense has been previously discussed. It is again denied.

Citation 588720

This citation proposes a penalty of $52 and it reads, in part:

The handrail on the drive side of the wash screen was incomplete. A section of walkway about 8-10 foot long did not have a handrail and a chain that would have blocked off the walkway was down the walkway was elevated about 8þ off the ground.
(Exhibit E-9)

The standard allegedly violated, 30 C.F.R. 56.11-2, was cited in connection with the first citation in this decision.

The inspector testified that a 42 inch handrail encompassed the walkway; except there was no handrail for 8 to 10 feet along the walkway. In addition, a chain was not hooked to block off access at the end of the walkway (Tr. 26, 27).

One worker was exposed to this condition. If he fell backwards off of the eight foot high walkway his injuries could range from minimal to fatal (Tr. 26-27).

The inspector had previously notified the operator of this condition (Tr. 25).

Discussion

The facts establish a violation of the regulation. The handrail on the elevated walkway was not of a "substantial construction" since a portion of the guard rail was missing.

Respondent's defense has been previously discussed and denied.

The citation should be affirmed.

CIVIL PENALTIES

Section 110(i) of the Act, now 30 U.S.C. 820(i), sets forth the criteria to be considered in assessing civil penalties.

Respondent has no adverse prior history relating to the issuance of any citations. The business, as noted in the stipulation, is quite small. The respondent was highly negligent in that these conditions were open and obvious. In addition, before these citations were issued, respondent had been informally advised by Inspector Broome of the conditions existing in Citations 588716, 588717, 588718 and 588720. The parties stipulated that the imposition of the proposed penalties will not

affect respondent's ability to continue in business. The gravity of each violation is severe and such gravity is apparent on the record.

A keystone of the Act is good faith compliance. In this case respondent did not demonstate any statutory good faith because the violative conditions cited by Inspector Broome were not abated until withdrawal orders were issued by MSHA Inspector David Estrada on September 2, 1981 (Stipulation, paragraph 9).

Considering the statutory criteria, and based on the entire record, I am unwilling to disturb the penalties proposed for these citations.

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

ORDER

The following citations and the proposed penalties therefor are affirmed:

Citation	Penalty
588681	$ 34
588682	72
588683	36
588715	195
588716	60
588717	60
588718	60
588719	44
588720	52

Respondent is ordered to pay to the Mine Safety and Health Administration the total sum of $613 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge