FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 10 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 84-3-M
	:	A.C. No. 29-01893-05502
	:	Docket No. CENT 84-19-M
	:	A.C. No. 29-01890-05501
v.	:	
	:	Portable Crushing Plant No. 3 & 4
SOUTHWAY CONSTRUCTION COMPANY, INC., Respondent	:	Docket No. WEST 84-27-M
	:	A.C. No. 05-03880-05501 BY2
	:	Docket No. WEST 84-28-M
	:	A.C. No. 05-03880-05502 BY2
	:	Union Carbide Pit

DECISION

Appearances: James H. Rarkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Ms. Izora Southway and Leroy Belt, Southway Construction Company, Inc., Alamosa, Colorado, pro se.

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 inspections of respondent's sand and gravel operations in New Mexico and Colorado. The Secretary of Labor seeks to impose civil penalties because respondent violated regulations promulgated under the Act.

After notice to'the parties, a hearing on the merits was held in Alamosa, Colorado on August 28, 1984.

The parties waived the filing of post-trial briefs.

Issues

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

Stipulation

At the commencement of the hearing the parties stipulated that the respondent was subject to the Act (Tr. 8).

CENT 84-3-M
Citation 2091920

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.14-1 which provides as follows:

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.

Summary of the Evidence

During this inspection on August 10, 1983 near Wagon Mound, New Mexico, MSHA Inspector Alfredo Garcia was accompanied by Darrell Yohn, the company representative. A particular place in the worksite came to the inspector's attention because a worker was cleaning debris at a tail pulley. The worker was kneeling on the ground about two feet from the end of the pulley. The unguarded tail pulley was under the L.J. Crusher. Photographs taken by the inspector showed the moving parts at the tail pulley. (Transcript at pages 10 through 17, 27, 28; Exhibits P1 and P2).

In the inspector's opinion, there was a hazard to this worker. He could become entangled in the tail pulley. This hazard was further complicated by the dusty conditions in the immediate vicinity. In the event the worker were to be caught in the tail pulley, injuries could range as high as a permanent disability (Tr. 17-21).

Mrs. Izora Southway, an officer of respondent, testified that Inspector Garcia was at this site and issued a citation on March 23, 1983. However, Mrs. Southway pointed out that no citation was issued at that time for this particular unguarded tail pulley. Mrs. Southway felt that since the citation was not issued at the time of the previous inspection it could not now be a violation of a substantial and significant nature (Tr. 22-24).

Discussion

The evidence here establishes a violation of the guarding standard, 30 C.F.R. § 56.14-1. It is true there was a guard located above the tail pulley which would prevent access to the area for anyone other than the employee who was cleaning the tail pulley itself. It is, however, the general purpose of the regulation to protect all employees and this would include the clean-up man working at this location. Cf. Missouri Gravel Company, 3 FMSHRC 2470 (1981).

The evidence further establishes that the violation is of a significant and substantial nature. In view of the testimony and experience of Inspector Garcia, I am unwilling to hold to the contrary, Cf. Consolidation Coal Company, 6 FMSHRC 34, (1984).

It is true that there was a guard located above the tail pulley. Photographs indicate that access was very limited for the clean-up man (Exhibits P1 and P2 illustrate the access.) These factors cause me to conclude that the negligence of the operator is somewhat overstated. This issue is addressed in the assessment of the civil penalty which is considered, infra.

The evidence offered by respondent concerns the failure of Inspector Garcia to issue a citation for this violative condition in March, 1983. This testimony essentially invokes the doctrine of collateral estoppel. In short, should MSHA now be estopped from claiming this violation occurred since it did not previously issue a citation for this condition?

This case particularly illustrates the weakness in respondent's argument. Inspector Garcia indicated that this condition was brought to his attention because the cleanup man was working at the end of the tail pulley. The position of this man, his activities with his shovel and his close proximity to the unguarded tail pulley brought the entire matter into focus. The citation was issued and properly so. The doctrine of collateral estoppel should not and 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; also on the issue of collateral estoppel, see the Commission decision in King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

The citation should be affirmed.

CENT 84-19-M
Citations 2090946, 2090947, 2090948

The above citations allege separate violations of 30 C.F.R. § 56.5-1(a) and 5-5 which provides:

Air Quality

56.5-l Mandatory. Except as permitted by § 56.5-5:

(a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis

of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the Secretary-Treasurer, P.O. Box 1937, Cincinnati, Ohio 45201, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mining Enforcement and Safety Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

56.5-5 Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted -engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Mining Enforcement and Safety Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.

(b) A respirator program consistent with the requirements of ANSI 288.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI 288.2-1969," approved August 11, 1969, which is hereby incorporated by reference and made a part hereof.

This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mining Enforcement and Safety Administration.

(c) When respiratory protection is used in atmospheres immediately harmful to life, the presence of at least one other person with backup equipment and rescue capability shall be required in the event of failure of the respiratory equipment.

Summary of the Evidence

On May 23, 1983, MSHA Inspector Archie Fuller inspected respondent's worksite two miles northeast of Blanco, New Mexico. The location was a basic sand and gravel operation with three workers at the site (Tr. 79-81).

The inspector placed a Bendix dust pump on the lapel of each worker and sampled them for nine hours of an eleven-hour shift. The filters had been pre-weighed, numbered and.marked. At this time the foreman, as the primary loader operator, would change off with the crusher operator about half of the time. The clean-up man drove the water truck. At the commencement of the inspection the inspector requested that the workmen perform their normal duties as far as was possible. At the conclusion of the sampling, he sealed the samples and forwarded them to MSHA for an analysis (Tr. 81-84, 87, 88).

The sampling results obtained from MSHA's technical laboratory indicated the following exposures for which citations were issued:

Occupation and Location	Sampling Time-min.	Sample Wt.-mg	SIO_2 Wt.-mg	$\%SIO_2$	TWA mg/m^3	TLV mg/m^3
Loader Operator (Foreman)	540	.420	.103	24.52	.515	.377
Crusher Operator	540	.344	.097	28.19	.422	.331
Plant Laborer	540	.407	.095	23.34	.499	,395

(Tr. 84-86; Exhibit P-4)

The company had respirators on the jobsite but they were not being worn. There was very little visible dust to be seen. In the inspector's opinion, the company should have been aware of the silica dust problems due to prior MSHA inspections (Tr. 86-90, 93).

Respondent's evidence shows that on August 2, 1983, this particular worksite was inspected by the same compliance officer. At that time the company was found to be in compliance with this regulation.

Discussion

The evidence establishes that each of the employees was over-exposed to silica dust. Cf. Climax Molybdenum Company, a division of Amax, Inc., 2 FMSHRC 2748 (1980).

The mere fact that an inspection in August, 1983 revealed the company was in compliance does not constitute a defense to the violations that occurred on May 23, 1983.

The three citations should be affirmed.

WEST 84-27-M
Citation 2096998

This citation alleges a violation of 30 C.F.R. § 56.15-4 which provides:

> 56.15-4 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.

Summary of the Evidence

Respondent was crushing rock for Corn Construction Company near Rifle, Colorado when MSHA Inspector Michael T. Dennehy arrived at the worksite before 8:00 a.m. on August 16, 1983. He contacted the company representative, Jim Farley. Before commencing his activities, Inspector Dennehy told Farley that he would be inspecting the area and he suggested that all of the employees wear their safety equipment. At that time it was established that there was only one pair of safety glasses available for the three workers at the jobsite. At that point one of the employees was designated to wear the available safety glasses (Tr. 30-35, 37).

Inspector Dennehy then proceeded with his inspection. During the course of his activities he saw a worker striking metal to metal. He was hammering a metal guard into place. In addition, the worker, who had been designated to wear the safety glasses, was in fact, wearing sunglasses. The sunglasses did not meet safety specifications. Sunglasses, such as he was wearing,

complicates the hazard because those glasses could shatter if struck with a piece of metal (Tr. 32, 33).

It is common practice in the industry to wear safety glasses when striking metal to metal. If this worker continued the practice there would be a substantial likelihood that an injury would occur (Tr. 34, 36).

Respondent offered no evidence to rebut this violation.

Discussion

The evidence establishes a violation of 30 C.F.R. § 56.15-4. This particular miner was without safety glasses or other suitable protection when he was striking metal to metal. The hazard was clear. Unprotected eyes could be injured.

The citation should be affirmed.

WEST 84-28-M
Citation 2096710

This citation alleges a violation of 30 C.F.R. § 56.5-1, cited, supra.

Summary of the Evidence

On the day he issued the citation for the failure to have safety glasses Inspector Dennehy conducted a dust and noise survey at the Union Carbide pit (Tr. 40-41, 53).

Inspector Dennehy prepared for his survey by precalibrating his pumps, then numbering them, and sealing the filters. He monitored two miners for an entire day. The sampling device was placed on respondent's employee Phil Miller, the clean-up man. At the conclusion of the work day Inspector Dennehy resealed the filters, recalibrated his pumps, and turned them in to be weighed. In the inspector's opinion, the samples were very valid (Tr. 41, 42).

An MSHA analysis of the sample established that Miller's exposure was 1.6 times over the TLV for silica. There was some visible dust present in the area, as well as some water sprays. MSHA advised the company of its analysis of the silica dust (Exhibit P3). Employee Miller, who was not wearing any personal protective equipment, was exposed to a dust concentration consisting of 16.21 percent silica. The citation itself was issued after the inspector received the technical data from MSHA's staff (Tr. 42-43; Exhibit P3).

Witness Richard Durand, an MSHA industrial hygienist and a person experienced in the effects of silicosis on the human body,

testified in the case. 1/ Witness Durand indicated that a 16 percent concentration of silica dust is relatively high. However, sand and gravel operations usually average silica dust concentrations in the vicinity of 16 to 20 percent (Tr. 55-58).

Silica affects a person's lungs. Fibrosis can result. After a person has been exposed, the scarring may progress further without any additional exposure. The disease and lung problems progress in tandem. As the lungs lose their elasticity, the heart, in turn, must pump harder (Tr. 58-61).

If an individual has been exposed to silicosis, he is thereby susceptible to tuberculosis. A chronic silicosis can develop from an exposure from about 1 to 16 percent over a long period of time. Acute silicosis can develop when there is an exposure above fifty percent for a period of two to five years. The witness considered any exposure above fifty percent to be high (Tr. 60-63, 69, 73).

Disability or death can be the ultimate results (Tr. 60-61, 73).

If workers are not wearing respirators then their problems with silica can be greatly enhanced.

Respondent offered no evidence to rebut the foregoing evidence.

Discussion

The evidence here establishes a violation of the regulation. The exposure to employee Miller to silica dust was 1.6 times of the threshold limit value.

On the uncontroverted evidence, the citation should be affirmed.

CIVIL PENALTIES

The statutory criteria for assessing a civil penalty is contained in 30 U.S.C. § 820(i). It provides as follows:

1/ Witness Durant's testimony was offered in connection with WEST 84-28-M and CENT 84-19-M.

> The Commission shall have authority to assess all civil penalties provided in this Act. 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.

In considering these factors I find that respondent had 64 citations issued against it in 1983. These were the result of 14 inspections at five different worksites (Tr. 115-116). Respondent's operations are highly mobile involving as many as 30 different sites a year (Tr. 116).

Respondent's prior citations were assessed a single penalty (Tr. 115, 116). Respondent contends that the citations in contest here should be assessed on the same basis. I reject this view. The Commission is bound by the statutory criteria and has rejected the Secretary's single assessment regulation. United States Steel Mining Co., Inc., 6 FMSHRC 1148 (1984).

Mrs. Southway testified that in 1983 the company compiled 51,136 man hours with no injuries at all of the mine sites (Tr. 116, 117). The company has three to four employees at each site with a maximum of about 20 employees (Tr. 117).

Mrs. Southway's testimony established that the company provided protective equipment in their plants. Further, the employees were instructed in their use, and they understood the MSHA regulations. I accept Mrs. Southway's testimony but an operator must do more than merely furnish protective equipment. It is the company's obligation to insist on the use of such equipment by its employee. This obligation can be met by training and other means. I consider the operator was negligent as noted in connection with each citation.

Mrs. Southway indicated the monetary significance of the penalties was not extreme. But she was concerned about the later effect of these citations on the company (Tr. 120). The general statutory scheme of imposing penalties seeks to promote an operator's efforts to provide for the safety and health of its miners. Since the violations have been established in these cases a penalty in accordance with the statutory criteria must be assessed.

The gravity of each violation appears in the record. As previously stated the negligence concerning Citation 2091920 (unguarded tail pulley) is overstated. The penalty should be reduced to $25.00. The three citations in CENT 84-19-M relate to silica dust and a civil penalty of $30.00 is proposed for each. On the other hand, in WEST 84-28-M, the Secretary proposes a penalty of $63.00 for a single exposure to silica dust. Considering the statutory criteria I believe that the penalty for Citation 2096710 should be reduced to $30.00 from $63.00.

It is to respondent's credit that it abated all of the violative conditions (Tr. 1211.

After carefully considering the statutory criteria, I deem that the penalties noted hereafter are appropriate and they should be affirmed.

Citation No.	Proposed Assessment	Disposition
2091920	$54.00	$ 25.00
2090946	30.00	30.00
2090947	30.00	30.00
2096948	30.00	30.00
2096998	68.00	68.00
2096710	63.00	30.00

Accordingly, based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. In CENT 84-3-M: Citation 2091920 is affirmed and a penalty of $25.00 is assessed.

2. In CENT 84-19-M: Citations 2090946, 2090947, and 2090948 and penalties of $30.00 for each such violation are assessed.

3. In WEST 84-27-M: Citation 2096998 is affirmed and the proposed penalty of $68.00 is assessed.

4. In WEST 84-28-M: Citation 2096710 is affirmed and a penalty of $30.00 is assessed.

5. Respondent is ordered to pay to the Secretary the sum of $213.00 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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