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SOL (MSHA) V. JOHN J. CRAIG
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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. SE 84-68-M A.C. No. 40-00041-05502
v.	Marmor Quarry & Mill
JOHN J. CRAIG COMPANY, RESPONDENT	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Mr. John J. Craig, President, John J. Craig Company, Knoxville, Tennessee, for Respondent.

Before: Judge Lasher

This matter came on for hearing in Knoxville, Tennessee, on January 9, 1985. MSHA seeks assessment of a $91 penalty each for the violations of 30 C.F.R. 56.14-1 (Footnote.1) alleged in Citation Nos. 2080846 and 2080847, issued by MSHA Inspector Dallas Shipe on April 18, 1984 during a regular inspection.

At the end of the hearing,(Footnote.2) Respondent's president, John J. Craig, conceded the occurrence of the violation described in

Citation No. 2080847 (Footnote.3) and with respect to Citation No. 2080846,(Footnote.4) Respondent made no persuasive or substantial denial or rebuttal of the Secretary's substantial evidence establishing the occurrence of the violation. Accordingly, both violations are found to have occurred.

Respondent's contentions before and during the hearing focused primarily on the amount of penalties which should be assessed.(Footnote.5)

PRELIMINARY FINDINGS

Based on stipulations reached by the parties, and the testimony and documentary evidence of record, it is found:

(1) Respondent, a small family corporation historically engaged as a producer of and wholesale dealer in Tennessee Marble and Terrazzo chips, operated the Marmor Quarry and Mill at all times pertinent to these proceedings (Tr. 64) and is subject to the jurisdiction of the Federal Mine Safety and Health Act.

(2) Respondent is a medium-sized mine operator in the marble industry (Tr. 124).

(3) Assessment of reasonable penalties will not jeopardize Respondent's ability to continue in business (Tr. 66).

(4) Respondent proceeded in good faith to attempt to achieve abatement of both violations after notification thereof (Tr. 58). No finding is made, however, that both violations have remained abated.

(5) During the 2-year period immediately preceding the issuance of the subject Citations Respondent had a commendable record of prior violations: a total of two, one of which was a guarding violation similar to those involved in this proceeding (Ex. P-4).

DISCUSSION AND ULTIMATE FINDINGS

Citation No. 2080846

Inspector Shipe credibly testified that, having in mind a fatality in North Carolina caused by an unguarded rotating shaft (Ex. P-5), he observed the condition described in the Citation and determined it to be a violation even though in several previous inspections conducted over the prior 4 years or so he had seen the same condition at Respondent's mine but had not recognized it as a violation.(Footnote.6)

When operating the machinery (drum) the derrick hoist operator sits facing it on an elevated bench with the end of the large (3-4 inches in diameter) pinion shaft exposed approximately 4 inches-rotating directly in front of him at approximately knee height, pointed not toward him but at right angle to his right, and about 1-foot from his legs (Tr. 15, 16, 50, 51; Ex. R-1). The condition, as such, was readily visible. The rotating shaft has a gear on it which pulls the drum and a "key"--which sticks out on the shaft to help hold the gear to the shaft--could "grab anything that got wrapped around it" according to the Inspector (Tr. 17, 59). The derrick hoist with the unguarded pinion shaft had apparently been operated in the same manner by the same operator, Ray Davis, for a period of many years (Tr. 73).

The hazard envisioned by the Inspector was (1) that the machine operator's clothing could become entangled in the shaft, pulling him into the machinery and suffocating him in the manner

depicted in Exhibit P-5, and (2) in like manner, other miners coming into the building could be exposed to the same risk (Tr. 22-24, 32, 59, 60).

Had the operator, Mr. Davis, or the foreman in his absence, actually been caught by the rotating shaft, the shut-off switch for the hoist would not have been within reach (Tr. 25, 45). In addition to the machinery operator, other miners, who Respondent admits would from time to time, come into the building for various purposes, were placed in jeopardy by the violative condition.

Although the parties differed on the probabilities of the hazard posed by the violation ever coming to fruition, the opinion of the Inspector that it was reasonably likely to happen and that such could happen anytime is credited, particularly in view of the close proximity of the operator to the exposed shaft in the ordinary course of his operation of the derrick hoist. Mr. Craig's opinion to the contrary, based at least in part on the belief that no such accidents had happened previously, is not so well founded. Must a serious injury or fatality actually occur before a hazard is cognizable? As noted above, had the clothing of the operator or other person been caught in the rotating pinion shaft the shut-off switch would not have been within reach. Thus, the elements for a serious, if not fatal, accident are present: (1) an unguarded rotating shaft, (2) in close proximity to the operator as well as the walkway which occasionally is traveled by other miners. The possibility of the accident occurring as contemplated by the Inspector clearly was not remote. There was at least a reasonable possibility of a miner's contacting the rotating shaft and suffering a resultant injury. Secretary v. Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094 (September, 1984). Such an accident could have occurred because of the inadvertence or pre-occupation of a miner while performing his routine or assigned tasks in an otherwise reasonable or prudent manner. Aberrational conduct or reckless disregard of a miner for his safety would not have been required for such an accident to occur.

Respondent contends that the degree of its negligence with respect to this violation should be significantly reduced because MSHA for a period of several years prior to April 18, 1984, had not found the condition to be an infraction. While the Secretary's lack of enforcement does not estop later enforcement if the safety standard is applicable, Secretary v. Burgess Mining and Construction Corporation, 3 FMSHRC 296 (February, 1981), lack

of enforcement by the regulator can induce a mine operator into relying on what it believes is a construction of the application of the standard to its operation. In a similar situation the Federal Mine Safety and Health Review Commission has rejected the applicability of the doctrine of equitable estoppel to the Secretary but viewed the Secretary's erroneous interpretation as a factor which should be considered in mitigation of any penalty to be assessed, Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (June, 1981), stating:

> "The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Lazy F.C. Ranch, 481 F.2d 985, 987-990 (9th Cir.1973); United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir.1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it."

It is concluded from the circumstances presented here that the pattern of MSHA's non-enforcement does greatly mitigate the Respondent's culpability. One would reasonably infer from the record as a whole that the hazard to miners' safety was actually not recognized by MSHA or the operator over a great period of time. Accordingly, the degree of Respondent's negligence is found to be only minimal. On the other hand, in view of the distinct possibility for serious or grievous harm to result from this violation, it is found to be very serious.

Citation No. 2080847

Upon walking into Respondent's saw room on April 18, 1984, Inspector Shipe observed 2 gang saws (Nos. 5 and 6) running while unguarded. These two saws which had not been in operation for "a long time", had been placed into operation approximately two days before the inspection. Respondent admitted the violation which pertained only to saw #5 (Tr. 112), and also conceded that it was aware that guarding (railing) was required on the 2 saws in

~567
question since it was required on 4 others (Nos. 1-4) which it had been operating previously. Mr. Craig testified that "he (the inspector) hit us just a very few days before" the guarding was to have been put in place. However, on the day of the inspection, railing or pipe to have been used for the guard was not seen by the inspector in the area.

The flywheel, a huge wheel with spokes, is approximately 5 feet in diameter and constructed of heavy metal. It runs fairly rapidly and could catch a miner or other person walking, nearby. The hazard envisioned by the Inspector was that a person could slip, fall or stumble into it or inadvertently walk into it. He indicated that occasionally there was "heavy traffic" along the walkway which is immediately adjacent to the revolving flywheel (Tr. 108, 109). Both miners and visitors to the office, which is adjacent to the gang saws, were placed in jeopardy of serious, if not fatal, injuries by the hazard created by the violation. There was at least a reasonable possibility of contact and injury. Secretary v. Thompson Brothers Coal Company, Inc., supra. This is found to be a serious violation resulting from a high degree of negligence on the part of Respondent.

The evidence bearing on all six mandatory penalty assessment criteria having been considered with respect to the 2 violations, it is concluded that the penalties proposed by the Secretary in this matter are appropriate and amply supported in the record with respect to both Citations.

ORDER

Respondent is ordered to pay the Secretary of Labor penalties totaling $182.00 ($91.00 for each violation) within 30 days from the date of issuance of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 30 C.F.R. 56.14-1, pertaining to guards, provides as follows:

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.

~Footnote_two

2 Tr. 133-135, 139.

~Footnote_three

3 The condition cited in Citation No. 2080847 is as follows:

The flywheel and the wide drive belt on the No. 5 gang saw was not guarded to keep a person from falling into them. A walkway is heavily traveled by the employees.

~Footnote_four

4 The violative condition cited is described therein as follows:

"The pinion shaft for the derrick hoist in the Engine Room No. 3 was not guarded. The shaft extends out about 4 inches with a key in it. The end of the shaft was about one-foot from the derrick operator's leg. His clothing could be caught in it."

~Footnote_five

5 The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a violation, the business size of the operator, and the number of violations previously discovered at the mine involved. Mitigating factors include the operators good faith in abating violative conditions and the fact that a substantially adverse effect on the operator's ability to continue in business would result by assessment of penalties at some particular monetary level. Factors other than the six criteria expressly provided in the Act are not precluded from consideration either to increase or reduce the amount of penalty otherwise warranted.

~Footnote_six

6 Sketches of the small shed-like building (engine room) where the derrick hoist was located, were prepared at the hearing by both the Inspector (Ex. P-6) and Mr. Craig (Ex. R-1). At the end of the hearing, a view of the area was taken by the undersigned which was unreported since the Court Reporter had no portable equipment available to record the same. The view indicated that neither sketch is entirely accurate. In particular, neither sketch correctly depicts the relative positions of the walkway through the area relative to the elevated bench upon which the operator sits and the shaft. The direction which the unguarded shaft faced relative to the operator's bench is correctly shown in Ex. R-1. However, R-1 incorrectly shows the walkway behind the bench, rather than its actual location between the shaft and the bench.