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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 85-156-M  
A.C. No. 02-01398-05502

v.

Reidhead Sand & Rock, Inc.

REIDHEAD SAND & ROCK, INC.,  
RESPONDENT

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,  
U.S. Department of Labor, San Francisco, California,  
for Petitioner.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place in Phoenix, Arizona on January 29, 1986.

Respondent failed to appear at the hearing and further failed to reply to an order to show cause issued after the hearing.

Summary of the Case

Gary Day, an MSHA supervisory mine inspector since 1975, inspected respondent on March 28, 1985 (Tr. 3).

On that occasion he observed that a 16 foot wide roadway, or ramp, lacked berms or guards. The ramp provides the only access to a dump hopper; further, it was elevated on a repose of zero to five feet (Tr. 5, 8).

A ten foot wide front-end loader travels the ramp to dump material into the hopper (Tr. 5). The loader, which weighed several tons, had a ten foot wide bucket with six foot tires (Tr. 6). The loader travels forward with the bucket elevated, then it backs down after dumping its load (Tr. 7).

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The foregoing facts caused the inspector to issue Citation 2087473 for a violation of 30 C.F.R. 56.9022. The cited regulation provides as follows:

Berms or guards. Berms or guards shall be provided on the outer bank of elevated roadways.

Inspector Day further observed that there was no handrail to serve as a guard for the conveyor. In addition, there was no emergency stop cord device along this waist high walkway which was adjacent to the rollers of the conveyor (Tr. 9, 10). Various workers use the walkway to service and inspect the conveyor (Tr. 10).

The foregoing facts caused the inspector to issue Citation 2087474 for a violation of 30 C.F.R. 56.9007. The cited regulation provides as follows:

Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

#### Discussion

The facts establish a violation of each regulation.

There were no berms or guards on the outer edges of the elevated roadway. Accordingly, the initial citation was properly issued.

Concerning the second citation: the evidence establishes that the conveyor along part of its walkway was unguarded. In addition, the walkway lacked an emergency stop device or cord.

The citations should be affirmed.

#### Civil Penalties

The criteria to assess civil penalties is set forth in Section 110(i) of the Act, now 30 U.S.C. 820(i). It provides as follows:

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.

Concerning the foregoing criteria: since it was favorable to respondent the judge accepted counsel's representation that the operator's history was relatively good inasmuch as the company had only two prior citations. In addition, the operator abated the violative conditions (Tr. 4). The evidence also indicates that the imposition of a penalty would not impair the operator's ability to continue in business (Tr. 8). The operator was negligent since both of the violative conditions were open and obvious. The gravity of each violation was high since a fatality could result; however, the inspector indicated that it was "reasonably unlikely" that an accident would occur.

The Secretary argues that the Commission should not be bound by MSHA's characterizations of the violations as non S & S. Therefore, it is asserted that the automatic twenty dollar penalty as proposed here is not appropriate (Tr. 13, 14).

I agree that the Commission is not bound by the MSHA formula. *Sellersburg Stone Company v. FMSHRC*, 736 F.2d 1147, 1152 (7th Cir.1984). However, in this case the evidence indicates the exposure to the loader operator was minimal. The loader only traveled 25 to 30 feet to where it dead-ended into the hopper. In connection with the unguarded conveyor, I note there was a handrail which served as a guard on a portion of this walkway. Apparently only a small portion was unguarded.

On balance, I deem that the proposed penalties are appropriate.

#### Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. 56.9022 and 56.9007.
3. The citations and the proposed civil penalties therefor should be affirmed.

#### ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2087473 and the proposed penalty of \$20 are affirmed.

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2. Citation 2087474 and the proposed penalty of \$20 are affirmed.

3. Respondent is ordered to pay to MSHA the sum of \$40 within 40 days of the date of this decision.

John J. Morris  
Administrative Law Judge