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SOL (MSHA) V. ANDERSON MILLING
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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 85-45-M A.C. No. 42-01760-05504
v.	Anderson Milling
ANDERSON MILLING COMPANY, RESPONDENT	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. J.L. Anderson, Anderson Milling Company, Woods Cross, Utah, 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 lime processing plant on September 7, 1984. On that date a federal mine inspector issued a citation for the violation of a safety regulation promulgated by the Secretary of Labor pursuant to the Act. The respondent, Anderson Milling Company, contested the Secretary's petition for the imposition of a civil penalty.

The case was heard in Salt Lake City, Utah on February 12, 1986 with both sides presenting evidence. Neither parties desired to file post-trial or other post-hearing submissions.

Issues

The issues are whether respondent violated the regulation; is so, what penalty is appropriate.

Citation 2358836

The above citation alleges respondent violated 30 C.F.R. 56.14Ä1. The cited regulation provides as follows:

56.14 Use of Equipment

Guards

56.14Ä1 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 Case

On the day of his visit to the worksite Edward Cordovo Soto, a federal mine inspector, found that the head pulley of respondent's elevated conveyor should have been guarded. Pinch points were formed where the conveyor belt goes over the roller (Tr. 13Ä15). The pinch points were an arm's length, about 18 inches, from an adjacent platform that provided access to the area (Tr. 14, 15). The operator's employees indicated there had been some spills; in addition, wire and wood could have become entangled in the machinery (Tr. 14). Maintenance would also be performed in the area of the pinch points (Tr. 15, 16).

Witness Anderson, citing his answer filed in the case, testified that other federal inspectors had not considered the pinch points to be a problem (Tr. 30). In addition, this particular item had been previously approved for safety (Answer).

The company has been accident free.

This particular conveyor only runs six minutes out of 24 (Tr. 28, 31).

Discussion

The evidence establishes that the pinch points were exposed moving parts. Further, a workman doing maintenance would be within 18 inches of this hazard. He could become entangled in the pinch points. The potential for a fatality or serious injury existed in these circumstances.

Respondent also asserts that a previous MSHA inspector approved the lack of a guard at this location. In short, respondent invokes the doctrine of collateral estoppel against MSHA.

I have previously refused to apply the doctrine in similar circumstances. MSHA inspectors have different areas of ex-

pertise; another inspector may not believe this condition was a violation of the regulation. The doctrine of collateral estoppel cannot be invoked to deny miners the protection of the Mine Safety Act. Servtex Materials Company, 5 FMSHRC 1359 (1983); Kennecott Minerals Company, 6 FMSHRC 2023, 2028 (1984). See also the Commission decision concerning estoppel in King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

The citation should be affirmed.

Determination of an Appropriate Penalty

Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The evidence shows that respondent is quite small with only one or two employees. It further shows that the operator's negligence is low inasmuch as the photographs indicates this location is not open and obvious. The operator established good faith in that it rapidly abated the violative condition. The company had four prior violations in the two-year period before September 6, 1984. The evidence further indicates that the company discontinued operations for a two month period beginning the week before the hearing. This was an annual downturn. The gravity of the violation is severe if an accident should occur.

On balance, I deem that a penalty of $25 is 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. 56.14Ä1.

3. The contested citation should be affirmed and a penalty assessed therefor.

ORDER

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

1. Citation 2358836 is affirmed.

2. A civil penalty of $25 is assessed.

3. Respondent is ordered to pay the sum of $25 to MSHA within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge