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SOL (MSHA) V. BRUBAKER-MANN
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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 84-103-M
A.C. No. 04-00030-05502

v.

BrubakerMann

BRUBAKERMANN INCORPORATED,
RESPONDENT

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner; Steve Pell, Esq., Ventura, California, for Respondent.

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 commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary to respondent's contentions in WEST 8496M

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2246284

This citation charges respondent with violating 30 C.F.R. 56.143 which provides as follows:

56.143 Mandatory. Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance

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sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

Summary of the Evidence

MSHA inspector Ronald Ainge, a person experienced in mining, issued this citation January 18, 1984 when he observed a violation of 30 C.F.R. 56.14Å3 (Tr. 16, 17, 22Å26, 132Å133, 138Å141; Ex. P1, P2, P3).

There was a possibility that a man could contact the chain drive behind this waist high guard particularly while lubricating or cleaning the equipment (Tr. 20, 21, 88, 90). The inspector did not observe anyone lubricating the machine while it was operating (Tr. 93).

The handrail and the chain drive are approximately 40 to 42 inches high (Tr. 263, 264).

There is a possibility that a person could accidentally reach behind the machine although it is guarded in front and over the top (Tr. 88, 89). An employee could gain access by reaching behind the guard and contacting the pinch point (Tr. 21).

By way of abatement the inspector required that the chain drive be enclosed from the back (Tr. 29).

Mr. Mann testified this machine has been in operation between 25 and 30 years (Tr. 231). Further, the guards had been previously approved by MSHA and CalÅOSHA inspectors (Tr. 231). The machine had a guard on the front and the top (Tr. 231). Further, no one would service this machine while it is operating (Tr. 231).

Evaluation of the Evidence

The evidence establishes that the chain drive was guarded. However, the inspector concluded that a worker could accidentally reach behind the guard and contact the pinch points.

The photographs do not support MSHA's theory that a violation existed here (Exhibits P1, P2, and P3). The pulley was guarded on the walkway side and a guard encircled the equipment. The conveyor itself blocked access to the unguarded side of the pulley. These factors cause me to conclude that no person could accidentally reach behind the guard and become caught between the belt and the pulley.

Citation 2246284 and all penalties therefor should be vacated.

Citation 2246286

This citation charges respondent with violating 30 C.F.R. 56.14Å6 which provides as follows:

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56.14Å6 Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Summary of the Evidence

Inspector Ainge issued this citation because he observed that the chain drive was entirely exposed. It was about four and one half feet off of the ground, close to a walkway and easily accessible (Tr. 30, 31; Ex. P4).

A person cleaning or lubricating this equipment could contact the chain drive and incur an amputation (Tr. 31).

There were workers moving throughout the plant and they would be in area as needed (Tr. 32). In the inspector's opinion the company would service the equipment while it was running (Tr. 32). Except for lunchtime he had never noticed a shutdown of the equipment which was conveying material.

An injury was reasonably likely to happen due to this condition (Tr. 33).

Mr. Tafoya, the company's representative, told the inspector that they had taken the old guard off to change the pulleys. After the change, the old guard would no longer fit (Tr. 33, 94).

In abating the condition it was suggested that a guard cover the drive chain (Tr. 34).

Witness Mann, who testified for the company, indicated the machine is in a very remote area. In addition, there was a temporary cover over it, but he was not familiar with it (Tr. 266).

At the time of the inspection the machine was in the process of being tested and repaired (Tr. 232).

Evaluation of the Evidence

In connection with this citation I credit the inspector's testimony. He observed the violation over a period of time. His testimony is further confirmed by the statement of respondent's representative Tafoya. There was no indication the machinery was being tested and the inspector did not observe a shutdown of the equipment.

Since the chain guard was unguarded, Citation 2246286 should be affirmed.

Citation 2246287

This citation charges respondent with violating 30 C.F.R. 56.14Ä1 which provides as follows:

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 Evidence

Inspector Ainge also issued this citation as a non-significant and substantial violation because the counter balance wheel on the simon shaker (FOOTNOTE 1) was unguarded (Tr. 35, 99).

The shaker generates considerable dust. A guard on the machine would preclude a possible broken bone (Tr. 100).

Mr. Mann testified this machine had been inspected for about 20 years. No one had required a guard on the back of the counter balance. Such a guard would not enhance the safety of the machine.

In addition, no one would service the machine while it is operating (Tr. 232, 233, 267).

Evaluation of the Evidence

Inspector Ainge testified as to facts that establish a violation of the regulation.

Mr. Mann does not deny that the condition exists but he asserts no guard had been required on the machine for 20 years. However, the mere fact a guard had not previously required does not constitute a defense. Further, I credit the inspector's expertise on whether a guard would enhance the safety of this machine.

Citation 2246287 should be affirmed.

Citation 2246289

This citation charges respondent with violating 30 C.F.R. 56.14Ä3 cited, supra.

Summary of the Evidence

This citation involved the chain drive of the conveyor system above the three-eighths inch rock hopper. The drive went from a motor to a head pulley (Tr. 40, 41; Ex. P7, P8, P9, P10). The head pulley did not have a back on it and it was also unguarded. The area had to be serviced and lubricated. A man could reach behind the guard and contact the pinch points between the drive chain and the sprockets (Tr. 40, 43).

On the day of the inspection the inspector saw employees in the area. The employees would have to go behind the head pulley and down the other side to have access to other parts of the plant (Tr. 43).

At any time during cleanup or lubrication these areas would be accessible (Tr. 44). The plant operated the entire time, except during lunch or a breakdown (Tr. 45).

Abatement was achieved by placing a backguard on the chain drive and the tail pulley was enclosed with more screening material so as to restrict access (Tr. 45).

Mr. Mann indicated this machine had been inspected many times in the last 20 to 25 years (Tr. 235). Prior to the inspection the machine had a back guard. But such a guard serves no purpose nor does it make the machine any safer (Tr. 235-237). The top of the conveyor was about 36 inches above the ground (Tr. 275, 276). The pinch point was not accessible because a person would have to go around the guard (Tr. 274, 275; Ex. P10).

Evaluation of the Evidence

The head pulley in this citation was unguarded. The factual situation accordingly differs from that in Citation 2246284, supra.

I further credit inspector Ainge's testimony as to the violation. Exhibit P10 particularly shows the ready access a worker would have to this hazard.

Citation 2246289 should be affirmed.

Citation 2246292

This citation charges respondent with violating 30 C.F.R. 56.9A7 which provides as follows:

56.9A7 Mandatory. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

Summary of the Evidence

There was a walkway on both sides of the conveyor system. But there was no guarding or emergency stop cords to stop the conveyor (Tr. 49, 111, 112, 135; Ex. P13, P14)..

The hazard here involved the possibility of a maintenance man being pulled into the conveyor system due to the absence of guarding or stop cords (Tr. 50; Ex. P13, P14).

There were people working in the area on the day of the inspection (Tr. 50).

The conveyor, according to Mr. Tafoya, had been in operation for a year. The inspector believed it was highly likely that an accident could occur (Tr. 52, 53, 114).

Mr. Mann stated that they were testing a stream of the rock on this conveyor. They had worked on this equipment for over two years; whenever the weather was bad, or the rock was wet, or in between jobs (Tr. 239, 242). The only people in the area would be those working on it (Tr. 240).

Evaluation of the Evidence

I credit inspector Ainge's testimony in connection with this citation.

It is clear that the conveyors were unguarded and not equipped with stop cords. Mr. Mann's testimony indicates that they were testing a stream of rock. I accept his explanation but the operation of the conveyor even in that manner would not excuse the use of stop cords.

Citation 2246292 should be affirmed.

Citation 2246293

This citation charges respondent with violating 30 C.F.R. 56.14Ä1, cited supra.

Summary of the Evidence

On the same conveyor system as previously cited, the head pulley was unguarded and accessible from both sides. There were handrails on the outer side but no guarding on the inside (Tr. 53, 55; Ex. P15, 16).

Employees were working on the system the day the citations were written (Tr. 53).

A worker could contact the unguarded head pulley between the conveyor system and the top of the head pulley (Tr. 53). This could occur during service, lubrication or cleanup (Tr. 54).

~1468

An injury in these circumstances could range from one involving no loss time to a fatality (Tr. 55, 56).

Mr. Mann indicated this machinery was not in operation. Further, it would not be run without a head or tail pulley (Tr. 242).

Evaluation of the Evidence

I credit Inspector Ainge's testimony.

Mr. Mann's testimony is not persuasive. A conveyor is in operation although it is merely running a stream of rock for testing purposes. Further, the photographs show that the head pulley was unguarded (Ex. P15, P16).

The citation should be affirmed.

Civil Penalties

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified at 30 U.S.C. 820(i). Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be the two citations vacated in *Brubaker v. Mann, Inc.*, 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The parties have stipulated that the operator is a small company. The penalties appear appropriate in relation to the small operator and they should not affect the ability of the company to continue in business. Concerning the negligence of the operator: the violations that are affirmed all involve the failure to provide guards or related safety devices. These conditions were open and obvious hence the operator must be considered to be negligent. The gravity for the violations is high since an amputation or fatality could result from these conditions. The operator is credited with good faith since the company abated the violative conditions.

The penalties proposed by the Secretary are as follows:

2246284	to be vacated
2246286	\$ 63
2246287	20
2246289	46
2246292	100
2246293	63

On balance, and in view of the statutory criteria, I consider that the more appropriate penalties are as set forth in the order of this decision.

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. Citation 2246284 should be vacated.
3. The following citations should be affirmed:

2246286
2246287
2246289
2246292
2246293

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

ORDER

1. Citation 2246284 and all penalties therefor are vacated.
2. The following citations are affirmed and the penalties as noted thereafter are assessed:

Citation	Penalty
2246286	\$52
2246287	15
2246289	36
2246292	50
2246293	42

John J. Morris
Administrative Law Judge

1 A simon shaker is a screening deck that separates different sizes of material (Tr. 99).