

CCASE:
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 86-82-M
A.C. No. 04-00030-05505

v.

BrubakerMann

BRUBAKERMANN, INC.,
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 2669970

This citation charges respondent with violating 30 C.F.R. 56.9088(a) which provides as follows:

56.9088(a) Roll-over protective structures (ROPS) and seat belts.

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(a) Excluding equipment that is operated by remote control, all self-propelled track-type (crawler mounted) or wheeled (rubber-tired) scrapers; front-end loaders; dozers; tractors, including industrial and agriculture tractors but not including over-the-road type tractors (the type that pull trailers or vans on highways); and motor graders; and wheeled prime movers (a tractor of the type and kind normally used as the mode of power for rubber-tired scrapers); as used in metal and non-metal mining operations, with or without attachments, shall be used such mining only when equipped with (1) roll-over protective structures (ROPS) in accordance with the requirements of paragraphs (b) through (g) of this standard, as applicable, and (2) seat belts meeting the requirements of the Society of Automotive Engineers (SAE), Motor Vehicle Seat Belts Assemblies-SAE J4v, approved November 1955, revised July 1965; Seat Belt Hardware Test Procedures-SAE J140a, approved April 1970, revised February 1973; Seat Belt Hardware Performance Requirements-SAE J141; Operator Protection for Wheel Type Agricultural and Industrial Tractors-SAE J333a, approved April 1968; revised July 1970, conforms to ASAE S305; and Seat Belts for Construction Equipment-SAE J386 approved March 1968; and, in accordance with paragraphs (b), (c), and (e) of this standard, as applicable.

Summary of the Evidence

MSHA inspector Ronald Barri issued this citation when he saw a driver climb out of a small Michigan front-end loader that was not equipped with seat belts (Tr. 151, 153). At the time the six or seven foot high loader was parked in front of the hopper at the crusher (Tr. 151, 153).

The lack of seat belts could cause the operator to be thrown from this equipment (Tr. 152). The inspector further considered it reasonably likely that this type of equipment would roll over (Tr. 152).

William Mann testified that the company had been informed that seat belts must be on the equipment but they do not have to be worn (Tr. 209).

Further, the vehicles involved in this citation and the following citation operate on a level slab (Tr. 209). But they must otherwise transverse grades of eight to ten percent in the area (Tr. 285).

Evaluation of the Evidence

The MSHA's inspector's testimony establishes a violation of the regulation.

Mr. Mann in his testimony asserts that the seat belts must be provided but need not be used. But in this case the loader was not equipped with a seat belt. Accordingly, a violation has been established and the citation should be affirmed.

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Citation 2669971

This citation charges respondent with violating 30 C.F.R. 56.9088(a), cited supra.

Summary of the Evidence

This citation was issued by MSHA inspector Barri when he observed that half of the seat belt in the 988 Caterpillar front-end loader was missing (Tr. 154).

The inspector observed the operator get out of the equipment (Tr. 154).

In the event of a rollover the operator could be thrown from the equipment and possibly crushed (Tr. 155).

Evaluation of the Evidence

The evidence establishes a violation of the regulation.

A portion of a seat belt is not in compliance with the regulation. The citation should be affirmed.

Citation 2669972

This citation charges respondent with violating 30 C.F.R. 56.14007 which provides as follows:

56.14007 Construction and maintenance.

Guards shall be of substantial construction and properly maintained.

Summary of the Evidence

This citation was issued when the MSHA inspector observed an 8 by 10 inch opening in the top screen of a V-belt drive. The top of the screen was 18 to 24 inches from the ground (Tr. 156-159; Ex. P17).

The hazard involved someone inadvertently getting their hand into the drive from the adjacent walkway (Tr. 158, 206). This exposure could cut or amputate a finger, hand or arm (Tr. 158).

In order to gain access to this area a worker would have to bend over but he would not have to get on his hands and knees (Tr. 205).

Evaluation of the Evidence

The evidence indicates the guard, with an eight by ten inch opening, was not properly maintained. The photograph (P17) confirms the credible testimony.

The citation should be affirmed.

Citation 2669974

This citation charges respondent with violating 30 C.F.R. 56.11001 which provides as follows:

56.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

Summary of the Evidence

A section of mat, eight inches wide and ten feet long, was missing on the outside edge of the landing along a walkway adjacent to a conveyor (Tr. 163, 164).

Someone could step in this open hole and incur scratches, lacerations or a possible groin injury (Tr. 164, 166, Ex. P19, P20).

Witness Mann testified that this seldom used, almost obsolete non-working area, was in the older part of the plant (Tr. 216, 288). There is an area to the left of that shown in the photographs where people walk (Tr. 216, 217; Ex. P19, P20). One would have to walk around bars and sections to walk on the area with the 10 foot missing section (Tr. 217). This area was not completely blocked off (Tr. 289). Employees have strict instructions not to enter any of the remote parts of the plant (Tr. 289). But no area of the plant was signed to prohibit entry (Tr. 289).

Evaluation of the Evidence

The facts establish a violation of the regulation. Employees had access to the violative condition.

The defenses raised by Mr. Mann relate to the imposition of a civil penalty. Minimal access and instructions not to enter remote areas relate to gravity and negligence. The proposed civil penalty should be substantially reduced.

Citation 2669975

This citation charges respondent with violating 30 C.F.R. 56.11002 which provides as follows:

56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

Summary of the Evidence

There were no handrails at the end of the elevated walkways of the fines conveyor. In lieu of handrails one side had a chain wired across it and the other had a piece of belting tied to it (Tr. 166, 167, 170; Ex. P21, P22, P23).

If the wire or belting broke a person could fall 20 feet to the ground (Tr. 168). Such a hazard could cause a fatality or a serious injury (Tr. 169, 170). The likelihood of an injury was reasonably likely (Tr. 170).

Witness Mann testified that no one has to go to this dead-end area of the plant except to repair a malfunction. If that occurred the plant would not be operating (Tr. 219, 220). Federal inspectors previously told the company to put a chain across this area (Tr. 219). After the company put a chain across, it was cited (Tr. 219).

Evaluation of the Evidence

The facts establish a violation of the regulation. The hazard of the situation was somewhat increased by the substitution of chain and belting in lieu of a substantial handrail.

Mr. Mann's testimony goes to the company's negligence, an item to be considered in assessing a civil penalty. The citation should be affirmed.

Citation 2669977

This citation charges respondent with violating 30 C.F.R. 56.14001, which provides as follows:

56.14001 Moving machine parts.

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

MSHA inspector Ronald Barri observed that the head pulley on the trumble conveyor lacked a guard. The pinch point was six inches from the walkway and 12 inches above it (Tr. 173, 174, 177; Ex. P25). There was a handrail alongside the walkway (Tr. 198). A person cleaning the equipment or lubricating it could become entangled in it (Tr. 174).

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The walkway provided access but the access stopped at the belt (Tr. 175). The pinch point could cause a serious injury, such as possibly strangling a person or injuring an arm (Tr. 175, 176, 197).

The company abated the condition by installing a guard (Tr. 176, 177; Ex. P26, P27).

Mr. Mann testified that no injuries had ever occurred with this machine. Further, before abatement, it had been in the same condition for 33 years (Tr. 223). Any injury would have to be deliberate (Tr. 224).

Evaluation of the Evidence

The evidence, supported by the photographs, establish that moving machine parts could be contacted by workers.

Mr. Mann's testimony is not persuasive. The fact that no injury has ever occurred is most fortunate. But the purpose of such a safety regulation is to prevent the first accident.

The citation should be affirmed.

Citation 2669978

This citation alleges a violation of 30 C.F.R. 56.14001, cited, supra.

Summary of the Evidence

The MSHA inspector testified that the oversized conveyor lacked a guard for the tail pulley (Tr. 179; Ex. P28).

If a person contacted the pinch point, which was 18 to 20 inches from the walkway, he could be pulled into it (Tr. 180-184). This could occur during cleanup, maintenance or lubrication (Tr. 180-182). Employees use this walkway (Tr. 182).

The hazard here could cause injury to an arm (Tr. 182).

The company abated by installing an expanded metal guard (Tr. 183, 184; Ex. P29), although the tail pulley had structural steel around it (Tr. 196). To gain access to the area a person would have to get down on his hands and knees (Tr. 196).

Mr. Mann indicated the tail pulley was located below a stairway (Tr. 224). It would be difficult as get close to the pinch points; in effect, it would require a deliberate act (Tr. 224, 225). It is not reasonably likely that someone could be injured in this area (Tr. 225).

Evaluation of the Evidence

In connection with this citation I conclude it was not reasonably likely that a person could contact the pinch points. The inspector indicated a person would have to be on his hands and knees to make such a contact. Further, the structural steel around the pulley served as a guard.

Citation 2669978 should be vacated.

Citation 2669979

This citation charges respondent with violating 30 C.F.R. 56.12032 which provides as follows:

56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Summary of the Evidence

The inspector observed that the junction box cover was missing from the drive motor on the number 3 conveyor (Tr. 184; Ex. P30).

The company abated by installing a cover (Tr. 185, 290; Ex. P31).

The absence of a cover could result in a short. The inspector believed that it was reasonably likely that this could occur. However, there was a "slim to no" chance of a resulting electrocution from touching the frame of conveyor (Tr. 186, 194). The equipment was grounded (Tr. 194).

Mr. Mann indicated an electrician was in the process of repairing this condition. He had returned to town for parts (Tr. 226). According to the company's electrician the condition proposed no danger to anyone (Tr. 226).

Evaluation of the Evidence

The testimony and the photograph establish that a violation occurred. Mr. Mann's testimony relates to the imposition of a penalty. The citation should be affirmed but the penalty substantially reduced.

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

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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. Concerning the negligence of the operator: all of the citations that are affirmed involve open and obvious conditions that should have been known to the operator. The negligence of the operator is established. Concerning gravity: In Citations 21669970 and 2669971 (missing seat belts) a severe injury or fatality could occur. In Citation 2669972 (unguarded V belt) an amputation could occur. In Citation 2669974 (outside edge of landing mat missing) the gravity of the violation is considerably overestimated. Only a small strip of the mat was missing. In Citation 2669975 (wire and belting instead of handrail) the defenses raised by Mr. Mann minimize the gravity. In Citation 2669977 (unguarded head pulley) the condition could cause a serious injury. In Citation 2669979 (cover plate) the gravity is very minimal in view of the fact that the system was grounded. The operator is credited with statutory good faith since the company abated the violative conditions.

The Secretary's proposed penalties are set forth below. On balance, I consider the penalties assessed hereafter to be proper in view of all of the statutory criteria.

Citation No	Proposed Assessment	Assessed
2669970	\$ 91	\$70
2669971	91	70
2669972	91	80
2669974	68	10
2669975	91	30
2669977	91	80
2669978	91	vacated
2669979	112	10

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 2669978 should be vacated.
3. The remaining citations should be affirmed and penalties assessed.

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

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ORDER

1. The following citations are affirmed and penalties assessed as noted:

Citation No.	Penalty
2669970	\$70
2669971	70
2669972	80
2669974	10
2669975	30
2669977	80
2669979	10

2. Citation No. 2669978 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge