

CCASE:  
SOL (MSHA) V. BRUBAKER-MANN  
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TTEXT:

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 86-94-M  
A.C. No. 04-00030-05506

v.

BrubakerÄMann

BRUBAKERÄMANN 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 84Ä96ÄM.

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 2669973

This citation charges respondent with violating 30 C.F.R. 56.20003(a) which provides as follows:

56.20003(a) Housekeeping.

At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

#### Summary of the Evidence

This citation was issued by MSHA inspector Ronald Barri because of a buildup of powder-like fines about six feet long and two feet deep on a walkway alongside a conveyor. The material had a thin layer of mud on it. This could cause slipping and tripping (Tr. 160-162; Ex. P18)

If someone fell it would not result in a serious injury (Tr. 162).

Witness Mann indicated that no one goes to this area when it is wet (Tr. 212). A worker would not be in the area unless he was lubricating the conveyor and then it would be shut down (Tr. 213). In addition, witness Mann indicated the area was blocked off (Tr. 213).

Mr. Mann also stated that the area cited was located at the top and at the extreme end of the plant. No one would have occasion to be there except to clean up or lube the equipment (Tr. 287).

#### Evaluation of the Evidence

I find the inspector's testimony to be credible. Mr. Mann concedes a worker would be in the area if he was maintaining the equipment. Such minimal use exposes that worker to the violative condition.

The citation should be affirmed.

#### Citation 2669976

This citation charges respondent with violating 30 C.F.R. 56.20003(a), cited supra.

#### Summary of the Evidence

This citation resulted from a spill of fine material approximately 18 inches deep along the walkway on top of the super doles storage tank (Tr. 171). This created a slipping or tripping hazard but injuries would be minimal (Tr. 173).

The area, after abatement, was photographed (Tr. 172, Ex. P24). The desert, where this plant is located, by its very environment, causes a buildup of dust and sand (Tr. 200). But the inspector believed the buildup was caused by a leak in the conveyor because it was the same material that was in the bins (Tr. 202).

Mr. Mann indicated the fines are a continual buildup and they clean it continually. No one would be on top of the tank unless there was a breakdown (Tr. 222, 223).

Evaluation of the Evidence

I credit the inspector's testimony. His evidence establishes a violation. The same hazard and exposure existed as was discussed in the preceding citation.

The citation should be affirmed.

Citation 2669980

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

There was no guard on the tail pulley of the two-inch rock conveyor to prevent a person from contacting a pinch point (Tr. 187; Ex. P32).

Employees have access to this area and a person could be caught and pulled into the tail pulley. A serious injury could result (Tr. 188, 189).

A workman could be injured in cleaning, lubricating or maintaining equipment in the area (Tr. 189).

The unguarded pinch point was 10 to 12 inches above and 18 to 20 inches from the walkway (Tr. 189).

The company installed a guard preventing access to the pinch point (Tr. 190; Ex. P33). In cross-examination the inspector agreed that the machine in question was under a stairway. Further, a person would have to squat and reach in to gain access to the pinch points (Tr. 194).

Mr. Mann indicated that previous MSHA inspectors had not cited the company for this condition (Tr. 222; Ex. R1).

Evaluation of the Evidence

The inspector agreed that the violative condition was under a stairway. In addition, a person would have to squat and reach in to gain access to the pinch points. The evidence causes me to conclude that this condition did not involve exposed moving machine parts which could be contacted by a workman.

This citation should be vacated.

Civil Penalties

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified 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 proposed penalties of \$20 each for the housekeeping violations appear appropriate in relation to the size of the operator and they should not affect the ability of the company to continue in business particularly considering its annual approximate gross income of \$1,000,000 (Tr. 301). Concerning the negligence of the operator: the housekeeping conditions were obvious and involved a substantial buildup. The operator must be considered to be negligent. The gravity, as noted by the inspector, is minimal. The operator is credited with statutory good faith since the violative conditions were rapidly abated.

On balance, I consider that a civil penalty of \$10 is appropriate for each of the housekeeping violations.

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. 56.20003(a) in two instances as alleged in Citations 2669973 and 2669976.
3. Respondent did not violate 30 C.F.R. 56.14001 as alleged in Citation 2669980.

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

ORDER

1. Citation 2669973 is affirmed and a penalty of \$10 is assessed.
2. Citation 2669976 is affirmed and a penalty of \$10 is assessed.
3. Citation 2669980 and all penalties therefor are vacated.

John J. Morris  
Administrative Law Judge

