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SOL (MSHA) V. SIERRA AGGREGATE
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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 PROCEEDINGS Docket No. WEST 85-162-M A.C. No. 04-04707-05502
v.	Docket No. WEST 85-174-M A.C. No. 04-04707-05503
SIERRA AGGREGATE COMPANY, RESPONDENT	Red Top Mine

DECISION

Appearances: Joseph T. Bednarik, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;
Mr. Donald Jolly, Bishop, California, pro se.

Before: Judge Lasher

These proceedings were initiated by the filing of petitions for assessment of a civil penalty by the Secretary of Labor (herein the Secretary) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (1977) (herein the Act). A hearing on the merits was held in Bishop, California on September 16 and 17, 1986, at which Respondent represented itself. The Secretary was well and ably represented by counsel.

The Secretary seeks assessment of penalties against Respondent for a total of 7 alleged violations involved in the two dockets which were consolidated for hearing in the Notice of Hearing issued July 23, 1986.

PRELIMINARY DISCUSSION

1. Background.

On March 18, 1985, MSHA Inspector Ronald Ainge conducted an inspection of the Red Top Mine operated by Sierra Aggregate Company near Victorville, California. At all relevant times the mine was owned and operated by Mr. and Mrs. Donald Jolly (T. 4, 11, 41, 42) as a sole proprietorship in a community property state. The Red Top Mine is one of two owned and operated by the Jollys. The other, the Black Point Mine, is located near Bishop, California. The offices of Sierra Aggregate Company are located at 2239 Sunrise Drive in Bishop.

Inspector Ainge observed 3 men working at the mine site when he arrived on March 18, 1985. One of these, Bret Redman, was employed full-time by Respondent as a watchman and front-end loader operator (T. 77) and the other two, although characterized by Respondent Donald Jolly as independent contractors (T. 79) and "self-employed" (T. 78) were actually hourly-paid, part-time employees (T. 76Ä80). Mr. Redman accompanied Inspector Ainge during the inspection.

2. Federal PreÄEmption.

Respondent, in correspondence (letter dated November 7, 1985) has raised the issue that regulation of his mine by MSHA is improper since such is also regulated by the California Occupational Safety and Health Administration (CALÄOSHA). The California OSH Act does not preempt the Federal Mine Safety and Health Act of 1977. BrubakerÄMann, Inc., 2 MSHRC 227 (1980). Section 506 of the Act (provided in the original 1969 Mine Act and left intact by the 1977 Amendments) permits concurrent state and federal regulation, and under the federal supremacy doctrine, a state statute is void to the extent that it conflicts with a valid federal statute. Dixy Lee Ray v. Atlantic Richfield Company, 98 S.Ct 988, 435 U.S. 151, 55 L.Ed.2d 179 (1978); Bradley v. Belva Coal Company, 4 MSHRC 982, 986 (1982). Accordingly, Respondent's contention is found to lack merit and is rejected.

3. Interstate Commerce.

The principal activity at Respondent's two mines is the excavation and processing of volcanic material into cinders. (T. 42Ä43). This material is sold for the production of concrete blocks (T. 43), decorative bricks (T. 44), soil additives (T. 44Ä45) and highway cinders (T. 70). Approximately 99% of the output of the Black Point Mine and 20% of the output of the Red Top Mine was sold to the State of California which used the cinders in the maintenance of highways, including U.S. Highway 395 and Interstate 15 (T. 72Ä74).

Sierra Aggregate Company owns a substantial amount of mobile equipment which is used at both mine sites. The equipment was manufactured out-of-state primarily by Caterpillar (T. 56Ä59, 81, 84) and is powered by diesel fuel. The total amount of diesel fuel purchased by Sierra Aggregate Company in 1985 exceeded 7,000 gallons (T. 83). Such was purchased from wholesale distributors of products manufactured by Chevron (T. 64) and Union Oil (T. 63). I take notice that these are businesses engaged in

interstate commerce.

Accordingly, it is concluded that Respondent mine operator owns and operates the mine in question at which volcanic material (cinders) is mined and processed for sale or use in or affecting interstate commerce.

4. Respondent's Mine in Operation.

Respondent contends that the mine (plant) was not in operation and that the Citations thus should not have been issued. The record, however, is clear that the plant was in operation on and off during the period February through May, 1985, and that on the day of the inspection, Bret Redman, who was characterized by Mr. Jolly at the hearing as being a front-end loader operator and watchman, was engaged in work as were two other part-time employees. This contention simply lacks merit and is rejected.

5. Preliminary Findings With Respect To Penalty Assessment Criteria.

a. Respondent, a sole proprietorship owned by Donald Jolly and his wife, Janis, is a small mine operator engaged in the surface mining, crushing, sizing, loading, sale and shipment of volcanic cinder (T. 42Ä48, 63-66, 70).

b. Respondent is a small mine operator (T. 31Ä33, 43, 53, 69, 70).

c. Respondent has no history of previous violations (T. 97).

d. Payment of penalties in this matter will not jeopardize Respondent's ability to continue in business (T. 97, 98).

e. With respect to Citations Nos. 2364580, 2364581, 2364582, 2364583, and 2364586, the Secretary concedes that Respondent, after notification of the violation, proceeded in good faith to promptly abate the violative conditions. With respect to Citations Nos. 2364584 and 2364585 the Secretary contends that Respondent did not proceed in good faith to promptly abate the violative condition; findings will be made in the separate discussion of these two violations which follows.

With the exception of the first Citation litigated and discussed herein, No. 2364580, which subsequently herein I have vacated, the remaining Citations charge contravention of safety and health standards in Part 56 of Title 30 of the 1984 Code of Federal Regulations (Revised as of July 1, 1984) covering sand, gravel and crushed stone operations.

The mandatory assessment factors of negligence, gravity and, where pertinent, abatement, will be taken up subsequently in the discussion of the separate alleged violations.

Docket No. WEST 85Ä174-M (Citations Nos. 2364581, 2364582 and 2364583)

Citation No. 2364581

The standard infracted, 30 C.F.R. 56.12Ä28 provides:

Mandatory. Continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary of his duly authorized representative.

The violative condition (or practice) was described by the Inspector as follows:

> There was no record of a continuity and resistance of grounding check being done within the recent past or at least Mr. Redman could not produce them.

The Respondent, Mr. Jolly, conceded on the record that the violation occurred (T. 90). Although the Inspector did not believe the violation was likely to result in the happening of the contemplated hazards (minor shock to electrocution), the gravity of the potential injury mandates a finding that the violation was at least moderately serious. Mr. Jolly, as previously noted, admitted the violation, and more specifically, conceded that the test itself had not been performed. Approximately one year prior to the issuance of the subject citation, Inspector Ainge advised Mr. Jolly that he was required to perform this test (T. 87, 88). Accordingly, Respondent is found to be negligent in the commission of this violation. The Secretary concedes that this violation was abated promptly and in good faith upon Respondent's notification thereof (T. 102). A penalty of $30.00 is assessed.

Citation No. 2364582

The standard infracted, 30 C.F.R. 56.4Ä12 (T. 136) provides:

> All flammable and combustible waste materials, grease, lubricants or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

The violative condition (or practice) was described by the Inspector as follows:

> There was a large amount of diesel fuel spillage on the ground at the fueling area.

The Inspector testified that there was extensive diesel fuel oil on the ground inside Respondent's refueling shed and that the mine operator had been notified of the fire hazard created thereby on a previous inspection. There were fire ignition sources in the area as well as other materials which would burn in the event of a fire. Had a fire started in the area, the

violative condition observed, as a minimum, would have contributed to and aggravated the hazard. Because diesel fuel is not as flammable as gasoline and since the possibility of a fire occurring was relatively remote, this violation is found to be but moderately serious. The mine operator, having prior knowledge of the hazard created, was clearly negligent. The violation was abated in good faith by the Respondent upon notification thereof. A penalty of $20.00 is sought by the Secretary and such is found appropriate and assessed.

Citation No. 23683

The standard infracted, 30 C.F.R. 56.4Ä7 (T. 135-137) provides:

> "Means shall be provided to remove or control spilled flammable or combustible liquids."

The violative condition (or practice) was described by the Inspector as follows:

> "The buckets that were placed under the oil barrels on the oil rack had been turned upside down and oil had been allowed to contaminate the earth under the oil rack."

The same violative condition had been cited on a previous inspection by Inspector Ainge. As to seriousness, the Inspector indicated that it would take "quite a fire" to get the oil-contaminated area to burn. Accordingly, this violation is found to be of a low degree of gravity and to have resulted from Respondent's negligence in allowing the condition to re-occur. Since this violation, like the previous one, was abated promptly and in good faith by the mine operator upon notification, the Secretary's administrative "single penalty assessment" of $20.00 is found appropriate and is assessed.

Docket No. WEST 85Ä162-M

Citation No. 2364580

> The standard infracted, 30 C.F.R. 50.30(a) provides: Preparation and submission of MSHA Form 7000Ä2¬Quarterly Employment and Coal Production Report. (a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000Ä2 in accordance with the instructions and criteria in 50.30Ä1 and submit the original to the MSHA Health and Safety Analysis Center, P.O. Box 25367, Denver Federal Center, Denver, CO 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from

> MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date.

The violative condition (or practice) was described by the Inspector as follows:

> "Mr. Redman could not produce the quarterly reports that are to be maintained on file at the mine property as stated in Part 50, 30 Code of Federal Regulations."

The regulation requires that the operator shall retain an operator's copy of the required quarterly report form "at the mine office nearest the mine . . . . " The record clearly establishes that this small mine operator's nearest-and only-mine "office" was in Bishop, California, and that indeed a copy of the form required retained there. The Inspector apparently was under the impression at the time he issued the Citation that the form was required to be kept at the mine site, since in the body of the Citation he mentioned that such reports "are required to be maintained at the mine property." Since under the precise requirements of the regulation and in the perspective of the geographic configuration of this modest mine operation the form was kept where it was required to be, no violation is found to have occurred.

Citation No. 2364584

The standard infracted, 30 C.F.R. 56.14Ä1 provides:

> 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.

The violative condition (or practice) was described by the Inspector as follows:

> "There were not any guards on either the head or tail pulley on the feed belt under the feed hopper. The plant was down for crusher repair."

During his inspection on March 18, 1985, Inspector Ainge observed that neither the head pulley nor the tail pulley on the conveyor system had guards to protect employees from contacting the pinch point (T. 143). A guard would have prevented contact between the pinch point and an individual's body or clothing or any tools which the individual may be using (T. 144). According to Mr. Ainge, the most likely result of such contact would be a

loss of limb (T. 151). Since the plant was not in production at the time of the inspection, Mr. Ainge felt that an injury was not likely to occur (T. 151). The violation is thus found to be of only a moderate degree of seriousness.

Inspector Ainge discussed the condition with Mr. Redman (T. 151) and explained what modification would be required to abate the hazard (T. 152). An abatement date of April 2, 1985, was selected (T. 152). On May 10, 1985, the conveyor were reinspected by Inspector Ainge (T. 152). At that time, the head pulley was guarded but no work had been performed on the tail pulley (T. 153). A continuation was issued by the Inspector (T. 153).

Inspector Ainge reinspected the conveyor on May 30, 1985. No additional work had been performed on the tail pulley (T. 153). A Section 104(c) non-compliance order was issued by Ainge after which abatement was accomplished.

While there was no specific evidence of Respondent's negligence attendant to the initial violation (T. 158), Respondent's failure to promptly abate the violation after notification thereof was willful; the plant was in operation at least four days during the interim period after the Citation was issued and before abatement was accomplished (T. 158; 2d Transcript, T. 17). A penalty of $200.00 is assessed.

Citation No. 2364585

> The standard infracted, 30 C.F.R. 56.14Ä1 provides: "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."

The violative condition (or practice) was described by the Inspector as follows:

> "The head pulley on the 30" x 80þ feed belt was not guarded. The plant was not working due to repair on the crusher."

The Inspector testified that a miner could have been pulled into the head pulley with resultant severe injuries including the separation of a limb. It was also his opinion, however, that it was unlikely such an accident would occur. The Respondent only partially abated the violative condition even after the Inspector extended the original abatement time, and it was necessary for the Inspector to issue a Section 104(b) non-compliance order. No evidence of negligence or willfulness was proffered with respect

to the initial commission of the violation. A penalty of $200.00 is assessed in view of the Respondent's intransigence¬or substantial neglect¬with respect to prompt abatement of the violation.

Citation No. 2364586

The standard infracted, 30 C.F.R. 56.11Ä1, relating to travelways, provides:

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

The violative condition (or practice) was described by the Inspector as follows:

> "There is three elevated conveyor belts that have gear reduction boxes on them. This area must be serviced at regular intervals. The people have been walking up the conveyor belts to access these areas."

The hazard foreseen by the Inspector was that miners servicing and lubricating would be required to walk up the conveyor belt to do so and there being no "safety means" present such personnel could fall to the ground¬a distance of some 40 feet. Had such an accident occurred, there was a "strong possibility" of a fatal injury, according to the Inspector. Although Respondent was given one month to abate the violation, such was not accomplished. The Inspector concluded, and I find, that Respondent knew of the violative condition/practice and was negligent in continuing such. While it does not appear that Respondent proceeded in good faith to promptly abate the violation after notification, Petitioner specifically makes no such contention, so it is found that Respondent did abate the violation in good faith. This violation is serious in view of the gravity of the hazard posed. Further, Respondent presented no rebuttal to the Secretary's allegation that this was a "serious and substantial" violation. In view of the severity of the hazard posed by the violation, the operator's apparent lack of concern for compliance with mine safety standards, and the Inspector's testimony as to the likelihood of the occurrence of an accident, it is concluded that the Secretary established the prerequisite elements of proof for "significant and substantial" violations mandated by the Federal Mine Safety and Health Review Commission in its decision in Mathies Coal Co., 6 FMSHRC 1 (1984, to wit:

> "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard¬that is, a measure of danger to safety¬contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be a reasonably serious nature."

In the premises, the Citation is affirmed in all respects and a penalty of $150.00 is assessed.

ORDER

1. Citation No. 2364580 is vacated.

2. The remaining 6 Citations hereinabove discussed are affirmed in all respects.

3. Respondent shall pay the Secretary of Labor within 30 days from the date hereof the six penalties hereinabove individually assessed in the total sum of $620.00.

Michael A. Lasher, Jr.
Administrative Law Judge