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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 86-61-M A.C. No. 04-01937-05501
v.	Sanger Pit & Mill
SANGER ROCK & SAND, RESPONDENT	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California for Petitioner; Mr. W.A. Baun, President, Sanger Rock & Sand, Clovis, California, pro se.

Before: Judge Cetti

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., ("Mine Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges the operator of an open pit mine with violating a safety regulation, 30 C.F.R. 56.14001, which requires the guarding of moving machine parts.

This proceeding was initiated by the Secretary with the filing of a proposal for assessment of a civil penalty. The operator filed a timely appeal contesting the existence of the alleged violation. The Secretary then moved to amend the citation to change the safety standard allegedly violated from 30 C.F.R. 56.14006 to 30 C.F.R. 56.14001.

A hearing on the merits was held before me at Fresno, California. Oral and documentary evidence was introduced by the parties and case was held open 15 days for the filing of proposed findings of fact and conclusion of law which were timely filed by the Secretary. Both parties waived their right to file post-trial briefs.

Issues

The issue as stated by the Secretary in his response to a Prehearing Order is whether or not the V-belt drive was "guarded by location". Stated more broadly the issues are the existence of the alleged violation of 30 C.F.R. 56.14001 and the appropriate penalty.

Stipulations

The parties stipulated as follows:

1. Respondent is the operator of an open pit mine with screening and processing equipment to process rock & sand.

2. Respondent is a small operator.

3. Respondent has a good history.

4. Respondent demonstrated good faith.

5. The penalty would not affect the ability of the respondent to continue in business.

THE REGULATION

30 C.F.R. 56.14001 provides as follows:

> 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

The inspector admittedly made his inspection at a time when the rock and sand processing plant was not in operation. By bending or stooping under some water hoses which were located 39 inches above the floor of a dead end catwalk the inspector was able to gain access to the area where he observed an unguarded V-belt drive on the No. 1 screen. The inspector testified that the V-belt drive had in the past been isolated and guarded by location. He explained that it had been guarded by location by virtue of a metal bar or railing (he also referred to it as a guard) which had been welded in such a way as to protrude across the dead end catwalk that was located along the side of the V-belt drive. The short bar had been welded across the catwalk in the area where the large belt-high water hoses partially blocked the catwalk. The inspector saw the metal bar lying on the deck below the area where it "had broken loose." The inspector stated that the alleged violation was abated when the metal bar or railing was welded back in the same place where it had broken loose.

Mr. Baun, president of the Sanger Rock & Sand testified that he is a graduate engineer. He received a BS degree in Engineering from University of Pacific in 1954 and for the past 20 years he has been the safety engineer for the company. He has read the manuals and attended MSHA and OSHA's seminars for different types of safety training.

Mr. Baun testified that even without the railing welded across the dead end catwalk the V-belt drive was guarded by location. It is located out of the way behind some equipment. The dead end catwalk is not a working area and not a travelway. There are three large water hoses that come down and block the access to the V-belt drive. These water hoses are located in such a way that you have to "make an effort" and "almost get down on your hands and knees" to get under them. When the plant is in operation no one would go to the area where the V-belt drive is located because they would be drenched by a high pressure spray of water that is used to wash the sand off the bottom of a conveyor belt that is located just above the area in question. If the plant had been operating the inspector would not have been in the area of the V-belt drive because of the noise and high pressure water spray coming down in that area. In addition, the inspector had to stoop down under the water hoses to gain access to the dead end catwalk.

On cross examination Mr. Baun stated that if there was a need to make a repair in the area of the V-belt drive, he would put a man in the area but only after the equipment was deenergized and locked out. The men are provided locks which they use to lock out equipment. The man making the repairs "holds" the key to the lock he is using so no other person can unlock the lock and start the equipment.

Findings and Reasons for Decision

The Federal Mine Safety and Health Review Commission in Secretary of Labor, v. Thompson Brothers Coal Company, Inc., 3 MSHC 1571 construed the guarding requirements of 77.400(a), a surface mining standard containing language identical to 56.14001. The Review Commission stated that in order to establish a prima facie case of a violation under this identically worded standard, "the Secretary of Labor must prove: (1) that the cited machine part is one specifically listed in the standard or is "similar" to those listed; (2) that the part was not guarded; and (3) that the unguarded part "may be contacted by persons" and "may cause injury to persons."

With respect to this later (third) requirement the Review Commission stated:

> The standard requires the guarding of machine parts only when they "may be contacted" and "may cause in

> jury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness . . . Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

In the present case, I accept and credit the testimony of Mr. Baun with regard to the inaccessibility of the V-belt drive while the plant is in operation. I find the Secretary failed to carry its burden of establishing a reasonable possibility of contact with the moving machinery in question. Although the Secretary produced some speculation on this point no persuasive evidence was produced to establish that anyone would ever be near the V-belt drive while it was in operation.

My finding that a violation of the safety standard was not established is also supported by the fact that no evidence was produced to establish that the metal bar or railing was not in place at the time the equipment was last in operation. Without such evidence no violation can be established in view of the inspector's testimony that as long as this guard or railing was in place the V-belt drive was protected by location. The inspector also found the violation abated when this piece of metal rail was again welded back in the same place where it had broken loose.

On questioning the mine inspector in an attempt to determine when the metal bar may have broken loose it became obvious that the inspector made no attempt during his inspection to determine the answer to this issue. Thus a finding that the railing was not in place at the time the plant was last operated would be based on mere speculation rather than evidence.

Mr. Baun offered into evidence the facilities last periodic inspection report covering the area where the V-belt drive was located. This report did not note anything unusual about the guard railing in question.

Further Findings and Conclusions of Law

1. Respondent is subject to provisions of the Federal Mine Safety and Health Act in the operation of its Sanger Pit and Mill facility.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter of this proceeding.

3. On September 10, 1985 a federal mine inspector conducted an inspection of respondent's rock and sand processing facilities located at Sanger, Fresno County, California.

4. Respondent is a small operator.

5. Respondent has a good history.

6. Respondent demonstrated good faith.

7. The Secretary failed to establish a reasonable possibility of contact with the moving machine part.

8. The violation of 30 C.F.R. 56.14001 was not established.

Accordingly, based on the findings of fact and conclusions of law herein I enter the following:

ORDER

Citation 2361739 and all penalties therefor are vacated.

August F. Cetti
Administrative Law Judge