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SOL (MSHA) V. VINNELL MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), Docket No. WEST 85-152-M
PETITIONER A.C. No. 04-03008-05509

v. Oro Grande

VINNELL MINING & MINERALS Docket No. WEST 86-157-M
CORPORATION, A.C. No. 04-03008-05510
RESPONDENT

Oro Grande Silica Mine

DECISION

Appearances: Leroy Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Los Angeles, California,
for Petitioner; Mr. Don L. McRae, Vice President,
Vinnell Mining & Minerals Corporation, El Monte,
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 pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a)(1977). The Secretary seeks assessment of penalties for a total of 13 alleged violations involved in the two dockets.

After the hearing in Victorville, California on April 8 and 9, 1987, the parties reached a settlement, which is here approved, involving 9 of the 13 alleged violations. Pursuant thereto, Respondent agrees to pay the full amount of Petitioner's initially proposed penalties, to wit:

Citation No.	Penalty
2671481	\$ 20.00
2671484	20.00
2671485	20.00
2671486	20.00
2671488	20.00
2364698 (Docket 85-152-M 1)	119.00
2671482	91.00
2671487	91.00
2671489	68.00

This Citation is the only one involved in Docket WEST 85-152-M. The remaining 12 Citations are contained in WEST 86-157-M.

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With respect to five of these Citations, Nos. 2671481, 2671484, 2671485, 2671486, and 2671488, the Secretary did not designate the violations involved as "Significant and Substantial". As to the remaining four Citations resolved by the agreement, Nos. 2364698, 2671482, 2671487, and 2671489, the parties have agreed that the violations described therein were "significant and substantial".

Four of the original 13 Citations (Nos. 2671483, 2671490, 2671491 and 2671492) remain for disposition. As part of their settlement, the parties agree that the "significant and substantial" designation thereon should be deleted and such will be so ordered subsequently herein. The occurrence of all violations being conceded, the issues involved for determination here are the amount of appropriate penalties which should be assessed for the four violations cited in Citations Nos. 2671483, 2671490, 2671491, and 2671492.

The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a given violation, the business size of the operator, and the mine operator's compliance history, i.e., number and nature of violations previously discovered at the mine involved. Mitigating factors include the operator's good faith in promptly abating violative conditions and the fact that a significantly adverse effect on the operator's ability to continue in business would result from assessment of penalties at a particular monetary level. Factors other than the six above-mentioned criteria (which are expressly provided in the Act) are not precluded from consideration either to increase or reduce the amount of penalty otherwise warranted.

Based on written stipulations submitted by the parties prior to hearing, I find this to be a small mine operator (T. 60) with an average history of prior violations (11 in the preceding 24-month period) who proceeded in good faith to promptly abate these four violations upon notification thereof. Payment of appropriate penalties will not jeopardize Respondent's ability to continue in business. The remaining mandated assessment factors, negligence and gravity, are separately discussed below as to each of the four Citations.

CITATION NO. 2671483

The standard infringed, 30 C.F.R. 56.12032, provides:

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

The violative condition (or practice) involved is described in the subject Citation as follows:

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"The main electrical panels cover plates were not in place. The panels were rated on high voltage. In the event a person would come in contact with energized part a serious injury would occur."

When observed by MSHA Inspector Edmundo Archuleta, the cover plates were laying on the ground in an unlocked building, an 8 x 20 trailer. The Inspector was advised that an electrical contractor was installing a new electrical system-but no one was in the area (including employees) when the condition was observed, nor were any warning signs up. The panel (conductors) was energized at the time. A sign on the one door to the trailer said: "Danger High Voltage". The record indicates that had someone tripped or otherwise have contacted the exposed energized wires, a fatality could have resulted. The Inspector felt it was likely that such event could have occurred and that one person would have been exposed to the hazard. Respondent showed that there was no reason for any employee to have been in the building and that the electrical contractor was the one who removed and left off the cover plates. There was no evidence as to the length of time the cover plates were off the panel. The electrical contractor worked for Respondent for approximately four months months and the inspection was conducted approximately midway or toward the end of such period (T. 140).

This is found to be a serious violation which resulted from the negligence of Respondent. Since it is not a "significant and substantial" violation, a penalty of \$75.00 is found appropriate.

CITATION NO. 2671490

The standard infringed, 30 C.F.R. 56.9007, provides:

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

The violative condition cited is described in the Citation as follows:

"The conveyor belt feeding the stacker conveyor belt was not equipped with an emergency stop device with stop cord. The conveyor belt was in the area where person (sic) walk and work on it."

At the hearing, Respondent contended that while the conveyor had no emergency stop device and was unguarded it had no "walkway" and was not covered by standard. Pursuant to the settlement herein, however, the violation was conceded.

The record indicates that the plant was not operating on the day the violation was observed by the Inspector. The hazard envisaged by the Inspector was that an employee could be caught in the pinch points while cleaning up spillage around the

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conveyor. Only one miner would have been jeopardized by the hazard created. Respondent presented convincing evidence that because of the distance above ground at the particular place where an employee might encounter the hazard there was only an extremely remote chance that he would come into contact with the pinch points (T. 213-214, 231-233).

In view of the facts that the plant was not operating on the day the violation was observed, the remoteness of the risk created by the violation ever coming to fruition, and the strength of Respondent's justification for questioning the application of the standard to the condition to begin with, it is concluded that only very moderate degrees of negligence and gravity should be attributed to this violation. A penalty of but \$25.00 is found appropriate and is assessed

CITATION NO. 2671491

The standard infringed, 30 C.F.R. 56.9007, is the same as that quoted above in connection with the previous Citation. The violative described therein is as follows:

"The stacker conveyor belt in the main plant was not equipped with an emergency stop device with stop cord. The conveyor belt is located where persons walk by it or have to work on it."

The Inspector's determinations with respect to this Citation were the same as those made in connection with the previous Citation, No. 2671490 (T. 243). The injuries he contemplated had an accident occurred ranged from the type which might result in "lost time" to those which might result in a fatality. The Inspector's opinion was that the Respondent was negligent since the violation was in "plain view" and that the degree of such negligence was but "moderate" since the plant was not in operation on the day of inspection. Respondent's evidence again established that because of the height of the place where the hazard was present it was "possible" but not likely that an injury would result therefrom. As in the case of the violation described in Citation No. 2671490, I conclude that only low degrees of gravity and negligence should be attributed to this violation. A penalty of \$25.00 is assessed.

CITATION NO. 2671492

The standard violated, 30 C.F.R. 56.14001, 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 involved is described in the Citation as follows:

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"The head pulleys on the west side of the cone crusher under conveyor belt was not guarded. The unguarded pulley was within the reach of persons who walk or work by the unguarded pulley."

The Inspector testified that the injuries which could result from this violation ranged from those resulting in "lost workdays" to fatalities. The hazard he foresaw was "if somebody was cleaning up or doing maintenance, they could come in contact with the unguarded pinch point and somebody could have also stumbled in and fell into the belt." He also attributed but a moderate degree of negligence to Respondent since he felt that after completion of the "expansion" program in progress at the time, Respondent would have installed appropriate guarding. The violative condition was open "to plain view." (T. 263). As with other violations, Respondent established that the plant was not running on the day in question. Respondent also showed that it was quite unlikely that cleaning up spillage would be attempted while the plant was in operation and the belts running (Tr. 266-267). Accordingly, the violation is found to be of a low degree of gravity and to have resulted from only a moderate degree of negligence on Respondent's part. As with the prior three violations, the "significant and substantial" designation is to be deleted-warranting a reduction in penalty. A penalty of \$25.00 is found appropriate.

ORDER

Respondent shall pay the Secretary of Labor within 30 days from the date hereof the penalties hereinabove individually assessed for the 13 violations in the total sum of \$619.00.

Citation Nos. 2671483, 2671490, 2671491, and 2671492 are modified to delete that portion thereof designating such violations as being "significant and substantial" and are affirmed in all other respects; the other nine Citations involved are affirmed in all respects.

Michael A. Lasher, Jr.
Administrative Law Judge