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SOL (MSHA) V. MOHAVE CONCRETE
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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 86-14-M A.C. No. 02-02253-05501
v.	Mohave Concrete
MOHAVE CONCRETE & MATERIALS INC., RESPONDENT	

DECISION AFTER REMAND

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; Mr. Larry Rinaldis, Mohave Concrete & Materials, Incorporated, Lake Havasu City, Arizona, pro se.

Before: Judge Morris

On November 18, 1986, the Federal Mine Safety and Health Review Commission remanded the captioned case and directed the judge to consider either the sufficiency of the cause asserted or the underlying merits of the case.

Subsequently Chief Administrative Law Judge Paul Merlin ruled that the operator should not be held in default. He further assigned the case to the undersigned for a hearing on the merits.

The hearing took place in Las Vegas, Nevada on February 19, 1987. The parties waived their right to file post-trial briefs.

Issues

The issues presented are whether the violations occurred; if so, what penalties are appropriate.

Stipulation

At the commencement of the hearing the parties agreed the Secretary could present evidence of one unguarded machine part and one junction box. In turn this evidence would be generally applicable to the similar remaining citations (Tr. 6, 7).

They further agreed that respondent is a small operator without any adverse history (Tr. 8Ä10).

Summary of the Case

Ronald W. Barri, an MSHA inspector for eight years, inspected respondent's plant on June 5, 1985 (Tr. 15, 16).

The plant was in operation and no one claimed it had been shut down or was being repaired. When he arrived on the site he talked to the dispatcher, who directed him to the foreman (Tr. 16, 17). The foreman shut down the plant before beginning the inspection (Tr. 17).

In connection with Citation 2366229 the inspector observed that the tail pulley of the main plant conveyor was unguarded. Any employee servicing or cleaning the area could come in contact with it (Tr. 18; Ex. P15). At the time an employee was removing large rocks and roots from the conveyor. If a person was pulled into the tail pulley he could be severely injured (Tr. 19).

The State of Nevada had inspected respondent three weeks before the MSHA inspection (Tr. 19, 20). The state representative reported to MSHA that the plant was in bad shape.

Citations 2366229, 2366232, 2366233, 2366234, 2366235, 2366236, 2366237, 2366238, 2366241 and 2366244 all relate to the unguarded movable machine parts.

Citation 2366236, involving the crusher flywheel and drive, because of the exposure involved a more serious hazard than the remaining citations (Tr. 20, 21; Ex. P5, P6). The gravity of the remaining conditions was pretty much the same (Tr. 21). Further, the observability and duration of the conditions were about the same (Tr. 22).

Respondent abated the violations within the specified time but the new guards were insufficient. They did not prevent a person from reaching behind and contacting the pulleys (Tr. 22).

The described condition of the unguarded machine parts resulted in the issuance of ten citations for the violation of 30 C.F.R. 56.14001. The cited regulation 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.

Citation 2366231 relates to a junction box for the feed conveyor drive motor. The box did not have a cover (Tr. 24; Ex. P17). If a short occurred the conveyor frame could be energized. This 440 volt exposure could electrocute the four workers in the

area who might contact the frame. The junction box, which was readily observable, was five or six feet above the ground (Tr. 25). The foreman indicated this condition had existed for some time (Tr. 25, 26).

Citations 2366231, 2366239, 2366240, 2366242, 2366243, 2366245 and 2366246 all involve junction boxes with the same conditions as previously described (Tr. 26). Exhibit P14 shows a switch on the three-quarter inch rock conveyor. The switch was in use and energized (Tr. 26, 27).

The condition of the junction boxes caused the inspector to issue seven citations for the violation of 30 C.F.R. 56.12032. The cited regulation provides as follows:

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

The inspector further observed a well traveled path, equivalent to a walkway, alongside the feed conveyor for the main plant. The failure to provide such an emergency stop cord resulted in the issuance of Citation 2366230 for a violation of 30 C.F.R. 56.9007. The cited standard provides as follows:

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

Two employees were exposed to the hazard, one was directly alongside the conveyor. A worker in this position could contact the moving conveyor, or the troughing idlers (Tr. 27, 28). Death or serious injury is a probable result from this hazard. It was indicated the condition had been there for several years (Tr. 28).

The inspector saw where the power cables enter into the metal switch gear boxes. The boxes were not equipped with proper fittings (Tr. 29, Ex. P14). The condition could cause the metal frame to cut through the insulation of the cable thereby causing a short. If a short occurred anyone touching the box could be electrocuted. Since the cables were in good condition it was unlikely that an accident would occur (Tr. 30).

The above condition resulted in the issuance of Citation 2366247 alleging a violation of 30 C.F.R. 56.12008. The cited standard provides as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The mine had been in operation for several years before the inspection but the company had not notified MSHA of its activities (Tr. 31).

This situation resulted in the issuance of Citation 2366258 alleging a violation of 30 C.F.R. 56.1000. The cited standard provides as follows:

> The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent.
> When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

At the time of the inspection the plant was running. In addition, the inspector saw the conveyors in motion, they were also shipping cement at a nearby batch plant. Further, an employee was picking rocks off the conveyor and another was running a loader feeding the plant. An additional worker was running a bulldozer pushing sand (Tr. 46, 47).

When he appeared the day following the inspection Mr. Polidori didn't claim the plant hadn't been in operation nor did he claim there had been a test run that day (Tr. 51).

Quinto Polidori, President of Mohave Concrete, testified for the respondent. He indicated the company also has a plant at Lake Havasu City, Arizona. They have been in operation for 12 years and never been cited (Tr. 69).

The plant involved in the instant case has been in operation for four and one-half years. The company does its best to keep and maintain a safe operation. The company received its lease from the Fort Mojave Indians in 1981. At that time he was told that no permit was required (Tr. 70).

At the time of this inspection the plant was not in operation. The jaw crusher had been removed. Further, the rock had been emptied from the hopper and it was picked up by hand (Tr. 71). The condition the inspector observed was temporary since they were emptying the hopper by hand (Tr. 71).

The company has had no difficulty with the lessor Indian Tribe (Tr. 72; Ex. R6).

The parties stipulated that if Mr. Rinaldis testified he would indicate that the company previously had some incompetent people working for it. Further, he would testify that Mr. Polidori is a safe operator (Tr. 75).

Witness Polidori further explained his drawing showing his conveyor and hopper (Tr. 77, 78; Ex. R5). At the time the jaw crusher was broken down and flat on the ground (Tr. 78). The plant was not in operation (Tr. 86, 88, 100)

During the inspection the conveyor was on the ground. The workers put the conveyor down to empty the hopper (Tr. 80). Also the guard was off so the machine could be tested (Tr. 81, 82).

The plant had been shut down three or four weeks, after the crusher broke down. This occurred after the state inspection (Tr. 83).

When the operation is run without a crusher it is referred to as a pit run. Since materials were inside the hopper, they did not operate as a pit run (Tr. 84).

In Citation 2366236 the guard was on the ground because repairs were being made (Tr. 87). The witness denies there is a part that should be guarded in Citation 2366237 (Tr. 89; Ex. P7, P9). In connection with Citation 2366241 there was a guard but a worker was changing the whole setup (Tr. 90; Ex. P9).

Concerning Citation 2366231 there was a cover but it had been taken off for repairs (Tr. 91).

Evaluation of the Evidence

Concerning the unguarded machine parts the pivitol issue focuses on whether the plant was in operation at the time of the inspection. The inspector's testimony is clear that it was functioning. On the other hand, respondent's evidence is, at times, obscure.

I find from the credible evidence that the plant was in fact in operation on the day of the inspection. Inspector Barri's testimony was precise on this issue; the employee was picking rock from the conveyor. Another worker was operating a loader; some conveyors were in motion (Tr. 46, 47). The owner, who was not present at the site until the following day, never claimed the plant was not in operation (Tr. 51). However, I agree with respondent's president, Quinto Polidori, that an unguarded part was being repaired on the day of the inspection. The presence of the worker picking rocks from the conveyor confirms this view. As a result of the repairs a worker could not be exposed and it is appropriate to vacate Citation 2366236 (Tr. 87; Ex. P5, P6).

The remaining guarding citations should be affirmed as the workers were exposed to these moving unguarded parts.

The citations relating to the cover plates should also be affirmed. All of the cited junction boxes lacked cover plates. Respondent claimed one of the boxes was being repaired. However, no credible evidence supports this assertion. In addition, respondent's witness was not present on the day of the inspection.

The citation concerning the lack of a stop device along the conveyor should be affirmed. The conveyor did not have a walkway as such but Inspector Barri observed a well traveled path adjacent to the conveyor. Such a path would be equivalent to a walkway within the terms of 56.9007.

Concerning the power cables entering the metal gear box the evidence establishes that the metal frames lacked proper fittings. The citation should be affirmed.

Respondent asserts that since it was a lessee on an Indian reservation it did not have to notify MSHA of its activities. Respondent's argument is contrary to the law. A general statute in terms applicable to all persons includes Indians and their property interests. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 80 S.Ct 543, 4 L.Ed.2d 584 (1960); Donovan v. Coeur d'Arlene Tribal Farm, 751 F.2d 1113 (1985).

The citation alleging respondent's failure to notify MSHA of its activities should be affirmed.

Civil Penalties

The statutory criteria to assess a civil penalty is contained in Section 110(i) of the Act, now 30 U.S.C. 820(i). It provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In connection with the above guidelines it appears that respondent has no adverse prior history. However, this could readily arise from the operator's failure to report its activities to MSHA. The parties agree as to the small size of the operator (Tr. 10); hence, the proposed penalties appear appropriate. The violative conditions involving the moving machine

parts, cover plates, conveyor and bushings were open and obvious. The operator must, accordingly, be considered as negligent. The failure to notify MSHA should also be considered as negligence on the part of the operator. The operator had another site not located on an Indian reservation. As such he should have inquired as to his rights as a lessee of Indian property. Whether the imposition of penalties would adversely effect the operator is an affirmative defense, Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974). Respondent offered no evidence on this issue. Except for the reporting requirement the gravity of the remaining violations is moderate. I credit the operator with statutory good faith. The company attempted to abate the conditions, although the inspector later found its guarding of the machine parts was inadequate. The deficiency was then corrected.

On balance, I believe the civil penalties set forth in the order of this decision are appropriate.

Based on the entire record and the factual findings made in the narrative portion of this decision I conclude that the Commission has jurisdiction to decide this case. Further, I enter the following:

ORDER

1. (Unguarded moving machine parts): The following citations are affirmed and penalties are assessed as noted:

Citation	Penalty
2366229	$50
2366232	50
2366233	50
2366234	50
2366235	50
2366236	Vacated
2366237	50
2366238	50
2366241	50
2366244	50

2. (Junction boxes)

Citation	Penalty
2366231	$20
2366239	20
2366240	20
2366242	20
2366243	20
2366245	20
2366246	20

3. (Emergency stop device)

Citation	Penalty
2366230	$30

4. (Insulated bushings)

Citation	Penalty
2366247	$20

5. (Failure to notify MSHA)

Citation	Penalty
2366258	$10

6. Respondent is ordered to pay to the Secretary the sum of $650 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge