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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 86-116-M A.C. No. 04-01616-05503
v.	Santa Margarita Mine
KAISER SAND & GRAVEL COMPANY, RESPONDENT	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; Mr. Clair E. Hay, Safety Manager, Kaiser Sand and Gravel Company, Pleasanton, 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 proceeding was initiated by the filing of a petition for assessment of a civil penalty by the Secretary of Labor pursuant to Section 110(a) of the Mine Act. After notice to the parties, a hearing on the merits was held before me on May 21, 1987. The parties presented oral and documentary evidence and submitted the matter for decision, without exercising their right to file post-trial briefs.

On January 28, 1986, a MSHA inspector conducted an inspection of the Santa Margarita Quarry and Mill operated by Kaiser Sand & Gravel Company at Santa Margarita, San Luis Obispo County, California. As a result of the inspection the mine inspector issued a citation charging the operator with a significant and substantial violation of Title 30 C.F.R. 56.14001 which requires guarding of tail pulleys.

The respondent filed a timely appeal contesting the existence of the alleged significant and substantial violation of the safety standard and the amount of the penalty.

Stipulations

The parties stipulated as follows:

1. Kaiser Sand & Gravel is a large company and operates a moderate-sized facility. The company has close to a four million man hours' work per year as a company with about 23,000 man hours work per year at the facility.

2. Respondent has an average history having had four violations in the previous two years.

3. Imposition of the penalty will not affect the ability of respondent to continue in business.

4. The violations were abated in good faith.

Review of Evidence and Discussion

Mr. Cowley made the January 28, 1986 inspection of the Santa Margarita Quarry. He testified that he has been a mine inspector with MSHA the past 11 years and altogether has had 32 years mining experience. In the course of his inspection of the quarry he observed the tail pulley for the 36 inch wide primary conveyor belt. In his opinion the tail pulley was not guarded.

The tail pulley was located at ground level not more than a foot or two high. When the mine inspector first walked up to the tail pulley he observed a rectangular piece of plywood that obscured his view of the pulley. The plywood was leaning against the rectangular opening in the thick concrete structure that enclosed the tail pulley. He pushed the piece of plywood that obscured his view of the pulley and it fell over. He testified that he pushed it to see if it was secured and to get it out of the way so it no longer obscured his view of the pulley. He stated that the plywood was not secured in anyway and did not guard "anything".

On cross examination the mine inspector admitted that he does not know anything about the plant's operating or lock out procedures. However if someone were to service a tail pulley of this type while it was operating he could come in contact with the tail pulley and if this occurred it could result in a very serious injury.

The conveyor belt and pulley were operating at the time of this inspection. The mine inspector testified that he observed no one in the area of the tail pulley. The machinery is operated and serviced by one person, the operator, whose shack is located on a different level above the pulley and some 40 to 50 feet away. The operator services the machinery the first thing in the morning before he starts the conveyor belt.

The respondent presented evidence that the tail pulley and conveyor belt were enclosed in the heavy concrete structure that formed the base of the crusher, except for the rectangular opening which exposed the end of the pulley. To eliminate this exposure a section of plywood was inserted in the frame of the opening. The plant manager stated that after the conveyor operated for a while there was a buildup of material that secured the plywood in place.

It was respondent's position that the tail pulley was guarded by its concrete enclosure and the plywood until the inspector pushed or pulled the unsecured plywood from the frame of the opening in the concrete enclosure.

The plant manager testified that safety is one of the top priorities at the quarry and it is the practice at that facility to lock out machinery before any maintenance, servicing or repair work is performed. The person who performs the work uses his own lock and keeps the key. They have regular monthly safety meetings that take care of any safety problems that arise.

The operator presented evidence that the tail pulley had been guarded by the enclosing concrete structure and the plywood for the past eleven years. During that time they've had a number of inspections by various mine inspectors including Mr. Cowley and no one had complained before as to the manner in which the tail pulley was guarded, Mr. Cowley admitted that in his prior inspection of the plant he had not cited this primary conveyor tail pulley for not having a guard or for having an inadequate guard.

Respondent near the end of the hearing stated for the record that he was not contesting the existence of the violation but vigorously denied that the violation was a significant and substantial violation.

I'm satisfied from the testimony of the mine inspector that at the time he observed the tail pulley in operation the piece of plywood (which normally was in place in the frame of the opening of the concrete enclosure) was on this occasion just leaning up against the concrete enclosure. I am persuaded that there was a violation of the guarding requirement but I do not find from the evidence presented in this case that the violation was significant and substantial.

The Review Commission has previously held that a violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary . . . must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazardÄthat is, a measure of danger to safetyÄcontributed 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 of a reasonably serious nature.

The Commission pointed out that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834 at 1836 (August 1984).

In this case the Secretary has established each of the four elements in the Mathies formula except No. 3. While it is possible that the hazard contributed to will result in an event in which there is an injury this possibility is relatively remote and under the facts of this case it is found not to be a reasonable likelihood.

This finding is consistent with the fact that the tail pulley was guarded for 11 years by its concrete enclosure and a piece of plywood placed in the frame of the opening and there is no evidence that during this long period of time there was any problems or injury of any kind. The condition was never cited. Presumably some of the MSHA inspectors who inspected this operation over the past eleven years checked to see how the tail pulley of the primary conveyor was guarded and saw no citable hazard. While this observation has no weight or value as to the existence of the violation it is certainly consistent with the finding that the violation was not a significant and substantial violation.

It was the Secretary's position that the negligence was ordinary negligence and on the basis of the evidence presented I concur and so find. The gravity of the violation is high with respect to the seriousness of the injury which could result if one became caught in the pinch point of the conveyor belt and pulley but is evaluated as low with respect to the likelihood of such an accident. I accept the stipulations of the parties with respect to the remaining statutory criteria set forth in Section 110(i) of the Mine Act.

Based upon my consideration of the six statutory penalty criteria in Section 110(i) of the Mine Act I conclude that the appropriate penalty for this violation is $70.00.

Conclusions of Law

Based upon the entire record and the 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. The respondent violated safety standard 30 C.F.R. 56.14001.

3. The violation was not significant and substantial and said allegation is stricken from the citation.

4. The citation as amended is affirmed and a civil penalty of $70.00 assessed.

ORDER

Accordingly, the citation, as amended, is affirmed and Kaiser Sand and Gravel Company is ordered to pay a civil penalty of $70.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge