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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

v.

KAISER SAND & GRAVEL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 86-230-M
A.C. No. 04-01616-05504

Santa Margarita Mine

DECISION

Appearances: Marshall P. Salzman, Office of the Solicitor, U.S.
Department of Labor, San Francisco, California,
for Petitioner;
Mr. Clair E. Hay, Manager, Kaiser Sand & Gravel Company,
Pleasanton, California, pro se.

Before: Judge Cetti

STATEMENT OF THE CASE

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 initiated this proceeding by the filing of a petition for assessment of a civil penalty pursuant to section 110(a) of the Mine Act. The respondent Kaiser Sand and Gravel Company (Kaiser) filed a timely answer contesting the existence of the violation, its classification as significant and substantial, and the amount of the penalty. After notice to the parties, an evidentiary 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 waiving their right to file post-trial briefs.

On June 10, 1986, Mr. Dale Cowley an MSHA inspector conducted an inspection of respondent's Santa Margarita Quarry and Mill located at Santa Margarita, San Luis Obispo County, California. As a result of that inspection the federal mine inspector issued a citation charging the respondent with a significant and substantial violation of Title 30 C.F.R. safety standard. The citation originally alleged a violation of Title 30 C.F.R. 56.14001. Prior to the hearing I granted the Secretary's motion to amend the citation to allege a violation of 30 C.F.R. 56.14003, which requires guards on conveyor drive pulleys to extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

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

The Citation as amended by the Secretary charges Kaiser with violating 30 C.F.R. 56.14003 which provides as follows:

Guards at conveyor drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

The mine inspector testified that in the course of his June 10, 1986, inspection of the secondary plant at the Santa Margarita mine he observed the guard for the V-Belt drive pulley on the wet shaker screen. He concluded the top portion of the guard did not extend a distance sufficient to prevent a miner from accidentally reaching behind the guard and getting his fingers caught between the belt and the pulley. The top portion of the guard was about three feet high and extended horizontally a distance of three-feet parallel to an adjacent designated walkway. The mine inspector concluded that if an employee were walking down the walkway and he became unbalanced or slipped he could accidentally reach behind the guard and get his fingers caught between the belt and the pulley. The violation was abated by extending the top portion of the guard towards the back a distance of three-inches. This narrowed by three-inches the gap that existed between the outer edge of the shaker screen and the inner edge of the guard through which a hand could accidentally reach behind the guard and become caught in the pinch point between the belt and the drive pulley.

Evidence was presented that just beneath the top horizontal portion of the guard are three C-120 V-belts and drive pulleys that shake the wet screens. Fingers caught in the pinch points could be amputated.

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Kaiser contends that the shaker screen is not a conveyor and that therefore 30 C.F.R. 56.14003 is not applicable and no violation existed.

The Federal Mine Inspector testified that the wet shaker screen is a conveyor of materials. As it separates the material by size, it conveys the material from one end of the screen to other. The plant manager described the screen as a "finished" shaker that screens and separates material of different sizes. The screened material drops below into a series of four bunkers. He stated that it is an inclined screen that moves material down the conveyor or screen by shaking it down. It vibrates and the material advances.

Mr. Cowley has been a mine inspector with MSHA the past eleven years and all together has had 32 years mining experience. He testified that the Dictionary of Mining, Minerals and Related Terms is the standard reference material for defining terms in the industry and is often used by his contemporaries and his supervisors. This dictionary is referenced in many court cases to define mining terms. The Secretary's counsel read into the record from page 260 of this dictionary the definition of a "conveyor vibrating type" as follows:

Conveyor, vibrating type. A conveyor consisting of a movable bed mounted at an angle to the horizontal, which vibrates in such a way that the material advances.

It satisfactorily appears from the record that the shaker screen in question is a conveyor within the meaning of the safety standard and that the safety standard is applicable.

The preponderance of the evidence establishes that the guard at the conveyor (screen shaker) drive pulley did not extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught in the pinch point and between the belt and the pulley. I therefore find that there was a violation of the guarding requirements of 30 C.F.R. 56.14003. However, I do not find from the evidence presented that the violation was significant and substantial.

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, 3-4 (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 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 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 will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834 at 1836 (August 1984). The Commission has further explained that in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, 6 FMSHRC 1836.

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. Even though the guard as it existed in place at the time of the inspection was not sufficient to fully satisfy the requirements of the safety standard, it was sufficient to reduce the likelihood of injury to "unlikely". It is therefore found under the evidence presented in this case that it is unlikely that the hazard contributed to by the violation will result in injury.

The mine inspector testified that the V-Belt and drive pulleys were guarded on all sides and ends except the back. He stated "the hazard was not obvious just by walking by observing".

The plant manager testified that he has walked around with each of the mine inspectors on all inspections of the site since he became manager eight or nine years ago. He stated that the area where the guard in question is located has been inspected before and mine inspectors have never issued a citation or made any comment about this particular guard.

The violation was easily and completely abated by extending the top of the guard three-inches. While the fact that no prior MSHA inspection found that the guard was inadequate is of no weight or value on the issue of the existence of the violation, it is consistent with the finding that the violation was not a significant and substantial violation and also with a finding that the operators negligence was low.

The gravity of the violation is high with respect to the seriousness of the injury which could result if one's fingers became caught in the pinch point of the V-Belt drive pulley but is evaluated as low with respect of the likelihood of such an accident. I accept the stipulation 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 \$50.00.

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Based upon the entire record and the findings made in the narrative portion of this decision, the following conclusions of law are entered:

Conclusions of Law

1. The Santa Margarita Quarry and Mill operated by Kaiser Sand & Gravel Company at Santa Margarita San Luis Obispo County, California is subject to the provisions of the Mine Act.

2. The Commission has jurisdiction to decide this case.

3. The respondent violated safety standard 30 C.F.R. 56.14003.

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

5. The citation as modified is affirmed and a civil penalty of \$50.00 assessed.

ORDER

Accordingly, the citation as modified is affirmed and Kaiser Sand and Gravel Company is ordered to pay within 30 days of the date of this decision a civil penalty of \$50.00.

August F. Cetti
Administrative Law Judge