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MSHA V. J & K CONSTRUCTION
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MAY 5, 1988

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

CIVIL PENALTY PROCEEDING
Docket No. WEVA 87-61
A.C. No. 46-01433-03505-S46

v. Loveridge Mine

J & K CONSTRUCTION COMPANY,
Respondent

DECISION

Appearances: William T. Salzer, Esq., Office of the Solicitor
U.S. Department of Labor, Philadelphia, PA, for
Petitioner; William A. Johnson, Esq., Washington, PA.
for Respondent.

Before: Judge Fauver

This civil penalty proceeding was brought by the Secretary of
Labor under the Federal Mine Safety and Health Act of 1977, 30 C.F.R.
§ 801 et seq.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, reliable,
and probative evidence establishes the following:

FINDINGS OF FACT

Order 2698660

1. On September 19, 1986, MSHA Inspector Wayne Fetty inspected
a worksite under the control of Respondent, a subcontractor, at the
Loveridge Mine No. 22. Respondent was performing metal sheeting work on
the outer walls of a preparation plant.

2. Inspector Fetty inspected three scaffolds used by Respondent
at the Loveridge worksite. Each scaffold was an electrically powered
"working platform" (or hoist) used by two individuals to raise and lower
themselves alongside a building. At the time of the inspection no workers
were on the scaffolds because of a work stoppage after an accident.

3. The scaffolds were 15 to 75 feet above ground, suspended from
outrigger beams on the roof. Two outrigger beams were used

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for each scaffold. Counterweights on the outrigger beams balanced the weight placed on the scaffolds. The counterweights were concrete discs held on a retaining rod.

4. On September 19 Inspector Fetty observed seven scaffold rope hooks with defective safety latches in that a spring operated latch was missing or broken. He found a hazardous condition for each latch because of the possibility that the scaffold rope would slip off the hook attached to the outrigger beam.

5. The September 18 entries in Respondent's examination book did not mention defective safety latches. The book contained safety checklists that were to be filled in by the examiner and countersigned by a supervisory official. However, no one countersigned the examination book on September 18 and as a matter of policy and practice, the lead sheeters conducted inspections of the scaffolds and rigging but the foreman made the entries and signed the book in the place for the examiner. The foreman had not been informed by the lead sheeter that the safety latches were missing or defective. As a result of investigations by MSHA prior to September 18, 1986, Respondent was placed on notice of the necessity for thorough daily examinations of the scaffolding equipment.

6. Inspector Fetty found that the counterweight assembly for Scaffold No. 1 did not have a pin for the retainer rod. A missing pin creates a hazardous situation. If the counterweight assembly were tipped to one side, the weights could slip off the retainer rod and the beams and scaffold could fall to the ground. At the time of inspection, Scaffold No. 1 was about 75 feet above ground. Respondent asserted at the hearing that the scaffold was going to be moved and that the retainer pin had been removed for the purpose of relocating the counterweights, but there was no evidence or claim of an intended move at the time of the inspection. The missing pin was not recorded in the hoist inspection book on September 18.

7. Inspector Fetty observed that No. 2 Scaffold, which was about 15 feet above ground, was missing a backrail. The function of the backrail is to prevent persons from falling backwards off the scaffold. The missing backrail was not noted in the examination book for September 18. The foreman had not been informed by the lead sheeter that the backrail was missing.

8. Based upon his findings of safety defects in the scaffolds and rigging, and his inspection of the examination book for September 18, Inspector Fetty issued Order 2698660, which charges a violation of 30 C.F.R. § 77.1403 based upon the following "Condition or Practice":

According to the records entered in the approved book 9-18-86 of the daily inspections of the powered scaffolding, used by sheathing personnel, are

inadequate in that upon my inspection of the scaffolding the following conditions was observed. The safety devices for the hooks attached to the outrigger beam located on the 7th floor roof is missing, the missing device is required to prevent the attached rope or cable from slipping off the hook. The two required hooks on each of the scaffolds were found the same way (Safety latches missing a total of seven) the bottom scaffold is not provided with a back guard to prevent a worker from falling, this scaffold is about 14 feet above the ground. The outrigging device installed on the seventh floor is not provided with pins to keep the counterweights from falling off should the outrigger beams turn sideways. A complete inspection of the scaffolding shall be made and the findings recorded in the approved book. Huey Kowcheck is the responsible foreman. The area is the Ludridge coal preparation plant.

Order 2698946

9. On September 18, 1986, MSHA Inspector Homer Delovich inspected Respondent's worksite at the Loveridge Mine No. 22 preparation plant. He was called to the worksite after being informed of an accident there that morning.

10. At the time of the inspection no workers were on the scaffolds because of a work stoppage after the accident. Respondent's contract work was to replace the sheeting on the outside of the preparation plant. Work began around 7:00 a.m. On the morning of September 18 John Carlisle and Dick Guthrie were working in the area of the Nos. 1, 2, and 3 scaffolds shown on Government Exhibit No. 9. Mr. Kowcheck was the foreman for the entire worksite. Inspector Delovich arrived at the worksite between 9:45 and 10:00 a.m. The accident occurred about 9:30 a.m.

11. No protection against falling objects was provided to persons working or traveling under Scaffold Nos. 1, 2 and 3. Individuals were exposed to the hazard of being hit by falling tools, equipment or aluminum sheeting. The area underneath Scaffolds Nos. 1 and 2 was traveled frequently by employees entering or leaving the preparation plant through the lunchroom door or equipment doors. This area was not roped off and danger signs were not provided. Inspector Delovich observed these conditions before the arrival of the ambulance (at 10:10 a.m.) and the removal of the accident victim from the worksite.

12. Respondent was informed by MSHA on prior occasions of the necessity of protecting persons from falling objects from scaffolds.

Order 2698945

13. On September 18, 1986, Inspector Delovich observed that Scaffold No. 2 (Gov. Ex. 9) was resting on top of a tin canopy structure that partially covered an elevated conveyor belt. The tin canopy was bordered by a walkway along the belt. A preponderance of the reliable evidence indicates that the sheeters climbed on the canopy below the scaffold to board or exit No. 2 Scaffold.

Order 2698947

15. On September 19, 1986, Inspector Delovich observed that No. 3 scaffold was located directly beneath an elevated belt conveyor.

16. Workers on No. 3 Scaffold were exposed to a hazard of being struck by broken conveyor belting in the event of an accident or malfunction of the conveyor above them. Broken belt sections could fall through the structure housing the conveyor and strike a worker on the scaffold. This condition exposed workers to a risk of serious injuries.

17. The foreman, Huey Kowcheck, had directed an employee, Scott Morgan, to install a water deflector above Scaffold No. 3 so that sheeters would not be hit with water draining off the conveyor belt. Mr. Kowcheck indicated to MSHA Inspector Paul Moore that the belt was running while sheeters were working on the No. 3 Scaffold.

DISCUSSION WITH FURTHER FINDINGS

Order 2698660

This order cites a violation of 30 C.F.R. § 77.1403 on the ground that an adequate examination had not been made of the three scaffolds on September 18, 1986. The inspector found a number of unsafe conditions but these were not reported in the required examination book and the person who signed the book was not the examiner who actually made the inspection. Inspector Fetty testified that the unsafe conditions included missing safety latches for the suspension ropes on the three scaffolds, a missing retaining pin for a counterweight assembly on one scaffold, and a missing backrail for another scaffold. None of these conditions was reported in the examination book.

Respondent acknowledges fault for one missing safety latch, for a well wheel hoist that transported parts and equipment to a scaffold (Tr. 159-160), but contends that the six outrigger beams were missing safety latches intentionally because they were not required. Inspector Fetty disagreed, and testified that he observed hooks that did not have a required spring safety latch and that when he told the foreman of this the foreman showed him hooks with safety latches that were available but had not been installed.

I accept the inspector's testimony that required safety latches for hooks used to suspend the scaffolds were missing or broken.

With respect to the missing pin for the retaining rod, Respondent contends that the pin had been removed in order to move the scaffold. The inspector testified that the two outrigger beams were approximately parallel and there was no evidence or statement during the inspection of plans to move the scaffold. The post-inspection explanation of Respondent as to the missing pin is not persuasive. There was ample opportunity for Respondent to offer an explanation as to the missing pin at the time the inspector was there, so that the inspector could have investigated the explanation by interviewing witnesses and verifying their statements against the physical evidence. Respondent failed to use this evidentiary opportunity and has not effectively rebutted the inspector's testimony on this point.

Similarly, the missing backrail was not explained by Respondent at the time of the inspection, and its post-inspection explanation is not found persuasive.

Respondent acknowledges that its policy was to have the foreman sign the examination book and not make the safety inspections himself (occasionally he made an inspection) (Tr. 203). This practice does not comply with the requirements of 30 C.F.R. §§ 1403 and 1404, which are interrelated. Section 1403 requires daily examinations of hoists and § 1404 provides that "the person making the [§ 1404] examination shall certify, by signature and date, that the examination has been made" and "If any unsafe condition is found ... the person conducting the examination shall make a record of the condition and the date." Neither of these requirements was met by Respondent, with the result that an adequate examination within the meaning of § 1403 was not made on September 18, 1986. This violation was serious because the purported examination signed by the foreman gave the erroneous representation that the hoists were safe when in fact there were serious safety defects. Given the background of prior accidents, investigations and clear notice to Respondent of the necessity for thorough, accurate safety examinations of the hoists, I find that Respondent violation was unwarrantable.

Considering all of the criteria for a civil penalty under § 110(i) of the Act, I find that a civil penalty of \$800 is appropriate for this violation.

Order 2698946

The inspector arrived at the accident site before the ambulance arrived. He saw no evidence of a danger sign or rope to keep people from the area beneath Scaffolds Nos. 1 and 2. Those scaffolds were being used for overhead work before the accident.

Respondent's witness Raymond Jennings testified that the area had been roped off with a danger sign on September 16 and 17, but he was not there on September 18. Respondent's witness Michael Cruny testified that the area was roped off with a danger sign the morning of September 18, but the inspector saw no evidence of a rope or danger sign when he arrived. I accept the inspector's testimony, and find that the inspector reasonably concluded that the area beneath active scaffolds was not protected from falling objects. This was a serious and unwarranted safety hazard in violation of § 77.203.

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of \$300 is appropriate for this violation.

Order 2698945

The inspector was justified in finding that employees were boarding and exiting No. 2 Scaffold by climbing on top of a tin canopy. This was not a safe means of access to or from a working place. Respondent contends that each employee was protected by a life line. However, a life line is not intended as a means of access to or from a scaffold and does not justify subjecting employees to falling hazards by unsafe access means. This was a serious and unwarranted violation of § 77.205.

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of \$500 is appropriate for this violation.

Order 2698947

Section 77.400(b) of 30 C.F.R. provides that "Overhead belts shall be guarded if the whipping action from a broken line would be hazardous to persons below." Respondent violated this section by assigning employees to work on a scaffold directly beneath a running, unguarded conveyor belt.

During his inspection, the inspector asked the foreman whether the belt was running when employees were assigned to work on the scaffold beneath the belt and he said, "Yes, the belt was running." Tr. 449. It was not necessary for the Government to prove that the belt had been running when employees were on the

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scaffold. It was sufficient to show that, had work progressed without the intervention of the Federal inspection, the employees would, in reasonable probability, be subjected to the hazardous condition cited. This was a serious and unwarranted safety hazard in violation of § 77.400(b).

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of \$300 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction in this proceeding.
2. Respondent violated the safety standards as charged in Orders 2698660, 2698945, 2698946, and 2698947.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay the above civil penalties of \$1,900 within 30 days of this Decision.
2. The Secretary's motion to withdraw the charge of a violation in Order 2698948 is GRANTED, and that charge is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

William T. Salzer, Esq., Office of the Solicitor, U.S. Department of Labor,
Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104
(Certified Mail)

William A. Johnson, Esq., 8 East Pine Street, Washington, PA 15304
(Certified Mail)