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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. CENT 87-59-M
A.C. No. 41-02577-05507

v.

Crusher No. 1 Mine

PRICE CONSTRUCTION,
INCORPORATED,
RESPONDENT

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Mr. Bob C. Price, Price Construction, Incorporated,
Big Spring, Texas, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

After notice to the parties a hearing on the merits was held in Big Spring, Texas on May 24, 1988.

The parties waived their right to file post-trial briefs and they submitted their cases on oral argument.

Summary of the Case

Citation No. 2869357 charges respondent with violating 30 C.F.R. 56.14001, which provides as follows:

56.14001 Moving machine parts.

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; saw-blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

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Citation No. 2869358 charges respondent with violating 30 C.F.R. 56.16005. The regulation requires that compressed and liquid gas cylinders be secured in a safe manner.

Stipulation

The parties stipulated as follows:

1. The name of the respondent company is Price Construction, Inc. with a place of business near Big Spring, Texas.

2. Jurisdiction is conferred upon the Federal Mine Safety and Health Review Commission under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. The alleged violation of the Act took place in or involves the mine that has products which affect commerce.

3. The name of the mine is Crusher No. 1, identification number 41A02577. The mine is located near Salt Flats, Texas in Culberson County. The size of the company is 32,723 production tons or hours worked per year and the size of the mine is 15,007 production tons or hours worked per year.

4. The imposition of any penalty in this case will not affect the operator's ability to continue in business.

5. The total number of inspection days in the preceding twenty-four months is three.

6. The total number of assessed violations (including single penalties timely paid) in the preceding twenty-four months is one.

7. On March 25, 1987, an inspection was conducted by Moises A. Lucero, an authorized representative of the Mine Safety and Health Administration.

8. Two Section 104(a) citations (numbers 2869357 and 2869358) were issued for violations of 30 C.F.R. 56.14001 and 30 C.F.R. 56.16005 respectively, on March 25, 1987.

9. An abatement date of March 25, 1987 was set for both citations. Both citations were abated immediately by respondent.

10. On May 21, 1987, respondent received its first proposed penalty.

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11. On May 21, 1987, respondent requested a hearing on the above citations.

12. On July 13, 1987, petitioner filed a complaint proposing penalty.

13. Respondent agrees to withdraw its request for hearing on citation number 2869358 and the Secretary agrees to reduce the citation to a non-significant and substantial, and reduces the proposed penalty to \$38.00. This reduction is supported by the facts that the violation was immediately abated, the respondent was unaware of the violating condition, the condition was a single incident and the likelihood of injury or illness was low.

II

Agreed Statement of the Issues

1. Whether a violation as alleged in Citation Number 2869357 is a significant and substantial violation within the meaning of the Act.

2. Whether the equipment concerned in Citation Number 2869357 was guarded by its location.

3. Whether a violation of 30 C.F.R. 56.14001 as alleged in Citation Number 2869357 did in fact occur.

III

Respondent's Statement of an Additional Issue

1. Whether the equipment concerned in Citation No. 2869357 could be reasonably expected to be contacted by persons.

IV

A. Witness for Petitioner

1. Moises A. Lucero will testify as to the conditions at the mine.

B. Witnesses for Respondent

1. Wesley Coleman, Plant Superintendent for Price Construction, Inc.

2. Charles E. Price, retired MSHA Inspector.

Exhibits

The following is a list of petitioner's exhibits:

- P1: The complaint proposing penalty with attachments.
- P2: Citation Number 2869357 on MSHA Form 7000Ä3 and Form 7000Ä3(a).
- P3: Investigator field notes (if available).
- P4: Photograph of air-compressor equipment at its location.

The following is a list of respondent's proposed exhibits:

- R1: MSHA Form 7000Ä3, Citation Number 286
- R2: MSHA Citation Number 2869359 dated 4Ä1Ä87.
- R3: MSHA Form 7000Ä3A Citation Number 2869359Ä1 dated 4Ä8Ä87.
- R4: MSHA Form 70002 Citation Number 2869360 dated 4Ä1Ä87.
- R5: MSHA Form 7000Ä3(a) Citation Number 2869360 dated 4Ä3Ä87.
- R6: MSHA Form 7000Ä3 Citation Number 2869360 dated 4Ä1Ä87.
- R7: MSHA Form 7000Ä3(a) Citation Number 2869381Ä1.
- R8: Hand written note documenting telephone request of Mr. Sidney Kirk for C.A.V. inspection.
- R9: Telephone billing record dated 2Ä1Ä87.
- R10: MSHA Form 4000Ä51 CAVÄNonpenalty notices dated 1Ä8Ä87 Ä 15 pages.
- R11: MSHA Form 7000Ä3(a) CAVÄNotice dated 5Ä7Ä87.
- R12: Form 7000Ä3(a) CAVÄNotices dated 3Ä25Ä87 Ä 15 pages.
- R13: Plant site and equipment photos.

Summary of the Testimony

Moises Lucero, an MSHA inspector for ten years, testified for the Secretary.

Mr. Lucero presented an issue as to whether a V-belt was unguarded on an air compressor. He inspected the company and issued Citation Number 2869357 on March 25th for a violation of 56.14001. The violation occurred because a V-belt on an air compressor next to a travelway was unguarded. Persons were exposed to the moving machine parts. (Tr. 16, 17; Ex. P1). The inspector took one photograph before he ran out of film (Tr. 18). The V-belt for a three H.P. drive was inside a trailer tool house used by four employees (Tr. 18, 19).

The inspector's photograph was taken from the doorway of the trailer. The compressor was at the entrance (Tr. 19). Along the side of the compressor is the walkway. Shelves are behind the compressor. The trailer wall is on the right side (Tr. 20). The inspector did not remember one way or the other if any object was in front of the compressor (Tr. 20, 21, 114). However, Exhibit R9 shows a box to the front of the compressor (Tr. 114).

The inspector evaluated the gravity of the violation and the likelihood of an injury (Tr. 21, 22, 24, 26).

A person walking by the V-belt would be within two feet of the exposed part (Tr. 27).

Wesley Ray Coleman, 29 years of age, testified for respondent. The witness has been a supervisor with respondent since 1985. During that time there have been three to four MSHA inspections and a courtesy inspection (Tr. 118, 119). Three different MSHA inspectors were involved.

Mr. Coleman was familiar with the air compressor located inside the doorway of the parts van (Tr. 120).

The compressor has always been bolted down. It is about eight feet back from the van door on the right hand side. The trailer is entered through two double doors on the back end of the van. Shelves are at the far end away from the door. The van wall is on the right side of the air compressor. A walkway is on the outside of the air compressor; the center of the walkway is approximately three and one-half feet from the compressor (Tr. 121, 122).

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The moving parts of the compressor are between the air compressor and positioned next to the wall. There are no moving parts on the front side. The air hose itself goes down through a hole in the floor (Tr. 123). The hose does not cause a tripping hazard (Tr. 124).

There is no reasonable access to any of the moving parts from the aisle or from either end (Tr. 125). A person would not fall from the aisle way and encounter any moving parts (Tr. 126). This is because the electric motor guards the sheave on the motor. The head of the air compressor and the wall guards the pulley. The flywheel on the compressor is smaller than the air compressor body and the air compressor head.

The compressor is waist high and its moving parts could only be contacted by the deliberate act of reaching behind the compressor (Tr. 127). No clothing or body parts could be sucked into the intake valve (Tr. 128, 129).

None of the other three MSHA inspectors ever claimed this was a hazard (Tr. 129). The compressor was guarded after the citation was issued (Tr. 130).

The compressor's moving parts were guarded (by location) in this fashion: the rear side was guarded by the wood paneling, the aisle side by the oversized electric motor and compressor head, the front end by stored materials consisting of cases of grease (Tr. 131, 132, 145, 146, Ex. R 9, R 11).

The compressor has never been involved in any injury while the witness has worked there (Tr. 138).

In cross-examination the witness agreed it was possible to get a hand into the space on the compressor (Tr. 142).

Evaluation of the Evidence

The pivotal question here is whether the V-belt on the cited air compressor was guarded by location.

The evidence is essentially uncontroverted that the V-belt was guarded at the rear by the wood panel, at the aisle side by the motor, and on the inner side by the wall of the van. The controversy

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thus focuses on whether or not the V-belt was guarded at the front. Respondent's witness Coleman indicated cases of grease were stored to the front of the compressor. As a supervisor he should know where his supplies were stored.

On the other hand, the inspector did not remember if there was any material stored to the front of the compressor. Further, his single photograph does not include that area (Exhibit P 2). But respondent's photograph clearly shows several boxes in front of the compressor blocking access to it (Exhibit R 9).

For these reasons I conclude that the V-belt was guarded by location. Further, the exposed moving parts could not be reasonably contacted by any person.

Respondent also raised the defense of collateral estoppel. Specifically, respondent argues and offers evidence to prove that other MSHA inspectors had inspected this area but had failed to issue any citations for this condition.

The doctrine of collateral estoppel does not apply in these circumstances. See *Servtex Materials Company*, 5 FMSHRC 1359 (1983) and *King Knob Coal Co., Inc.*, 3 FMSHRC 1417 (1981).

For the reasons initially stated Citation 2869357 and all penalties therefor should be vacated.

Citation 2869358

In connection with this citation the parties stipulated that the citation could be reduced to a non-significant and substantial violation and the penalty reduced to \$38.00.

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Based on the foregoing findings of fact and conclusions of law I enter the following:

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ORDER

1. Citation 2869357 and all penalties therefor are vacated.
2. Citation 2869358 is affirmed as a non S & S violation and a penalty of \$38.00 is assessed.
3. Respondent is ordered to pay to the Secretary the sum of \$38.00 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge