CCASE:
SOL (MSHA) V. ARC MATERIALS CORP.
DDATE:
19880916
TTEXT:

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. WEST 87-108-M A.C. No. 26-00457-05507 Gibson Road Pit and Mill
v.	
ARC MATERIALS CORPORATION - WMK TRANSIT MIX, RESPONDENT	Docket No. WEST 88-8-M A.C. No. 26-00458-05508 Buffalo Road Pit and Mill

DECISION

Appearances: Jonathan S. Vick, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;
Ralph Kouns, Safety Director, ARC Materials Corporation, Las Vegas, Nevada.

Before: Judge Lasher

This matter arises pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (herein the Act). Petitioner seeks assessment of penalties for 2 violations- both of which are conceded by Respondent-- which are cited in 2 Citations (one in each docket). These two dockets were consolidated for hearing and decision by Notice dated March 22, 1988. Both Citations, issued under Section 104(a) of the Act, charged Respondent (ARC) with infractions of 30 C.F.R. 56.14001, pertaining to "Guards" and entitled "Moving Machine Parts", which provides:

> 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.

The Citations were issued by MSHA Inspector Earl W. McGarrah on different inspection dates and at the two mines reflected in the caption. Both Citations charged guarding violations involving tail pulleys and also alleged that the violations were so-called "Significant and Substantial" violations.

Issues

ARC concedes the existence of the occurrence of the violative conditions charged and described in both Citations. ARC

contends, however, with respect to both violations that it was not "reasonably likely" for the potential hazard created by the violative conditions to have occurred and to have resulted in injuries to any of its employees (miners). See Stipulation, Court Ex. 1. In the context of this proceeding, the concept of "reasonable likelihood" applies to and affects two aspects of each violation; first, as part of the consideration of the mandatory penalty assessment factor of gravity (Footnote 1), and, secondly, as one of the elements of proof required in "significant and substantial" violations.

General Findings.

Respondent ARC, at the times material herein, owned and operated a "ready-mix" sand and gravel operation with 3 pits- two in Nevada, the Gibson Road and Buffalo Road pits involved here and a third pit at Bullhead, Arizona. Respondent's payroll at the time of the violations and also at the time of hearing approximated 150 employees (T. 76Ä78, 83).

During the 2Äyear period prior to the commission of the violation charged in Citation No. 2671967, ARC had a compliance history of 19 prior violations at the Gibson Road Pit operation, 8 of which were guarding violations (T. 25).

During the 2Äyear period prior to the commission of the violation charged in Citation No. 2669032, ARC had a compliance history of 27 prior violations at the Buffalo Road Pit operation, 9 of which were guarding violations (T. 94Ä95).

After receiving notification of the violations charged in the two subject Citations, ARC demonstrated good faith in attempting to achieve rapid compliance with the regulations violated (Court Ex. 1).

The penalties herein assessed will not jeopardize ARC's ability to continue in business (Court Ex. 1; T. 15).

A. Docket No. WEST 87Ä108ÄM

Citation No. 2671967, issued December 16, 1986, by MSHA Inspector McGarrah, in Section 8 thereof, charges:

> The tail pulley on the west side feeder conveyor belt was not guarded. The pinch point was located about ground level where it could be contacted by a person and cause a serious injury.

At the time this violation was observed, the plant was not operating (T. 53, 65Ä66, 72, 92). The Inspector was unable to ascertain how long the guard, which he observed against a wall nearby, had been off (T. 34, 36, 63). The Inspector believed a laborer had told him the guard had been removed for "cleanup" and not been put back on (T. 36Ä37). The circumstances surrounding the removal of the guard and the timing thereof in relation to the shut-down of the plant were not ascertainable (T. 34Ä38, 63). There is no basis to infer that the guard would not have been put back prior to resumption of the plant's operation.

A person walking on the walkway alongside the pinch point would have been within 10 to 12 inches of the pinch point (T. 60). The hazard created by the unguarded self-cleaning tail pulley in question was of a person having their clothing caught and being pulled into the pulley (Ex. MÄ6; T. 30, 40, 61), or of slipping and falling into it or the pinch point (between the bottom of the conveyor belt and pulley itself). The unguarded pulley was in an area where employees could be expected and would have a reason to be working (T. 42Ä46, 47, 62, 66). Four or five employees would have been exposed to the hazard (T. 51, 66, 72).

Since the circumstances causing and surrounding the violation are not known it is concluded that it was not reasonably likely that the hazard envisioned by the Inspector would have occurred (T. 34Ä38, 89Ä90; Ex. MÄ6) even though reasonably serious or even fatal injuries could have resulted therefrom (T. 67Ä69) had the hazard come to fruition.

B. Docket No. WEST 88Ä8ÄM

Citation No. 2669032, issued May 19, 1987, in Section 8 thereof, charges:

> The tail pulley was not guarded on the type two seperator south dual conveyor belt at the dry plant. The pulley could be contacted by a person and could cause an injury.

The tail pulley in question (depicted in Ex. MÄ12) was also adjoined by a walkway which would have been traveled frequently by employees (T. 97Ä98, 101). Inspector McGarrah testified that the walkway was a foot or more from the tail pulley and, with respect to the hazard created thereby, that "a person could be walking along this walkway with those raw material and rocks laying on it and could twist his ankle and fall into the tail pulley or slip and get a foot or something over into it." (T. 98). The hazard posed is similar to that described in connection with Citation No. 2671967 hereinabove.

Four to six employees would have been exposed to the hazard (T. 101.

The plant was running on the day this violation was observed (T. 110Ä111). Inspector McGarrah testified that he was told by a laborer on the day the Citation was issued that "the guard had been taken off and hadn't been put back on" (T. 111). As with the prior Citation, the actual circumstances surrounding the commission of the violation and the length of time the guard was removed is not subject to determination.

The record does indicate that it was reasonably likely that the hazard envisioned by the Inspector would have occurred (T. 98, 99, 101Ä102, 105Ä106, 109) and that such would have resulted in the occurrence of reasonably serious injuries (T. 98, 105Ä106, 109).

Discussion

In Secretary v. Texasgulf, Inc., 10 FMSHRC 498 (April 20, 1988), the Commission reaffirmed its long-standing analytical formula for "significant and substantial" questions stating:

> Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. 814(d)(1). 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." Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). 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 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 has explained further that the third element of the Mathies formulation "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, 1836 (August

~1257

1984) (emphasis deleted). We have emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

With respect to Citation No. 2671967, the Inspector conceded that the plant was not running at the time of his inspection and at the time the Citation was issued. Since it was not ascertainable how long the guard had been removed and the circumstances of its removal are unknown, in the context of the plant's being shut down it would be pure speculation to conclude that (1) there there was a reasonable likelihood that the hazard contributed to would result in an injury or (2) that ARC was negligent in the commission of this violation. This is not found to be a significant and substantial violation. In all the circumstances, this is found to be a moderately serious violation as to which there is no evidence of negligence on the part of the mine operator. A penalty of $100.00 is found appropriate.

As to Citation No. 2669032, the record supports, and I have previously found the factual underpinnings for, the application of the Commission's Texasgulf formula. This violation is thus found to be significant and substantial. Since several employees would have been exposed to the hazard created by the violation, and since reasonably serious injuries could be expected to have been incurred had the hazard come to fruition, this is found to be a moderately serious violation. While this infraction occurred while the plant was in operation, there again was no basis for concluding that the mine operator was negligent. Weighing these factors in conjunction with the previous findings as to the operator's size, good faith in abatement and compliance history, a penalty of $125.00 for this violation is found and appropriate.

ORDER

Citation No. 2671967 in Docket No. WEST 87Ä108ÄM is modified to delete the "Significant and Substantial" designation thereon.

Respondent shall pay the Secretary of Labor the total sum of $225.00 as and for the civil penalties above assessed for the two violations on or before 30 days from the date of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
Footnote starts here:-

~Footnote_one

1 On the face of the Citations, under Section 10 A thereof relating to "gravity", the Inspector checked the "Reasonably

Likely" box indicating that an "injury or illness" would be reasonably likely to result from the violations. Box 10C was, as above noted, checked on both Citations indicating that the Inspector felt both violations were "Significant and Substantial."