

CCASE:
SOL (MSHA) V. COLUMBIA PORTLAND CEMENT
DDATE:
19880907
TTEXT:

~1363

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

v.

COLUMBIA PORTLAND CEMENT
COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 88-54-M
A.C. No. 33-03990-05521

Jonathan Limestone Mine

ORDER OF APPROVAL AND ORDER TO PAY FOR ONE SETTLEMENT
ORDER OF DISAPPROVAL AND ORDER TO SUBMIT
INFORMATION FOR NINETEEN SETTLEMENTS

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for 20 violations originally assessed at \$20 each for a total of \$400. The proposed settlements are for the original amounts. As set forth herein, I approve one of the recommended settlements based upon information contained in the citation, but I am unable to approve the remaining 19 because the present record contains insufficient information.

Citation No. 3058714

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.14006, because the guard for the self-cleaning tail pulley on the No. 9 auxiliary belt conveyor was not securely in place while the machine was in operation. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an incident occurred could result in permanent disability. The operator exhibited moderate negligence in not guarding the belt conveyor."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions. Therefore, I have no basis to accept his representations. Although the citation recites that the belt was not in operation, it

~1364

further states the electrical circuit was energized. More information is needed for me to make a determination on gravity. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is permanent disability.

Citation No. 3058715

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.9022, because berms were not provided for the outer banks of the elevated roadway leading to the hopper above the auxiliary No. 9 belt conveyor for a distance of approximately 15 feet. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could result in permanent disability. The operator exhibited moderate negligence in not providing a berm for the elevated roadway."

The Solicitor gives no reasons for any of the foregoing conclusions, but the citation states that the roadway was not being used at this time. On this basis I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059190

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the conduit used as a grounding conductor for the stop switch on the No. 9 auxiliary feed belt located at the finishing mill was broken in two places. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing adequate protection for the grounding conductor."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059192

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12032, because the junction box cover for the tailing screw beside the No. 2 elevator in the basement of the baghouse was missing exposing the conductors to damage. The Solicitor asserts: "The probability of the

~1365

occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an incident occurred could result in a fatality. The operator was moderately negligent in not adequately covering the junction box."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059193

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the 120 volt fan located at the loading dock door of the bag storage room was not equipped with a grounding conductor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in not equipping the fan with a grounding conductor."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Additionally, the Solicitor incorrectly represents the gravity of this citation. The citation lists gravity as lost workdays or restricted duty, although the Solicitor represents it as permanent disability.

Citation No. 3059194

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the conduit on the alarm switch at the No. 5 packer station in the baghouse was broken. The citation recites that the condition put added strain on the connections in the switch. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could have resulted in lost workdays or restricted duty. The operator exhibited moderate negligence in not having repaired the broken conduit."

~1366

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059196

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the conduit holding the light outside of the car shop was broken. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could have resulted in lost workdays or restricted duty. The operator exhibited moderate negligence in not having repaired the broken conduit."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3058720

According to this Solicitor, this citation was issued for a violation of 30 C.R.R. 56.11001, because a spill of limestone had accumulated on the first landing below the top floor of the raw mill building. The citation recites that the condition put excess weight on the floor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could have resulted in lost workdays or restricted duty. The operator exhibited moderate negligence in not cleaning the spilled limestone."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059385

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12028, because the continuity and resistance of the grounding system for the plants and mine had not been tested on an annual basis. The last date of test was March 10, 1986. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard

~1367

is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in not conducting the annual testing in a timely manner."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059386

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12034, because the 110-volt light bulb on the extension light in the machine shop was not guarded. The light was 4 feet above the floor and presented a burn hazard. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not guarding the light."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059388

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12008, because the 440-volt cables did not enter the metal frame of the No. 3 motor control center through proper bushings and fittings. The motor control center was located on the fourth floor of the raw mill. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing proper insulation."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059422

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.4201(a)(1), because the fire extinguishers located in the raw mill were not inspected on a monthly basis. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not checking the fire extinguishers on a monthly basis."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Additionally, the Solicitor incorrectly represents the gravity of this citation. The citation lists gravity as no lost workdays, although the Solicitor represents it as lost workdays or restricted duty.

Citation No. 3059392

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12020, because an insulation mat was not provided for the disconnect switches and breaker controls located in the basement of the packhouse. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing an insulation mat."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Additionally, the Solicitor incorrectly represents the gravity of this citation. The citation lists gravity as fatal, although the Solicitor represents it as lost workdays or restricted duty. Finally, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the citation indicates the projected injury is fatal.

Citation No. 3059393

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12034, because guards were not

~1369

provided for two light bulbs in the west tunnel of the packhouse. The light bulbs were approximately 5 feet above the walkway. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing guards for the light bulbs."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059394

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the grounding conductor on the motor for the fan in the packhouse was not adequately affixed. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059397

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12020, because an insulation mat was not provided on the concrete floor in the motor control center for the precipitator building. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing an insulation mat."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059398

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the conduit for the motor for the No. 5 side gather up screw conveyor was broken in two places. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059423

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.4102 because an accumulation of oil on the floor of the compressor room in the basement of the packhouse. The citation recites that the oil had run under and into the 440-volt electrical motor control panel, creating a fire hazard. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Although the citation recites that a fire extinguisher was nearby, more information is needed for me to make a determination on gravity since the oil had spread under the electrical panel.

Citation No. 3059424

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.17001, because illumination was not sufficient to provide safe working conditions in the east tunnel of the packhouse. Light bulbs were either missing or burned out for a distance of approximately 80 feet. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an

~1371

accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing the violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059404

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12032, because the cover plate on the junction box at the head pulley of the coal incline belt was missing. The citation recites that the condition exposed conductors on the junction box to damage at the head pulley of the incline belt. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Discussion of Settlement Disapprovals

The conclusions which the Solicitor uses each time regarding probability of occurrence are, of course, intended to satisfy the Secretary of Labor's regulation for single penalty assessments (30 C.F.R. 100.4). In effect, a single penalty assessment of \$20 is available under this rule, if the violation is not "significant and substantial," as that term of art has been interpreted by the Commission in contest cases under section 104(d) of the Act. 30 U.S.C. 814(d). Due to the absence of any data or reasoning to support his bare assertions, it appears that the Solicitor in this case has not satisfied the Secretary's requirements for imposition of a \$20 penalty.

However, the issue in this case is not whether the Secretary of Labor's regulations are met. It is well established that penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's regulations or proposed penalties. Rather, they must determine the appropriate amount of penalty, if any,

~1372

in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. 820(k). Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir.1984). Wilmot Mining Company, 9 FMSHRC 686 (April 1987). U.S. Steel, 6 FMSHRC 1148 (May 1984).

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U.S.C. 820(k), which provides

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. * * *

The legislative history makes clear Congress' intent in this respect: See S.Rep. No. 95-181, 95th Cong., 1st Sess., 44-45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

In order to support his settlement recommendations, the Solicitor must present the Commission Judge with information sufficient to satisfy the six statutory criteria in section 110(i) with respect to the instant citations. I accept the Solicitor's statistics regarding history and in absence of any evidence to the contrary, I accept his representations regarding good faith abatement and ability to continue in business.

However, the Solicitor's representation of the operator as small in size cannot be accepted on the present record. The Proposed Assessment sheet gives the company's annual hours worked as 1,088,152 and the mine's annual hours worked as 417,735. The Solicitor should explain why he believes the operator is small.

No information is given to support the Solicitor's representation that in all these citations, the operator was guilty of moderate negligence. The Solicitor has merely relied upon the box checked by the inspector on the citation. Accordingly, on the critical statutory criterion of negligence, I have no basis to make the necessary determinations for nineteen of the citations, as set forth above.

So too, in these nineteen citations no information is given for me to make findings on gravity. As already noted,

~1373

the Solicitor's unsupported representations relate to "significant and substantial" not "gravity." The Commission has pointed out that although the penalty criterion of "gravity" and the "significant and substantial" nature of a violation are not identical, they are based frequently upon the same or similar factual considerations. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n. 11 (September 1987). *Youghioghney and Ohio Coal Company*, 9 FMSHRC 2007, 2013 (December 1987). Here no factual considerations have been given upon which I can decide gravity. A violation conceivably could possess some degree of gravity, but still not rise to the level of significant and substantial. As a general matter, \$20 would appear to be a nominal penalty appropriate for a non-serious violation, in absence of other unusual circumstances. But here again, the Solicitor has merely relied upon the box checked by the inspector on the citation. Accordingly, for the crucial statutory criterion of gravity, I have no basis to make the necessary determinations.

In light of the foregoing, the recommended settlements for 19 citations cannot be accepted on the present record.

ORDER

Accordingly, it is Ordered that the recommended settlement of \$20 be Approved for the following citation:

Citation No. 3058715

It is further Ordered the operator pay \$20 for this citation within 30 days from the date of this decision.

It is further Ordered that the recommended settlements be Disapproved and that within 30 days from the date of this order, the Solicitor submit sufficient information for me to make proper settlement determinations under the Act with respect to the following 19 citations:

Citation No. 3058714
Citation No. 3059190
Citation No. 3059192
Citation No. 3059193
Citation No. 3059194
Citation No. 3059196
Citation No. 3058720
Citation No. 3059385
Citation No. 3059386
Citation No. 3059388
Citation No. 3059422

~1374

Citation No. 3059392
Citation No. 3059393
Citation No. 3059394
Citation No. 3059397
Citation No. 3059398
Citation No. 3059423
Citation No. 3059424
Citation No. 3059404

Paul Merlin
Chief Administrative Law Judge