

CCASE:  
SOL (MSHA) V. LINCOLN SAND & GRAVEL  
DDATE:  
19881208  
TTEXT:

~1679

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.

LINCOLN SAND AND GRAVEL  
CO.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 88-67-M  
A.C. No. 11-01151-05504

Lincoln Sand & Gravel Co.

DECISION

Appearances: Miguel J. Carmona, Esq., U.S. Department of Labor,  
Office of the Solicitor, Chicago, Illinois,  
for the Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$168 for three alleged violations of the mandatory safety standards found in 30 C.F.R. Part 56.

The respondent contested the violations and requested a hearing. Pursuant to notice, a hearing was convened in St. Louis, Missouri, on July 25, 1988, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without them. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived its opportunity to be further heard in this matter.

ISSUE

The issue presented in this case is whether the petitioner has established the violations cited, and, if so, the appropriate civil penalty that should be assessed for the violations.

MSHA's Testimony and Evidence

The following MSHA exhibits were received in evidence in this proceeding:

1. A copy of the section 104(a) Citation No. 3057591, issued by Inspector James R. Bagley on October 15, 1987.
2. A copy of the section 104(a) Citation No. 3057592, issued by Inspector James R. Bagley on October 15, 1987.
3. A copy of the section 104(a) Citation No. 3057593, issued by Inspector James R. Bagley on October 27, 1987.
4. A copy of the proposed assessment data sheet.

Inspector Bagley testified that he conducted a regular safety inspection of the mine, a sand and gravel operation, on October 15, 1987.

During the course of this inspection, he observed a 3/8 inch stacker conveyor belt that he wanted to inspect, so he climbed on the walkway that is attached to that conveyor. When he stepped on the walkway, it started bouncing. He looked underneath the walkway and saw that the first two support braces supporting the walkway were broken, which left only three support braces intact. He therefore felt that the access was not safe, and that this was a violation of 30 C.F.R. 56.11001. The walkway is used by employees to perform maintenance and repair work on the conveyor itself, and it is the only means of access to that conveyor.

A second condition discovered by the inspector was that the cover plates on several electrical junction boxes and switch boxes were not in place on board the dredge. With the covers missing, the employees were exposed to 440-volt terminals inside the boxes located approximately 5 1/2 feet above the floor of the dredge in an active work and travel area. The inspector found this to be a "significant and substantial" violation of 30 C.F.R. 56.12032, which could reasonably be expected to result in fatal electrical shock or serious burns.

During a compliance follow-up inspection on October 27, 1987, Inspector Bagley issued a third citation because he found a transformer enclosure on the south end of the repair shop which was not locked against unauthorized entry. The transformer inside the enclosure was energized to 2200 volts and the so energized terminals of the transformer were located approximately four feet above ground level. The inspector determined that this was a "significant and substantial" violation of 30 C.F.R.

~1681

56.12068 because the transformer was located in a normal work area. If anyone did contact the terminals on the transformer they would receive a fatal electrical shock or a serious burn.

#### Respondent's Failure to Appear at the Hearing

The record in this case indicates that a Notice of Hearing dated July 1, 1988, setting this case down for hearing in St. Louis, Missouri, on July 25, 1988, was received by the respondent on July 5, 1988.

This hearing was originally noticed for 8:00 a.m. on that date. Subsequently, the week prior to the hearing in a phone call which I received from the respondent they requested a later hearing time and so I telephonically approved a change to 10:00 a.m. on the same date in the same place. This message was also conveyed to the Secretary's counsel and the court reporter so the hearing effectively was changed to 10:00 a.m., July 25, 1988. At 10:30 a.m., Mr. Miguel Carmona of the Solicitor's Office called the Lincoln Sand and Gravel Company in Lincoln, Illinois. He spoke to a Mr. Ash, who identified himself as the Office Manager for the Lincoln Sand and Gravel Company. Mr. Ash advised that they were not coming to the hearing.

The hearing proceeded in the respondent's absence. The petitioner put in her case through the testimony of Inspector Bagley and moved for an Order affirming the three citations and the proposed civil penalty.

Under the circumstances in this record, I conclude and find that the respondent has waived its right to be heard further in this matter and that it is in default. Although Commission Rule 29 C.F.R. 2700.63 calls for the issuance of a Show Cause Order before a party is defaulted, given the facts of this case, set out above, I conclude that the issuance of such an order would be a futile gesture.

#### Fact of Violation

I conclude and find that the petitioner has established the three alleged violations of 30 C.F.R. Part 56 set out in Citation Nos. 3057591, 3057592 and 3057593 by a preponderance of the evidence. The testimony of Inspector Bagley fully supports the citations which he issued and his special findings concerning the "S & S" nature of the violations. Therefore, the citations are affirmed as issued.

~1682

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the proposed civil penalty assessment of \$168 is appropriate in this case.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$168 within thirty (30) days of the date of this decision, and upon receipt of that payment by MSHA, these proceedings are DISMISSED.

Roy J. Maurer  
Administrative Law Judge