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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. WEST 88-337-M
A.C. No. 05-03295-05514

v.

Wolf Pit No. 1 and Plant

COLORADO SILICA SAND, INC.,
RESPONDENT

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor
U.S. Department of Labor, Denver, Colorado
for the Petitioner;
Mr. Lennart T. Erickson II, Vice-President,
Colorado Silica Sand, Inc., Colorado Springs,
Colorado, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating a safety regulation 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 Denver, Colorado on April 25, 1989.

The parties waived their right to file post-trial briefs, submitted their cases on oral arguments, and further waived receipt of the transcript and requested an expedited decision.

Summary of the Case

Citation No. 3065071 charges respondent with violating 30 C.F.R. 56.14006, which provides as follows:

56.14006 Placement of guards during
during machinery operation.

Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. The operator has 13 miners working two shifts; the company is a medium-sized operator.
2. The imposition of a civil penalty will not impair the company's ability to continue in business.
3. Abatement was rapidly accomplished in this case.

Secretary's Evidence

ARNOLD B. KERBER, an MSHA inspector, is a person experienced in mining and mine safety. He has been an inspector for approximately 15 years.

The witness is familiar with the Wolf Pit No. 1 mine located in El Paso County, Colorado. Both the plant and pit are under MSHA's jurisdiction.

The company uses front-end loaders to remove silica sand from a hillside deposit. From there it is trucked to the plant site where it is eventually fed into hoppers.

On June 21, 1988, the inspector met Jack Wright, the superintendent of maintenance, at the work site. They toured the plant looking for any unsafe conditions.

At the plant the silica sand is conveyed by a brown crossover belt conveyor. The conveyor transfers the sand between storage bins; it is transported from the north side to the south side of the plant. The belt conveyor is 36 feet long; the belt itself is 24 inches wide.

The conveyor runs continually except when it is shut down.

On June 21, 1988, the inspector observed the guard at the head pulley of the conveyor lying on the ground. The conveyor is usually completely covered. However, on this occasion there was no guard at the head pulley where the belt meets the top roller. The exposed area was 18 inches by 12 inches.

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The opening itself was 48 inches above the ground and if a person fell he could become entangled with the head pulley. If this occurred it would be possible to suffer the loss of an arm. In addition, there was quite a bit of silica sand spillage in the area; sand of this type can be slippery and walking in it can be difficult.

On the day of the inspection the belt was not being tested; further, company representative Wright did not claim it was being tested.

There was a regular track where workers travel near this area and the missing guard was in plain view.

On the day the citation was issued the conveyor had been operating and there was material on the belt.

The inspector learned that three employees had come in at 5:00 a.m. and the balance of the employees had come in at about 8:00 a.m. when the regular shift begins. The citation was written at approximately 11:00 a.m. It was terminated the next day when the inspector returned to the site. At that time the guard was back in place.

During the balance of the day the inspector reviewed the records that MSHA requires the company to keep. On June 22, 1988, the following day, he tested employees for silica as well as noise exposure. On June 23 he was there for a short time for a close-out conference.

When conducting the inspection it was windy. Dust and sand reduced visibility in the area.

The guards of the conveyor themselves were corrugated metal and usually connected to the conveyor. (See Exhibits R-1, R-2, R-3, R-5). The inspector did not learn who had removed the guard.

In cross-examination the inspector indicated he has received good cooperation from the company. He had also inspected the company in March 1987. He had previously asked the company to move a guard about 6 inches forward; he had also issued a citation for that condition. However, there had been no conversation about the particular head pulley that resulted in the instant citation.

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The company was operating the plant because the inspector would not have written the citation as S & S unless the plant was operating. A good portion of the inspector's activities concentrate on pointing out exposed pinch points to the company representatives.

Operator's Evidence

LENNART T. ERICKSON, II is a Vice-President of the company in charge of finance and administration.

The particular silica mined by the company is harder and rounder than a river run. The company's silica, a dune deposit, runs about 95 percent silica sand; a river run is approximately 65 percent.

Mr. Erickson was not present when Inspector Kerber issued his citation. However, his duties require that he investigate all MSHA citations. In connection with this citation he talked to Dale Correll (plant superintendent), Jim Wright (maintenance supervisor), and Bill Hoss (mechanic).

These three men are no longer with the company and they told him that they were to fasten the guard covers. This could only be accomplished by a tack weld. Mr. Erickson also learned from investigation that the previous night the conveyor guard had blown off. The morning of the investigation it was to be replaced and welded.

In addition, the conveyor was not in operation.

The company tries to follow MSHA's rules and regulations.

On cross-examination, the witness agreed that it had been some months before, at a prior inspection, when they had been told by the inspector to move a guard forward.

Company employee Correll told Mr. Erickson the plant was not operating at the time of the inspection nor had the conveyor been running that day. The plant can be in operation without the conveyor operating. The conveyor runs about 50 percent of the time.

The normal shift of the company starts about 8:00 a.m.

The company's position that the conveyor was not in operation is set forth in the company's letter dated December 15, 1988, which is in its answer filed in the case.

Discussion

A credibility issue arises here as to whether the plant was operating at the time of the inspection. On this issue I credit the inspector's testimony: the citation was issued about 11:00 a.m. when the full work force of thirteen workers was on the site. I reject the operator's contrary evidence which is admittedly hearsay with only minimal foundation.

The regulation involved here requires that a guard shall be securely in place "while machinery is being operated." The credible evidence establishes that the conveyor at the head pulley was not in place. In fact, it was lying on the ground. The inspector indicated that the conveyor was not being tested and the company representative accompanying him did not claim that any such test was taking place.

The credible evidence in the case establishes that the conveyor was neither conveying material nor moving at the time the citation was issued. However, I infer the conveyor was nevertheless "being operated" as that term is used in 56.14006. It is apparent that the conveyor supplies silica to the plant about 50 percent of the time. Since the plant itself was operating I infer the conveyor was also being operated. To like effect, see Freeport Koolin Company, 2 FMSHRC 233, 250, 251 (1980) (Cook, J), and The Hanna Mining Company, 2 FMSHRC 1446, 1453 (1980) (Broderick, J).

On the uncontroverted credible evidence it appears that a violation of 56.14006 existed.

At best, the company's defense is that the wind had blown the guard off of the conveyor and that the company had three hours to find and remedy this condition. The company's defense cannot prevail. The fact that it had only three hours to find and remedy the defective condition relates to the company's negligence and not as to whether a violation occurred. Negligence is a factor to be considered in the imposition of a civil penalty.

Since the uncontroverted evidence shows the guard was not in place and the conveyor was in operation, a violation occurred and Citation No. 3065071 should be affirmed.

Civil Penalty

The statutory criteria to assess civil penalties is contained in section 110(i) of the Act.

The evidence shows that for the two years ending June 20, 1988, the operator was assessed for 29 violations of safety regulations. (Exhibit P-1).

The stipulation of the parties indicates the company is a medium-sized operator. The company's negligence must be considered low in that it had a relatively short period of time to discover and correct this violative condition. The stipulation indicates that payment of a penalty will not cause the operator to discontinue its business. The gravity of the violation is high since a miner could be severely injured if he became entangled with the exposed pinch point. The operator is entitled to its statutory credit for good faith since it rapidly abated the violative condition.

On balance, I deem that a civil penalty of \$40 is appropriate.

ORDER

Based on the foregoing finding of fact and conclusions of law I hereby enter the following order:

Citation No. 3065071 is affirmed and a penalty of \$40 is assessed.

John J. Morris
Administrative Law Judge