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SOL (MSHA) V. BANDAS INDUSTRIES  
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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 89-30-M  
A.C. No. 41-01786-05525

v.

Docket No. CENT 89-42-M  
A.C. No. 41-01786-05526

BANDAS INDUSTRIES INCORPORATED  
RESPONDENT

Nolanville Quarry Plant

DECISION

Appearances: Michael Olvera, Esq., Office of the Solicitor,  
U.S. Department of Labor, Dallas, Texas,  
for Petitioner;  
Robert Bandas, Vice President Bandas  
Industries, Inc., Temple, Texas for  
Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging Bandas Industries, Inc., (Bandas) with 24 violations of regulatory standards. The general issues before me are whether Bandas violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At hearing the Secretary moved for the approval of a settlement agreement with respect to 18 of the citations at bar. She has submitted sufficient information to show that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly an order will be incorporated in this decision approving the proposed settlement and directing payment of the agreed upon penalties.

At hearing the Secretary also moved to withdraw and vacate Citation No. 3276776 acknowledging that she did not have the necessary expert testimony to support the citation. Under the circumstances the motion to withdraw was granted. In addition, the inspector who issued Citation

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No. 3276766 acknowledged at hearing that he could not recall the specific facts regarding the nature of the alleged violative conditions. Accordingly, in the absence of probative evidence in support of the alleged violation the citation was dismissed at hearing. Three citations therefore remain at issue.

Citation No. 3276600 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 56.9087 and charges as follows:

Allegation: A caterpillar 988A front-end loader was provided with a back-up alarm which was not automatic.  
Violation: the caterpillar 988A front-end loader company number 145 was not provided with an operable back-up alarm. The unit was operating in the pit area loading haul trucks. The driver's view to the rear was obstructed and no ground observer was used to signal the driver when backing up. No evidence was found to indicate the back-up alarm was not automatic.

The cited standard, 30 C.F.R. 56.9087, provides as follows:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Inspector Robert Lemasters of the Federal Mine Safety and Health Administration (MSHA) testified that he had observed the cited front-end loader at about 1300 hours on September 13, 1988, operating without an operable back-up alarm and with no one in the area acting as a ground observer. Lemasters also observed that the view to the rear of the front-end loader was obstructed for about 15 feet behind. He testified that he had observed some of the haul truck drivers outside of the truck cabs walking in the vicinity of the front-end loader. According to Lemasters these drivers were thereby exposed to the hazard of being run over. Based on this evidence and reports of "Fatalgrams" (MSHA reports involving similar violations causing fatalities) Lemasters opined that a fatality was reasonably likely under the circumstances.

Lemasters found only low negligence because of evidence that the cited equipment had been examined before the shift began and had been reported as properly functioning at that time. The violation was promptly abated when a ground wire was reconnected. These findings are not disputed.

Robert Bandas, Vice President of the Respondent, testified that in his opinion it would be extremely remote for the back-up alarm to not function. According to Bandas the area in which the front-end loader was operating had no pedestrian traffic. Moreover the truck drivers were forbidden by company policy to leave their trucks. Bandas had personally never seen any driver outside of his truck in this area.

In evaluating the above evidence I find that the violation is proven as charged. I further conclude that the uncontradicted testimony of Inspector Lemasters concerning his observation of truck drivers outside of their cabs in the vicinity of the front-end loader is to be credited. Bandas testified only that it was contrary to company policy to do so and that he had never personally observed any driver outside of his truck in the area. This evidence does not contradict the direct observations of Lemasters. Accordingly I find under the circumstances that injuries of a reasonably serious nature, including fatalities were reasonably likely. Under the circumstances I find that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). Under the circumstances and considering the size of the operator, its history of violations, and the fact that the violation was abated in accordance with the Secretary's directive, I find that a civil penalty of \$136 is appropriate.

Citation No. 3276515 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 56.14003 and charges that "the guard on the tail pulley of the by-pass conveyor at No. 1 plant did not extend far enough to cover the pinch points."

The cited standard provides as follows:

Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

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According to MSHA Inspector John Carter the cited guard on the tail pulley in fact did not cover the pinch points as noted in the photograph admitted in evidence. (See Exhibit PX-16). According to Carter, workmen in the area such as miners cleaning-up around the cited tail pulley would be exposed to entanglement in the pinch point suffering loss of, or broken, limbs. Carter acknowledged however that the pinch point was not directly accessible because of the belt structure. At the same time he opined that there was no obstruction "that couldn't be gotten around".

According to Robert Bandas there was very little foot traffic in the cited area and in any event it was nearly impossible because of the belt structure itself for an employee to get close enough to the cited pinch point to become untangled. Bandas also noted that at the time of the violation and since then the belt has not been cleaned while in motion. In light of the firsthand knowledge and experience of Bandas, corroborated in significant respects by Inspector Carter, I find but limited exposure to this hazard. Accordingly while I find that the the violation is proven as charged, I find that exposure to the cited hazard was so remote as to make it unlikely that an employee would become entangled in the cited tail pulley. Accordingly I do not find the violation to be "significant and substantial" or of high gravity. In the absence of any evidence of negligence I am unable to evaluate this criterion. Under the circumstances I find that a civil penalty of \$75 appropriate.

Citation No. 3276517 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 56.9054 and charges that "there was a build up of material at the bumper block at No. 3 Plant dump station."

The cited standard, 30 C.F.R. 56.9054, provides that "berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations." It may reasonably be inferred that the cited standard requires that the safety devices not only be provided but must also be maintained "to prevent overtravel and overturning at dumping locations".

According to MSHA Inspector John Carter there was indeed a buildup of material at the cited bumper block in an amount sufficient to enable a truck backing up to the dumping location to pass over the block and into the dumping station. According to Carter however, at most the driver would only be

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"shaken up" if his truck backed over into the dumping station. Carter also observed that the plant was not then in operation.

According to Robert Bandas the blocks were 18 inches high and there was only 6 inches of material buildup so that the likelihood of the truck backing over the block was "very slim". He also noted that sufficient protection still remained in spite of the buildup to hinder the rear movement of any truck.

Within this framework of evidence I find that a violation existed as charged. In light of the testimony however that, at worst, the truck driver would only be "shaken up" I cannot find that the violation was of high gravity or "significant and substantial". I am also unable to find negligence in light of the absence of any evidence on this issue. Within this framework I find that a civil penalty of \$50 is appropriate.

ORDER

Docket No. CENT 89-30-M: Citation No. 3276766 is vacated. The remaining citations are affirmed and Bandas Industries, Inc., is directed to pay civil penalties of \$1,482 for the violations cited therein with 30 days of the date of this decision.

Docket No. CENT 89-42-M: Citation No. 3276776 is vacated. The remaining citations are affirmed and Bandas Industries, Inc., is directed to pay civil penalties of \$156 for the violations cited therein within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge  
(703) 756-6261