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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 88-93-M A.C. No. 29-00425-05501
v.	Yaple Creek Pit
YAPLE CREEK SAND & GRAVEL, RESPONDENT	

DECISION

Appearances: Janice L. Holm, Esq., Jack F. Ostrander, Esq.
Office of the Solicitor, U.S. Department of
Labor, Dallas, Texas,
for Petitioner;
Jay Rubin, Esq., Stout & Rubin, Truth or
Consequences, New Mexico,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating eight safety regulations 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 El Paso, Texas on July 18, 1989.

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

Stipulation

At the commencement of the hearing the parties stipulated that the Commission had jurisdiction to determine the issues herein. Further, it was stipulated that respondent is a sand and gravel operator and is subject to the Act; however, since this operator has only one employee engaged in the actual mining and processing of the sand and gravel, it is asserted that in this unique circumstance the MSHA lacks jurisdiction.

Issues

The issues raised are whether a one-man operation is subject to the Act. Further, should the issues of estoppel and vagueness cause a dismissal of the complaint herein. Additional issues concern whether respondent violated the regulations and, if a violation occurred, what penalty is appropriate.

Threshold Issues

The initial threshold issue is whether a one-man operation is subject to the Mine Safety Act.

The evidence on this issue is uncontroverted. Mr. Robert Huffman is the owner of Yaple Creek Sand & Gravel. He is the sole individual involved in processing the sand and gravel. Mrs. Pat Huffman handles the book work for the company but she does not engage in the actual mining process.

On the foregoing facts I conclude that although the respondent has no employees engaged in the removal of the sand and gravel other than Mr. Huffman, the company is nevertheless subject to the Act.

In Marshall v. Sink, 614 F.2d 37, 1980, the United States Court of Appeals for the 6th Circuit noted that the respondent therein was subject to federal regulations even though he owned and operated a small mine without employees, 614 F.2d at 38.

The foregoing case law, which is now generally established, rests on the broad Congressional definition of a mine. The definition as enacted by the Congress provides:

> (h)(i) "Coal or other mine" means (a) an area of land from which minerals in a non-liquid form . . . are extracted. 30 U.S.C. 802(3).

Further, there is no indication in the Congressional history that Congress intended to exclude a one-man operation from complying with safety and health regulations. To like effect see C.D. Livingston, 7 FMSHRC 1485 (1985).

On the basis of the existing case law I conclude that a one-man operation is indeed subject to the Act.

Respondent also raises the defense that other MSHA inspectors had indicated to the operator that his operation was in compliance with the law. Since no previous citations have been issued, the citations issued here in the instant case should be vacated on the doctrine of estoppel.

The argument is rejected for several reasons. The Commission has ruled that estoppel does not apply against the federal government, King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421. Further, it is clear that lack of previous enforcement does not support a claim of estoppel. See J & R Coal Company, 3 FMSHRC 591 (1981); Burgess Mining and Construction Corporation 3 FMSHRC 296 (1981); Price River Coal Company, 5 FMSHRC 1734 (1983). The defense of estoppel should not prevent the Secretary from enforcing the Act. This is because inspectors have different areas of expertise. One inspector might not consider a factual circumstance to constitute a violation. However, another inspector might clearly conclude a violation exists. For these reasons the doctrine of estoppel in safety and health matters cannot be invoked against the Secretary.

Respondent also raises the issue that the regulations involved in this case are unconstitutionally vague and fail to give a one-man operator fair notice of what is required of him to comply with the regulation. I reject respondent's views. Regulations such as are involved in the instant case are not considered in a vacuum. Generally such safety regulations are examined and must be looked at in light of the conduct to which they are applied. Ray Evers Welding Company v. OSHRC, 625 F.2d 726, 732, 6th Cir. (1980). General terms such as "unsafe or dangerous" frequently appear in federal safety and health regulations. This approach has been recognized as necessary where narrower terms would be too restrictive. Specifically, standards of this type must often be made simple and brief in order to be broadly adaptable to myriad circumstances, Kerr-McGee Corporation, 3 FMSHRC 496 (1981); Alabama By-Products Corporation, 4 FMSHRC 2128 (1982); Evansville Material, Inc., 3 FMSHRC 704 (1981). Specifically, I do not find that the regulations herein are unconstitutionally void.

Summary of the Case

William Tanner, Jr., an MSHA inspector experienced in mining, testified for the Secretary. Inspector Tanner inspected respondent and issued citations on February 18, 1988. On subsequent followup inspections the alleged violations had not been abated. Mr. Huffman, owner of the company, requested that the inspector issue orders so the issues could be contested. In fact, orders were issued under section 104(b) of the Act.

Robert Huffman (owner) and his wife, Mrs. Huffman, testified for the company. It is apparent in the case that the inspector and Mr. Huffman had difficulty communicating during the inspections. Respondent introduced photographs of some of the areas cited by the inspector. The judge considers these photographs to be pivotal to a disposition of the issues.

Citation Nos. 2867903, 2867904, 2867905, 2867906, and 2867908 charge respondent with violating 30 C.F.R. 56.14001, which provides as follows:

> Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Citation No. 2867903

The Secretary's evidence by its inspector indicates that the chain drive assembly on the hopper feeder conveyor belt was not guarded. The drive assembly was 2 or 3 feet off the ground. The inspector considered this hazard to be open and obvious; other inspectors had said that it needed to be guarded. The inspector indicated that the operator would have to get under the hopper in order to contact the chain drive. Injury in this circumstance could result in loss of fingers. The inspector believed the negligence of the operator was moderate. Particularly, the operator had been previously told about this guarding requirement. The operator had further indicated that the machinery had been running on weekends and that he had recently been running it.

Respondent's case consisted of three photographs (Exhibit R-4). These photographs indicated a gate was available to keep people away from the chain drive.

In rebuttal the inspector reviewed Exhibit R-4 and concluded that the gate failed to provide a guard such as the type required by MSHA.

Discussion

In connection with this citation I credit the Secretary's evidence. It is true that Exhibit R-4(a) and R-4(c) show the presence of the gate but it is apparent, particularly from Exhibit R-4(a) that the unguarded chain drive assembly was at least 4 to 5 feet from the gate. I further conclude that the condition was open and obvious and therefore the operator was negligent. However, the gravity is low since the the unguarded assembly is quite low to the ground. This citation should be affirmed.

Citation No. 2867904

The Secretary's evidence in this case shows that the flat belt drive assembly on the crusher was not adequately guarded and the hand control was located between the wheel and the frame.

Inspector Tanner testified that respondent attempted to guard this assembly. The hazards involve a miner becoming entangled in the equipment or being injured if the belt should break. He considered that the level of exposure was reasonably likely and he believed the operator was moderately negligent in that he knew of this violation.

Respondent's evidence indicated that the clutch handle had been moved and he offered a series of photographs (Exhibit R-5).

In rebuttal the inspector reviewed the photographs and he indicated that they showed an attempt to guard the tail pulley. He further clearly identified an unguarded and exposed pinch point, marking it with an "x" on Exhibit R-5(b). Inspector Tanner further indicated that Exhibit R-5 shows an unguarded condition. Exhibit 5(d) shows the head and tail pulley where a person could walk to the area and reach the unguarded portions by hand. Exhibit 5(d), according to the inspector, shows the flat belt guarded in front.

Discussion

The photographic evidence shows the flat belt drive assembly was not adequately guarded; further, the hand control was located between the wheel and the frame. Exhibit R-5(a) shows the hand control. I conclude that the photographs support the testimony of Inspector Tanner and a violation of the guarding standard has been established. Citation No. 2867904 should be affirmed.

The Secretary's evidence indicates that the head and tail pulleys on the conveyor belt system were not guarded.

The inspector wanted these pulleys guarded because a person could contact them. The hazards would involve persons coming entangled with such pinch points. Hand and arm injuries were possible and the inspector considered it reasonably likely that an injury would occur. He further believed the negligence of the operator to be moderate. He had designated this as an S&S violation. The inspector estimated that the head and tail pulley was 5 to 6 feet off the ground.

Respondent offered photographs of the head pulley and tail pulley. Exhibit R-6(a) seems to indicate that both the head and tail pulley are over 6 feet off the ground. Exhibit R-6(b) shows the unguarded pulley to be 8 feet off the ground and Exhibit R-6(c) shows the head pulley to be 15 feet off the ground.

In rebuttal the inspector reviewed the photographs and indicated that a person could reach the pinch points by standing on the opposite side of the head and tail pulley shown in Exhibit R-6(a). He further marked an arrow to the pinch points in the photographs.

In addition, he indicated that Exhibit R-6(b) shows the head pulley. An arrow was marked to the pinch point. Such a pinch point could be readily reached without using a ladder or by walking up the muck piles. Most operators leave muck piles there so they can get to the pinch point to perform maintenance. In the inspector's view Exhibit R-6(d) possibly shows the head pulley 8 feet high and the inspector agrees that it may be that the head pulley was not covered by the particular citation.

Exhibit R-6(d) shows where the inspector asked the operator to guard the equipment. In his view the head pulley was not guarded.

Discussion

The testimony and the photographic exhibits cause me to conclude that the head and tail pulleys were at least in excess of 6 feet off the ground and, in fact, as high as 15 feet off of the ground. For these reasons I conclude that the unguarded equipment and these moving machine parts are not likely to be contacted by any person nor injure any such person within the meaning of the regulation. For these reasons no violation of the guarding standard occurred and Citation No. 2867905 should be vacated.

Citation No. 2867906

In connection with this citation, the Secretary's evidence showed that the V-belt drive assembly on the jaw crusher was not guarded on the inside and outside. Inspector Tanner considered this the worst of the guarding violations he saw. This was particularly hazardous because at this unguarded point Mr. Huffman poured oil into the machinery. It was 4 to 6 inches from the oil cups to the gears. There was oil dripping on the side. The inspector told Mr. Huffman that this condition must be fixed before he operated the equipment. If a person became caught in the unguarded assembly a fatality could result. The inspector considered this an S&S violation and, further, he believed the operator was negligent because the operator knew of the problem.

The operator offered to write a letter stating if anything happened the inspector would not be responsible.

Respondent's evidence indicated that one guard had been added on the V-belt side since the citation was written. He further offered photographs of the condition (Exhibit R-7).

Exhibits R-7(a), (b) and (c) depict the V-belt drive assembly and show the conditions as they existed in February 1988. The additional guard had in fact been added at the suggestion of respondent's attorney.

In rebuttal, Inspector Tanner reviewed the photographs. Exhibit R-7(a) shows the place where Mr. Huffman checks the bearings and also shows the piece of steel where he stands. Mr. Huffman had added a guard between the cups and the flywheel but in the inspector's opinion the right hand side was still unguarded.

Exhibit R-7(b) shows the outside of the V-belt assembly and shows it to be unguarded. A person would have to reach out to "get it". When the inspector was there these were unguarded.

Inspector Tanner marked an arrow to the unguarded area and indicated a person could reach the motor drive by hand.

Exhibit R-7 shows an area where Mr. Huffman oils the equipment which was unguarded at the time of the inspection. He asked for a guard on the side and indicated that there is a guard on the left hand side.

Respondent agrees that one guard on the V-belt side was added since the citation was written. The photographs, particularly R-7(b) and R-7(a), show the unguarded assembly.

Discussion

This citation should be affirmed. The photographs support Inspector Tanner's testimony.

Citation No. 2867907

Citation No. 2867907 charges respondent with violating 30 C.F.R. 56.11012, which provides as follows:

> Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The Secretary's evidence shows that the screw on the sand washer was not protected to prevent persons from falling into it. The evidence further indicated to Inspector Tanner that the sand washer was 2 to 5 feet high and it was necessary to have a cover over the lower half. The equipment was supposed to have a travelway and nearby footprints indicated that someone had been in the area.

In the inspector's view this was a large size screw; the hazard could involve possible loss of leg or hand or an arm. He further considered that it was likely that such an accident could occur. In addition, he considered this to be an S&S violation.

The inspector believed the operator was moderately negligent because the company knew the hazard was there and had been so advised by previous inspectors. The screw conveyor itself was between 6 to 8 feet to a low of 2 feet. The inspector asked that the lower part be covered.

Respondent's evidence consisted of photographs, Exhibit R-8. Respondent indicated that both screens had been taken off the shaker but the Mr. Huffman felt safe with the condition.

In rebuttal Inspector Tanner reviewed the photograph and noted that the cover was not in place on the occasion of his first and second inspections. The inspector required that it be put in place.

Discussion

Mr. Huffman agrees that both screens had been taken off the shaker. Exhibit R-8 was taken after the citation was written. I accordingly credit the inspector's testimony that the violative condition existed at the time of the inspection.

It accordingly follows the citation should be affirmed.

Citation No. 2867908

This citation charges a violation of the guarding standard, 30 C.F.R. 56.14001.

Inspector Tanner testified the screw drive assembly for the sand screw washer was unguarded. It was unlikely that a person would get into the screw drive assembly but if it occurred he would suffer the possible loss of a hand, fingers, arms, or in any event, lost days.

He believed the operator was moderately negligent since he knew of the violative condition. The assembly was between 2 feet on the wall to a high of 6 to 8 feet off the ground. The bottom of the assembly was filled with sand.

Mr. Huffman indicated that the assembly was at least 8 feet off the ground. In support of his position he offered Exhibit R-9. The photograph shows the end of the screw sand washer which is 8 feet above ground. This is the condition that was depicted in February 1988. The operator believed the condition was safe because it was necessary for him to use a ladder in order to reach it to service it. He usually services the areas that are to be maintained before he to runs his equipment.

In rebuttal Inspector Tanner drew an arrow to the area he believed should have been guarded. Due to the build up of a muck pile underneath, a person could reach it. It was in this same condition in February 1988. He wrote this as a non-S&S violation.

Discussion

I credit Mr. Huffman's version of this condition. The existence of a muck pile is not shown in the photograph nor does the equipment indicate that there would be a build up of such a pile in this particular area. It accordingly follows that workers could not contact or be injured by the exposed parts.

This citation should be vacated.

Citation No. 2867909

Citation No. 2867909 charges respondent with violating 30 C.F.R. 56.12032, which provides as follows:

> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

The Secretary's evidence shows that the cover on the electrical junction box to the screw drive motor was missing. There were electrical connections inside the box and there were wires sticking out. The hazard involved improper insulation and a fatality could result if a person contacted such equipment. The inspector believed the operator was moderately negligent. The condition was open and obvious, and the box itself was 6 to 8 feet off the ground.

Respondent indicated and concurred that the cover was missing but he did not see that it would make any difference since there were no exposed wires. Exhibits R-10(a)(b) and (c) were received in evidence and the operator indicated he had never had a problem with this particular junction box.

In rebuttal Inspector Tanner drew arrows to the junction box. In Exhibit R-10(b) you can observe where a person could contact the junction box by walking up the muck pile.

Discussion

The operator admits the cover on the electrical junction box was missing and he failed to prove in the inspection that there was testing being done or that repairs were being undertaken.

The particular standard in question, namely 56.12032, is a mandatory standard. The regulation does not require a potential for contact or injury as does the guarding regulation.

This citation should be affirmed.

Citation No. 2867910

Citation No. 2867910 charges respondent with violating 30 C.F.R. 56.12028, which provides as follows:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

The Secretary's evidence shows that a test of the continuity of resistance of the grounding systems had not been done on the plant and a record of such test had not been made.

The purpose of the regulation is to insure that plant generators are grounded. The hazard in this situation is that a possible fatal injury could occur and there have been numerous such fatalities.

The inspector considered this to be an S&S violation particularly because of the volume of water in close proximity to the crusher. Water could establish an effective ground.

The inspector believed the operator had been moderately negligent and he should have known that electrical equipment had to be grounded. Mr. Huffman indicated that it had not been tested.

Mr. Huffman testified that he had not had an electrician run a test but he believed the grounding wires were apparent. In connection with this he offered Exhibit R-11(a), (b) and (c) which show the ground wires. This was the condition existing in February 1988.

In rebuttal Inspector Tanner reviewed the photographs and stated that Exhibit R-11(a) does not show if the grounding is adequate and that cannot be determined until a grounding check has been done. Further, Exhibit R-11(b) shows the power cable was wrapped in tape. In addition, Exhibit R-11(c) shows the frame was grounded but it doesn't show, nor does it establish, if the grounding system was effective.

Discussion

The evidence established by the inspector and confirmed by Mr. Huffman is that a test of the continuity of resistance of the grounding system had not been done on the plant nor had a record of such tests been made.

For the foregoing reasons this citation should be affirmed.

Civil Penalties

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

One criteria involves the operator's history of previous violations. However, in this case there was no evidence of the prior history. However, inasmuch as the inspection occurred shortly after a start-up, I infer that the operator's history is favorable to the company.

Additional criteria is whether the penalty is appropriate in relation to the size of the business and whether the penalty will affect the operator's ability to continue in business. It is apparent that this is a small operator and in fact only Mr. Hoffman engaged in the actual preparation of the sand and gravel. Mrs. Huffman indicated the company is doing better than breaking even.

Concerning the operator's negligence, the evidence establishes that the operator was negligent in that the conditions were open and obvious.

The Mine Safety Act provides for a credit for good faith in attempting to achieve rapid compliance. However, in this case the operator requested that an order be issued in order that he might litigate the issues involved. However, issues of good faith fall under a broad umbrella and I find

from the credible evidence that Mrs. Huffman was in contact with MSHA in a conference call in an effort to resolve these citations. In addition, she previously advised MSHA of their most recent start-up of the business (Exhibit R-5). I conclude that such activities fall within the broad umbrella of good faith.

The foregoing conditions apply to all of the statutory criteria for assessment of the civil penalty except the criteria of gravity. This criteria is now considered.

Citation No. 2867903 (chain drive assembly): the gravity in this situation is low since a person would have to be within 2 or 3 feet of the ground to contact the unguarded chain drive.

Citation No. 2867904 (flat belt drive assembly): the gravity here is likewise low. The guard did not fully enclose the belt but the pinch points are enclosed by the guard and the position of the hand control as shown in Exhibit R-5(a) would not cause any serious problems.

Citation No. 2867905 (head and tail pulleys on conveyor): this citation is to be vacated.

Citation No. 2867906 (V-belt assembly): the gravity involved in this guarding violation is particularly troublesome in that the operator must pour oil to maintain the equipment while it is running. No doubt the oil in the immediate vicinity would cause a slippery condition. I believe the gravity in this violation is high.

Citation No. 2867907 (sand washer): the gravity connected with this violation is high. Due to the size of the screw involved a person could lose a limb.

Citation No. 2867908 (screw drive assembly for sand washer): this citation is to be vacated.

Citation No. 2867909 (cover for electrical junction box): I consider the gravity for this violation to be low. In addition, the positioning of the box, 6 to 8 feet off the ground, would render likelihood of any serious injury to be remote.

Citation No. 2867910 (checking grounding system): the gravity involved in this violation is high since an inadequate grounding system could result in a fatality.

I conclude that the penalties set forth as to each of these citations in the order in this decision are appropriate.

ORDER

Based on the foregoing findings of fact and conclusions of law it is hereby ordered that:

1. Citation No. 2867903 is affirmed and a civil penalty of $25 is assessed.

2. Citation No. 2867904 is affirmed and a civil penalty of $25 is assessed.

3. Citation No. 2867905 is vacated.

4. Citation No. 2867906 is affirmed and a civil penalty of $100 is assessed.

5. Citation No. 2867907 is affirmed and a civil penalty of $50 is assessed.

6. Citation No. 2867908 is vacated.

7. Citation No. 2867909 is affirmed and a civil penalty of $25 is assessed.

8. Citation No. 2867910 is affirmed and a civil penalty of $50 is assessed.

John J. Morris
Administrative Law Judge