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MSHA V. A. H. SMITH STONE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 29, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA) Petitioner — CIVIL PENALTY PROCEEDING; Docket No. VA 89-28-M; A. C. No. 44-02965-05518

v. — Louisa Plant

A. H. SMITH STONE COMPANY, Respondent

DECISION

Appearances: Jack Strausman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Lisa M. Wolff, Representative for A. H. Smith Stone Company, Branchville, Maryland, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against A. H. Smith Stone Company pursuant to the Federal Mine Safety and Health Act of 1977. An evidentiary hearing was held on August 30, 1989, and post-hearing briefs have been filed.

Order No. 3045441 dated July 17, 1988, alleges a violation or 30 C:F.R. 56.14006 for the following condition:

> "This is an order of withdrawal, the employee shoveling under the feeder shaker under the #1 jaw crusher shall be withdrawn immediately. The employee was shoveling within a foot of the unguarded V-belt drive and drive motor of the shocker feeder. This is an imminent danger situation."

30 C.F.R. 56.14006 provides as follows:

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

At the hearing the parties agreed to the following stipulations (Tr. 5-6):

(1) the operator is the owner and operator of the subject mine;

(2) the operator and mine are subject to the Federal Mine Safety and Health Act of 1977;

(3) the administrative law judge has jurisdiction of this case;

(4) the inspector who issued the subject order was a duly authorized representative of the Secretary;

(5) a true and correct copy of the order was served upon the operator;

(6) a copy of the subject order is authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein;

(7) the alleged violation was abated in good faith;

(8) the history of prior violations is as set forth in the Solicitor's prehearing statement;

(9) the operator's size is as set forth in the Solicitor's prehearing statement.

The inspector testified that when he arrived, the plant was running (Tr. 11). He saw and heard material being dumped into the feeder hoppers for the crushers and then coming off at the end of the conveyor belts (Tr. 11-12). After greeting the foreman who was sitting on a front end loader, the inspector turned and saw an employee shoveling at an unguarded belt (Tr. 13). This belt ran from the pulley on the motor to the pulley on the shaker (Tr. 16, MSHA Exhs. 4-6). There was no guard on the drive or on the pulleys (Tr. 28). The employee who was shoveling was within one foot of the unguarded drive (Tr. 14). The jaw crusher was above his head and the shaker feeder was in front of him (Tr. 27). The foregoing testimony is uncontradicted and I accept it.

The inspector further stated that the belt was not being tested. He explained that testing of this belt is done by running the belt for 10 minutes with a small amount of material

on it (Tr. 33, 42-43). Unlike a conveyor belt which carries material, the V-belt in this case only drives machinery (Tr. 70-71). In addition, no one told the inspector the belt was being tested and from his seat on the front-end loader the foreman was too far away to have observed whether the belt was operating properly (Tr. 33-35, 41-42, 59). Finally, if resting were being done, an employee would not have been assigned to do the normal work of shoveling so close to the unguarded belt drive (Tr. 33, 41-42). I accept this uncontradicted testimony and based upon it find that the belt was not being tested.

In light of the foregoing I conclude a violation existed.

As already set forth, the employee was shoveling one foot away from the unguarded belt which was running. I accept the inspector's description of the floor as slippery due to the presence of dust, water, oil and grease (Tr. 36). The inspector stated that if an employee were caught in the belt he could lose his fingers, hand, arm or life (Tr. 371. Under the circumstances the violation presents the discrete safety hazard of slipping and becoming caught. Because of the proximity of the employee to the moving, unguarded belt a reasonable likelihood existed that the feared hazard of becoming caught in the machinery would occur. And as set forth above, if an injury resulted it would be of a serious nature. Accordingly, under Commission criteria the violation was significant and substantial. Mathies Coal Co., 6 FMSHRC l (1984), Consolidation Coal Company, 6 FMSHRC 34 (1984). For the same reasons I find the violation was very serious indeed. 1/

According to the inspector, the foreman on the front end loader saw the employee shoveling near the unguarded belt (Tr. 38). The foreman therefore was guilty of a high degree of

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1/ The violation was cited in a 107(a) imminent danger withdrawal order/104(a) citation. The operator has not contested the order. However, the record demonstrates that the inspector was correct in issuing it. Cf. Freeman Coal Mining Co., 2 IBMA 197, 212 (1973) aff'd, 504 F.2d 741 (7th Cir. 1974); Eastern Associated Coal Corp., 2 IBMA 128 (1973) aff'd, Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277 (4th Cir. 1974); Cyprus Empire Corporation, 11 FMSHRC 368, 374-376 (1989).

negligence and his negligence is imputable to the operator. Southern Ohio Coal Company, 4 FMSHRC 1459 (1982) 2/.

The remaining 110(i) criteria are covered by the stipulations of the parties.

The post-hearing briefs filed by the parties have been reviewed. To the extent they are inconsistent with this decision, they are rejected.

ORDER

In light of the foregoing it is ORDERED that Order/Citation No. 3045441 be AFFIRMED.

It is further ORDERED that a penalty of $1,250 be ASSESSED.

It is further ORDERED that the operator PAY $1,250 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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2/ As set forth herein, the testimony of the inspector, who was the only witness to testify, was undisputed. At the hearing the operator's representative moved for a continuance and requested a subpoena because the foreman was not present to testify (Tr. 72-73). However, the notice of pre-hearing and hearing was issued more than two months in advance of the hearing, and in her prehearing statement the representative identified the foreman as the operator's witness who would testify at the hearing. At the hearing the representative did not know why the foreman, who is still in the operator's employ, did not appear (Tr. 74). Her belated request for a continuance and subpoena was untimely and ungrounded and as such, it was denied from the bench (Tr. 74).

Distribution:

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