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SOL (MSHA) V. WALSENBURG SAND & GRAVEL
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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 PROCEEDINGS Docket No. WEST 88-96-M A.C. No. 05-03920-05502
v.	Docket No. WEST 88-142-M A.C. No. 05-03920-05503
WALSENBURG SAND & GRAVEL COMPANY, INCORPORATED, RESPONDENT	Vezzani Pit

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, For Petitioner;
Ernest U. Sandoval, Esq., Walsenburg, Colorado, For Respondent.

Before: Judge Cetti

This case is before me upon the petition 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", for the alleged violation of three regulatory standards.

The Secretary charges the operator of the Vezzani Pit, Walsenburg Sand & Gravel Company, Inc. (Walsenburg), with the violation of 30 C.F.R. 50.30, 56.9032, and 56.14001.

Walsenburg filed a timely appeal from the Secretary's proposal for penalty. After notice to the parties the matter came on for hearing before me at Pueblo, Colorado. Oral and documentary evidence was introduced and the matter was submitted for decision without the filing of post-hearing briefs.

The general issues before me are whether Walsenburg Sand & Gravel violated the cited regulatory standards, whether or not the violations were significant and substantial, and, if violations are found, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

The federal mine inspector, Lyle K. Marti, testified he inspected the Vezzani Pit and found it to be a small intermittent seasonal operation. It consisted of a pit, a crusher with screening facilities, a maintenance shop and a hot plant. Raw material is extracted from the earth and processed. The product produced is used in asphalt paving and road construction.

The parties stipulated the operation was a small one. When the pit is open only three employees on average operate the facility. On the day of the inspection the plant and crusher were not running and only one employee was at the site.

Docket Number WEST 88-96-M

Citation No. 3065794

When Inspector Marti arrived at the mine office, the first thing he did was review the required records. One of the required records is a quarterly employment report, MSHA Form 7000-2, which states the number of hours worked and the average number of employees who work at that pit during the quarter. This report must be submitted quarterly to the Health Analysis Center in Denver within 15 days after the end of the quarter. The inspector found the first and second quarter reports were timely submitted but the third quarter report due by October 15th had not been submitted as of November 4th, the date of his inspection.

Inspector Marti informed Evelyn Vezzani, Secretary-Treasurer and wife of Louis P. Vezzani, the President of the corporation, that Walsenburg was in violation of 30 C.F.R. 50.30 since the third quarter report had not been submitted in time to arrive at the Denver center by October 15th. Mrs. Vezzani told him the report had been overlooked. She explained that they were closing-out their business at the pit so they had a lot of different reports to get out and the third quarterly report was just overlooked.

The inspector testified that the citation was abated before he arrived at the pit the next day, by Respondent's mailing the required report to the center in Denver.

Louis P. Vezzani, Respondent's President, testified that the failure to send in MSHA Form 7000-2 within 15 days of the end of the third quarter was "strictly a clerical oversight" on the part of his wife.

The undisputed testimony clearly established a violation of 30 C.F.R. 50.30. Citation No. 3065794 alleging a violation of 30 C.F.R. 50.30 for failure to submit the third quarterly report, MSHA Form 7000-2, to the MSHA Health and Safety Analysis Center within 15 days after the end of the third calendar quarter, is affirmed.

The Secretary originally characterized the violation as not significant and substantial and proposed a penalty of $20. At hearing counsel for the Secretary contended that the negligence was high and proposed to increase the penalty from $20 to $100.

In determining the appropriate penalty for this violation I have considered the statutory criteria set forth in section 110(i) of the Act including the operator's small size. I credit the undisputed testimony that the failure to submit the report in a timely manner was due only to a clerical oversight. I see no basis for determining negligence to be high enough to warrant the higher penalty proposed. I find the appropriate penalty for this violation is the $20 penalty originally proposed by the Secretary.

Citation No. 3065796

This citation alleges a violation of 30 C.F.R. 56.9032, which provides:

> "Dippers, buckets, scraper blades, and similar moveable parts shall be secured or lowered to the ground when not in use."

Approximately 110 feet from the west side of the crusher Inspector Marti observed a Caterpillar road grader that had a 12 foot long blade. The road grader was parked unattended with the blade in a raised position. The blade was not secured or lowered to the ground as required by the cited safety standard.

The blade had not been lowered to the ground because the grader might have to be pulled a few feet in order to start it. The grader could not be "pull-started" with the blade on the ground.

Inspector Marti testified that he was concerned that there could be a mechanical or a hydraulic failure that could accidentally cause the blade to come down. If someone were working with their foot under the blade when it came down it could cause a permanent disabling injury.

Mr. Louis Vezzani testified that without starting and running the motor of the road grader, there was "no possible way" that the blade could fall or come down. The engine has to be running in order to mechanically power the blade up or down. The blade lift is mechanically gear driven. It is not a hydraulic mechanism. Consequently, there is no possibility that there could be a release of hydraulic pressure that would drop the blade. The operator has to start the engine and mechanically lower the blade. Mr. Vezzani has used the road grader since 1961 to maintain the pit access road and there has never been an injury involving that equipment.

Inspector Marti stated that the violation was abated during the afternoon of the day of his inspection by an operator who started the engine of the road grader and lowered the blade.

This citation, No. 3065796, was originally marked and issued as a non-S&S violation. At the hearing counsel for the Secretary stated that she believed the evidence would show that the violation was significant and substantial and that the negligence was very high. Counsel proposed to amend the assessed penalty from $20 to $200.

The Commission has stated that a "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822.

In Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

On review and evaluation of the evidence I find that a preponderance of the evidence fails to establish the third element of the Mathies Coal formula. A preponderance of the evidence fails to establish a reasonable likelihood that the hazard contributed to will result in an injury. This finding is consistent with the low exposure to the hazard and the history of no injury involving the road grader since it was acquired by the operator in 1961.

Considering the criteria set forth in section 110(i) of the Act, it is found under the particular facts surrounding this violation, that the Secretary's original proposed penalty of $20 is appropriate for the violation.

Docket WEST 88-142-M

Citation No. 3065797

This citation reads as follows:

> "The fan blade on the motor-grader (CAT.- NO 12 SN: 8T16519) was not guarded against personal contact."

The citation alleges a significant and substantial violation of 30 C.F.R. 56.14001 which provides as follows:

56.14001 Moving machine part

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

Inspector Marti testified that the same Caterpillar roadgrader cited for failure to lower the blade was also cited for a violation of 30 C.F.R. 56.14001 because he believed the blade of the engine fan was exposed to personal contact. He testified it had no guard that would prevent accidental finger contact. The engine had no side panels. If the motor had side panels, Inspector Marti would have considered this adequate protection from the hazard of the fan blade and would not have issued the citation. Contact with the blade could cause serious injury such as loss of a finger.

Respondent presented evidence that the road grader was used only to maintain the access road to the pit. It was manufactured in 1951 without any side panels. Its engine fan had and still has, a shroud which is a semi-covering around the fan blade. The shroud covers and thus guards half the blade. Respondent has owned the road grader for the last 27 years and there has never been an accident or injury involving that piece of equipment.

There has been no one working at the pit site since October 15, 1987, approximately 20 days before the inspection. Before that date the work at the pit had been seasonal and intermittent. At the end of the access road leading to the site is a gate that was kept locked except when someone was working at the pit. When the pit was open and working an average of three men operated the facility. Consequently, exposure to the hazard of the partially guarded fan blade was low.

Louis Vezzani testified that after the inspection he abated the alleged violation by removing the equipment from the mine site. Except for purposes of abatement the equipment was last used at the mine site on October 15, 1987, which was approximately 20 days before the November 4th inspection. No work had been done at the mine site since October 15, 1987.

Inspector Marti testified that he never returned to the pit after his inspection, but on the basis of information given to him by respondent, all violations were abated within the extended time he allowed for abatement.

A preponderance of the credible testimony established a violation of 30 C.F.R. 56.14001 in that the revolving fan blade was inadequately guarded.

The Secretary originally assessed a penalty of $54 for this violation. At the beginning of the hearing counsel for the Secretary stated that "primarily due to the lack of abatement of the violation" the proposed penalty should be increased to $400. I find, however, that the unrebutted testimony of Mr. Vezzani and the testimony of Inspector Marti clearly shows there was an abatement of the violation.

The Secretary has the burden of proving that a violation is significant and substantial. Under Mathies Coal the Secretary of Labor must prove all four elements of the Mathies formula. The third element is "a reasonable likelihood that the hazard

contributed to will result in an injury." A "reasonable likelihood" is more than just a possibility. The evidence in this case established that the revolving blade of the fan was partially guarded by a shroud, that the road grader was used only to maintain the access to the pit, and that only three people seasonally and intermittently worked at the site. Exposure to contact with the fan blade of the motor was very limited. Upon evaluation of the actual circumstances surrounding this violation I find that a preponderance of the evidence established a possibility that the hazard contributed to will result in an injury but not a likelihood. Therefore, I find that the violation was not significant and substantial.

Considering the statutory criteria set forth in section 110(i) of the Act and the circumstances surrounding this violation, I find the appropriate penalty for the violation is $40.

For the foregoing reasons I enter the following:

ORDER

1. Citation No. 3065794 and the Secretary's original assessment of a $20 penalty is affirmed.

2. Citation No. 3065796 and the Secretary's original assessed penalty of $20 is affirmed.

3. Citation No. 3065797 is modified to strike the characterization of the violation as significant and substantial and a civil penalty of $40 is assessed.

The respondent is directed to pay to the Secretary of Labor a civil penalty in the sum of $80 within 30 days of the date of this order.

August F. Cetti
Administrative Law Judge