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SOL (MSHA) V. HINKLE CONTRACTING
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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. KENT 90-5-M A.C. No. 15-00099-05514
v.	Strunk Crushed Stone
HINKLE CONTRACTING CORP., RESPONDENT	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Bob Connolly, Esq., Stites & Harbison, Louisville, Kentucky for Respondent.

Before: Judge Melick

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," charging Hinkle Contracting Corporation (Hinkle) with two violations of mandatory standards and proposing a civil penalty of $1,350 for the violations. The general issue before me is whether Hinkle violated the cited standards and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Citation No. 3438481 issued pursuant to Section 104(d)(1) of the Act1

charges, as amended, as follows:

> A 36 inch belt conveyor provided with an elevated walkway along its entire length was not equipped with a functional emergency stop device. The 575 conveyor was approximately 450 feet long. The trough rollers created pinch points along the length of the conveyor at approximately 42 inches from the walkway level. The conveyor had been installed approximately 6 months prior and had been fitted with the emergency stop device but had not been wired electrically in order for the device to function. The plant had been in operation since March 13, 1989. The plant superintendent William Huckaby, stated that they had been waiting on the availability of company electricians to furnish the installations. Management had not taken any steps to lessen the risk or hazard through warning signs or hazard training for the employees. This is an unwarrantable failure on the part of the operator.

The cited standard, 30 C.F.R. 56.14109, provides as follows:

> Unguarded conveyors next to the travelways shall be equipped with--
> (a) Emergency stop devices which are located so that a person falling on or against the conveyor

can readily deactivate the conveyor drive motor, or

(b) Railings which--

(1) Are positioned to prevent persons from falling on or against the conveyor.

(2) Will be able to withstand the vibration, shock, and wear to which they will be subjected during normal operation; and

(3) Are constructed and maintained so that they will not create a hazard.

Hinkle acknowledged at hearing that it had neither an operable emergency stop device nor guard rails along its 450 foot long No. 57 conveyor. Hinkle alleges that an unwritten so-called "42 inch exception" to the cited mandatory standard was applicable to this case. Under this purported exception belt conveyors that are 42 inches or higher above the adjacent walkway need not be guarded or have an operable emergency stop device. Since the conveyor here was higher than 42 inches Hinkle maintains that the "42 inch exception" applies and that there was accordingly no violation.

The origins of this purported "42 inch exception" are unclear. In its answer filed in this case Hinkle states it was an unwritten "rule-of-thumb" applied by another Federal agency, the Occupational Safety and Health Administration (OSHA). William Huckaby a Hinkle superintendent recalled that it was a guideline once used by the State of Oklahoma which he learned about when taking a licensing test there. Safety Director Lowell Manning thought that other MSHA inspectors had told him of the "42 inch exception". Hinkle elected however not to call any such MSHA inspector who had allegedly given this advice.

Neither Inspector Shanholtz nor MSHA field office supervisor Vernon Denton had ever heard of any such "42-inch exception" to the mandatory standard. Indeed there is nothing in the language of the regulation to even remotely suggest such an exception. Moreover there is no rational basis for such an exception. Indeed, to the contrary, the most hazardous area of exposure to miners would appear to be within arms reach above 42 inches. Under the circumstances I find the so-called "42-inch exception" to be a fiction. The plain language of the standard must in any event prevail.

Since the conveyor when installed in 1988 came already furnished with an emergency stop cord and required only minimal electrical installation to activate, I find the failure of management to have had the cord activated to have been particularly negligent. This negligence is further aggravated by allowing the non-functioning stop cord

to remain in place thus giving a false sense of security. Operator negligence was even further aggravated by isolating the only means of stopping the conveyor at a location some 200 feet from the conveyor. This is the type of aggravated conduct and omission that constitutes unwarrantable failure. Emery Mining Corporation 9 FMSHRC 1997 (1987).

In reaching these negligence and "unwarrantable failure" findings I have not disregarded Hinkle's claims that the conveyor had previously been inspected by MSHA inspectors and had never before been cited. However the only credible evidence that the belt had in fact previously been inspected came from Inspector Shanholtz himself. According to Shanholtz when he previously inspected the plant it was not in production and the cited belt was not running. In any event even had other inspectors failed to discover the violative inoperable stop cord on prior inspections, that is by no means indicative of any MSHA approval of the violation. Indeed the presence of the stop cord, albeit an inoperable one, may very well have deceived other inspectors into believing there was no violation.

The violation was also of high gravity and "significant and substantial". In order to find a violation "significant and substantial", the Secretary has the burden of proving the existence of an underlying violation of a mandatory standard, the existence of a discrete hazard (a measure of danger to health or safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1 (1984).

The testimony of Inspector Shanholtz is credible in this regard and fully supports the gravity and "significant and substantial" findings. In reaching this conclusion I have not disregarded Hinkle's claims that the condition was not hazardous since there had never previously been any injuries along the belt and that the work of lubrication, maintenance and cleanup along the belt was performed only when the belt was shut down. Inspector Shanholtz noted however, without contradiction, that there was in fact pedestrian traffic on the walkway immediately adjacent to the unguarded conveyor. Moreover the hazard was particularly serious in this case because of the absence of any stopping mechanism in close proximity to the beltline. The only stop switch for the belt was located some 200 feet away. Thus if a miner became caught in the belt it was indeed reasonably likely that serious injuries or death would occur before the belt could be shut down.

Citation No. 3438483 charges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 56.3200 and charges as follows:

> Loose, unconsolidated material was observed on the highwall where the pit haul road parallelled the west quarry wall. Large loose slabs and boulders, some weighting several tons, were observed along a 200 foot section of the wall. The ground along the wall was fractured and fragmented. The wall was approximately 40 feet high. Haulage equipment and pickups utilized the road on a daily basis. One section of the road was slightly overhung by the loose material.

The cited standard 30 C.F.R. 56.3200 provides as follows:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

According to Inspector Shanholtz the cited loose material was fractured with numerous cracks. Some of the material was also in overhanging rock. He also found that along the top edge there were large round boulders "just sitting there" with "nothing holding them". According to Shanholtz, Foreman Tim Hatton, who was accompanying him during his inspection, agreed that the cited conditions did exist and admitted that the large boulders on the top edge appeared to be "sitting on nothing but their imagination".

Shanholtz also observed that the highwall actually over hung a section of the road. Other loose material along the highwall also was in need of scaling. According to Shanholtz falling material would likely have dropped onto the haul road on which haulage equipment and pick-up trucks were operating. Shanholtz opined therefore that it was highly likely for serious injuries or fatalities to occur.

Shanholtz also found the operator chargeable with high negligence in that MSHA officials had previously discussed the highwall problems with Hinkle officials. Hinkle had then agreed to scale the highwall and widen the road. Indeed

Shanholtz himself had discussed these problems with Hinkle representatives during his October 1988 visit.

According to Shanholtz, Hatton also admitted that he and Lowell Manning had inspected the highwall the week before the inspection and had agreed that it needed scaling. They had reportedly stopped scaling operations however because the machinery they had would not reach high enough along the wall. Shanholtz observed that it took seven days after the citation was issued to properly scale the highwall and thus abate the problem.

Within this framework it is clear that the violation is proven as charged and that it was "significant and substantial" and of high gravity. I find Inspector Shanholtz's testimony in this regard to be credible including his testimony regarding admissions by representatives of the operator at the time of the inspection.

While Hatton denied at hearing that he made the admissions attributed to him by Shanholtz I do not find his denials to be credible. Moreover I can give but little credence to the self-serving statements of Lowell Manning, William Huckaby, and Timothy Coomer.

Considering the criteria under section 110(i) of the Act I find that the following civil penalties are appropriate. Citation No. 3438481, $750, Citation No. 3438483, $600.

ORDER

Hinkle Contracting Corporation is hereby directed to pay civil penalties of $1,350 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE

1. Section 104(d)(1) reads as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to

be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.