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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;
Robert M. Connolly, Esq., Stites & Harbison,
Louisville, Kentucky
for Respondent.

Before: Judge Melick

This case is before me upon remand by the Commission on April 4, 1990, to consider the parties' post-hearing briefs and to reevaluate the decision rendered in these proceedings on March 9, 1990, in light of those briefs.

Respondent maintains in its brief that the unguarded belt cited in this case (Citation No. 3438481) was nevertheless safe because (1) it was at or above shoulder height for any man using the adjacent walkway, (2) no one has ever been injured by the unguarded belt, (3) the height of the belt effectively served as a guard, (4) it would be impossible to fall on the belt, (5) a kill switch is not vital to safety on larger conveyors, (6) greasing, maintenance and clean-up are performed during the evening shift while the conveyor is not operating and, (7) workers were aware that the kill switch was inoperable.

I have evaluated all of the factors cited by Respondent as purportedly demonstrating the safety of the unguarded belt with an inoperable kill switch but find them to be unsubstantiated, without merit, or both. Even assuming that the belt was located at or above shoulder height for workers using the walkway this does not afford protection to the arms and hands of persons who may be caught and/or drawn into the belt. In addition, even assuming that no one had ever been

injured by the belt it cannot reasonably be inferred from such evidence under the circumstances herein that serious injuries would not occur in the future.

Moreover even assuming that the height of the belt would prevent persons from falling onto the belt the greater hazard is presented by pinch points. The bald statement that a "kill switch" is not vital to safety on larger conveyors is without evidentiary support and contrary to common sense. In addition even assuming that greasing, maintenance and clean-up were performed during the evening shift while the belt was not operating it is not disputed that the inspector himself and other persons observed by the inspector were using the walkway adjacent to the conveyor while the belt was in operation. Even assuming that workers were aware that the kill switch was inoperable the inherent hazard of the unguarded belt with an inoperable kill switch was nevertheless present.

Respondent also maintains in its brief that it was without negligence in failing to guard its conveyor and in failing to have an operable kill switch because MSHA Inspectors Erickson and Manwarring had granted them a specific exception from the application of the cited mandatory standard. If such an exception had been established by credible evidence the argument might have some merit. However, Respondent has simply failed to adequately support its allegations.

In any event, mine operators may be presumed to know the law for obtaining modification of the application of mandatory standards under section 101(c) of the Act. Likewise mine operators may be presumed to know that MSHA inspectors do not have the authority to grant exceptions or modifications to the application of mandatory standards. The negligence and unwarrantable failure findings reached in this case are therefore fully supported.

With respect to Citation No. 3438483 Respondent argues that the decision failed to taken into account the fact that it had, before the citation was issued, spent three days removing over 200 tons of rock to improve the condition of the cited highwall. Even assuming this representation were true however the evidence shows that these corrective measures were discontinued well before the job of scaling the highwall had been completed. There was no credible evidence moreover that the operator intended to resume work on the highwall. In any event the negligence findings were based in part upon the Respondent's abandonment of correcting the highwall conditions.

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Under the circumstances I find no basis for amending the findings in the decision dated March 9, 1990.

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