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SOL (MSHA) V. HOWARD SAND
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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. SE 89-152-M A.C. No. 09-00281-05513
v.	Howard Mine
HOWARD SAND COMPANY, RESPONDENT	

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Harold Brown, Owner, Howard Sand Company, Howard, Georgia, Pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of $147 for an alleged violation of mandatory safety standard 30 C.F.R. 56.14112. Respondent filed a timely answer and contest, and a hearing was held in Macon, Georgia. The parties waived the filing of posthearing arguments, but I have considered their oral arguments made on the record during the course of the hearing in this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the violation was "significant and substantial" (S&S), and (3) the appropriate civil penalty to be assessed for the violation,

taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4-6, Exhibit ALJ-1):

1. The respondent is engaged in a mining operation which affects commerce and it is subject to the Act.

2. The Commission has jurisdiction in this case.

3. The inspector who issued the subject citation is a duly authorized representative of the Secretary and a true and correct copy of the citation was served on the respondent.

4. The imposition of a civil penalty assessment for the violation will not affect the respondent's ability to continue in business.

5. A violation of the cited standard, 30 C.F.R. 56.14112 existed as cited in that the drive shaft coupling on the dredge, diesel engine was not equipped with a guard at the time of the inspection (Tr. 7).

6. The violation was abated in good faith.

7. The respondent's history of prior violations, as shown on an MSHA computer print-out (exhibit P-1), is correct.

8. The respondent is a small mine operator.

9. The issues remaining for trial are the degree of negligence and the reasonableness of the proposed civil penalty assessment of $147.

Discussion

The contested section 104(a) S&S Citation No. 3432413, served on the respondent on May 17, 1989, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.14112, and the cited condition states that "The drive shaft coupling on the dredge diesel engine is not equipped with a guard."

Petitioner's Testimony and Evidence

MSHA Inspector Darrell Brennan confirmed that he inspected the respondent's sand and gravel operation on May 17, 1989, and that he issued the citation after finding that the coupling apparatus connecting the diesel engine and pump used to pump the sand from the pit was not provided with any guarding to prevent contact with persons. He stated that the engine was mounted on an elevated platform "dredge" approximately 8 feet by 12 feet. He explained that the sand is flushed from the pit walls by high pressure water hoses into the pit, and it is pumped from the pit by the pump in question. Two men are usually present doing this work.

Mr. Brennan stated that the diesel engine is approximately 4500 horsepower, and that the drive shaft coupling connecting the engine to the pump rotates at approximately 1700-1800 rpm's. He described the coupling as a "donut" shaped device which coupled the engine and pump shafts together, and he confirmed that it was not guarded at all.

Mr. Brennan stated that there was a plate steel walkway approximately 2-1/2 to 3 feet wide adjacent to the unguarded coupling. He stated that the walkway is wet and muddy, and that the two men working in the pit pumping sand would have occasion to come to the platform where the engine was located to check it, grease it, or perform maintenance work. Someone would also be required to be in the area to start up the engine and pump, and to engage the clutch, and they would also be there to shutdown the engine at the end of the work shift.

Mr. Brennan stated that the wet and muddy walkway conditions presented a slipping hazard, and given the fact that the unguarded shaft coupling turned at a high rate of speed and created a "vacuum," he believed that it was reasonably likely that someone on the slick walkway would fall directly into the unguarded coupling and suffer injuries of a reasonably serious nature, including disabling injuries. For these reasons, he concluded that the violation was significant and substantial.

Mr. Brennan confirmed that during a prior inspection of the platform "dredge" area in question on September 15, 1988, he issued a citation on the same diesel engine because one of the V-belt pinch points was not adequately guarded. Although a guard

was installed, he did not believe that it was sufficient to cover the pinch point (exhibit P-3). Mr. Brennan believed that the shaft coupling which he cited on May 17, 1989, was provided with a guard at the time of his previous inspection on September 15, 1988.

Mr. Brennan further stated that although he was not certain whether the shaft coupling in question was previously guarded, he would have issued a citation if it were not guarded. He stated that Mr. Brown did not accompany him during his inspections. He did not know whether the engine was greased while the engine was running, and he was not aware of the respondent's maintenance procedures or whether maintenance was ever performed with the engine and pump operating (Tr. 8-30).

Respondent's Testimony and Evidence

Harold Brown, respondent's owner and operator, stated that he operates four sand and gravel plants and has been in business and operated the kinds of equipment associated with his business for 60 years. He stated that MSHA inspects his operations two or three times a year, and that except for one occasion approximately 10 years ago when he was cited at another operation for failing to guard an engine shaft coupler, he has not been previously cited at the Howard Mine for a violation of this kind.

Mr. Brown confirmed that two men work in the pit pumping sand, and that the pumper is usually 60 feet away from the dredge where the unguarded engine drive coupler was located. The other person may grease the engine as required, and if there is a problem he would have to go and check the engine and pump while it is in operation. He stated that the pump operates approximately 3 hours a day, 4 days a week, and that the person who is there usually sits in his car while the pump is operating. Someone would have to start and stop the engine pump each day.

Mr. Brown conceded that the engine and pump shaft coupler cited by Inspector Brennan was not guarded, and that there was a violation of the cited standard. However, he believed that the proposed civil penalty assessment was excessive for the violation. He stated that although he was previously cited in September, 1988, he was unaware of that violation until he called his manager at that operation after he received the May 17, 1989, citation from Mr. Brennan. Mr. Brown also believed that he had a good safety and accident record, and that he has always corrected any conditions brought to his attention by the MSHA inspectors. He did not believe that the cited condition was as serious as a "pinch point" hazard (Tr. 30-47).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory standard 30 C.F.R. 56.14112, for failure to equip the cited drive shaft coupling on the dredge diesel engine with a guard. The standard requires that equipment guards be securely in place while machinery is being operated. The inspector confirmed that he cited section 56.14112, rather than section 56.14107, which requires the guarding of moving machine parts to protect persons from contacting couplings that can cause injury because of his recollection that the coupling was guarded during a prior inspection on September 15, 1988, but that the guard was not in place when he conducted his inspection on May 17, 1989 (Tr. 28-29).

The respondent stipulated to the fact of violation, and the inspector's unrebutted testimony establishes that the cited coupler was not guarded. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Significant and Substantial Violation

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." 30 C.F.R. 814(d)(1). 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, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Brennan testified credibly that because of the slippery conditions on the steel walkway adjacent to the unguarded coupler which would be turning at a high rate of speed when the engine was in operation it was reasonably likely that someone walking along the walkway with muddy boots or shoes would fall directly into the coupler and suffer permanently disabling injuries. He also believed that a person could break his back or suffer very serious injuries if he were to contact the coupler (Tr. 14-15). The inspector confirmed that while the walkway was provided with a guardrail on the "outside," no guardrail was provided on the "inside" and someone "could get right into the motor" (Tr. 26-27).

Although Mr. Brown did not consider the hazard presented by the unguarded coupler to be a "pinch point" hazard, he agreed that the inspector was concerned that the coupling turning at 1,700 rpm's under high speed would injure anyone who contacted it. He also agreed with the inspector's belief that anyone walking on the steel walkway with slippery boots could inadvertently fall into the unguarded coupler. He also conceded that someone would walk by the location of the unguarded coupler once or twice a day (Tr. 35, 44).

In view of the foregoing, I conclude and find that the violation was significant and substantial, and I agree with the inspector's finding in this regard. Accordingly, IT IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small mine operator and that the civil penalty assessment for the violation will not affect the respondent's ability to continue in business. I adopt these stipulations as my findings and conclusions with respect to these issues.

History of Prior Violations

MSHA's computer print-out with respect to the respondent's compliance record for the period May 17, 1987 through May 16, 1989, reflects that the respondent paid civil penalty assessments for 31 violations, eight which were for violations of section 56.14112. I take note of the fact that 13 of these prior assessments were for non-S&S "single penalty" section 104(a) citations, and that the remaining citations were all section 104(a) "S&S" citations.

Negligence

The inspector made a finding of "moderate negligence" in this case, and the petitioner confirmed that this was the case and that the respondent is not charged with any "reckless disregard" of the cited standard (Tr. 42). I agree with the inspector's moderate negligence finding and I conclude and find that the violation was the result of the respondent's failure to exercise reasonable care.

Gravity

On the basis of my significant and substantial findings and conclusions, I conclude and find that the violation was serious.

Good Faith Compliance

The parties stipulated that the violation was abated in good faith by the respondent and I adopt this stipulation as my finding and conclusion on this issue. I have taken this into consideration in the assessment of the civil penalty for the violation in question.

Civil Penalty Assessment

In mitigation of the proposed civil penalty assessment in this case, respondent Brown asserted that he operates four plants and has never had an injury as a result of the cited unguarded equipment during MSHA inspections which have been conducted two

times a year since 1978. Mr. Brown also stated that the particular need for a coupler on the cited equipment had never previously been brought to his attention until the inspection in May, 1988, and he disagreed with the inspector's belief that the cited coupler had previously been guarded (Tr. 21, 31). Mr. Brown stated further that during his 60 years' of experience in the business, he has never had an injury at any of his operations (Tr. 32). He explained that he has operated diesel motors, couplers, and pumps similar to the one cited in this case for 60 years without an injury (Tr. 37-38). Although he conceded that he has previously been cited for violations of section 56.14112, he confirmed that none of these were for failure to guard couplers on any of his barges (Tr. 39).

Mr. Brown further confirmed that subsequent to the issuance of the citation in this case, he learned from the manager of one of his other operations that a similar coupler was cited by MSHA 10 or 12 years ago, but that this violation was never previously brought to his attention (Tr. 40).

Although the inspector confirmed that he had previously cited the same diesel engine on September 15, 1988, because a guard on the drive motor did not cover the pinch points, he conceded that the cited standard involved a judgment call as to whether the guard was sufficient and that a guard had in fact been provided.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, including the arguments advanced by the respondent in mitigation of the civil penalty, I conclude and find that a civil penalty assessment of $100 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $100 for the violation which has been affirmed, and payment shall be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras
Administrative Law Judge