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SOL (MSHA) V. CANTERA HIPODROMO
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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 89-103-M A.C. No. 54-00298-05504
v.	Cantera Hipodromo Mine
CANTERA HIPODROMO, INCORPORATED, RESPONDENT	

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner;
Antonio Ortiz Brunet, President, Cantera Hipodromo, Canovanas, Puerto Rico, Pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding 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 $178, for an alleged violation of mandatory safety standard 30 C.F.R. 56.11001. The respondent filed an answer denying the violation, and a hearing was held in San Juan, Puerto Rico. The parties did not file posthearing briefs, but I have considered their oral arguments made in the course of the hearing in this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standard as alleged in the proposal for assessment of civil penalty, (2) whether the alleged violation was "significant and substantial" (S&S), and (3) the appropriate civil penalty to be assessed against the respondent for

the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act.

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, 20 C.F.R. 2700.1 et seq.

Discussion

The contested section 104(a) "S&S" Citation No. 3049732, was issued on October 19, 1988, and it cites an alleged violation of mandatory safety standard 30 C.F.R. 56.11001. The cited condition or practice states as follows:

> No safe means of access was provided to the drive belt of vibrator #2. This area is visited for maintenance, the height from the ground is about 9 feet.

Petitioner's Testimony and Evidence

MSHA Supervisory Mine Inspector Juan Perez testified as to his experience, and he confirmed that he has served as an inspector for 15 years. He stated that he made a courtesy visit to the respondent's stone processing plant on August 27, 1987, when it was initially constructed, and that he did so at the request of the respondent. He confirmed that the plant was not producing during his visit and that he inspected the equipment and informed the respondent that a platform was required around the perimeter of the No. 2 vibrator in order to provide a safe means of access for personnel who would be performing periodic greasing and maintenance for the unit.

Mr. Perez explained the operation of the rock crushing and sizing plant, and produced a sketch of the No. 2 vibrator, which reflects how it appeared during his courtesy visit without the platform, and how it appeared during his compliance inspection on October 19, 1988, with a platform on one side of the No. 2 vibrator (exhibit P-1).

Mr. Perez stated that the No. 2 vibrator was approximately 9 feet high from ground level to the platform area, and that the unit itself was approximately 3 feet high. The distance from the top of the unit to the ground below was 12 feet. Mr. Perez confirmed that while MSHA usually recommends that a work platform be completely installed around all sides of a vibrator unit at other similar plants, he accepted the respondent's installation of a work platform, with guard rails, around two sides and rear

of the unit, and that this provided a safe means of access to the unit when maintenance is being performed (photographic exhibits R-5 and R-6).

Mr. Perez confirmed that when he inspected the plant on October 19, 1988, respondent's plant supervisor Ramon Rondon was with him. Mr. Perez stated that he observed that one platform with a handrail was installed along the left side of the unit, and that the platform with handrails which should have been installed on the right side of the unit was lying on the ground away from the unit in an area where the grass had grown around it, and it appeared to be in a rusty condition (photographic exhibit R-1).

Mr. Perez stated that Mr. Rondon informed him that he was having problems with the No. 2 vibrator screens which were located inside the unit, but that the unit was required to process and size some of the stone which was dumped into it by means of a conveyor belt. Mr. Rondon further informed him that he intended to continue using the unit even though he was experiencing some mechanical problems with the screen devices. Mr. Perez stated that he observed some stockpiled stone materials on the ground, and he assumed that the materials had been recently processed through the No. 2 vibrator.

Mr. Perez stated that maintenance work and greasing had to be performed on the vibrator on a daily basis, or at least two times a week, and that the lack of a work platform on both sides of the unit did not provide a safe means of access for at least one of the maintenance personnel who performed this work. Mr. Perez believed that the lack of a platform exposed the maintenance man to a danger of falling 9 feet to the ground if he were on a ladder performing work on the side of the unit without the platform, and at least 12 feet to the ground if he were on top of the unit attempting to perform some work on the unit. Mr. Perez further believed that it was reasonably likely that a fall would occur, and that if it did, the individual would likely suffer lost work day injuries of a reasonably serious nature. Under all of these circumstances, Mr. Perez concluded that the violation was significant and substantial.

Mr. Perez confirmed that he based his moderate negligence finding on the fact that the respondent intended to install the required platform and had installed a platform with handrails along one side of the vibrator unit (Tr. 14-42).

On cross-examination, Mr. Perez confirmed that although his experience does not include maintenance work on vibrators, he has observed the greasing and maintenance work performed from platforms on similar units. Mr. Perez further confirmed that while he did not know how long the vibrator screen was not in an operational condition, he believed that the problems experienced by

Mr. Rondon with the screening devices occurred on the day of his inspection.

Mr. Perez stated that he spoke to Mr. Ortiz during the afternoon of his inspection, and he confirmed that Mr. Ortiz informed him that the new No. 2 vibrator unit had arrived at the dock and would be brought to the site and installed by the end of the week.

Mr. Perez stated that during his inspection on October 19, 1988, he observed a wooden ladder at the plant and that Mr. Rondon informed him that the ladder was sometimes used to grease and service the No. 2 vibrator unit. Since the ladder reached only to the middle of the unit, Mr. Rondon further informed him that someone would climb to the top of the unit from the platform which was on one side of the unit in order to grease or service it. Under these circumstances, Mr. Perez believed that the use of a ladder, and climbing to the top of the unit, presented a falling hazard to the individual using these means of access to reach and service the No. 2 vibrator and screens.

Mr. Perez stated that he observed no one performing any greasing or maintenance work on the vibrator on the day of his inspection, and he observed no grease fittings from the unit to the ground. He also confirmed that the vibrator gears were intact on the machine and he did not observe any of the machine parts shown in photographic exhibits R-2, R-3, and R-4, on the ground.

Mr. Perez confirmed that the same No. 2 vibrator unit was cited by MSHA Inspector Roberto Torres Aponte during a previous inspection on March 30, 1988, and that the citation was issued pursuant to section 56.11001, because a platform was not installed around the unit to provide a safe means of access for maintenance work on the unit (Tr. 53-63).

MSHA Inspector Alexandro Baptista confirmed that he terminated the October 19, 1988, citation issued by Inspector Perez, and that he did so after finding that platforms with guard rails had been installed around three sides of the No. 2 vibrator. Mr. Baptista also confirmed that the No. 1 vibrator unit was also equipped with a platform and guard rails (Tr. 75-77).

Antonio Ortiz Brunet, respondent's president, stated that he operates three plants, and he described them as a sand plant, a stone quarry plant, and the portable stone crushing, sizing, and processing plant which was inspected by Inspector Perez on October 19, 1988. Mr. Ortiz confirmed that he requested Mr. Perez to visit the plant when it was being constructed, and he did not dispute the need for work platforms to provide a safe means of access for the No. 2 vibrator unit. Mr. Ortiz stated that he has always done what was required of him to comply with

the law and MSHA's requirements, and to insure the safe operation of his plant.

Mr. Ortiz stated that he contested the citation because he was not happy with the action taken by Inspector Perez. He explained that he informed Mr. Perez that the plant was not in operation because the No. 2 vibrator was inoperative and that a new vibrator, which was at the dock, would be installed within a few days and that the platforms would also be installed at the same time. After the vibrator and platforms were installed, Mr. Ortiz stated that he called Mr. Perez and invited him to the plant to verify the installation, but that Mr. Perez declined to come to the plant and informed him that he did not have the time.

Mr. Ortiz confirmed that the top of the vibrator was 12 feet above ground level, and that the vibrator was approximately 4 feet high. He conceded that only one platform was installed along one side of the vibrator on October 19, 1988, and that the other platform had been removed and was on the ground. Mr. Ortiz stated that the vibrator was being dismantled in anticipation of the installation of the new one which he had purchased. He stated that the vibrator was not in operation on the day of the inspection because of the inoperative screens and that it had not been in operation for approximately 4 weeks prior to the inspection. He stated further that the vibrator gears had been removed from the unit prior to the inspection, and he produced three photographs of the old parts which he said were on the ground (exhibits R-2, R-3, and R-4). He indicated that the gears were removed while both platforms were in place, and that the platform which was not in place and on the ground when Inspector Perez observed it had been taken down while the vibrator unit was being dismantled. He confirmed that he was not at the plant everyday, but tries to visit it once a week.

Mr. Ortiz stated that during the time the vibrator was inoperative, he sold the materials which had been previously processed and stockpiled through the plant. He agreed that if the plant were in operation the citation would be justified. However, since the plant was down and could not operate with the broken vibrator, he did not believe that the citation issued by Mr. Perez was justified, and he considered the inspector's action as unfair (Tr. 78-99).

Inspector Perez was recalled, and he confirmed that when he observed the No. 2 vibrator on October 19, 1988, it was intact and no gears or other parts were removed, and he observed no evidence of any repair work. He further confirmed that he spoke with plant superintendent Rondon who informed him that there had been a problem with the vibrator that morning and that only half of the plant was operating. The superintendent in no way indicated that the plant had been down for 4 weeks (Tr. 101-102). Mr. Perez believed that the plant was in operation the previous

weeks because of the coloring of the stockpiled crushed rock. He stated that after he had finished his inspection, and while discussing the results with Mr. Rondon, Mr. Ortiz informed him about the vibrator problem (Tr. 103).

Plant Superintendent Ramon Rondon testified that on the day of the inspection work was being performed on the ball bearings and pulleys of the screening machine. He explained that crushing could not be done because the vibrating screen was stuck (Tr. 109-111). Mr. Rondon confirmed that the vibrator was shutdown on the day of the inspection. He explained that the vibrator and screen were working on the morning of the inspection, but that when they became stuck that same morning, the vibrator was shutdown. He also indicated that the vibrator was operational 11-days prior to the inspection (Tr. 112-113). The vibrator was working the day of the inspection, but when some of the parts broke, the plant was shutdown (Tr. 116).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.11001, for failure to provide a safe means of access for the No. 2 vibrator at its crushed stone screening and processing plant. Section 56.11001, provides as follows: "Safe means of access shall be provided and maintained to all working places."

The evidence in this case establishes that Inspector Perez had previously made a "compliance assistance" visit to the plant in August 1987, during which time he advised the respondent of the need for a platform to provide access to all sides of the vibrator where maintenance work was required to be done on the equipment. Upon his return to the plant site on October 19, 1988, to perform a regular plant inspection, Inspector Perez found that a platform had been installed around one side of the vibrator but not on the other side where greasing and other maintenance work was required to be performed. Mr. Perez found the platform, with guard rails attached, which should have been installed around the rest of the vibrator, lying on the ground, and it appeared to have been there for some time. Under these circumstances, and since one side of the vibrator lacked a platform which would provide a safe means of access for maintenance personnel, Mr. Perez issued the citation.

The respondent's president, Antonio Ortiz Brunet, did not dispute the need for work platforms on both sides of the No. 2 vibrator to provide a safe means of access for maintenance personnel, nor did he dispute the fact that only one platform had been installed on one side of the vibrator on the day of the

inspection, and that the other platform had been removed and was lying on the ground.

In his defense, Mr. Ortiz maintained that at the time of the inspection, the cited vibrator was not in operation because of some inoperative screens, and that it had not been in operation for approximately 4-weeks prior to the inspection. He also maintained that the vibrator gears had been removed, and that the vibrator was being dismantled in anticipation of replacement by a new one which had arrived on the island and was awaiting delivery from the dock to the plant. Since the plant was down and could not operate with a broken vibrator, Mr. Ortiz believed that the citation was not justified, particularly when he informed the inspector that the vibrator was being replaced by a new one.

The question of whether or not the vibrator was in operation at the time of the inspection is relevant to the question of whether or not the situs of the violation was a "working place" covered by section 56.11001, and it is also relevant to the gravity or seriousness of the violative condition. The fact that the respondent purchased a new replacement vibrator prior to the inspection, and that it intended to install it, may not serve as a defense to the violation, but it may be considered as evidence of the respondent's good faith compliance.

Mr. Ortiz' testimony that the vibrator was inoperative on the day of the inspection, and that the plant was down, and had not operated for 4 weeks, is in direct conflict with the testimony of Inspector Perez, and the respondent's own witness, plant superintendent Ramon Rondon. Mr. Perez testified that he personally observed the cited vibrator on the day of his inspection and that it was intact and the gears had not been removed. Mr. Perez saw no evidence of any repair work taking place, and he testified that Mr. Rondon informed him on the day of the inspection that the vibrator may have experienced some problem earlier in the week, and that it did develop a problem on the morning of the inspection, but at least half of the plant was still in operation at that time. Mr. Rondon testified that although some maintenance work was being performed on the screening machine on the morning of the inspection, the vibrator in question had been in operation that morning, but it subsequently developed a problem and the plant had to be shutdown. Mr. Rondon also testified that the vibrator had been operational at least 11-days prior to the inspection.

Mr. Ortiz argued that a photograph of the vibrator gear, which also shows the date of the newspaper depicted in the photograph, establishes that the vibrator was not installed, and that the plant was down on the day before the inspection (Tr. 105). Although the inspector indicated that Mr. Ortiz was not with him when he visited the plant during his inspection, Mr. Ortiz stated

that he was there in the afternoon (Tr. 105). He also stated that he tried to visit the plant at least once a week.

I have examined the photographs of the vibrator gears which Mr. Ortiz claims had been removed prior to the day of the inspection (Exhibits R-2, R-3, and R-4). Apart from the photographs, Mr. Ortiz produced no documentation or maintenance records to establish when the vibrator gears were removed and sent to the shop for maintenance. Photographic exhibit R-3, is dated in ink on the reverse side, and the dates "7-22-1988" and "7-19-1988" appear. No further explanation was forthcoming from Mr. Ortiz with respect to these dates. Assuming the photographs were taken in July, 1988, this would have been some 3-months prior to the issuance of the citation on October 19, 1988, and any suggestion that the gears had been removed and the plant was down as early as July, 1988, would be contrary to the testimony by Mr. Ortiz that the plant was down for 4-weeks prior to the inspection. It would also be contrary to the testimony of Mr. Rondon that the vibrator and plant were in operation as early as 11-days prior to the inspection, and indeed, on the morning of the inspection. It is impossible to decipher the date of the newspaper shown in photographic exhibit R-2, even with a hand-held magnifying glass. Under the circumstances, I have given little evidentiary weight to the photographs in question.

After careful consideration of all of the evidence and testimony in this case, I find the testimony of Inspector Perez and Mr. Rondon to be more credible than that of Mr. Ortiz. Based on the testimony of Mr. Perez and Mr. Rondon, I conclude and find that the vibrator and plant were in operation on the morning of October 19, 1988, when the inspection was conducted by Mr. Perez, and Mr. Ortiz' assertion to the contrary is rejected. I further conclude and find that the cited vibrator location which lacked a platform to provide a safe means of access for maintenance and service personnel was a "working place" within the meaning of the cited standard, and that the petitioner has established a violation by a preponderance of the evidence. Accordingly, 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).

Based on the evidence and the credible testimony of Inspector Perez, I conclude and find that the violation posed a discrete falling hazard and constituted a significant and substantial violation. The intent of the cited standard section 56.11001, is to provide a safe means of access for mine personnel who are required to service equipment or to routinely check it during its operation. In this case, the lack of a platform deprived mine personnel of a safe mans of access to the equipment. Inspector Perez determined that the vibrator required either daily or weekly maintenance, and that maintenance personnel who were required to service the equipment would reasonably likely be exposed to a hazard of falling approximately 9 feet to the ground below. If this occurred, it would be reasonably likely that a person would suffer more than just "first aid" type

of injuries (Tr. 33-34). He explained that without the platform as a safe means of access to the vibrator, anyone servicing the equipment would have to climb on top of it to service it or perform maintenance work, and that usually one person performs this task (Tr. 35). Mr. Perez confirmed that plant superintendent Rondon informed him that an employee was required to service the vibrator, and that without the platform, the person doing the work accessed the equipment by climbing on top of it from a nearby walkway (Tr. 43, 49-51).

In view of the foregoing, I conclude and find that the petitioner has established by a preponderance of the evidence that the violation was significant and substantial. Accordingly, the inspector's finding in this regard IS AFFIRMED.

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

The evidence reflects that the respondent operates a sand plant, a stone quarry plant, and a portable rock processing plant where the violation in question took place. The respondent's total annual production was approximately 51,071 man-hours, and the facility where the citation was issued worked 17,440 man-hours annually. The respondent employs a total of 11 employees (Tr. 13).

The respondent's President, Antonio Ortiz Brunet described the facility in question as a stone crushing and sizing plant producing and processing stone which was sold and used to make asphalt, concrete, and cement blocks.

I conclude and find that the respondent is a small crushed stone mine operator, and absent any evidence to the contrary, I further conclude and find that the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

Good Faith Compliance

Inspector Perez fixed the abatement time as October 23, 1988, and Mr. Ortiz confirmed that the new No. 2 vibrator unit was installed within 3 or 4 days after the citation was issued. Inspector Perez confirmed that Mr. Ortiz telephoned him later in the week after the citation was issued and informed him that the new vibrator had been brought to the facility and installed with the platform around three sides.

Although the record reflects that the citation was terminated on December 27, 1988, Inspector Perez agreed that the respondent exercised good faith compliance in timely abating the condition and providing a safe means of access to the No. 2 vibrator. I conclude and find that the respondent timely

corrected the cited condition in good faith within the time fixed by Inspector Perez, and I have taken this into consideration in assessing the civil penalty for the violation in question.

History of Prior Violations

The petitioner did not submit any information with respect to the respondent's compliance record or prior history of violations. However, MSHA's proposed civil penalty assessment includes an MSHA Form 1000-179, which reflects that the respondent had eight assessed violations for the 24-month period prior to the issuance of the contested citation on October 19, 1988. One of those prior violations is a section 104(a) "S&S" Citation No. 3050735, issued on March 30, 1988, citing a violation of 30 C.F.R. 56.11001, for the failure of the respondent to provide a safe means of access for the same No. 2 vibrator screen unit which is the subject of the contested citation in this case. Under the circumstances, although I cannot conclude that the respondent has a particularly poor compliance record, I have considered the fact that the respondent was cited a second time for the identical condition 7 months after the first violation which was issued on March 30, 1988.

Negligence

Inspector Perez confirmed that he based his moderate negligence finding on the fact that the respondent intended to comply with section 56.11001, and had installed one of the platforms which provided some access to at least one side of the No. 2 vibrator at the time of his compliance inspection of October 19, 1988.

Mr. Ortiz testified that at the time the citation was issued the new No. 2 vibrator which he had purchased at a cost of $38,000, exclusive of spare parts, which cost an additional $10,000, was at the receiving dock and had not as yet been delivered to the site for installation. Mr. Ortiz testified further that the old vibrator was causing problems and the new one had been ordered as a total replacement. Under the circumstances, I agree with the inspector's moderate negligence finding, and I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care by removing part of the platform and leaving it off of the No. 2 vibrator unit until the new one was taken to the plant site and installed.

Gravity

In view of my significant and substantial (S&S) findings, I conclude and find that the violation was serious.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment in the amount of $178, for the violation in question, is reasonable and appropriate, and IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $178 for the violation which has been affirmed in this case. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge