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SOL (MSHA) v. SKELTON INCORPORATED
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 90-194-M A.C. No. 05-03985-05511
v.	
SKELTON INCORPORATED, RESPONDENT	El-Jay Mine

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Ruth Gray, Secretary, Skelton, Inc., Norwood, Colorado, for Respondent.

Before: Judge Lasher

In this matter the Secretary of Labor (Petitioner) seeks assessment of penalties for 10 alleged violations (described in 10 Citations) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1977).

At the outset of hearing in Montrose, Colorado, on November 14, 1990, Respondent agreed to pay in full MSHA's initially proposed penalties for Citation No. 3452866 ($74) and Citation No. 3450113 ($20) and, the Petitioner concurring, this disposition was APPROVED from the bench.

With regard to the remaining eight citations (3 citing electrical violations, 3 citing alleged "inadequate guard" situations, 1 "berm" matter, and 1 "failure to report" matter), the parties presented testimonial and documentary evidence at hearing and waived filing post-hearing briefs. Respondent concedes the occurrence of the 3 electrical violations but challenges the level of MSHA's penalties therefor. As to the remaining 5 citations, both the "occurrence" and "amount of penalty" issues are viable and were litigated.

GENERAL BACKGROUND

Respondent established no economic defense in mitigation of penalty.

a. Stipulated Penalty Assessment Factors.

Based on the written stipulation (Court Exhibit 1) submitted by the parties, it is found that Respondent is (1) a small sand and gravel operator with (2) a history of 17 violations during the two-year period (12/6/87 to 12/6/89) preceding the issuance of the first Citation involved in this proceeding, and (3) that Respondent, after notification of the alleged violations, proceeded in good faith to promptly abate such conditions.

b. Respondent's Operation.

Respondent operates a portable rock-crushing unit (which can be moved to different locations by tractor-trailer), with a primary jaw crusher, conveyance, and load, haul, and dump equipment. (Tr. 55-56, 145-149).

PRELIMINARY MATTERS

Respondent, as I understand its position, contends that it should not be assessed penalties since it was not afforded the right to request a CAV (Compliance Assistance Visit) and did not have prior electrical inspections prior to the subject inspection. (Tr. 15, 136, 165, 166, 167).

The CAV process is not provided for in the Mine Act and is not a mine operator's absolute right. In this connection, it is noted that the record reflects that MSHA was not notified by Respondent as to the site at which it was operating prior to the time the inspectors discovered its operation, inspected it, and issued the subject citations. In any event, the mine in question is clearly subject to the Mine Act and inspections thereof are mandated by such Act, Section 103(a), 30 U.S.C. 815. Further, Sections 104(a) and 110(a) of the Mine Act require that a citation be issued and a penalty assessed when a violation occurs. See Old Ben Coal Co., 7 FMSHRC 205208 (1985). Accordingly, the various contentions of Respondent based on its failure to receive a prior CAV are found to lack merit and are REJECTED.

It is noted that Respondent in this matter was not represented by legal counsel. Thus it is appropriate that another aspect of the CAV issue be considered even though not specifically raised. That is, does the fact that a CAV was not conducted prior to the time the subject Citations were issued estop the government enforcement agency from citing violations? Quite simply, the answer to this question is that the Mine Safety and Health Review Commission has rejected the doctrine of equitable estoppel in Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981):

> The Supreme Court has held tha equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although inrecent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against government in some circumstances. See, for example, United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal consevatively with this area of the law. This restrained approach is bttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.

Respondent also expresses concern about the "inconsistency" of the MSHA inspectors. (See Respondent's letter dated June 18, 1990; Tr. 34-35, 154, 155, 294). Again, insofar as this position constitutes raising the defense of equitable estoppel, it is rejected. However, as the Commission in King Knob, supra, also noted, such factors as prior non-enforcement or confusion caused by MSHA enforcement policy, can, in the abstract, be considered in mitigation of otherwise appropriate penalties. Such has been done in this decision.

THREE "ELECTRICAL" VIOLATIONS

As above noted, Respondent concedes the occurrence of these three Section 104(a) violations cited March 6, 1990, in Citations numbered 3449865, 3449867, and 3449868. The Secretary seeks penalty assessment of $91 for each of the three which involve infractions of 30 C.F.R. 56.12008.(Footnote 1)

The record shows that MSHA Inspector Ronald J. Renowden accompanied Inspector Michael T. Dennehy on a regular inspection of Respondent's operation near Blanding, Utah, from March 6 through March 8, 1990. Inspector Renowden, an electrical specialist with impressive qualifications, performed the electrical part of the inspection. (Tr. 49-58, 59).

Based on the preponderant reliable and substantive evidence, I make the following findings:

A. Citation No. 3449865.

Because there was an improper fitting, i.e., no fitting, on the power cable entering the motor terminal box, i.e., a metal enclosure (Tr. 64), the hazard of a shock, burn, or electrocution was created. The power cable (moving back and forth and flexing) could be damaged by the metal edge and energize the metal framework of the conveyor involved, whichwould, in turn, energize the framework of the crushing unit. (Tr. 65-69, 70, 82, 85).

Since it was reasonably likely that the hazard contributed to by the violation could result in an injury of a reasonably serious or fatal nature (Tr. 77), the violation is found to be not only significant and substantial S & S) as charged by Inspector Renowden (Tr. 71-73, 74, 87), but also very serious (Tr. 74, 76, 88).

Since the problem was visible to one observing the equipment, I find that the mine operator was negligent in allowing such violative condition to exist. (Tr. 77, 85, 141, 144, 155, 158, 171, 176).

B. Citation No. 3449867.

This violation was cited because there was no fitting where the cable (cord) supplying power to a crossover conveyor entered the metal junction box (terminal housing) to secure the cable from strain and protect it from the sharp metal hole edges of the

junction box. (Tr. 95-97, 98). The cord is referred to as "SO cord" in the Citation, which in turn means "hard surface oil resistant." (Tr. 110).

A ground fault hazard was created because this condition could damage the cable "to a point that one of the energized phase conductors inside the cable could energize the metal casing of the motor . . . and energize the framework of the crusher" (Tr. 98, 110) similar to the violation described in Citation No. 3449865, supra. Such hazard could easily come to fruition and result in injuries such as electrical shock and "arc-flash burns" as well as electrocution. (Tr. 99, 100). Because of the amount of vibration and flexing that occurs in the situation involved, it was reasonably likely (1) that the hazard could occur to cause an injury, particularly since there was no other "strain relief" support (Tr. 100-101, 102-107) and (2) that such would cause a reasonably serious injury. This is a serious violation and was charged to be a "significant and substantial" one as well. The violative condition was readily observable and the determination here that this violation resulted from negligence on the part of the mine operator is supported in the record. (Tr. 107, 108, 141, 144, 170, 171, 176). Notably, Respondent's foreman who was responsible for electrical compliance (Tr. 135, 140, 144) testified as follows:

> Q. Yesterday, the inspector mentioned there was some confusion when they arrived as to who was in charge. Can you tell us why there was some confusion?
>
> A. Because of stuff like this, having to do this, come to a hearing and things. Who would want to take responsibility, if you have to come to this kind of stuff all the time?
>
> Q. Well, who is the person--according to your management structure--who was the person that should take charge of this?
>
> A. Me. (Tr. 144)

C. Citation No. 3449868.

Here again, as in the prior two electrical violations, this Citation alleged a similar violation of 30 C.F.R. 56.12008 and such was determined by the Inspector to be "Significant and Substantial." (Tr. 130). And again, there was no fitting for the cable (Tr. 124). Inspector Renowden credibly testified and explained that the hazard from the instant violation was "worse" than the previous two violations (Tr. 125), that the cord was

subject to vibration, flexing, and rubbing, and that severe electric shock resulting in electrocution of miners could easily result. (Tr. 125-126, 130, 131, 132). This is found to be a very serious violation.

The mine operator is again found to have committed this violation as a result of a significant degree of negligence. (Tr. 131, 132, 141, 144, 158, 170, 176).

In mitigation, Respondent established that it had had no prior electrical accidents (Tr. 83), or injuries from electrical problems (Tr. 136).

Perry Rowe, a foreman for Respondent mine operator, testified that he was responsible for the electrical equipment, but that he had no electrical training and was not an electrician. (Tr. 135, 140, 149, 161). Mr. Rowe had "no idea" why there were no fittings on the equipment involved in the three electrical violations (Tr. 141) and thought that "whoever made the machine" was responsible for not putting the fittings in place. (Tr. 141).

CONTESTED CITATIONS

The Respondent challenges the occurrence of the violation charged in the following five Citations. Based on the preponderant reliable and substantive evidence, the following findings are made with regard thereto.

A. Citation No. 3450115.

This 104(a) Citation issued by MSHA Inspector Michael T. Dennehy on March 6, 1990, alleges an infraction of 30 C.F.R. 56.14107 (Footnote 2) as follows:

> The guard for the head pulley on the undercone conveyor was not adequate to protect a person from contact with the fins on the head pulley. The head pulley was approximately 63 inches from ground level.

~300
Moving machine parts.

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The self-cleaning (with fins) head pulley in question had only a "partial guard" which, while guarding the pinch point, did not cover moving machine parts, i.e., the metal fins. (Tr. 191, 193, 204-205). The guard was thus inadequate. (Tr. 194, 199, 201-204). The fins, being 63 inches from the ground, did not meet the "7-foot" exception contained in the standard. (Tr. 199). The violation charged in the Citation is found to have occurred.

The inadequacy of the guarding around the two-inch fins, which were susceptible to contact on one side of the pulley, created the hazard that a miner could be pulled into the pulley and lose a finger, hand, or arm. (Tr. 195, 200, 201, 202, 207). Such could be a permanent disabling injury. (Tr. 207). Since there was no foot traffic in the area (Tr. 217, 226), and because of the 63-inch height of the fins off the ground, it was not likely that a person would come into contact with the fins and be injured by the hazard. The violation is thus found to be only moderately serious. (Tr. 199, 203, 207).

The Respondent mine operator is not found to be negligent in the commission of this violation since Respondent showed that it received a Citation in 1987 for not having a guard on the pulley and that such was abated (and the Citation terminated) by the installation of the guard observed by and cited as inadequate by Inspector Dennehy in this matter. (Tr. 197, 198, 207-212, 217, 225-226, 246, 247). It thus appears that MSHA at one time had in effect approved the guard set-up cited in the subject Citation.

B. Citation No. 3450118.

1. The condition cited by Inspector Dennehy on March 7, 1990, as a violation of 30 C.F.R. 56.14107 is as follows:

> The pinch point on the chain sprocket that drives the jaw crusher's feeder was not adequately guarded to prevent a person from contacting the sprocket or pinch point. This drive was near the front access area to the jaw crusher.

2. The violation occurred as cited by the Inspector in the Citation. (Tr. 230, 231, 232, 235, 246).

3. The partial guarding that was in place on March 7, 1990, was inadequate. (Tr. 230, 233, 234, 235, 240, 241, 257). There was no guard on the pinch point. (Tr. 235, 236, 241).

4. The hazard was that a person could come into contact with the pinch point (Tr. 231), i.e., the moving machine part (sprocket and chain), and have a finger, hand, or arm severed. (Tr. 232, 233, 234).

5. The violation was not "significant and substantial." (Tr. 233-234).

6. It was not "reasonably likely" that this hazard would come to fruition. (Tr. 234, 236-237, 239, 240). The violation is found to be serious. (Tr. 234, 236, 237, 239, 240, 241).

7. As in the case of the previous citation, Respondent is not found to be negligent in the commission of this violation since it established that it had received a prior citation in 1986 from a different inspector for a guard violation and that such was abated and the citation terminated by the installation of the guarding cited as inadequate in the subject Citation. (Tr. 242, 245, 246-247, 248-253, 255).

C. Citation No. 3452863.

1. The condition cited by Inspector Donnehy on March 6, 1990, as a violation of 30 C.F.R. 56.14107 is as follows:

> The guard for the under conveyor (jaw) was not adequate where the access ladder to the crusher post near the head pulley belt driven shaft was to protect a person from contact with the pinch point. This pinch point was next to the access landing of the jaw crusher's diesel engine.

2. The record establishes that the pinch point in question was not adequately guarded. (Tr. 264-266, 271, 281). The violation occurred as cited by the Inspector in the Citation. (Tr. 264-268, 290).

3. The hazard, contact of a person with the pinchpoint, could result in loss of fingers and limbs, and there was a "slight chance" such could be fatal. (Tr. 268-269, 271).

4. This was a "significant and substantial" (S & S) violation since the area is traveled and one person is required to be in the area to gain access to the diesel engine which powers the conveyor in question. (Tr. 264, 265, 269, 276-277, 295). It was reasonably likely that the hazard would come to fruition. (Tr. 273, 276-277, 295, 299-300).

5. Although the violative condition was out in the open and obvious (Tr. 274), the Respondent is not found to be negligent in the commission of this violation, since it established that it had received a prior citation from a different inspector for a guard violation and that such was abated and the citation terminated by the installation of the guarding cited as inadequate in the subject Citation. (Tr. 291-192, 297).

D. Citation No. 3450117.

1. The condition cited by Inspector Donnehy on March 7 1990, as a violation of 30 C.F.R. 56.9300 is as follows:

> The elevated roadway used to gain access to the jaw crusher's feed hopper was not provided with a berm to prevent the Kawasaki front end loader from dropping off the unprotected sides. The top of the roadway had a 5- to 6-foot drop-off. Berms or guardrails shall be at least mid-axle height of the large self-propelled mobile equipment which usually travels the roadway."

2. 30 C.F.R. 56.9300 provides:

> Berms or guardrails.
>
> (a) Berms of guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
>
> (b) Berms or guardrails shall be at least midaxle height of the largest self-propelled mobile equipment which usually travels the roadway.
>
> (c) Berms may have openings to the extent necessary for roadway drainage.
>
> (d) Where elevated roadways are infrequently traveled and used only by service or maintenance vehicles, berms or guardrails are not required when the following criteria are met:

(1) Locked gates are installed at the entrance points to the roadway.

(2) Signs are posted warning that the roadway is not bermed.

(3) Reflectors are installed at 25-foot intervals along the perimeter of the elevated roadway.

(4) A maximum speed limit of 15 miles per hour is posted.

(5) Road surface traction is not to be impaired by weather conditions, such as sleet and snow, unless corrective measures are taken to improve traction.

(e) This standard is not applicable to rail beds.

3. On the inspection day, Inspector Dennehy observed a 12-foot wide Kawasaki rubber-tired front-end loader carrying material from the pit area to the crusher along a 16-foot wide "elevated roadway," i.e., at the crusher end of the roadway there was an elevated ramp running approximately 40 feet in length. For the top 10 to 12 feet of the ramp there was a drop-off of 5 to 6 feet. The drop-off gradually tapered off to zero feet as the ramp dropped downward 40 feet from the top end at the crusher to the bottom level where the roadway was flat. There was no berm (or guardrails) along the entire length of the roadway. (Tr. 305-309, 311, 316, 317, 340, 341). Toward the top of the ramp, the drop-off was sufficient to overturn the Kawasaki F.E.L. (Tr. 309).

4. Therefore, the violation occurred as cited by the Inspector.

5. The hazard created by the violation was that the loader would drop over the edge of the ramp and turn over. (Tr. 311-312). Such an accident could result in injuries ranging from minor "lost time" injuries to fatal (Tr. 312-313) to the operator of the F.E.L. (Tr. 315-316). Thus, this is found to be a serious violation.

6. Since the violative condition was obvious (Tr. 319), the Respondent is found to be negligent in the its commission.

7. The violation, however, is not found to be "significant and substantial":

a. Only the one piece of equipment uses the elevated portion of the roadway (ramp) at any given time. (Tr. 321).

b. There was roll-over protection over the operator's cab on the F.E.L. (Tr. 314-315, 321, 341).

c. There have been no prior accidents involving the F.E.L. (Tr. 332, 352).

d. No vehicles have gone over the side of the ramp. (Tr. 333).

e. It is not reasonably likely that the F.E.L. would go over the side of the ramp at the highest point where the drop-off is 5 to 6 feet. (Tr. 335, 337, 338, 339, 341, 342, 344, 346).

It is concluded that it was unlikely that the hazard envisioned by the Inspector to result from the violation would come to fruition to cause injuries and that it is also unlikely that, if the F.E.L. did go over the side of the ramp, it would result in any injuries of a serious nature.

Accordingly, the prerequisites for the determination of a "significant and substantial" violation, as set forth by the Federal Mine Safety and Health Review Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) were not established, and the "S & S" finding on the face of the Citation is vacated. The Citation in other respects, including the Inspector's determination of negligence, is affirmed.

E. Citation No. 3450265.

1. The condition cited by Inspector Leo E. Hotz on December 6, 1989, as a violation of 30 C.F.R. 56.1000 is as follows:

> The operator has failed to notify the proper MSHA office of the recent commencement of operation and location of his portable crusher.

2. 30 C.F.R. 56.1000 provides:

> Notification of commencement of operations and closing of mines.
>
> The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict

> Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent.
>
> When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

3. The violation occurred as cited by the Inspector in the Citation. (Tr. 360, 361). Specifically, Respondent commenced its operation and failed to notify MSHA by letter or telephone (Tr. 362) that it was going to do so. (Tr. 362-373, 383, 384, 393, 396). When this Citation was written, MSHA did not know the location of Respondent's mining operation. (Tr. 366, 373).

4. The Inspector did not designate, nor is it found, that this violation is significant and substantial.

5. While the violation of this standard could not cause an accident--or directly cause an injury--(Tr. 364), MSHA cannot fulfill its mandate to inspect without such notification and the resultant knowledge where mines are located. (Tr. 363-365). This is found to be a very serious violation. (Tr. 367-368).

6. Since it was Respondent's third violation of this standard and, since Respondent has been in business a sufficient time to know of this requirement, it is found to have been guilty of a significant degree of negligence in the commission of this infraction. (Tr. 367, 370-371, 385-388).

7. MSHA, on the basis of a "special assessment," sought a penalty of $300 at the administrative level. In view of the history of Respondent's non-compliance with this important regulation--vital to safety enforcement--it is found that the administrative level penalty, even though a special assessment, is below the absolute minimum ($400) which should be assessed here.

ASSESSMENT OF PENALTIES

Based on the foregoing findings and conclusions, the following penalties are FOUND APPROPRIATE and ASSESSED:

Citation No.	Penalty
3450265	$400
3449865	125
3449867	125
3449868	125
3450113	20
3450115	50
3450117	125
3452863	125
3452866	74
3450118	50
TOTAL	$1,219

ORDER

Respondent shall pay the Secretary of Labor within 40 days rom the date of this decision the penalties above assessed otaling $1219.00.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:

1. 30 C.F.R. 56.12008 provides:

Insulation and fittings for power wires and cables.

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

2. 30 C.F.R. 56.14107 provides: