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SOL (MSHA) v. CALDWELL STONE
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Federal Mine Safety and Health Review Commission
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. SE 90-79-M A.C. No. 31-01869-05525
v.	
CALDWELL STONE COMPANY, INC., RESPONDENT	Miller Hill Quarry

DECISION

Appearances: Leslie John Rodriguez, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Mr. Dale Caldwell, President, Caldwell Stone Company, Inc., Hudson, North Carolina, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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). Petitioner seeks a civil penalty assessment in the amount of $650 for an alleged violation of mandatory safety standard 30 C.F.R. 56.14107(a). The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Hickory, North Carolina. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record in the course of the hearing.

Issues

The issues presented in this case are (1) whether the respondent violated the cited mandatory safety standard, and (2) the appropriate civil penalty to be assessed pursuant to 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, 30 U.S.C. 301, et seq

2. 30 C.F.R. 56.14107(a).

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

Stipulations

The parties stipulated that the Commission has jurisdiction in this matter and that the respondent is a small mine operator (Tr. 4).

Discussion

The contested section 104(a) non-"S&S" Citation No. 3254968, issued by MSHA Inspector William T. Hall on February 6, 1990, cites an alleged violation of mandatory guarding standard 30 C.F.R. 56.14107(a), and the cited condition or practice states that "The head pulley and drive unit were not guarded on the surge conveyor."

Petitioner's Testimony and Evidence

MSHA Inspector William T. Hall testified as to his education, experience, and training, and he confirmed that he holds a bachelor's degree in industrial technology and occupational safety and health from the University of Kentucky (Tr. 10-12). He confirmed that he conducted an inspection at the respondent's mining operation on February 6, 1990, and that foreman John Cline accompanied him (Tr. 13).

Mr. Hall stated that he issued the citation in question after finding that the surge conveyor head pulley and drive unit, which constituted moving machine parts, were not guarded. In view of the numerous inspections he has conducted, Mr. Hall could not specifically recall or describe the area where the violative conditions were present. However, he confirmed that the hazard concerned exposed moving machine parts which could cause injury to only one employee, namely, a plant utility clean-up man who would be in the area. Under the circumstances, he concluded that an injury was unlikely, and that the violation was non-"S&S" (Tr. 14).

Mr. Hall confirmed that subsection (b) of section 57.14107, provides an exception which does not require a guard if the exposed moving part is at least 7 feet away from any walking or working area. However, in the instant case, there was a material spillage buildup of approximately 1-foot under the conveyor and this placed the unguarded head pulley within 6 feet of the

spillage and outside of the exception. He confirmed that he is 6-foot one and a-half inches tall, and when he stood on the material he was "looking right at the head pulley" which he estimated was 6 feet above the material on which he was standing (Tr. 14-15).

Mr. Hall could not recall that foreman Cline made any comments about the violation, and he confirmed that it was abated (Tr. 15). He stated that he based his "high negligence" finding on the respondent's prior violation history of the guarding standard. He confirmed that the unguarded pulley was readily observable, and it appeared that a competent person had not inspected the workplace for a hazard. Under the circumstances, he found no mitigating circumstances with respect to the respondent's negligence (Tr. 16).

Although Mr. Hall agreed that someone would have to make a deliberate effort to reach the unguarded pulley, he nonetheless believed that anyone walking on the material spillage buildup could slip and fall into the pulley. However, he believed that an injury was unlikely, and that the violation was not significant and substantial because only one person was in the area. Mr. Hall confirmed that he recommended a "special civil penalty assessment" for the violation because of the respondent's past history of violations of the guarding standard in question (Tr. 17-18).

On cross-examination, Mr. Hall stated that if someone tripped on the material spillage pile he could fall into the head pulley which would be 6 feet above ground at this location (Tr. 19). He confirmed that he did not measure the distance between the top of the pile and the unguarded pulley because "I could walk right up to it and see it was 6 feet above the ground" (Tr. 20).

After reviewing several photographs of the conveyor produced by the respondent, Mr. Hall stated that he could not identify the cited unguarded pulley in question because he could not specifically recall it because "it's been over a year ago and things could have changed on the property" (Tr. 21-22; exhibits R-1 through R-4).

Referring to photographic exhibit R-3, the respondent's representative, Dale Caldwell, stated that Inspector Hall listed the wrong conveyor in his citation, and he believed that Mr. Hall mistook the tail pulley of the No. 2 surge conveyor for the head pulley. However, Mr. Caldwell explained that the surge conveyor cited by the inspector is a part of the "second phase" of the surge conveyor which is "the belt coming out of the tunnel" (Tr. 33). Inspector Hall could not recall the head pulley and drive unit that was cited (Tr. 33). Although he identified a drive

unit in the photograph, Mr. Hall reiterated that due to the passage of a year, he could not recall the specific situation (Tr. 34).

In response to further questions, Mr. Hall stated that he relied on a computer print-out of the respondent's history of prior violations which is on file in his office. He believed that he issued some of the prior guarding citations, and although he could not recall reviewing the prior citations at the time of his inspections, he believed that he did because he is required to review the mine file. He stated that he was not influenced by the delinquency letters reflected in exhibit P-1, because the computer print-out in the mine file was not the same as the one in evidence in this case and he would not have had the delinquent payment information when he made his negligence finding in this case (Tr. 27).

Mr. Hall confirmed that in view of the exception found in section 56.14107(b), the question of whether a guard was required would depend on whether there was a material spillage buildup on the ground below the pulley, and that the requirement for a guard could change from day-to-day depending on the existence of spillage which may result in the moving part being less than 7 feet above the spillage pile. If there was no spillage, the unguarded pulley would have been 7 feet above the ground and it would not require a guard (Tr. 27-29).

Mr. Hall stated that the conveyor is supposed to be locked out when maintenance work or greasing is performed, but he did not know the procedures followed by the respondent in this regard (Tr. 29-30).

Respondent's Testimony and Evidence

Dale Caldwell, respondent's president, testified that Inspector Hall cited an unguarded surge conveyor head pulley and drive unit, and referring to photographic exhibits R-1 and R-3, he identified the location of these moving parts as the circled equipment on the conveyor shown at the top of the photographs. However, he indicated that what the inspector actually observed was an unguarded tail and head pulley on the number 2 conveyor, and he identified this piece of equipment as the conveyor closest to the ground as shown in exhibits R-1 and R-3 (Tr. 34-35).

Mr. Caldwell believed that Inspector Hall was looking at the bottom conveyor when he issued the violation, and that he incorrectly identified it as the surge conveyor when he wrote the citation. Mr. Caldwell stated that he knew that Mr. Hall had the wrong conveyor "because my foreman took me out there and showed me the conveyor" (Tr. 36). Mr. Caldwell stated that the surge conveyor head pulley and drive unit shown in exhibits R-1 and R-3

were probably 7 or 8 feet above the material buildups shown in the photographs (Tr. 36).

Mr. Caldwell confirmed that he was not with Inspector Hall when he issued the citation, but that his foreman was. He also confirmed that he discussed the citation with Mr. Hall, but did not point out that he may have cited the wrong conveyor. In explaining why he did not point this out to the inspector, Mr. Caldwell stated that "I'm glad when he leaves," but that the $650 fine "got my attention," and that he reviewed the citation and "I realized that he had the wrong conveyor down there" (Tr. 41).

Mr. Caldwell stated that foreman Cline informed him that Mr. Hall had cited the wrong conveyor after they returned to the plant to discuss abatement. Mr. Caldwell stated that regardless of whether the head pulley or tail pulley were correctly cited, he still believes that someone would have to deliberately reach or jump up to contact the unguarded equipment (Tr. 42).

On cross-examination, Mr. Caldwell confirmed that the four photographic exhibits were taken the day before the hearing of January 23, 1991. Although he agreed that the amount of spillage shown in the photographs is not the same observed by the inspector during his inspection, Mr. Caldwell believed that the area where the material drops below the conveyors is the same area (Tr. 47).

Mr. Caldwell reiterated that foreman Cline told him that Inspector Hall issued the citation for the unguarded tail pulley of the No. 2 belt, and that the surge conveyor is the conveyor that feeds onto the No. 2 belt (Tr. 48). Mr. Caldwell agreed that it was not unusual to have material spillage in the area where both conveyors are located (Tr. 49).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory guarding standard 30 C.F.R. 56.14107(a), for failing to provide a guard for the cited surge conveyor head pulley and drive unit. Section 57.14107, provides as follows:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, fly-wheels, coupling, 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.

Subsection (b) of the standard provides an exception for guards, and it provides that no guard is required if the exposed moving parts are at least 7 feet away from walking or working surfaces. In this case, Inspector Hall confirmed that he issued the citation and found a violation because the accumulated material spillage under the exposed conveyor pulley and drive unit placed them within 7 feet of the spillage (Tr. 30). The petitioner's counsel agreed that this was the case, and he pointed out that if the spillage had been cleaned up no guard would have been required and the respondent would have been in compliance (Tr. 31).

Mr. Caldwell asserted that he contested the citation because he believed that the proposed civil penalty assessment for the violation was excessive (Tr. 5). He contended that the inspector identified the wrong pulley in the citation and that he mistook the tail pulley of the No. 2 surge conveyor for the head pulley. Mr. Caldwell confirmed that he was not with Mr. Hall when he inspected the conveyor and issued the citation, and he indicated that foreman Cline told him that Mr. Hall had incorrectly identified the cited piece of equipment.

Inspector Hall testified that he cited the unguarded surge conveyor head pulley and drive unit, but in view of the fact that the citation was issued over a year ago, and the many intervening inspections he has conducted, Mr. Hall could not recall the specific piece of equipment which he cited, nor could he identify it in any of the photographic exhibits.

Mr. Caldwell did not produce foreman Cline to testify in this case. Further, Mr. Caldwell confirmed that he discussed the violation with Inspector Hall when he issued the citation but that he said nothing to him about citing the wrong conveyor (Tr. 40), and I take note of the fact that Mr. Caldwell said nothing to suggest that Mr. Hall may have cited the wrong piece of equipment when he filed his answer of July 2, 1990, in this case. I also take note of Mr. Caldwell's testimony that the head pulley cited by Mr. Hall, and the tail pulley referred to by Mr. Caldwell were "both at the same area" and that he believed that someone would have to deliberately reach up to contact them (Tr. 41). I further note the fact that the photographs produced by Mr. Caldwell were taken almost a year after the citation was issued.

The respondent's argument that Mr. Hall incorrectly identified the cited pulley in question is rejected, as less than credible. I find Mr. Hall to be a credible witness, even though he had no present recollection of all of the details surrounding

the issuance of the violation. I conclude and find that the petitioner has established a violation of the cited standard, and the citation issued by the inspector 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 operator. Mr. Caldwell testified that the quarry in question is his only mining operation and that he employs 11 miners. He confirmed that his annual production in 1990 was approximately 200,000 tons of crushed stone (blue granite), and that the quarry worked approximately 19,163 man-hours (Tr. 4-5). I have taken this into consideration in assessing the civil penalty for the violation in question.

In the absence of any evidence to the contrary, I cannot conclude that the payment of the civil penalty which I have assessed for the violation will adversely affect the respondent's ability to continue in business.

History of Prior Violation

The respondent's history of prior violations is reflected in a computer print-out covering the period February 2, 1988, through February 5, 1990 (exhibit P-1; Tr. 8). The information in the print-out shows that the respondent was assessed for 65 violations, and that the proposed civil penalty assessments for these violations totalled $6,476. The respondent paid civil penalty assessments in the amount of $1,681.19, for 26 of the violations. The remaining unpaid violations resulted in delinquency letters from MSHA and referrals of several violations to the United States Attorneys Office for collection action (Tr. 18). Mr. Caldwell stated that he is currently making payments on the delinquent assessments (Tr. 8).

I take note of the fact that forty (40) of the prior assessed violations were section 104(a) non-"S&S" citations. Eight (8) of the prior violations were for violations of section 56.14107, and two (2) of these were non-"S&S," and six (6) were "S&S,"

For an operation of its size, I cannot conclude that the respondent has a particular good compliance record, particularly with respect to the non-payment of assessed civil penalties which has resulted in a number of MSHA delinquency letters, and several referrals to the U.S. Attorneys Office for collection. I have considered this compliance record in assessing the civil penalty for the violation.

Gravity

Inspector Hall confirmed that due to the passage of time, he could not recall the specific conditions which prevailed at the time he issued the citation (Tr. 14, 19). He stated that the conveyor is required to be locked out when it is greased or maintenance is performed, and there is no evidence that this was not done. Under the circumstances, and in view of the inspector's non-S&S finding, I conclude and find that the violation was non-serious. I find it unlikely that the one employee who may have been in the area would walk or stand on top of the accumulated spillage under the conveyor and place himself at risk by contacting the unguarded equipment in question.

Good Faith Compliance

The record reflects that the violation was abated 1-hour prior to the time fixed by the inspector on the same day the citation was issued. Abatement was achieved by cleaning up the spillage under the conveyor, thereby placing the unguarded equipment at least 7 feet above the ground (Tr. 31). Under the circumstances, I conclude and find that the respondent abated the violation rapidly and in good faith, and I have taken this into consideration in the assessment of the civil penalty for the violation.

Negligence

Inspector Hall made a finding of "high negligence," and he testified that he based this on the respondent's prior history of violations of the guarding standard (Tr. 15). He found no mitigating circumstances, and indicated that the unguarded equipment was in plain view and that a competent person should have noticed the violation (Tr. 16).

The inspector could not recall the circumstances surrounding the issuance of the prior eight guarding violations. Mr. Caldwell conceded that violations have occurred in the past, but he pointed out that no injuries have ever resulted from any of these violations, and that he has always corrected any cited violative conditions (Tr. 5-6). The petitioner and the inspector had no information to the contrary regarding the respondent's accident-free record (Tr. 43-44).

Mr. Caldwell testified that he had never been cited for any similar conditions during the entire time he has been in business since 1979, and that all conveyor moving parts have always been above ground level (Tr. 20, 24).

Contrary to the inspector's "high negligence" finding, which I find is unsupported, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Civil Penalty Assessment

The record in this case reflects that the non-"S&S" violation was "specially assessed" at $650, and the special assessment officer noted that the respondent "had been cited numerous times for similar conditions during previous inspections at the mine." The petitioner's counsel confirmed that MSHA has changed its civil penalty assessment policy in light of a recent Federal district court decision, and that "stiffer penalties" have been assessed based on "prior history" (Tr. 38).

In this case, MSHA's computer print-out reflects eight prior citations for violations of section 56.14107, over a 2-year period of time. However, copies of the prior citations were not produced by the petitioner, and the inspector could not recall the circumstances under which those prior violations were issued (Tr. 8, 26).

It is clear that I am not bound by MSHA's proposed civil penalty assessment, or the penalty assessment procedures found in Part 100, Title 30, Code of Federal Regulations. Contested civil penalty cases are heard de novo by the presiding judge, and any civil penalty assessment is made in accordance with the criteria found in section 110(i) of the Act.

With regard to MSHA's "excessive history" civil penalty assessment policy, I take note of the fact that the Commission's Chief Judge, Paul Merlin, recently ruled that the policy is invalid because of the Secretary's failure to adopt such policy through rulemaking. See: Secretary of Labor (MSHA) v. Drummond Company, Inc., Docket No. SE 90-126, March 6, 1991. Apart from this ruling, and although I have concluded that the respondent does not have a particularly good overall compliance record and have taken this into consideration in assessing the civil penalty for the violation which has been affirmed, I cannot conclude that the respondent's history of prior guarding violations is such as to warrant any additional increase in the 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 a civil penalty assessment in the amount of $125 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 $125, for a violation of 30 C.F.R. 56.14107(a), as stated in section 104(a) non-S&S Citation No. 3254968, February 6, 1990. Payment is to be made to MSHA 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