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SOL (MSHA) v. JAMIESON CO.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280 1244 Speer Boulevard
Denver, CO 80204

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

JAMIESON COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 90-197-M
A.C. No. 04-01924-05518

Docket No. WEST 90-205-M
A.C. No. 04-01924-05519

Pleasanton Pit & Mill

DECISION

Appearances: George O'Haver, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco, CA,
for Petitioner;
William R. Pedder, Esq., Alameda, CA,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") alleges Respondent Jamieson Company, ("Jamieson"), violated safety regulations promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq. (the "Act").

A hearing on the merits was held on July 9, 1991, in San Francisco, California. The parties filed post-trial briefs.

Docket No. West 90-197-M

This case involves three citations. Citation No. 3460324 alleges Jamieson violated 30 C.F.R. 14112.

At the hearing, Petitioner moved to vacate this citation.

For good cause shown, the motion was granted and it is formalized in this decision.

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Citation No. 3458703 alleges the operator violated 30 C.F.R. 56.14112(B). (Footnote 1)

THE EVIDENCE

Ann F. Johnson, an MSHA inspector since February 1989, is experienced in mining and construction. (Tr. 7).

On March 6, 1990, she inspected Jamieson's sand and gravel operation in California. The fairly good-sized operation employs about 80 people.

During the course of the inspection Ms. Johnson observed the guard on the PC4A tail pulley conveyor belt. The guard was hanging by one of its two posts. The posts secure the pinch point on the tail pulley. (Tr. 9). Ms. Johnson prepared a drawing depicting the guard. (Ex. S-1).

The head pulley of the conveyor was depositing coarse material (rock and dirt) onto the tail pulley of the conveyor.

The inspection party determined that the material coming off the head pulley had knocked off the guard. (Tr. 10, 11). There was a single extended guard for the tail pulley and the conveyor belt roller. (Tr. 12).

Ms. Johnson states she was on the other side of the guard from the portion shown in Exhibit R-2. The company had only one guard at that time. (Tr. 14, 15).

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CHRISTOPHER LEE MATHIAS, safety coordinator for Jamieson, accompanied the inspector during the walk-around. (Tr. 26, 27).

The drawing (Exhibit R-1) is a fair representation of the conveyor belt. There are two separate guards: One is for the tail pulley and one for the skirting panel. The tail pulley guard did not fall in any fashion. Material coming into the hopper caused the skirting guard to be displaced.

The guard was photographed (Exhibit R-2) from a different side but it reflects the situation. The tail pulley guard is separate from the skirting guard. (Tr. 29).

The side shown in Exhibit R-2 is not the side where the guard was displaced.

Even with the skirting guard out of place no one would have access to the tail pulley since the tail pulley was well protected. The skirting guard had fallen down between the first and second inspection of the area. (Tr. 32).

Mr. Mathias disagrees with the inspector's contention that the guard was one piece rather than two. The skirting panel guard that fell was actually protecting the conveyor belt rollers. (Tr. 35).

Exhibit R-3 is MSHA's policy statement relating to conveyor belt rollers. (Tr. 36).

Discussion and Further Findings

The critical question here is whether there were separate guards, namely a skirting guard and a tail pulley guard.

The citation itself does not clarify this issue. However, Inspector Johnson prepared a diagram at the time of the inspection (Exhibit S-1). The diagram shows shape of the "fallen" guard to be elongated rather than square. This discription bears a striking resemblance to the drawing of the skirting guard shown in the operator's schematic drawing. (Ex. R-1).

The inspector testified the guard was a one piece unit. However, I credit the contrary testimony of Jamieson's safety coordinator. He indicated the tail pulley guard was separate from the skirting guard. As a safety coordinator, Mr. Mathias should be more familiar than the inspector with the intricacies of the guards on the PC-4A conveyor.

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In the factual scenario presented here it appears a prima facie violation of 56.14112(b) existed. It is uncontroverted that the skirting guard was not "securely in place" within the meaning of the regulation.

In support of its defense that the citation should not have been issued, Jamieson offers a portion of MSHA's Program Policy Manual, Volume IV, Part 56/57, which provides in part as follows:

Conveyer belt rollers are not to be construed as "similar exposed moving machine parts" under the standard and cannot be cited for the absence of guards and violation of this standard where skirt boards exist along the belt. However, inspectors should recognize the accident potential, bring the hazard to the attention of the mine operators, and recommend appropriate safeguards to prevent injuries. (Ex. R-3).

The cited portion of the Policy Manual is not applicable here. It is true the conveyor belt rollers are at least partially guarded by skirt guards along the belt. (See Ex. R-2). However, MSHA's policy statement deals with "similar exposed moving machine parts". Such "exposed moving machine parts" are not involved in the cited regulation, 56.14112.

Even assuming MSHA was not following its own directives that factor would not be a sufficient reason to vacate an otherwise valid citation. MSHA's instructions are not officially promulgated and do not prescribe rules of law binding on the Commission. Old Ben Coal Company 2 FMSHRC 2806, 2809 (1980).

Citation No. 3458703 should be affirmed.

Citation No. 3458711 alleges a violation of 30 C.F.R. 56.12005. (Footnote 2)

THE EVIDENCE

During the inspection Ms. Johnson observed a power cable lying across a concrete driveway. The welding power cable extended from the mill shop to the tool crib building. The 440 volt cable was not bridged or protected. There were tire marks on the cable. If cables of this type are run over, the inside wires can be crushed. If electrical current escapes, a fatality could result. (Tr. 17, 18). There were employees in the area. The condition was abated by putting the cable in conduit and placing it over the top of the driveway. Ms. Johnson prepared a diagram showing the violative condition. (Ex. S-2). The cable had been spliced next to the shopmill but the splice was not mechanically strong. (Tr. 19-21). It had rained the day of the inspection and there was moisture in the air. (Tr. 24).

One to five people could be impacted by this situation. (Tr. 25).

MERLE W. MOODY, an electrician for Jamieson, accompanied the inspector. The location of the cable across the driveway was temporary.

Mr. Moody did not observe any water in the area. In his opinion if there was any leak from the cable it would go to ground which is wrapped in the cable. However, it could go to ground or spray out. (Tr. 39). If the electricity goes to ground, the current is broken and it kicks the breaker. (Tr 40).

Witness Mathias (recalled) indicated the photograph (Exhibit R-3) depicts the same condition as existed on the day of the inspection. (Tr. 43).

Discussion and Further Findings

Respondent does not dispute the existence of this violation but contests the "significant and substantial" designation and the number of people affected, i.e., five (5) with the consequent alleged high degree of negligence.

A violation is properly designated as being of a significant and substantial nature if, based on 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, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In Consolidation Coal Co., 8 FMSHRC 890, 897-98 (June 1982), aff'd, 824 F.2d 1071 (D.C. Cir.

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1987), the Commission explained that adapting the National Gypsum/Mathies test to a violation of a mandatory health standard results in the following formulation of the elements necessary to support a significant and substantial finding:

(1) The underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

In the instant case, Inspector Johnson testified that a fatality could result if the high voltage current escaped from the power cable. I credit Ms. Johnson's testimony over the contrary view of the operator's expert. Mr. Moody, in fact, conceded that electricity "could" spray out of the power cable. (Tr. 39).

The close proximity of workers in the vicinity of the power cable establish factors (3) and (4) within the National Gypsum doctrine. Factors (1) and (2) are apparent.

Citation No. 3458711 should be affirmed.

Docket No. WEST 90-205-M

This case involves Citation No. 3460325 alleging the operator violated 30 C.F.R. 56.14201(b).

At the hearing, Petitioner moved to vacate the citation.

For good cause shown, the motion was granted and it is formalized in this decision.

Civil Penalties

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act, 30 U.S.C. 820(i).

The evidence establishes that Jamieson has 80 employees and is a "fairly good-size" operator. As a result, the penalties herein appear appropriate.

There is no evidence as to the effect of the penalty on the operator's ability to continue in business. However, this is an affirmative defense.

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The record fails to develop any facts showing the operator's prior history.

Concerning the operator's negligence: the guard was displaced between the initial inspection and a subsequent walk-through on the same day. This indicates only minimal negligence was involved.

The power cable on the concrete driveway involves high negligence such the condition was open and obvious.

The gravity involving the displaced guard was minimal as the tail pulley guard remained in place. Further, employees were only minimally exposed to the hazard.

The power cable involved exposure to at least one employee. I consider the gravity high whether one employee or five employees were involved.

The operator demonstrated statutory good faith by abating the violative conditions.

Considering the statutory criteria, I consider that the penalties set forth within this decision are appropriate.

For the foregoing reasons I enter the following:

ORDER

Docket No. West 90-197-M:

1. Citation No. 3460324 and all penalties therefor are VACATED.

2. Citation No. 3458703 is AFFIRMED and a penalty of \$20 is ASSESSED.

3. Citation No. 3458711 is AFFIRMED and a penalty of \$200 is ASSESSED.

Docket No. West 90-205-M:

4. Citation No. 3460325 and all penalties therefor are VACATED.

John J. Morris
Administrative Law Judge

Footnotes start here:-

1. The cited regulation reads as follows:

56.14112 Contruction and maintenance of guards.

(a) Guards shall be constructed and maintained to-

(1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation; and

(2) Not create a hazard by their use.

(b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

2. The cited regulation reads as follows:

56.12005 Protection of power conductors from mobile equipment.

Mobile equipment shall not run over power conductors, nor shall loads be dragged over power conductors, unless the conductors are properly bridged or protected.