CCASE:
SOL (MSHA) V. TEXAS INDUSTRIES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 92-78-M A.C. No. 41-02852-05517
v.	
TEXAS INDUSTRIES, INCORPORATED, RESPONDENT	Tin Top Sand and Gravel Plant

DECISION

Appearances: Olivia Tanyel Harrison, Esq. and Jack Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Bob Williams, Texas Industries, Incorporated, Weatherford, Texas, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq., the "Act," charging Texas Industries, Incorporated (Texas Industries) with six violations of mandatory standards. The general issue before me is whether Texas Industries violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed.

Citation No. 3895580 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 56.12025 and charges as follows:

> The spray bar water pump 480 VAC and its switch gear were not effectively grounded in that a grounding conductor had not been provided from the main service near the transformers to the electrical switch gear about 300 feet away.

The cited standard provides in relevant part that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection."

Texas Industries does not dispute that the violation existed as charged but maintains that it was neither "significant or substantial" nor of serious gravity. Melvin Robertson, an MSHA mine inspector/electrical with extensive electrical experience, testified that indeed there was no grounding medium for the branch circuit to the 35 horsepower starter pump as charged. According to Inspector Robertson, the National Electrical Code, which is also used and followed by the Texas Industries' electrical engineer, provides the relevant industry standards. These standards were not being followed with respect to the cited branch circuit. Moreover, Robertson noted that the National Electrical Code specifically provides that "the earth shall not be used as the sole equipment grounding conductor" and therefore the peg ground utilized at the pump site was clearly inadequate. Inspector Robertson opined, based upon the existing conditions, that there was a reasonable likelihood for ground faults to occur resulting in electrical shock or fire. He also noted that the voltage was sufficient to cause electrocution.

On behalf of Texas Industries, Charles Cleaveland, the Tin Top Plant Manager at the time the citations were issued, disagreed with Inspector Robertson's opinion regarding the severity of the hazards. At the same time, however, Cleaveland readily acknowledged and qualified his statement by conceding that he did not have electrical expertise. Under the circumstances I can give Mr. Cleaveland's lay opinion but little weight. On the other hand, the expert testimony of Inspector Robertson is persuasive regarding the severity of the hazard and I have no difficulty in concluding based on that testimony that the hazard was both "significant and substantial" and serious. See Mathies Coal Co, 6 FMSHRC 1 (1984), U.S. Steel Mining Co, 7 FMSHRC 1125 (1985). There is a dearth of evidence on the issue of negligence and considering the remaining criteria under Section 110(i) of the Act, I find that a civil penalty of $100 is appropriate.

The remaining five citations charge violations of the standard at 30 C.F.R. 56.141079(a) and each charges, in essence, that a flange type bushing or seal keeper on the ends of a rotating shaft were exposed and not guarded. These were all located in areas along walkways where an employee would, according to the inspector, likely get a hand, finger, or clothing caught in pinchpoints or suffer injuries from the rotating bolts protruding from the moving machine part. The specific charges in the citations are set forth in the appendix attached hereto.

The cited standard, 30 C.F.R. 56.14107(a), reads as follows:

> Moving machine parts shall be guarded to protect
>
> persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys,

flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Texas Industries does not dispute the existence of the cited violations, but maintains that they were neither "significant and substantial" nor serious. According to MSHA Inspector Robertson, the factual situations involved in Citation Nos. 3895911, 3895912, and 3895914, were essentially the same. Each involved an unguarded rotating shaft with bolts protruding from the rotating shaft and a gap of approximately one-half inch that was unguarded and would permit a hand or finger to be inserted causing broken bones, lacerations, and mangled hands and/or fingers. Robertson concluded that the hazard was "significant and substantial" and serious because of the close proximity of these unguarded moving machine parts to walkways at a height of approximately 30 to 40 inches above the walkway and in areas in which an employee might reach as for a handrail. He observed that employees were greasing at the time the citations were issued and that there were grease fittings in close proximity to the moving machine parts. He testified that in most cases the grease fittings are directly behind the flange and noted that greasing does in fact occur at these locations while the plant is in operation.

With respect to Citation Nos. 3895915 and 3895975, Inspector Robertson observed that the cited unprotected gaps exposing the moving machine parts were larger than those previously cited and therefore would permit an employee's clothing to become entangled by the moving parts. He concluded that these hazards were less severe than where the hand or fingers could become mangled.

Plant Manager Charles Cleaveland testified on the other hand that these citations did not present a major safety hazard. He based his conclusion upon the fact that the plant had been in operation since 1975, had been inspected many times by 10 or 11 different inspectors and that this was the first time these conditions had been cited. In addition, he noted that the cited areas have work platforms with handrails. It was therefore his opinion that it was unlikely for employees to use the flanges as handrails. He further testified that serious injury findings in these cases was inconsistent with findings in another citation (Citation No. 3895913) which the same Inspector found not to be "significant and substantial."

In rebuttal Inspector Robertson observed that the conditions found in Citation No. 3895913 were distinguishable in that a bar provided partial protection to employees and would have hindered employees from exposure to the hazardous moving machine part. Inspector Robertson also testified that in 1988 he had specifically informed previous Plant Manager Fuller of the hazardous nature of the exposed flanges and advised him to provide guards for those exposed flanges.

Under the circumstances I find that the Secretary has met her burden of proving that the violations were indeed "significant and substantial" and serious. In light of the inspector's testimony regarding previous warnings to management to guard the cited conditions in 1988, it is also clear that the operator is chargeable with negligence. Considering all of the criteria under 110(i) of the Act, I find that the Secretary's proposed penalties are indeed appropriate.

ORDER

Texas Industries, Incorporated, is hereby directed to pay civil penalties of $456 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
703-756-6261

APPENDIX

Citation No. 3895911:

A flange type bushing or seal keeper was mounted on the end of the No. 128 belt conveyor drive gear box drive shaft rotating within an approximately one half inch of the belt drive guard. The flange is about 40 inches up from the walkway where an employee would likely get hand or finger into pinch point.

Citation No. 3895912:

flange type bushing or seal keeper was mounted on the end of the No. 127 belt conveyor gear case drive shaft. The belt heads on the rotating flange came very close to the drive guard approximately one half inch and was located about 40 inches up from the walkway where an employee would travel to service the area.

Citation No. 3895914:

A guard was not provided for the rotating flange on the drive shaft of No. 123 belt conveyor gear case shaft. The flange rotates very near the drive gear (belt heads about 1/2 inch from guard) causing a pinch point about 40 inches up from the access way that an employee would likely get finger caught in.

Citation No. 3895915:

A guard was not provided over the rotating flange on the end of the gear case shaft of No. 120 belt conveyor. Bolt heads on the key way area on the flange could catch clothes of employees. This flange is located just under where an employee would check oil in gear case or near where he would grease pillow block bearing. An employee was observed greasing in Plant during shift.

Citation No. 3895975:

A flange type bushing or seal keeper was mounted on the end of the No. 122 belt conveyor gear case drive shaft. The bolt heads on the rotating flange came very close to the drive guard where an employee would likely get a finger caught in the pinch point or catch clothes.