

CCASE:
SOL (MSHA) V. YOUNG BROTHERS
DDATE:
19920707
TTEXT:

~1139

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
1244 Speer Boulevard #280
Denver, CO 80204-3582
(303) 844-5266/FTS 564-5266

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

v.

YOUNG BROTHERS INCORPORATED,
CONTRACTORS,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 91-221-M
A.C. No. 41-03142-05520

Atkins Pit

DECISION

Appearances: Olivia Tanyel Harrison, Esq., Jack F. Ostrander,
Esq., Office of the Solicitor, U.S. Department of
Labor, Dallas, Texas,
for Petitioner;
Richard C. Baldwin, Waco, Texas
for Respondent.

Before: Judge Lasher

In this matter, MSHA, proceeding pursuant to Section 110(a)
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
820(a), seeks assessment of civil penalties (\$20 each) for two
alleged violations of 30 C.F.R. 56.14107(a).1

The issues are whether violations occurred and, if so, the
amount of appropriate civil penalties therefor.

The two Section 104(a) non-"Significant and Substantial"
Citations involved were issued by MSHA Inspector Mike Sanders on
May 29, 1991.

~1140

Citation No. 3895441 describes the allegedly violative condition as follows:

The guard provided to cover the Self-Cleaning Tail pulley pinch points on the C-12 conveyor did not extend a sufficient distance to cover all exposed areas.

Based on the preponderant reliable and probative evidence introduced at hearing the following findings of fact are made.

The violation as described by the MSHA Inspector in the Citation did occur. The Inspector clearly and credibly testified that a violation was observed and the citation was issued because the C-12 conveyor, which did have guards on both sides of the tail pulley, was not properly guarded in the back section thereof. There was not a guard surrounding all of the pinch points. (T. 24). The Inspector testified:

The back section of the tail pulley was not guarded, in that an employee in the area could easily gain access to the area of the tail pulley." (T. 25).

The Inspector credibly testified that in addition to the back section of the tail pulley, the "top section thereof "just directly above the tail pulley" was also unguarded. (T. 24, 31).² The hazard was an employee's becoming caught in the pinch points while the tail pulley was in operation. Employees were able to walk into the area where they would incur exposure to such hazard. (T. 25-26, 55). Occurrence of such an accident was possible but not likely. If it did occur, it could result in loss of a limb. (T. 25-28).

The guarding in question was personally installed by Plant Manager Torgerson. (T. 44, 52). He conceded that a miner has to get underneath the tail pulley "frequently" in order "to clean out," (T. 46, 49-50, 51, 55) and that the miner "would be standing right next to the conveyor" when he did so. (T. 55).

~1141

He also admitted being familiar with the regulation requiring rear guarding on these conveyors. (T. 56). Accordingly, it is found that this is a serious violation which occurred as a result of the Respondent's negligence. (See also T. 57-58).

It is noted that in Respondent's post-hearing brief, Inspector Sanders' testimony is seriously misquoted. This misrepresentation, constitutes Respondent's defense. The Brief, at page 3, states: "On cross-examination, Mr. Sanders states clearly that, "if the conveyor had had a top guard, no citation would have been issued'."3 It is thus necessary to examine what Inspector Sanders' testimony, at page 31 of the transcript, actually was:

Q. You indicated in testimony that there were guards on the side of the conveyors.

A. Yes, sir.

Q. Was there a guard on the top of the conveyor at that time?

A. No, sir. If there were, I would not have cited that condition.

Q. But your notes do not indicate one way or the other, do they?

A. They indicate that it was not guarded--pinch point--tail pulley did not completely cover the pinch points at the rear of the self-cleaning tail pulley. So the rear of the self-cleaning tail pulley was not totally covered. (Emphasis added). (T. 31).

Further explanation is unnecessary; Respondent's defense is REJECTED.

Turning now to Citation No. 3895442 it describes the allegedly violative condition as follows: "The guard provided at the tail pulley of the C-11 conveyor were [sic] constructed of rubber belting and could not be properly secured into place."

~1142

Inspector Sanders testified that the rubber guarding used on the C-11 conveyor in question "has never" been acceptable to MSHA (T. 64-65)4 since the tail-pulley operation cannot be clearly seen without removing or lifting the guard as is the case with "expanded metal or screen cloth" guards which permit the tail pulley to be serviced through small holes and grease fittings without lifting the guard. (T. 64). The Inspector said the hazard would be "someone lifting the rubber belting up simply to observe a condition which could be a build-up of material, a noisy bearing, just to examine the general area and the condition of the tail pulley." (T. 66). He pointed out that it would be necessary for miners to come into the area to do shoveling and maintenance (T. 66) and stated there was a "possibility" that an incident could thus occur (Tr. 66), meaning that a miner could be caught in the pinch points and suffer injuries such as loss of limbs, broken bones, cuts, bruises, and abrasions. (T. 66).

The Inspector conceded that if someone fell against the rubber guarding, which was 3/8 of an inch thick rubber "conveyor belting" (T. 73-74), he would not reasonably expect such person to go through the guarding. (T. 71).

Respondent's witness, Plant Manager Torgerson, testified that if someone fell against the guard he would not pass through to the pulley and that if someone were to hit the guard as hard as possible with a shovel it would not penetrate the guarding material. (T. 74). Torgerson also established that the pulley in question was guarded from the top, both sides, and the rear, and that cleaning was normally accomplished by use of a front-end loader or small loader, rather than having an employee on the ground lifting up the guard to clean. (T. 75).

The preponderance of the evidence indicates that there was only a remote possibility that any miner or other person would

~1143

come into contact with the pinch points of the tail pulley. In any event, I conclude, that to the extent MSHA's Guide to Equipment Guarding heavily relied upon by the Inspector to formulate his opinion as to the inadequacy of the guard, creates a presumption or inference that metal or non-rubber guarding material was required, such inference or presumption is rejected. Such Guide is an informally promulgated handbook containing guidelines to aid inspectors in enforcing the Mine Act and such guides are not equivalent to safety regulations or rules of law binding on the Commission in all cases. Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (June 1981).

In the instant matter I find no evidentiary basis to support a conclusion that there existed a reasonable possibility of anyone contacting the tail pulley in question. Thompson Brothers Coal Company, 6 FMSHRC 2094 (September 1984). Accordingly, Citation No. 3895442 will be VACATED.

Penalty Assessment - Citation No. 3895441

Respondent, a medium to a large Texas construction company (T. 51-53), is the operator of the Atkins Pit, a very small surface limestone mine consisting of a quarry and a primary and a secondary crusher. It had a history of 43 previous violations (T. 81) during the two-year period immediately preceding the issuance of the citation. The parties stipulated that the violation was abated in "a timely fashion" and that payment of penalties would not affect Respondent's ability to continue in business. The violation described in this citation was above determined to be serious and to have resulted from Respondent negligence. Accordingly, a penalty of \$150 is ASSESSED.

ORDER

1. Citation No. 3895442 is VACATED.

2. Respondent SHALL PAY to the Secretary of Labor within 30 days from the date of issuance of this decision the sum of \$150 as and for a civil penalty for Citation No. 3895441.

Michael A. Lasher, Jr.
Administrative Law Judge

FOOTNOTES START HERE:-

1. This standard provides:

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.

2. Respondent's Plant Manager, Hans Torgerson, denied that the top portion was unguarded. I find the Inspector's testimony more trustworthy and it is accepted on this point. In any event, the record is clear that the rear of the tail pulley was not adequately guarded, that this was the Inspector's primary

concern, and that such constitutes a violation.

3. Respondent's presentation of this evidence, without citation to the transcript, could have been seriously misleading.

4. The Inspector pointed out that MSHA's interpretation is based on its "guarding book," which is entitled "MSHA's Guide to Equipment Guarding," Ex. P-2. Significantly, rubber guarding is not specifically banned by this document, which on page 4 thereof states, inter alia: "Materials for guards should be carefully selected. For most installations, guards of bar stock, sheet metal, perforated metal, expanded metal, or heavy wire mesh are more satisfactory than those of other materials. It is also noted that the regulation allegedly infringed does not specifically or absolutely bar the use of rubber as a guarding material.