CCASE:
SOL (MSHA) V. GFD CONSTRUCTION
DDATE:
19930208
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 92-61-M
	:	A.C. No. 08-01046-05511
v.	:	
	:	Green's Pit
GFD CONSTRUCTION COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
Anthony Green, GFD Construction Company, Incorporated, Pensacola, Florida, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding arising under Sections 105(d) and 110(a), 30 U.S.C. 815(d) and 820(a), of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. ("Mine Act"), the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), seeks civil penalty assessments for seven alleged violations of mandatory safety standards for surface metal and non-metal mines found in Part 56 of the Code of Federal Regulations ("C.F.R."). The Secretary further asserts that four of the alleged violations constitute significant and substantial contributions to mine safety hazards ("S&S" violations). A hearing on the merits of the matter was held in Pensacola, Florida.

JURISDICTION

In order to establish the nature of the operation at issue and Mine Act jurisdiction, the Secretary first called Anthony Green. Green stated that since 1980 he has been the owner of GFD Construction Company ("GFD"), which at its Green's Pit, conducts primarily a masonry sand extraction operation.(Footnote 1) According to

_____

1 In addition to the extraction of sand, Green stated that GFD also extracts some clay and is involved in providing fill dirt and top soil to buyers, as well as in land clearing. Tr. 10.

Green, sand is dredged from ponds at the pit, is separated from foreign material and is trucked from the pit to purchasers. Approximately eighty-five percent of the sand is sold to home builders, but GFD also sells to county and federal institutions, such as Eglin Air Force Base. Tr. 11. At the pit, GFD operates heavy equipment such as a dragline, front end loaders, back hoes and trucks. Approximately, ninety percent of the trucks are purchased outside the state of Florida, in Alabama. The trucks transport sand to purchasers' job sites over public highways. Tr. 11-12. In addition, the last front-end loader purchased by GFD was manufactured in Japan. Tr. 11.

Section 4 of the Mine Act, 30 U.S.C. 814, makes subject to the Act, "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine." Given Green's testimony, I conclude that GFD's business affects interstate commerce, that GFD is an operator subject to the provisions of the Mine Act in the operation of Green's pit and that, as a result, the Commission has jurisdiction over this proceeding.

In order to establish the existence of each alleged violation, and, where applicable the violation's S&S nature, the Secretary called to testify Jackie Shubert, a MSHA inspector with approximately 6 years of inspection experience. Shubert, who issued all seven of the alleged violations, also testified regarding the gravity of each alleged violation and GFD's negligence in allowing the violations to exist. GFD's case was presented through the direct testimony of Green and through Green's cross-examination of Shubert.

Section 104(a) Citation No. 3596821, 10/15/91, 30 C.F.R. 56.14130(a)(3)

EVIDENCE

The citation states:

> The Kobelco 600A front-end loader S/N 02119 was not provided with seat belts.

Exh. P-2. In addition to finding that a violation existed Shubert found that the violation constituted a S&S violation.

Shubert stated that on October 15, 1991, he conducted an inspection of Green's Pit. Upon arriving at the mine, he stopped at the mine office to advise Green of the nature of his visit. Green did not accompany him during the inspection. Tr. 14-15

At the pit, Shubert observed a Kobelco front-end loader ("loader") dumping sand into a truck. Upon inspecting the loader, he noticed that it lacked a seat belt. Tr. 16. Shubert considered this to be a violation of Section 56.14130(a)(3).

Explaining why he regarded the violation to be S&S, Shubert stated that the loader's operator compartment had rollover protection but not a closed cab. Although the loader was being operated on level ground., Shubert nonetheless feared that it could turn over and throw the operator from the compartment, subjecting him to crushing injuries or death should the rollover protection structure strike him. Shubert stated that if the bucket were not loaded evenly and were raised, the loader could become unstable and overturn. Shubert mentioned an incident at a Mississippi operation where this had happened. Tr. 17-20.

Shubert also explained his understanding that GFD did not own the loader, that the loader had been rented by GFD from Pensacola Ford Tractor Co., and that the rented loader had been at the pit for approximately two weeks. Nonetheless, Shubert believed that GFD, as the operator, was responsible for assuring that the loader complied with all applicable federal mine safety regulations when it was operated at the pit. Tr. 57.

Green agreed that the front-end loader was rented. Tr. 81.

THE VIOLATION

Section 56.14130(a)(3) requires that seat belts be installed on wheel loaders. There is no dispute that the cited loader was a wheel loader and that it lacked a seat belt. Moreover, there is no dispute that GFD was the operator of the pit and that the front-end loader, although rented, was under GFD's control and direction at the pit. As Shubert correctly stated, whether or not an operator owns a piece of equipment, the operator is responsible for assuring regulatory compliance while the equipment is in operation at its mine. Therefore, I find that the violation has been established.

S&S

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety

> standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury and, (4) a reasonable likelihood that the injury in question will be of a reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury". U.S. Steel Mining Co.,6 FMSHRC 1834, 1836. (August 1984).

There was a violation of the cited standard. In addition, Shubert's testimony established a measure of danger contributed to by the violation in that the lack of a seat belt contributed to the danger of the loader operator being injured should the loader overturn. Further, I conclude that Shubert's testimony established that the hazard of being thrown and injured was reasonably likely to occur, even though the front-end loader was being operated on fairly level ground. Shubert specifically referenced the danger of loaders overturning due to unevenly filled buckets, and Shubert noted that such an accident had happened before. In addition, and as Shubert also noted, this particular front-end loader lacked a protective cab. Finally, a loader operator who was thrown from the operator's compartment and struck or crushed by the roll-over protection structure surely would be reasonably likely to suffer a serious injury--even death. In sum, I agree with the inspector that this was a S&S violation.

GRAVITY AND NEGLIGENCE

The violation was serious. As the inspector testified, without a seat belt the protection afforded by the front-end loader's roll-over protection "was not worth a dime." Tr. 19. While Green expressed the opinion that a bar in front of the operator's compartment would prevent the operator from being thrown forward, he agreed that nothing would prevent the operator from being thrown or from falling sideways. Tr. 83-84.

Further, I conclude that GFD was negligent in allowing the violation to exist. The seat belt was missing. It is the operator's duty to ensure that the seat belt was in place and was functional. GFD did not meet its duty in this regard.

Section 104(a) Citation No. 3596822, 11/15/91, 30 C.F.R. 56.14132(a)

EVIDENCE

The citation states:

> The back-up alarm on the Kobelco 600A front-end loader S/N 02119 was not being maintained in working condition.

Exh. P-3.

Shubert stated that while inspecting the same loader, he observed the machine backing up and did not hear the back-up alarm sound. Upon closer inspection, he found that the alarm was in place but was not working. He was not sure why the alarm failed to sound.

Green did not dispute this testimony.

THE VIOLATION

Section 56.14132(a) requires that back-up alarms be provided on self-propelled mobile equipment and be maintained in functional condition. The inspector's testimony regarding the non-functioning state of the alarm was not contradicted, and I conclude that the violation existed as charged.

GRAVITY AND NEGLIGENCE

The violation was not serious. The inspector indicated that he believed it unlikely that the violation would result in injury to any miner. Exh. P-3.

Further, and for the reasons stated with regard to the violation of Section 56.14130(a)(3) previously discussed, I conclude GFD was negligent in allowing the violation to exist.

Section 104(a) Citation No. 3872700, 10/15/91, 30 C.F.R. 56.1410(a)(2)

EVIDENCE

The citation states:

> The parking brakes on the Kobelco 600A front-end loader[,] Serial Number 02119[,] would not hold the load on level ground with [an] empty bucket, in that the loader rolled freely when [the parking] brakes was [sic] applied.

Exh. P-4.

Shubert stated that during the course of his inspection of the previously discussed loader he asked that the parking brakes be engaged, and he observed that the loader, nonetheless, continued to roll. Tr. 23.

THE VIOLATION

Section 56.1410(a)(2) requires that if self-propelled mobile equipment is equipped with parking brakes, the brakes shall be capable of holding the equipment, with its typical loaded on the maximum grade it travels. Shubert's testimony regarding the lack of effect of the loader's parking brakes was not disputed, and I conclude that the violation existed.

GRAVITY AD NEGLIGENCE

The violation was not serious. As with the lack of a working back-up alarm, Shubert found the non-operational parking brakes unlikely to cause injury. Exh. P-4. Further, and for the reasons stated with regard to the violations of Sections 56.14130(a)(3) and 56.14132(a), I conclude that GFD was negligent in allowing the violation to exist.

Section 104(a) Citation No. 38728411, 10/15/91, 30 C.F.R. 56.14132(a)

EVIDENCE

The citation states:

> The front-end loader was not being maintained in functional condition, in that when the horn button was depresses the horn didn't sound an alarm on the Kobelco 600A front-end loader[,] Serial Number 02119. There was no fast traffic in the area.

Exh. P-5.

Shubert testified without contradiction that when he asked the loader operator to blow the horn on the loader, the horn would not sound. Tr. 24.

THE VIOLATION

Section 56.14132(a) requires that horns provided on self-propelled mobile equipment be maintained in functional condition. Shubert's testimony established that the horn would not function. I find that the violation existed as charged.

GRAVITY AND NEGLIGENCE

Shubert stated on the citation form that there was no fast traffic in the area, and he further indicated that it was unlikely an injury would result from the violation. Exh. P-3.
I therefore conclude that the violation was not serious.

Further, and for the reasons stated with regard to the violations of Sections 56.14130(a)(3), 56.14132(a) and 56.1410(a)(2), I conclude that GFD was negligent in allowing the violation to exist.

Section 104(a) Citation No. 3596823, 11/15/91, 30 C.F.R. 56.14107(a)

EVIDENCE

The citation states:

> The main pump drive shaft located on the dredge was not provided with a guard to protect a person from contacting the drive shaft. The operator stands beside the drive shaft to operated the dredge.

Exh. P-6. In addition, Shubert found that the violation was S&S.

Shubert stated that after inspecting the loader he went to the part of the pit where the dredge was located. Shubert went by boat to inspect the dredge. The dredge was not pumping at the time Shubert arrived, but Shubert stated that the dredge operator, Willie Small, told him that it had been pumping earlier that morning and that the dredge was not then operating because the pump had lost its prime. Tr. 24-25. Small was trying to reprime the pump. Tr. 25.

Shubert described the dredge as having a diesel powered main pump, along with a smaller primer pump. According to Shubert, the main pump sucks sand up through a long snout. The snout is lowered into the water and down to the sand floor of the pond by

a winch. The sand is then sucked up to the snout, through the pump and is piped to another area of the pit where it is discharged. Tr. 26.

Shubert stated that the drive shaft on the main pump is 8 feet long and 3 inches in diameter. The shaft rotates very rapidly. The drive shaft turns the main pump. Shubert testified that the dredge operator may sit 10 to 12 inches from the shaft during the course of his duties while operating the dredge. Tr. 27-28. Because, in Shubert's experience, all dredges are subject to oil leaks and water spills on the their decks, Shubert feared the dredge operator could slip or fall in the immediate vicinity of the turning shaft, and the operator's clothing could become caught in the shaft and the operator could be pulled into the shaft. If such were to happen, Shubert feared that a broken limb or even a lost limb could result, as well as possible cuts. Tr. 30.

During cross-examination, Green asked Shubert if he had been told that the dredge was sabotaged shortly before the inspection and Shubert stated that he had not. Tr. 48. Green explained during his testimony that the dredge had been sunk in 35 feet of water, that it had completely turned over and that when Shubert saw the dredge it had recently been refloated but that the pump mechanism was gone and the main pump did not work. According to Green, on October 15, GFD was trying to get the pump fixed. Tr. 68-69.

THE VIOLATION

Section 56.14107(a) requires that moving machine parts that can cause injury shall be guarded to protect persons from contacting such parts. In addition, the regulations enumerates several parts that must be guarded, and shafts are among the parts listed. As Commission's Administrative Law Judge George Koutras has stated, "[t]he language. . . found in [Section] 56.14107(a) specifically and unequivocally requires guarding for any of the enumerated moving parts that can cause injury if contacted. The obvious intent of the standard is to prevent contact with a `moving part'." Highland County Board of Commissioners, 14 FMSHRC 270.291 (February 1991)(ALJ Koutras).

I conclude that the violation existed as charged. While Green maintained that the pump was not working on October 15, he did not go to the pit with Shubert and was not there to hear Shubert's conversation with Small. Nor did Green mention the sabotage to Shubert when Shubert came to his office on the morning of the inspection. Tr.75-76. Shubert was adamant that Small told him the pump had been in operation that morning, and I credit Shubert's testimony. It seems logical that if the dredge had still been out of operation due to the sabotage, Green would have told Shubert. Moreover, Shubert stated that before

reaching the dredge he had seen sand at the end of the dredge pipeline. Shubert believed the sand had been dredged that morning. Tr. 103. Thus, I conclude that the pump had been in operation on October 15.

The main pump drive shaft was a long and rapidly rotating part. Shubert's fear that the dredge operator could become entangled on the shaft should he slip or fall in its vicinity was reasonable, and it is reasonable to credit his belief that an injury could result. Therefore, I conclude that the main pump drive shaft could cause injury if contacted. It was not guarded, and I therefore find that the violation existed as charged.

S&S

The evidence shows a violation of the underlying guarding standard. There was a measure of danger contributed to by the violation. The unguarded drive shaft, in conjunction with the proximity of the dredge operator and the usual presence of oil and water on the deck of the dredge, was reasonably likely to result in an injury. Further, becoming entangled with the shaft could have resulted in a reasonably serious injury. In sum, I agree with Shubert that this was a S&S violation.

GRAVITY AND NEGLIGENCE

As indicated, Shubert stated that slipping or falling into the shaft and becoming entangled in it could lead to broken or lost limbs and to cuts. These are serious injuries. Further, the dredge operator at times had to work in close proximity to the shaft and, as Shubert also observed, oil and water was usually present on the dredge deck to some degree. Tr. 29-30, 50. While the shaft remained unguarded the conditions under which the dredge operator worked increased the likelihood that he would be injured. I therefore conclude that this was an serious violation.

I credit Green's testimony that the dredge recently had been sabotaged. However, I also credit Shubert's testimony that the dredge had been in operation the day of his inspection. Not only was he told this by GFD's employee, he observed sand that he had reason to believe had been dredged before he arrived at the mine. Green suggested that in the sinking of the dredge, the guard had been lost. Whether or not this happened, once the dredge resumed operation a guard was required and in neglecting to provide it, GFD failed to meet the standard of care required of it as an operator. I therefore conclude that GFD was negligent in allowing the violation to exist.

Section 104(a) Citation No. 3596825, 10/15/91, 30 C.F.R. 56.14107(a)

EVIDENCE

The citation states:

> The V-belt drive on the small primer pump located on the dredge was not provided with a guard to protect persons from contacting the V-belt.

Exh. P-7. In addition, the inspector found the violation to be S&S.

Shubert described the V-belt drive as consisting of a belt that sits in a pulley. As such, it is similar to a drive pulley. He also explained that the primer pump is the smaller of the two pumps on the dredge and that it pumps water into the main pump in order to get the main pump started. Tr. 31-32. Because the V-belt drive lacked a guard, Shubert believed that should the dredge operator slip or fall, he or his clothing could become caught in the drive. Tr. 32. The dredge deck was usually wet; and as previously noted, Shubert stated that small amounts of oil or diesel fuel and water were present on the deck. Tr. 33. In Shubert's opinion this made it highly likely that the dredge operator would slip or fall into the belt drive. Tr. 33-34. Shubert described an incident in Mississippi where this had occurred and where a miner had lost a thumb. Tr. 32. He also stated that the dredge operator would walk within one or two inches of the V-belt drive during the normal course of a work day. Tr. 34.

THE VIOLATION

Drive pulleys are among those enumerated moving machine parts that Section 56.14107(a) requires must be guarded if they can cause injury. I accept Shubert's testimony that the V-belt drive lacked a guard. I also accept Shubert's testimony with regard to the possibility of injury should the dredge operator slip or fall into the V-belt drive. Although Green maintained that the dredge was not operable when the violation was cited, I have found to be credible Shubert's testimony that the dredge had been operated on October 15. Thus, I conclude that the violation occurred as charged.

S&S

The evidence shows a violation of the cited guarding regulation. There was a measure of danger contributed to by the violation. The unguarded V-belt drive, together with the possible proximity of the dredge operator to the unguarded part and the consistently slippery condition of the dredge deck, made

it reasonably likely that injury to the dredge operator would occur. Further, becoming entangled with the V-belt drive would be likely to cause a reasonably serious injury. In sum, I agree with Shubert that this was an S&S violation.

GRAVITY AND NEGLIGENCE

The violation was serious in that it subjected the dredge operator to the likelihood of loss or injury of a finger or thumb. Once the dredge resumed operation, a guard was required. In neglecting to provide it, GFD failed to meet the standard of care required by the regulation, and thus was negligent in allowing the violation to exist.

Section 104(a) Citation No. 3872742, 10/15/91, 30 C.F.R. 56.14107(a)

EVIDENCE

The citation states:

> The "V"-belt for the winch that operates the suction pipe was not guarded to protect persons, the dredge operator was working in the area.

Exh. P-8. In addition, the inspector found that the violation was S&S.

As already indicated, the standard requires V-belt drives that can cause injury to persons to be guarded.(Footnote 2) Shubert described the function of the winch as pulling the cable that was attached to the nozzle of the dredge and thus allowing the nozzle to be raised. When the winch was released the nozzle dropped into the water. The V-belt drive only ran when the winch was engaged. While the dredge operator was normally seated while the winch was engaged, he occasionally had to walk by the V-belt drive to inspect the nozzle and in so doing he passed within inches of the V-belt drive. Tr. 36-39, 51. If the dredge operator were to slip or fall into the V-belt drive, a possibility made likely by the usual presence of water, and of lubricants or fuel on the dredge deck, Shubert feared that the operator could loose fingers or even a limb. Tr. 37.

_____

2 Although the citation is written in terms of the belt, Shubert's testimony made clear that his concern was for the unguarded belt drive. Tr. 36-37.

THE VIOLATION

As previously indicated, I accept Shubert's testimony that the dredge had been operating earlier in the day. I also accept his testimony with regard to the lack of a guard and that a person could be injured if entangled in the V-belt drive.(Footnote 3) There was a violation of the cited regulation.

S&S

For the same reasons as those stated with respect to the preceding violation, I agree with Shubert that this was an S&S violation.

GRAVITY AND NEGLIGENCE

For the same reasons as those stated with respect to the preceding violation, I conclude that the violation was serious and that GFD was negligent in allowing the violation to exist.

CIVIL PENALTY CRITERIA

The criteria that I must consider when assessing civil penalties is contained in Section 110(i) of the Mine Act, 30 U.S.C. 820(i). Gravity and negligence have been discussed. With regard to size of the business of the operator, it is clear from Green's testimony that GFD is a small operator. Further, there is no evidence that the size of the penalties assessed will adversely affect GFD's ability to continue in business. The only evidence submitted regarding GFD's previous history of violations are copies of two citations, one issued on July 11, 1989 for a violation of Section 56.14130(a) and one issued on May 31, 1990 for a violation of Section 56.14100. I conclude from this that GFD has a negligible history of previous violations. Finally, GFD abated the violations within the time set by Shubert, and Shubert had nothing but praise for the manner in which GFD complied once it had been cited. I conclude, therefore, that GFD demonstrated good faith in attempting to achieve rapid compliance.

_____

3 Green testified that there was no V-belt drive on the winch, rather that the winch was hydraulically operated. Tr. 65. However, Shubert was certain that when he observed the winch the V-belt drive mechanism was present. He stated that a hydraulic system had been installed for the winch but only after he issued the October 15 citation. Tr. 66-67. Green was not at the pond with the inspector on October 15, nor did he testify that he went to the pond that day. Since I have no reason to doubt Shubert's testimony with regard to what he observed on October 15, I conclude Shubert's description of the winch mechanism was accurate.

CIVIL PENALTIES

Considering all of the statutory civil penalty criteria, I conclude the following penalties are appropriate:

1. Citation No. 3596821 - $40

2. Citation No. 3596822 - $20

3. Citation No. 3873700 - $20

4. Citation No. 3872841 - $20

5. Citation No. 3596823 - $40

6. Citation No. 3596824 - $40

7. Citation No. 3872842 - $40

ORDER

Based on the above it is ordered:

1. The citations at issue are AFFIRMED.

2. GFD shall pay to the Secretary the assessed civil penalties within thirty (30) days of the date of this order and upon receipt of payment this proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge
(703) 756-5232

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, 2015 Second Avenue, No., Suite 201, Birmingham, AL 35203 (Certified Mail)

Mr. Anthony Green, G F D Construction Company, Incorporated, 8777 Ashland Avenue, Pensacola, FL 32534 (Certified Mail)

/epy