

CCASE:  
SOL (MSHA) V. NOLAND INCORPORATED  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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March 16, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 92-45-M
Petitioner	:	A.C. No. 05-04119-05510
	:	
v.	:	Docket No. WEST 92-88-M
	:	A.C. No. 05-04119-05511
NOLAND INCORPORATED,	:	
Respondent	:	Noland Pit

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Kent F. Williamson, Esq., Cortez, Colorado,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, in these civil penalty proceedings, charges Noland, Incorporated, ("Noland") with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act").

A hearing on the merits was held in Durango, Colorado on September 22, 1992.

The parties waived the filing of post-trial briefs and submitted the issues on oral argument.

Stipulation

At the commencement of the hearing the parties filed a written stipulation and they agreed as follows:

1. Respondent is engaged in mining and selling of sand and gravel in the United States and its mining operations affect interstate commerce.
2. Respondent is the owner and operator of the Noland Pit, MSHA I.D. No. 05-04119.

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3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

6. Additionally, Citation Nos. 3630511, 3630517, 3630518, 3630648, 3630650, 3630651, 3630654 and 3630614KF and order numbers 3630615 and 3630617 are admitted into evidence for the truthfulness and relevancy of the facts and designations contained therein. The sole issue remaining with regard to the above listed citations and orders is whether the plant was in operation at or about the time of the inspections. This issue alone will determine whether the alleged violations occurred. (See Judge's order of February 6, 1993).

7. Order numbers 3630620 and 3630646 are admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

8. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

9. The proposed penalty will not affect Respondent's ability to continue business.

10. The operator demonstrated good faith in abating the violations.

11. Respondent is a small mine operator with 4,560 tons of production in 1990.

12. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

In view of paragraph 6 of the stipulation as to the truth and relevancy of the ten citations/orders therein, it is appropriate to set forth the text of the enforcement documents.

Citation Nos. 3630511, 3630517, 3630518,  
3630648, 3630650, 3630651, 3630654, 3630614  
and Order Nos. 3630615 and 3630617

Citation 3630511 alleges Respondent violated 30 C.F.R.  
56.12040.(Footnote 1) The violative condition cited by MSH  
reads as follows:

The metal cabinet/enclosure containing  
motor circuit 480VAC switchgear for the  
"Telsmith Cone Crusher" motor and the  
"Pioneer Screen" drive motor was observed  
having unsafe access. Operating controls,  
such as overload relay reset button and  
circuit breaker ON-OFF levers were not  
installed so that they can be operated  
without danger of contact with energized  
conductors, parts and terminals. Voltage in  
this cabinet was 480VAC. The cabinet door  
was not locked and hot-line tools were not  
available as an alternative measure. If a  
person was to unintentionally contact an  
energized 480VAC component there could easily  
be an electrocution. Normal practice is not  
to enter equipment when energized however it  
has been done on occasions without incident.

Citation No. 3630517 alleges Respondent violated 30 C.F.R.  
56.12001.(Footnote 2) The violative cited condition by MSH  
reads as follows:

The utility/distribution transformer lo-  
cated at the MCC room was not properly pro-  
tected by circuit breakers or fuses of the  
correct type and capacity. The transformer  
is believed to be 15KVA, single phase, 60KZ;  
primary wired for 480VAC and the secondary  
for two voltages, 240/120v. The primary was  
improperly protected by an MCP (Meter Circuit  
Protector) 30 amp circuit breaker set to trip

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1 56.12040 Installation of operating controls

Operating controls shall be installed so that they  
can be operated without danger of contact with  
energized conductors.

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2 56.12001 Circuit overload protection.

Circuits shall be protected against excessive  
overload by fuses or circuit breakers of the correct  
type and capacity.

at 120 amps. The secondary conductors from the transformer were not protected by fuses or a breaker. The individual branch circuits at the 100 ap panel were protected by circuit breakers.

Citation No. 3630518 alleges Respondent violated 30 C.F.R. 56.12018.(Footnote 3) The violative condition cited by MSH reads as follows:

Some principal power switches located at the genset van MCC room were not labeled to properly show what they control and identification could not be readily made by location. These were on 480 and 240/120 VAC circuits.

Citation No. 3630648 alleges Respondent violated 30 C.F.R. 56.14201.(Footnote 4) The violative condition cited by MSH reads as follows:

The entire length of the conveyors were not visible from the the starting switches inside the crusher control van, and an audible waring (sic) system was not provided to warn persons that the conveyors would be starting.

Citations No. 3630650 alleges Respondent violated 30 C.F.R.

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3 56.12018 Identification of power switches.

Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

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4 56.14201 Conveyor start-up warnings.

(a) When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor.

(b) When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

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56.11002.(Footnote 5) The violative condition cited by MSH reads as follows:

Handrails were not provided on the access stairway to the generator/electrical trailer to prevent a person from slipping or falling! The trailer floor was about 43 inches above ground level.

Citation 3630651 alleges Respondent violated 30 C.F.R. 56.18002.(Footnote 6) The violative condition cited by MSH reads as follows:

Records were not being kept by the operator that a competent person designated by the operator was examining each working place at least once each shift for conditions which may adversely affect safety or health. It is intended that such examinations will assist the operator in detecting potentially dangerous conditions which can unnecessarily expose persons to hazards.

Unsafe conditions were found as a result of this inspection resulting in the issuance of citations and orders. It is apparent that effective safety exams are not being conducted as required by the standard.

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5 56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

56.18002 Examination of working places.

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

(c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

These records shall be made available for review by the Secretary or his authorized representative.

Citation No. 3630654 alleges Respondent violated 30 C.F.R. 56.15001.(Footnote 7) The violative cited by MSHA reads as follows:

First aid material at the Noland Pit did not include a stretcher and blanket in the event of an emergency.

Citation No. 3630614 alleges Respondent violated 30 C.F.R. 56.14107.(Footnote 8) The violative condition cited by MSH reads as follows:

The head pulley, tail pulley and belt drive on the 5X16 conveyor under the Red Pioneer screen were not guarded to protect a person from contact with the pinch points. The head pulley was approximately 57 inches above ground level, the tail pulley was approximately 9 inches above ground level and the drive was approximately 60 inches above ground level. The pinch points were easily accessible while the conveyor was in operation. This condition existed for 6 days. This is an unwarrantable failure condition.

Order No. 3630615 alleges Respondent violated 30 C.F.R. 56.14107.(Footnote 9) The violative cited by MSHA reads as follows:

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7        56.15001    First-aid materials.

Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

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8        56.14107    Moving machine parts.

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

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9        Cited in footnote 8.

The head pulley on the output #1 conveyor was not guarded to protect a person from contact with the pinch point. The pinch points were approximately 62 inches above ground level and easily accessible while in operation. The condition existed for at least 6 days. This is an unwarrantable failure condition.

Order No. 3630617 alleges Respondent violated 30 C.F.R. 56.14107.(Footnote 10) The violative condition cited by MSH reads as follows:

The head pulley on the primary reject conveyor under the primary screen was not guarded to protect a person from contact with the pinch points. The pinch points were approximately 53 inches above ground level and easily accessible while the conveyor is in operation. This condition has existed for at least 6 days. This is an unwarrantable failure condition.

#### Discussion and Further Findings

The parties stipulated that the sole issue in connection with the above citations and orders is whether the plant was in operation at or about the time of the inspection. That issue will determine whether the alleged violations occurred. (Stipulation, paragraph 6).

On this credibility issue I credit the testimony of Randy Smith. He was the Noland Crusher operator for eight years before quitting in March 1991. He quit because of an accident involving his uncle, Wayne Noland. When he quit in March 1991, the plant was running while he didn't think it was in "full operation" it was "producing sand."

I credit Mr. Smith since he appears to be a totally disinterested witness. At the time he quit the company, he was running a 950 loader stacking sand. (Tr. 67). In such an occupation he would be in a position to know if the plant was in operation. He also indicated the plant had produced about 500 yards of sand. (Tr. 68).

The testimony of Randy Smith that the plant was in operation is further confirmed by MSHA's inspector Ronald J. Renowden. He indicated that after returning from the house (from reviewing

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10 Cited in footnote 8.



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Part 50 records) the pit and the crusher were operating. (Tr. 87). Also there was material coming off the belts and going into the crusher. The whole plant, including every conveyor, was in operation. (Tr. 88).

Mr. Dennehy also testified that when the inspectors returned to the plant from Mr. Noland's home they noticed they were feeding the feed hopper and the crusher. In addition, material was coming off the belt screens and being stockpiled. (Tr. 21).

Respondent's witnesses, Ricky F. Noland and Wayne Noland, testified as to many reasons why the plant was not operational. The new crusher was being assembled; test runs were still being conducted; a second conveyor and hopper had to be built; a lot of different construction had to be done. Further, the various electrical amperages had to be set; on the day of the inspection there was no power at the wash plant. When the plant started up on March 26, 1991, Mr. Noland was aware everything had not been aligned and adjusted.

Respondent's evidence is not persuasive since Respondent was able to start the plant on the same morning the inspectors arrived. It is true that Mr. Noland thought he was operating the plant at MSHA's request. But the fact is that he was able to "turn on" the plant at about 10 a.m. on the morning of the inspection. This causes me to conclude the plant was "in operation" at or about the time of the inspection.

While Mr. Noland had requested a CAV (Compliance Assistance visit) inspection from MSHA there is no indication he would receive such an inspection. In fact, Mr. Renowden told Mr. Rick Noland that he didn't think MSHA could do a CAV inspection. (Tr. 79, 80).

For the foregoing reasons and on the basis of the sole issue as presented by the parties I find the plant was "in operation" at or about the time of the inspection. Accordingly, the eight citations and two orders received in evidence herein should be affirmed.

#### Civil Penalties

Section 110(i) of the Mine Act mandates consideration of six criteria in assessing civil penalties.

The stipulation here indicates Noland as a small operator producing some 4,560 tons of production in 1990.

The stipulation further indicates the penalty will not affect the operator's ability to continue in business.

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Exhibit G-1 establishes a favorable prior history with only five assessed violations for the two year period ending March 25, 1991.

Noland was negligent since the violative conditions were open and obvious.

I consider the gravity of the violative conditions in Citation Nos. 3630511, 3630517, and 3630518 to be high since these violation involve electrocution hazards.

The gravity involved in Citation Nos. 3630648, 3630650, 3630651 and 3630654 is moderate and do not involve life threatening hazards.

Citation No. 3630614 and Order Nos. 3630615 and 3630617 involve unguarded equipment. Such conditions can cause severe injuries including amputation. The gravity is accordingly high.

The penalties contained in the order of this decision are appropriate.

Order No. 3630620

The facts involved in this order and the subsequent order are more complex than in the previous 10 citations/orders. In view of this factor it is appropriate to enter findings of fact based on the credible evidence.

As a threshold matter, the parties stipulated that the above two orders are admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevency of any asserted therein.

Order No. 3630620 alleges a violation of 30 C.F.R. 56.14107.(Footnote 11) The condition alleged by MSHA to be violative of the regulation reads:

The wash plant feeder which was driven by a chain drive attached to the tail pulley of the wash plant feed conveyor was not guarded to protect a person from contact with the pinch points and chain drive. The pinch points and chain drive were approximately 24 inches above ground level and approximately 9 ft from the hopper's opening. The pinch points & chain drive were easily accessible while in operation. This condition has

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11 Cited in footnote 8.

existed for at least 6 days. This is an unwarrantable failure condition.

In connection with this order it is uncontroverted that Citation No. 3630614 is the underlying D-1 citation. (Tr. 25, Ex. G-3).

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial reliable and probative evidence establishes the following:

#### Findings of Fact

1. The sand plant (also called the wash plant) was not in operation on March 26. It had probably last been in operation in late October when freezing conditions caused the company to pull the pump. (Tr. 129, 130).

2. On the day of the inspection there was no power at the sand plant. The plant is separate from the crusher. (Tr. 25, 117, 129, 130).

3. The guard had been removed to clean up behind and around the conveyors. (Tr. 119-121).

4. The sand plant had not been in operation from January 1991 through March 26, 1991 because of the power disconnect. (Tr. 146).

#### Discussion and Further Findings

It is apparent the sand wash plant was not in operation nor did it have the capability to operate since power was not available.

A plant operator and the plant electrician should know if this portion of the plant could function.

In the previous 10 citations I relied on the testimony of MSHA's witness, Mr. Renowden. However, that testimony is not persuasive here since Mr. Renowden was not testifying as to the conditions at the wash plant.

Mr. Dennehy, who issued this order stated he "never saw the wash plant in operation." (Tr. 55, 56).

In addition, Randy Smith stated: "I don't know about the wash plant." (Tr. 69).

Since the sand plant was not operating nor capable of operating there could be no moving machine parts to cause injury as provided in C.F.R. 56.14107.

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For the above reasons Order No. 3630620 should be vacated.

Order No. 3630646

This Order alleges a violation of 30 C.F.R. 56.14112(b).(Footnote 12) The condition alleged by MSHA to be violative of the regulation reads:

The guard on the left side of the sand stacker tail pulley had been removed, allowing access to the fins on the self cleaning tail pulley. This conveyor was located in the wash plant. The fins were approximately 1 ft above ground level and easily accessible while in operation. This condition has existed for at least 6 days. This is an unwarrantable failure condition.

#### Discussion and Further Findings

The previous findings of fact set forth in connection with Order No. 3630620 are appropriate and are incorporated herein.

The same basic conditions exist since this machinery could not be operated no violation of C.F.R. 56.14112 could occur.

Order No. 3630646 should be vacated.

Based on the foregoing findings of fact and conclusions of law I enter the following:

#### ORDER

1. Citation No. 3630511 is AFFIRMED and a civil penalty of \$50 is ASSESSED.

2. Citation No. 3630517 is AFFIRMED and a civil penalty of \$50 is ASSESSED.

3. Citation No. 3630518 is AFFIRMED and a civil penalty of \$50 is ASSESSED.

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12 56.14112 Construction and maintenance of guards.

(a) Guards shall be constructed and maintained to-

(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.

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4. Citation No. 3630648 is AFFIRMED and a civil penalty of \$30 is ASSESSED.

5. Citation No. 3630650 is AFFIRMED and a civil penalty of \$30 is ASSESSED.

6. Citation No. 3630651 is AFFIRMED and a civil penalty of \$30 is ASSESSED.

7. Citation No. 3630654 is AFFIRMED and a civil penalty of \$30 is ASSESSED.

8. Citation No. 3630614 is AFFIRMED and a civil penalty of \$300 is ASSESSED.

9. Order No. 3630615 is AFFIRMED and a civil penalty of \$300 is ASSESSED.

10. Order No. 3630617 is AFFIRMED and a civil penalty of \$300 is ASSESSED.

11. Order No. 3630620 is VACATED.

12. Order No. 3630646 is VACATED.

John J. Morris  
Administrative Law Judge

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