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SOL (MSHA) V. CALCO
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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 92-139-M
Petitioner	:	A.C. No. 05-02798-05518
	:	
v.	:	
	:	Salida Plant
CALCO INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;

Robert K. Murray, Esq., Golden, Colorado,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA) charges Respondent Calco Incorporated ("Calco") with violating five safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et. seq. (the "Act").

Hearings were held in Denver, Colorado, on December 14, 1992, and January 8, 1993.

The parties waived post-trial briefs and requested an expedited decision.

STIPULATION

At the commencement of the hearing the parties filed a written stipulation stating as follows:

1. Calco is engaging in mining and selling of quicklime and limestone in the United States, and its mining operations affect interstate commerce.

~481

2. Calco is the owner and operator of Salida Plant Mine, MSHA I.D. No. 05-02798.

3. Calco 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 citation was 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 its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. 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.

7. The operator demonstrated good faith in abating the violation.

8. Calco is a Metal/Non-metal mine operator with 38,401 tons of production in 1991.

The five citations involved here allege violations of 30 C.F.R. 56.14107(a) which provides:

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

BACKGROUND

ARTHUR LEE ELLIS has been a metal/non-metal mine inspector for five years. Prior to MSHA his experience was in underground mining.

On August 6, 1991, Mr. Ellis inspected Calco's Salida plant. The plant manager, Lawrence Martinez, accompanied him on the inspection.

Citation No. 3905779

The above-numbered citation reads as follows:

A tail pulley and chain and sprock sprocket guard were not provided on the screen plant conveyor, exposing employees to the possibility of being caught in the pinch points. The tail pulley and chain drive was located under the feed hopper and approximately 6" above ground level.

EVIDENCE

Mr. Ellis issued this citation when he found there was no guard on the tail pulley or chain drive under the feed hopper. Exhibits R-1 and R-2 are photographs of the screen plant conveyor and Exhibit P-2 is a schematic drawn by the inspector. Exhibit P-2 depicts the chain sprocket, tail and head pulleys and identifies pinch points as No. 1, No. 2, and No. 3. The area outlined in red on Exhibit P-2 shows the outside parameters of the side of the screen plant conveyor.

The chain sprocket has grease fittings at the tail pulley and drive and the pulley itself is 12 inches above the ground. The pinch points are located at the bottom and at the chain drive sprocket. The belt, which moves material uphill, is 30 inches wide. The pulley moves at 60 to 70 RPM, and the sprocket moves at approximately 100 RPM.

In the inspector's opinion, it was reasonably likely that an accident could occur. However, he agreed that the distance between the side wall of the conveyor and the pinch points was a narrow 18 inches. The inspector indicated that an employee would maintain the plant conveyor twice a shift by servicing the equipment and removing the spillings.

A likely injury could be permanently disabling, including the loss of a limb.

MSHA records indicate that 75 to 80 percent of fatalities caused by moving machine parts involve conveyor belts. (Ex. P-3, P-9).

The citation was terminated by the installation of a spring guard placed around the pinch points and by further agreement that the company would not use any shovels to remove accumulations under the equipment. The grease zerts themselves were moved outward 18 inches to 2 feet from their present location.

~483

To accomplish this, holes were made in the outside panel of the plant conveyor. It is 10 feet from the outside edge of the conveyor to the pinch points. It is 18 inches from the tail pulley to the chain sprocket.

In the inspector's opinion, miners would be in close proximity to shovel and remove spillage. Accidents have occurred involving the use of tools and workers have been sucked into pinch points and killed or disabled. The equipment the inspector had in mind was shovels, hoes, and hammers. However, he had never seen such an injury occur.

LAWRENCE MARTINEZ testified for Calco. He is the plant manager and is familiar with the citations. Mr. Martinez confirmed that the conveyor belt itself was 18 inches from the side of the conveyor when the conveyor is installed. (The conveyor is not installed in photographs R-1 and R-2.)

No maintenance is performed on the equipment when it is operating as the unit has a lockout to shut down operations and this is the procedure used by Calco. It was Mr. Martinez's opinion that it was not possible for any miner to be caught in the pinch points. They would not crawl back in the narrow space to clean up any accumulations. Mr. Martinez agreed the greasers are maintained once a shift when the equipment is shut down and locked out. He also indicated that employees have never entered without a lockout.

MICHAEL OVERSOLE is the Calco maintenance supervisor. He testified that no one could be caught in the pinch points. There is a very narrow space between the pinch points and the side wall. Anyone would have a difficult time in getting back there.

When accumulations develop, the conveyor is lifted with a loader and since it is on wheels it is pushed out of the way of any accumulations.

Mr. Oversole further identified a hole near the structure measuring 2 feet by 2 feet (marked on Exhibit P-2). It is possible to go through this hole to grease the zerts. This would not be done unless the equipment was locked out. However, it is possible to grease the zerts without turning off the equipment. If a miner was greasing or adjusting the belt, he could be seen from the outside of the conveyor.

VIRGIL FULLER, a Calco employee, is in charge of lubrication and greasing the equipment and he has greased it on numerous occasions. In fact, no one else greases it.

Mr. Fuller described in detail the disconnect and the lockout procedures. During lockout when Mr. Fuller greases the tail

~484

pulley, it is necessary for him to bend over, turn sideways and squeeze back into the area of the bushing. The opening is about 15 inches.

Mr. Fuller does not enter through the holes in the rear of the equipment. He enters from the open conveyor side and then moves into the narrow space. (Tr. 206).

DISCUSSION AND FURTHER FINDINGS

The disposition of this citation turns on the construction to be given to the cited regulation, Section 56.14107(a). Should the regulation require compliance in all places irrespective of whether a miner might contact the moving machine parts. On the other hand, should the scope of the regulation be limited to situations where there is a reasonable likelihood that a miner could contact the moving machine parts.

The regulation stripped of its surplusage merely states that "moving machine parts shall be guarded to protect persons from contacting ... moving parts that can cause injury." In this case it is uncontroverted that Calco always follows a lockout procedure. However, MSHA's regulation does not recognize lockouts as an exception to compliance. In short, compliance with the regulation is required. In sum, the Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners. *Westmoreland Coal Co. v. FMSHRC*, 606 F.2d 417, 419-420 (4th Cir. 1979).

On the basis of the evidence presented here and for the foregoing reasons, I conclude that this citation should be affirmed and a penalty assessed.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly designated as being of an S&S nature "if, based on the particular facts surrounding that 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 Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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 reasonably serious nature.

6 FMSHRC at 3-4, See also *Austin Power Co., v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988) aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The facts here establish a violation of the underlying guarding regulations. A measure of danger to safety was contributed to by the violation. Given the difficulty of entering and working on an 18 inch space coupled with the company's evidence of a lockout procedure, it would appear the facts fail to establish (3) of the Mathies formulation. However, the Commission has recently indicated that "the Mathies test requires an evaluation of the violation at the time of the citation including an examination of the risk of serious injury, given the presence of the violative condition in normal mining operations." *Gatliff Coal Company, Inc.*, 14 FMSHRC 1982 (December 1992).

Here it appears the equipment was unguarded and a worker could be seriously injured (establishing (4) of the Mathies formulation). Normal mining operations would not involve a shut-down and lockout. Further, it is not possible for the operator to prevent a worker from maintaining the equipment in close proximity to the unguarded pinch points.

The operator abated this violative condition by extending the grease zerts 18 inches to 2 feet through the outside panel of the conveyor. Such an abatement should protect the workers on this site. The S&S allegations are affirmed.

CIVIL PENALTIES

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

Calco is a small operator since it produced 38,401 tons of limestone and quicklime in 1991. The penalties contained in the order are appropriate considering the operator size.

Penalties will not cause the operator to discontinue in business. However, the evidence shows the operator's weak financial condition and this factor has been considered. (See sealed Ex. R-7.)

The operator has a favorable history. Exhibit P-1 indicates the operator paid six violations in the two-year period ending August 5, 1991.

~486

Calco was negligent since the violative condition of Citation No. 3905779 was open and obvious.

If a worker became entangled in the pinch points, he would be seriously injured; hence, the gravity must be considered as high.

Calco demonstrated statutory good faith in abating the violative conditions.

Citation No. 3905781

The above-numbered citation reads as follows:

A tail pulley guard was not provided on the limestone feed conveyor belt, exposing employees to the possibility of being caught in the belt pinch points. The tail pulley was located about 2' above ground level. An employee passes through this area several times a shift.

EVIDENCE

Mr. Ellis issued this citation when he found exposed pinch points on the operator's limefeed tail pulley. Specifically, the pinch points were at the bottom of the tail pulley. The described area is shown slightly behind the angle iron to the front of the hopper as shown in Exhibit P-4. There was no guard and an employee that was observed in this area was cleaning up with a broom and shovel. Debris can be seen on the floor of the area in Exhibit P-4.

The pulley moves at 60 to 80 RPM and is in constant motion. The pinch point is 2 inches off the ground and the inspector believed an injury could easily happen as a miner could slip and fall. Further, his clothing could be caught in the pinch point. In addition to cleaning up around the area, it would also be necessary to grease and adjust the belt. In the inspector's opinion, injury could include loss of a limb.

The condition was terminated by the installation of a guard on the equipment.

The distance from the tail pulley to the angle iron is 3 to 4 inches; it is the same distance to the pinch point.

Mr. Martinez testified for Calco that there was no guard on this equipment. However, the pinch point was one foot above the floor and a person would have to be very low to the ground to get his hand into the pinch point. He would, in fact, have to fall at a perfect angle to become entangled.

~487

The angle iron shown in Exhibit P-4 is the same as the angle iron on the side away from the camera. Exhibits R-3 and R-5 show the guards that were installed by the operator.

The only reason anyone would be in this area would be to clean up or service the equipment. Workers shovel the gravel while the belt is moving.

A worker could stick his hand directly into the pinch point. Mr. Martinez would shut off the equipment if the belt had to be worked on.

The metal screens shown in Exhibits R-3 and R-5 were installed after the citation. As a result of the installation, no one person can reach into the pinch points. The machine is greased three times a week. It is necessary to clear the rubble every shift or every other shift.

Mr. Oversole testified the pinch point was under the angle iron a foot or so off of the floor. In his opinion, the frame provides adequate protection from the pinch point, and it was his view that no one could fall into the return belt of the equipment.

Miners would be in the general area of the conveyor when it was running.

VIRGIL FULLER, testifying for Calco, indicated he is familiar with the equipment in Exhibit P-4. The pinch point is at the bottom of the equipment about 7 inches above the floor. However, if a person slipped, he could not get tangled up in the pinch point. The angle iron frame provides adequate protection from the pinch point. However, he would ask that a guard be put there. If anyone came in contact with the pinch point, it would be a deliberate attempt because it would not be an inadvertent act.

On cross-examination Mr. Fuller agreed that it would be possible to reach into the pinch point but that in his opinion the point was inaccessible. It is 6 to 8 inches to contact the pinch point. You could not get your hand in and out quickly. However, a person could purposely put his hand into the pinch point.

DISCUSSION AND FURTHER FINDINGS

The position of the pinch point indicates from the evidence that it would be difficult for a miner's body to become entangled. However, entanglement with clothing could occur. Given the strict compliance imposed by Section 56.14107(a), it is necessary

~488

for the operator to guard against the stated contingency even though the occurrence of that contingency might be unlikely.

For the above reason, Citation 3905781 should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

The formulation in Mathies and Gatliff apply here. The record generally meets the Mathies criteria. Following Gatliff, the evidence indicates a risk of serious injury exists particularly if a miner's clothing becomes entangled in the pinch point. Even though such entanglement is remote, workers in close proximity were exposed.

The S&S allegations should be affirmed.

CIVIL PENALTIES

In connection with Citation 3905781, the operator must be considered as negligent since employees work in the area and the condition was open and obvious.

Further, gravity must be considered as high since if a worker became entangled he could be seriously injured.

The remaining penalty criteria have been previously discussed.

Citation No. 3905782

The above-numbered citation reads as follows:

The tail pulley guard was not adequate, head pulley guard was not provided and back portion of chain drive guard was not provided on the No. 2 limefeed conveyor belt, exposing employees to the possibility of being caught in the pinch points. The tail pulley was located approximately 2' above cement floor and the head pulley and chain drive were in front of and above 18" to 24" from a ladder used by employees to check on small grizzly and clean rocks from grizzly which is between the ladder and head pulley (about 18" to 24" wide). This is done on a regular basis.

EVIDENCE

Mr. Ellis wrote one citation for three different conditions on the same piece of equipment.

Concerning the tail piece, an inadequate guard, as shown in Exhibit P-6, was on the equipment. After abatement, the new guard is shown in Exhibit R-6.

In addition to the above-described condition at the tail pulley, there were also pinch points at the head pulley and in the chain drive to its right. The condition at the head pulley is shown in Exhibit P-5. The pinch points are where the conveyor contacts the head pulley. Since the material is moving uphill into the grizzly, the pinch point would be on the far side of the head pulley and away from a worker.

Additional pinch points are shown in the chain drive which appears to be partially enclosed and to the right of the head pulley.

These pinch points are 7 feet off the ground and only accessible by a ladder. It is necessary for employees to climb the ladder to pick any large rocks off of the grizzly and this clean-up occurs several times a shift.

The head pulley moves at 60 to 80 RPM and the sprocket (to the right in P-5) moves at 120 RPM.

Mr. Ellis expressed the view that if a miner on the ladder lost his balance, his clothes or part of his body could become entangled. He considered it reasonably likely that there could be a permanent disabling injury or loss of limb.

Mr. Ellis agreed that the pinch point at the conveyor and the head pulley were 3-1/2 feet away from a worker on the ladder. In addition, the distance involved would be increased by the 18-inch head pulley. He also indicated the pinch point was 2 feet 9 inches from the face of the ladder. The limestone would be moving uphill toward the ladder. He believed a person's arm can reach 2 to 3 feet depending on the turn of the torso. He believed a person or his clothing could be caught in all three of the pinch points involved here.

Mr. Martinez testified the manner in which he stepped on the second rung to throw rocks out of the grizzly. He had never been concerned that an employee could be hurt by slipping or falling.

Exhibit R-6 shows the tail pulley after a guard was attached. The pinch point itself at the tail pulley is within 5 inches of the floor. Mr. Martinez believed that if a person laid down on the floor he could put his hand in the pinch point.

Mr. Martinez indicated the equipment is maintained three times a week. Further, they have adjusted the belt with the conveyor running.

~490

Mr. Oversole indicated a worker could not contact the pinch point at the bottom of the tail pulley unless he was really trying.

Mr. Oversole has cleaned out the grizzly himself and it is only necessary to go up the ladder high enough to see the rocks. This is usually four rungs down from the top. The first rung is at chest level and there is no need to go any higher.

Mr. Fuller expressed the view that the pinch point on the tail pulley was 7 to 8 inches above ground. He further indicated the guard that was installed at the time of the inspection was adequate.

In connection with the head pulley: a worker normally goes up two rungs on the ladder and is leaning forward. It is unlikely he will fall backwards. To get tangled up in the head pulley, you have to go higher on the ladder and reach around the head pulley to contact the conveyor belt.

Mr. Fuller has climbed the ladder to clean out the grizzly on two or three occasions. He has cleaned out the grizzly when the conveyor was moving. In his opinion, you cannot reach the pinch point from a position of being waist high on the ladder.

Mr. Fuller indicated he is a rank and file person with Calco and he has not been paid for testifying. He has been employed there for eight years, and the company runs a safe operation.

DISCUSSION AND FURTHER FINDINGS

Concerning the tail pulley: the evidence establishes its guard at the time of the inspection was not adequate. Exhibit P-6 shows the opening between the old guard and the conveyor. While it was claimed that the metal piece along the edge of the conveyor also served as a guard, it is apparent that a sufficient opening exists for a person to slip a hand or clothing or even a tool into the pinch point through the unguarded opening. (Compare Ex. P-6 and Ex. R-6, the before and after.)

The operator's witnesses testified as to the difficulty of contacting the pinch point and the necessity of reaching over the head pulley to make that contact. I'm not persuaded by that testimony as it is all premised on how high the employee stands on the ladder. The employee, if he slips, would almost automatically reach forward since he can only fall if he goes backwards. He thereby exposes himself to contacting the pinch point formed by the conveyor and the head pulley.

Citation No. 3905782 should be affirmed and a penalty assessed.

SIGNIFICANT AND SUBSTANTIAL

The formulation in Mathies applies here. The evidence establishes an underlying violation of 30 C.F.R. 56.14107(a). A discrete measure of danger to workers was contributed to by the unguarded equipment. The various conditions in this citation indicate a reasonable likelihood existed that the hazard will result in an injury. It is also reasonable that an injury would be serious and possibly fatal.

The S&S allegations should be affirmed as to Citation No. 3905782.

CIVIL PENALTIES

The operator was negligent as these violative conditions were open and obvious.

The possibility of being caught in pinch points results in the gravity as being considered high.

The additional civil penalty criteria has been previously discussed.

Citation No. 3905783

The above-numbered citation reads as follows:

The head pulley and tail pulley guard were not adequate in that a person could reach behind the guards and touch the pulleys on the No. 1 limefeed conveyor belt, exposing employees to the possibility of being caught in the pinch points. The tail pulley was approximately 2' above a cement floor and the head pulley was approximately 6' high above a cement floor. An employee passes through this area several times a day.

ARTHUR ELLIS issued the above citation on August 6, 1991. He observed a tail pulley with a small guard. The pulley itself was about 10 inches above the cement floor. The head pulley was 6 feet above the floor and fed into another conveyor. A worker could touch the head pulley and it had bars welded onto it.

The chain drive and sprocket were exposed.

Mr. Ellis believed the guard was not adequate as it did not cover the pinch points. There was nothing covering the tail pulley on the back. About 8 to 10 inches were uncovered. If a worker was caught by the moving machine part, he would be injured.

Exhibit P-7 is a photograph of the head pulley and the drive on Conveyor No. 1. The head pulley is in the center of the photograph and the pinch points are at the top.

In the inspector's opinion, the bars on the head pulley create additional pinch points.

The conveyor belt moves material uphill and the pinch points would be on top.

There are pinch points at the sprocket where it meets the chain.

In Mr. Ellis's opinion the pinch points were not adequately guarded at the bottom of the tail pulley and a worker could be caught by the moving shaft.

Mr. Ellis expressed the view that it was reasonably likely that an accident would occur since employees walk by this area and service the equipment. Workers would also clean up if a spill occurred. Both the tail pulley and head pulley are cleaned up on a daily basis. At the tail pulley Mr. Ellis observed gravel that had been spilled.

Mr. Ellis also believed that the loss of a hand, finger, or arm was possible, and he considered it easy for a worker to be injured if he slipped or fell into the pinch points. He had seen workers cleaning with a broom and shovel and the equipment could be pulled into the pulley. In addition, clothes could be caught.

The head pulley is 6 feet above the ground and 2 feet from the walkway. If a worker tripped and fell, he could only fall into the area of the tail pulley. He could not fall into head pulley area.

The inspector believed the company was negligent since the violation could be easily seen and management should have known about it.

The inspector testified that workers have been injured by equipment of this type and he identified Exhibits P-3 and P-9 as MSHA reports generally relating to injuries involving moving machine parts. He has also learned of a number of instances involving tools and, as a result, he marked this violation as possibly causing a permanent disability.

Inspector Ellis agreed that he measured the vertical distance to the center of the head pulley. The distance was 72 inches, plus or minus 2 inches. It was also 1-1/2 to 2 feet from the frame over to the conveyor. It was 7-1/2 feet to the unguarded pinch points from where Mr. Ellis was standing to make his vertical measurement.

~493

Mr. Ellis was familiar with 30 C.F.R. 56.14107(b), which provides as follows:

Guards shall not be required where the exposed moving parts are at least 7 feet away from walking or working surfaces.

It was Mr. Ellis's opinion that the guards were not adequate.

LAWRENCE MARTINEZ, plant manager, testified the bars welded on the head pulley are 1/4 to 3/8 of an inch. The distance from where he was standing below the head pulley was 6 feet vertically and 2 feet laterally, or a total of 8 feet.

The company has a lock-out procedure and does not grease the equipment when it is running. Exhibit R-13 shows the head pulley of the conveyor.

Virgil Fuller is shown in R-13. Mr. Fuller is 6 feet tall and to reach the pinch point he would have to reach an additional foot. In Mr. Martinez's opinion the pinch point in the vicinity of the head pulley is inaccessible. Further, the addition of the 3/4 inch riser did not create any additional pinch point.

Exhibit R-14 shows the feed conveyor tail pulley section. The tail pulley is not greased when the machine is "on the run."

The conveyor belt is adjacent to where people walk several times a day.

Exhibit R-13 shows the head pulley and Exhibit R-14 shows the tail pulley.

MICHAEL OVERSOLE testified the parallel ribs welded on the head pulley were 3/8 of an inch round stock mild steel. There was 2 inches between each rib. There was a 1/4 inch gap. A person could not get a finger into the 3/8 inch gap.

In Mr. Oversole's opinion, the guarding on the equipment was adequate when the citation was issued.

Mr. Oversole agrees that he adjusts the conveyor belts when they're installed, and then once after they stretch for wherever adjustment is needed. They do not grease the head pulley area and they clean around the head pulley and tail pulley once a shift.

Exhibit P-6 appears to show a gap but it could not be more than 2-1/2 inches. It would be possible to get a hand in this area but you still could not reach the pinch point.

VIRGIL FULLER, in addition to his other qualifications, is also an emergency medical technician certified by the State Board of Health. In addition, he is a licensed minister and preaches when requested.

Mr. Fuller identified himself in Exhibit R-13 where he is reaching upward and standing against a conveyor belt. Even in that position, he is 10 to 12 inches from the pinch points.

Mr. Fuller is 6 foot 1 inch; the vertical distance adjacent to the head pulley is 6 feet and the horizontal distance to the head pulley is 1 1/2 to 2 feet.

Measured on a curve with a tape measure, it is 88 inches from the ground level to the pinch point. The measurement would be 7 feet 4 inches. In Mr. Fuller's opinion, it would not be possible to become tangled up in the conveyor, nor could a worker become tangled in the head pulley.

Exhibit R-14 shows the tail pulley and it was received as an accurate photograph of the present guard. The opening in the tail pulley area is 2 1/2 to 3 inches and it is an additional 18 inches to the pinch point. No worker at Calco could reach the pinch points.

On the head pulley the welded ribs were 3/8 inch when new. A worker could only get his fingers between the conveyor and the head pulley if he did so purposely. The tail pulley pinch point is inside the frame and if a worker put his hand into the open area he would have to go an additional 8 to 10 feet to reach the pinch point, and this would not be possible.

Mr. Fuller indicated he services the equipment when it is operating at four grease points on the drive side and he has a grease tube permanently affixed to the machine.

A pinch point could be contacted if a person had a reach of 88 inches. Mr. Fuller could not reach the pinch point nor would his shirt sleeve become entangled.

In Exhibit R-13 he is leaning as far as he could go and could only go an additional 1 inch.

Mr. Martinez could reach the pinch point because he is taller.

The equipment is greased once a week. There's often gravel on the floor near this equipment.

On the head pulley there is a grease zert 8 to 10 inches outside of the guards. In addition, there is a grease tube.

When Mr. Fuller rebuilt the guards they had to be extended.

Exhibit P-6 shows the tail pulley guard.

There's a 2-1/2 inch gap in the bottom of the skirting. The skirting is a 1/4 inch by 4 inch piece of metal and, in addition, a 1/2 inch by 5 inch rubber skirting. The skirting serves to keep the material on the belt.

DISCUSSION AND FURTHER FINDINGS

AMENDMENT

This case originally commenced December 1992. At that time the Secretary sought to amend her citation so as to include therein allegations that the sprocket and chain drive guard were unguarded.

Respondent claimed surprise and its motion for a continuance was granted. The case was re-set to January 8, 1993. No written amendment was filed, but inasmuch as the parties had discussed the nature of the amendment at the December hearing, the operator could not have been surprised by the amendment and the Secretary was permitted to orally amend the citation and add in the citation an allegation that the "sprocket and chain drive guard" were unguarded or not adequately guarded.

This citation involves a question of law.

The question of law is whether moving machine parts should be guarded when those exposed moving parts are "at least 7 feet away from walking or working surfaces" as contained in Section 56.14107(b).

It is clear that the vertical measurement under the head pulley was at least 6 foot and the horizontal distance was 1 1/2 to 2 feet. The Secretary argues that the distance involved should be "as the crow flies." On the other hand, the operator correctly argues that even the crow could fly, he (the crow) could not fly through the lower conveyor belt. In Exhibit R-13 Mr. Fuller is leaning on the lower conveyor belt and reaching forward in the direction of the head pulley pinch points.

In connection with this matter, I find the operator's testimony to be credible concerning the distance involved between the walking or working surface and the exposed moving parts. That distance, as Mr. Fuller testified, was 7 feet 4 inches. By virtue of Section 56.14107(b) no guards are required under these circumstances.

I further credit the operator's testimony as to the tail pulley. The operator, in my view, is in a better position to describe the relative distances from the opening in the tail pulley guard to the pinch point. While I agree there is an opening, there is no credible evidence that any worker could reach to the pinch point even if he placed his hand deliberately in the area.

The sprocket and chain guard drive which the Secretary claims was also unguarded is a greater distance from the floor than the head pulley is from the floor. Accordingly, the sprocket and chain guard drive is greater than 7 feet from the working surface and under 56.14107(b) no guarding is required. (See Exhibits P-7 and R-13.)

For the foregoing reasons Citation No.3905783 should be vacated.

Citation No. 3905784

The above-numbered citation reads as follows:

A tail pulley guard was not provided on the Briq conveyor belt, exposing employees to the possibility of being caught in the belt pinch points. The tail pulley was of the self-cleaning type and located about 1' above basement (sic) floor. Employees must pass by tail pulley to get to electrical switch gear.

ARTHUR ELLIS issued the above citation when he observed a self-cleaning tail pulley without a guard. Workers were exposed to the possibility of being caught by the pinch points and this could cause a serious injury to a worker.

Exhibit P-8 is a drawing purporting to show the tail pulley as well as a door to the motor control center. The drawing is Mr. Ellis's best recollection of the scene.

The pinch point is at the bottom of the tail pulley. In addition to persons being entangled, tools could also be entangled.

It was a foot from the tail pulley to the ground and the inspector estimated that the pulley moves at 60 to 80 RPM. From the pulley to the door is 10 feet.

Workers would go alongside the conveyor to get to the door.

In rebuttal testimony Inspector Ellis stated he was in error on this point. He indicated there was no walkway along the side

~497

of the briquette conveyor. Exhibits R-8 and R-11 each show a side of the conveyor.

Mr. Ellis noted that in the area near the pinch points workers sometimes went to service the equipment.

He believed that the violation was significant and substantial and reasonably likely to cause an injury. The most likely injury would be loss of a limb as a worker could trip and fall into the pinch point or be pulled into the equipment.

He believed it was easy for an accident to occur as employees pass this area several times a day.

The tail pulley was a foot off the floor. He considered the negligence to be moderate as management should have known of the condition.

LAWRENCE MARTINEZ testified that the ceiling deck as shown on Exhibit R-11 is 4 feet above the briquette conveyor. Anyone walking in this area would necessarily stoop over. It would not be possible to walk alongside the conveyor without stooping down.

Exhibit R-9 is taken from the adjacent walkway with the camera pointing upward on the conveyor belt.

The tail pulley has sealed bearings and no maintenance is required except to change the bearings. On Exhibit R-10 the material is transported uphill. The pinch points on the tail pulley are difficult to see due to the installation of guards after the citation was issued.

Exhibit R-11 shows the briquette conveyor with the photograph taken from underneath the platform.

The briquetter system is only operated about 16 hours a month and it depends upon the requests made by the customers for the briquette products. The briquetter is usually operated about every two months.

The function of the briquetter is to take powder or rock and briquette it, much like a charcoal briquette.

Employees walk by this area daily and the panels shown in the background of R-8 hold electrical switches to operate the equipment.

On August 6, 1991, there were no guards on the conveyor.

Mr. Martinez drew a plan view of the briquetter building. He identified the various portions of the building as well as the described platform which was 4 feet above the floor.

He indicated a walkway is located at the end of the conveyor belt, and if you fell, you would not fall into the conveyor belt. A switch gear is right at the end of the walkway.

The electrical controls shown in the back of Exhibit R-8 were for the blower, the bag house, and related equipment.

It is possible to turn off the blower, the bag house, and related electrical equipment while the briquetter is still running. It is possible to turn the machinery on and off if a spillage occurs. There's no necessity to maintain the equipment while the system is running.

MICHAEL OVERSOLE, maintenance superintendent, agrees with Mr. Martinez's drawing in R-12. He indicated the conveyor is protected from an accident due to the platform. A worker could not become entangled even if he slipped and fell.

If the briquetter is running, the lime will burn your eyes but visibility is no problem when you enter the area.

It is necessary to walk by the end of the tail pulley to reach the electrical controls.

VIRGIL FULLER handles the lubrication of equipment in the plant. The briquetter has sealed bearings so there is no occasion to be in the vicinity of the conveyor belt. In addition, a worker could not get tangled up in the pinch points on the belt and any entanglement would have to be deliberate. The briquetter system operates about 16 hours a month.

When Mr. Fuller goes onto the walkway he checks the rollers under the conveyor and checks the alignment of the conveyor belt. (See Drawing R-12 identifying the walkway area and the area where the conveyor is located.)

DISCUSSION AND FURTHER FINDINGS

Exhibits R-8, R-9, R-10, and R-11 are photographs of the tail pulley involved here. In the background of R-8 are the electrical panels that control the briquetter. To reach these panels a workman would have to pass by the tail pulley. Exhibits R-8 and R-11 show spillage from the briquetter. Removal of that spillage would require a worker to be in close proximity to the unguarded pitch points which were described in detail by the inspector.

The operator contends there's no necessity for any workers to be in close proximity to the unguarded tail pulley. However, Exhibit R-9 clearly shows an electrical panel directly above the conveyor. The electrical panels, according to the evidence,

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control the operation of the bag house, et cetera. These electrical panels above the tail pulley, however, do not control the running of the actual briquetter itself.

I do find from Exhibit R-9 that the electrical panels are in quite close proximity to the tail pulley. For this reason, this citation should be affirmed since entanglement is a definite possibility.

Citation No. 3905784 should be affirmed and a penalty assigned.

SIGNIFICANT AND SUBSTANTIAL

The formulation in Mathies applies. The evidence establishes an underlying violation of 30 CFR 56.14107(a). A discrete measure of danger to workers was contributed to by the unguarded tail pulley. It appears there is a reasonable likelihood that the hazard will result in an injury. A worker using the electrical panel could become entangled. If such an event occurred, injury could possibly be fatal.

The S&S allegations are affirmed.

CIVIL PENALTIES

The operator was negligent as this condition was open and obvious.

The gravity must be considered as high in view of the possibility of entanglement.

Other statutory criteria has been previously discussed.

ESTOPPEL

ROBERT MURRAY, president and counsel for Calco, asserts other MSHA inspectors have not cited the company for the conditions observed by Mr. Ellis.

As a general rule, equitable estoppel cannot be asserted against the Secretary. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421-22 (June 1981). Further, prior non-enforcement does not bar the Secretary from citing violative conditions. Conesville Coal Preparation Company, 12 FMSHRC 639, 672 (April 1990.)

For the foregoing reasons, I enter the following:

ORDER

1. Citation No. 3905779 is AFFIRMED and a penalty of \$50 is ASSESSED.

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2. Citation No. 3905781 is AFFIRMED and a penalty of \$50 is ASSESSED.

3. Citation no. 3905782 is AFFIRMED and a penalty of \$75 is ASSESSED.

4. Citation No. 3905783 is VACATED.

5. Citation No. 3905784 is AFFIRMED and a penalty of \$50 is ASSESSED.

John J. Morris
Administrative Law Judge

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