CCASE:
SOL (MSHA) V. CARL SCHLEGEL, INC.,
DDATE:
19930810
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 92-345-M
	:	A.C. No. 20-02621-05505
v.	:	
	:	Docket No. LAKE 92-357-M
CARL SCHLEGEL, INC., Respondent	:	A.C. No. 20-02621-05507
	:	Docket No. LAKE 92-389-M
	:	A.C. No. 20-02621-05506
	:	
	:	Allis Chalmers Plant No. 1
	:	
	:	Docket No. LAKE 93-77-M
	:	A.C. No. 20-02833-05504
	:	
	:	Docket No. LAKE 93-78-M
	:	A.C. No. 20-02833-05505
	:	
	:	Howe Road Plant

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
James L. Winckler, Esq., Moran, Bladen and Winckler, P.C., Lansing, Michigan, for Respondent.

Before: Judge Amchan

These cases are before me upon petitions for civil penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et. seq., for eight alleged violations of mine safety standards. This matter was heard in Lansing, Michigan on June 8, 1993.

After considering the record before me, I have assessed civil penalties of $1,297(Footnote 1). Two of the citations allege violations due to Respondent's unwarrantable failure to comply with a mandatory safety standard pursuant to section 104(d)(1) of

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1A total of $1,648 in penalties was proposed by the Secretary of Labor.

the Act. I have affirmed this allegation with respect to one of the violations but not the other. Several violations were alleged to be "significant and substantial" and, while I have affirmed that characterization with respect to some violations, I have vacated it with regard to others.

The penalties at issue are the result of citations issued by MSHA Inspector Gerald Holeman during two inspections of sites at which Respondent was working. The first inspection was conducted in Shiawassee County, Michigan, where Respondent had set up a portable crushing plant to produce gravel (Jt. Exhibit 1).(Footnote 2) Four of the citations allege violations of 30 C.F.R. 56.14107(a), which 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."

Citation No. 3887301 was issued for the absence of a guard on the back, top and right side of the self-cleaning tail pulley to the crusher feed conveyor, and the absence of a guard on the drive belts and headpulley of the same conveyor (Tr. 17-30). A $50 penalty was proposed for this violation. Respondent does not contest the fact that these areas had no guard until after the citation was issued. However, it contends that there was no hazard to employees because the sides of the pulleys were protected by solid steel components of the machinery and the ends were protected by cross-bracing (Tr. 129-133). Similarly the company contends that two I-beams blocked access to the top of the pulleys (Tr. 132).

Respondent disagrees with Inspector Holeman's opinion that employees might contact the unguarded pulleys when shoveling debris that might fall underneath the pulleys or when lubricating the pulleys. Respondent's superintendent, John Warvel, convincingly testified that Carl Schlegel, Inc., by digging a hole next to its crusher for spillage, had eliminated any need for employees to get near the pulleys to shovel debris (Tr. 130-131). However, I am not persuaded that potential exposure while lubricating the machinery had been eliminated sufficiently to obviate the need for a guard.

Although Warvel testified that all lubrication is done by the company while its machinery is shutdown (Tr. 130-131), he did not convince me that this must always be the case. Given the unpredictability of human behavior, it is quite possible that an employee might attempt to save time and lubricate the machinery while it was operating, rather than shutting the equipment down;

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2This portable crushing plant was manufactured by Allis Chalmers Company, hence the references to "the Allis Chalmers plant" throughout the record.

therefore, I credit Inspector Holeman's testimony and find sufficient exposure to the pulleys to affirm the citation. See Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094 (September 1984).

Citation No. 3887302 was issued for the absence of a guard for the self-cleaning tail pulley on the crusher plant belt and the head pulley of the same conveyor (Tr. 30-36).(Footnote 3) This violation was cited as a "significant and substantial" violation because Inspector Holeman believed that an injury was reasonably likely in that the unguarded hazardous areas on this conveyor were more accessible to employees than in other locations(Tr. 40-41). The unguarded self-cleaning tail pulley jutted out 1 foot beyond the equipment above it (Tr. 39, 135-136).

Respondent's Superintendent Warvel conceded that the tail pulley is this location needed a guard. In fact, he testified that the pulley had been guarded when used in another location a few days prior to the inspection. He had instructed his foreman, Roger Howard, to install a better guard (Tr. 135-136, 153-154).

The company contends that this citation and the other guarding violations should be vacated because inspector Holeman did not observe the machinery operate without proper guarding (Tr. 13, 104-105). The plant was shutdown the day of the inspection due to complaints from neighboring residents regarding dust. However, Holeman testified that respondent's foreman, Roger Howard, had told him that the equipment had been operated the day before the inspection (Tr. 15, 123). I find that Holeman was justified in inferring that the equipment had been run without proper guarding and I draw the same inference.

Superintendent Warvel testified that he assumed the guard had been on the equipment at this location the day before when the company had performed "test runs" of its machinery (Tr. 153-154)(Footnote 4). However, Mr. Warvel was not present at this worksite on the day in question (Tr. 155), and, thus, has no first-hand knowledge on this issue. I, therefore, credit Mr. Holeman's testimony, which is based upon a reasonable inference drawn from an admission from Respondent's foreman.

This citation was issued as a "significant and substantial" violation. Pursuant to Commission precedent, the Secretary, in

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3Each citation for lack of guarding pertains to a different conveyor. Failure to guard different locations on the same conveyor were grouped into one citation.

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4Mr. Warvel's testimony on this issue is somewhat contradictory. He also stated that he did not know if the equipment had been operated without a guard (Tr. 136).

order to establish a "significant and substantial" violation, must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard 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 Mathies Coal Company, 6 FMSHRC 1 (January 1984).

The only one of the above criteria at issue here is the likelihood of injury. There is no question that if an employee contacts an unguarded belt or pulley it is reasonably likely that he or she will sustain serious injury. Inspector Holeman differentiated this citation from the other guarding citations on the basis that the unguarded tail pulley was a foot outside of the superstructure of the equipment and, therefore, presented an opportunity for accidental contact without any unusual behavior on the part of an employee (Tr. 40-41). I find that this distinction is sufficient to warrant the conclusion that injury was reasonably likely and I find this citation to be a "significant and substantial" violation.(Footnote 5)

Citation No. 3887303 alleges that the left side of the self-cleaning pulley to the crusher transfer conveyor was unguarded (Tr. 42-47). Respondent's superintendent, John Warvel, conceded that the area required a guard (Tr. 136-137). Inspector Holeman testified that injury was unlikely in that it would require an affirmative act to contact the unguarded pulley (Tr. 46). I affirm this citation.

Citation No. 3887304 alleges that the top of the self-cleaning tail pulley to the dust conveyor was unguarded (Tr. 49-53). An employee would have to get behind the bracing supporting the feed hopper to contact this pulley (Tr. 50). Inspector Holeman testified that there is a possibility that this

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5I declined to allow Respondent to introduce evidence that other firms in its industry had received citations for similar or identical violations, but that none of these citations had been characterized as "significant and substantial" (Tr. 71 - 76). I find such evidence irrelevant to the issues before me. Just as the Secretary is not estopped from issuing a citation because he has failed to cite an identical condition previously, he is not estopped from characterizing a violation as "significant and substantial" because he has not done so in the past. See Lancashire Coal Co., 12 FMSHRC 272 (ALJ Koutras, February 1990), and the cases cited therein.

Moreover, to allow such testimony would oblige me to determine whether the prior violations were distinguishable from the instant case. The appropriate manner to decide the "significant and substantial" issue in this case is to consider the facts of this case, rather than the facts of other cases.

could occur (Tr. 51-52). Although injury in this instance is clearly unlikely, it is sufficiently possible to warrant affirmation of the citation--given the possibility that an employee might try to lubricate the equipment or check the bearings while the equipment was operating.

The Front-End Loader

During his inspection of May 21, 1992, Inspector Holeman observed Foreman Roger Howard and another employee standing in front of an unoccupied front end loader (Tr. 53-59). The bucket of the loader was raised approximately one and a half feet above the ground and the two men were using it as a bench on which to work on a piece of metal (Tr. 54). Holeman issued Citation No. 3887305 on the basis of these observations alleging a violation of 30 C.F.R. 56.14206(b). The standard requires that: "When mobile equipment is unattended or not in use, dippers, buckets and scraper blades shall be lowered to the ground . . . ."

This citation included a notation that the violation met the criteria set forth in section 104(d)(1) of the Act, implying that the violation was significant and substantial and was due to the operator's unwarrantable failure to comply with the standard (Exhibit P-5, block 12). Inspector Holeman opined that the bucket could suddenly drop and seriously injure an employee's foot (Tr. 55, 111-113). On balance, I find that an injury was not reasonably likely in that I am not persuaded that a sudden drop of the bucket was likely. Moreover, the only evidence supporting the finding of an unwarrantable failure to comply, or a high degree of negligence, as testified to by the inspector (Tr. 59-61), is Foreman Howard's statement to the inspector that he knew he shouldn't have been using the bucket in this manner.

The fact that Foreman Howard recognized a hazard after having it called to his attention does not establish an unwarrantable failure to comply with the regulation or a high degree of negligence. There is no evidence that he knew prior to his conversation with the inspector that this condition either violated the law or presented a danger. The record, at best, supports a finding of ordinary negligence which is insufficient for a finding of "unwarrantable failure". Emery Mining Corp., 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987). This citation is affirmed as a "non significant and substantial" violation of section 104(a).

Inspector Holeman also determined that the parking brake of the front-end loader being used by the employees in reference to Citation No. 3887305 was not fully effective (Tr. 62-65). On May 4, 1992, Foreman Howard had reported to higher management that the parking brake was not working properly (Exh. P-7). It had not been repaired between May 4 and the May 21 inspection

(Tr. 69, 142-143). When Mr. Holeman observed the loader it was parked on relatively level ground, straddling a hump (Tr. 76). The inspector asked that the parking brake be tested on a slope that he described as a 3 percent grade (Tr. 63-64). The brake failed to hold the vehicle, which rolled down the ramp (Tr. 64). Mr. Holeman issued Order No. 3887306 alleging a violation of 30 C.F.R. 56.14101(a)(2), which provides: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

Mr. Holeman further found that the violation was due to the Respondent's unwarrantable failure to comply with the standard and that it was "significant and substantial"(Footnote 6). The unwarrantable failure finding was based on the fact that the defective condition of the parking brake had been reported to Respondent and that employees had been allowed to use the loader even though the defect had not been corrected.

Respondent's superintendent, Warvel, conceded that the parking brake had lost some, but not all of its effectiveness, due to grease on its linings (Tr. 141). He testified that he determined that the grade on which Inspector Holeman had the brake tested was 45 degrees, rather than 3 degrees (Tr. 141). He also testified that the front-end loader used the inclined roadway on which the brake was tested once or twice daily and that it was capable of holding in the areas in which Carl Schlegel employees were working (Tr. 140-143).

I find that the violation was both significant and substantial and due to Respondent's unwarrantable failure to comply with the standard. It is not necessary to resolve the conflict in testimony with regard to the slope of the ramp on which the brake was tested.(Footnote 7) What is important is that Respondent was on notice that the parking brake was defective and continued to use it without objectively determining how much of the brake's effectiveness was lost. I find that once Respondent knew the brake was defective its conduct was "aggravated" in that it was taking a grave risk with the lives of its employees in

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6Inspector Holeman's testimony is not couched in terms of "unwarrantable failure"; however, Inspector Holeman clearly concluded that this violation met the criteria of "unwarrantable failure" (Tr. 69, Exhibit P-6, page 2).

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7Nevertheless, I credit Inspector Holeman's testimony over that of Mr. Warvel. Mr. Warvel did not observe the test of the parking brake and Respondent has not clearly established that the ramp about which Mr. Warvel testified was the ramp on which the parking brake was tested. Testimony from Mr. Howard, who was present, would have been much more persuasive.

continuing to use the front-end loader without an objective determination of the extent of the defect. I, therefore, conclude that the violation herein was due to Respondent's unwarrantable failure to comply with the standard Peabody Coal Company, 14 FMSHRC 1258 (August 1992). Allowing Respondent to rely on a seat-of-the-pants determination that the defect would not endanger its workers is completely contrary to spirit of the Act. I find the higher penalties called for, when a violation meets the criteria of section 104(d)(1), are justified in this instance.

With regard to whether the violation was "significant and substantial", an accident resulting from the failure of the parking brake would clearly be likely to result in death or serious injury. Moreover, as the equipment was clearly defective and operated on steep inclines at least daily, I find the chance of an accident occurring was also reasonably likely.

The Howe Road Inspection

On August 21, 1992, Mr. Holeman inspected another site at which Respondent was engaged in a dredging operation. This worksite was located on Howe Road in Clinton County, Michigan. As during his previous inspection, the site was not actually producing on the day of his arrival due to a malfunction of the dredge (Tr. 119, 123).

Inspector Holeman observed a stacking conveyor with an elevated walkway next to, and parallel to it. Although the conveyor had a handrail along its sides, the end of the conveyor was open and Mr. Holeman concluded that the absence of a handrail exposed employees to a hazard of falling ten feet to a stockpile of sand (Tr. 81-90, 118).

Mr. Warvel testified that while he agreed that the end of the walkway should have been guarded, it was rarely used and that the potential fall distance was only seven feet (Tr. 143-144). I credit the testimony of Mr. Warvel in this regard, noting that Mr. Holeman did not measure the distance (Tr. 89).

I find that an accident was very unlikely in this instance due to the fact that the walkway was used infrequently and because the sides of the walkway were guarded. Moreover, given the fact that a fall would be onto a pile of sand, I find it unlikely that serious injury would result from this violation. I affirm the citation as a non "significant and substantial" violation.

During his inspection of the Howe Road plant, Inspector Holeman observed a 13-foot wide bridge constructed of culvert pipe and earthen material which did not have a berm on either side. The bridge was used by Respondent's equipment, including a

9-foot wide Caterpillar scraper, to cross a stream 10 feet below it (Tr. 95-101). The inspector issued Citation No. 4095665 which alleged a violation of 30 C.F.R. 56.9300(a). That standard requires that: "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

Respondent is apparently most concerned with the "significant and substantial" characterization of the violation (Tr. 145). I find that all four elements of a "significant and substantial" violation have been established by the Secretary. Given the width of the bridge and the width of Respondent's equipment, I find that an accident was reasonably likely and that an injury, if one occurred, would likely be fatal or very serious.

ORDER

Conclusions and Penalty Assessment

Section 110(i) of the Act requires the Commission to consider six factors in assessing civil penalties: the operator's history of previous violations, the appropriateness of such penalty to the size of Respondent's business, the negligence of the mine operator, the effect of the penalties on the operator's ability to remain in business, the gravity of the violations and the good faith of respondent in attempting to achieve rapid compliance with the Act.

The penalties for the violations alleged in this matter are relatively low to start with--all under $1,000; four of the eight under $100. Respondent has conceded that payment of the penalties would not put it out of business and objects primarily to the "significant and substantial" characterization of the violations (Tr. 168-169).(Footnote 8) The size of Respondent's business, its history of previous violations, and its good faith in rapidly correcting the violations indicate that relatively low penalties, such as those proposed by the Secretary, are warranted in those instances in which the Secretary has established all the facts it

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8While Respondent lost over $300,000 in 1988 and 1989, it is not the only business venture of David R. Schlegel, the President and sole officer. Despite losses in some years, the undersigned is left with the impression that the operation of Respondent company is economically advantageous for Mr. Schlegel and that the economic benefit derived from its operations would not be significantly compromised by payment of the penalties assessed in this matter. Mr. Schlegel draws a weekly salary of $1200 from Respondent. In 1990 Respondent showed a profit of $146,594 (Tr. 166-177).

alleges. The gravity and negligence issues must be addressed on a violation by violation basis.

Citation No. 3887301 - A $25 penalty is assessed in light of the low gravity. A $50 penalty was proposed.

Citation No. 3887302 - The $147 penalty proposed by the Secretary is assessed in light of the likelihood of injury and obviousness of the hazard. This citation is affirmed as a "significant and substantial" violation.

Citation No. 3887303 - A $25 penalty is assessed in light of the low gravity. A $50 penalty was proposed.

Citation No. 3887304 - A $25 penalty is assessed in light of the low gravity.

Citation No. 3887305 - A $50 penalty is assessed. A $300 penalty was proposed. This citation is affirmed as a violation of section 104(a) of the Act. The characterizations of "unwarrantable failure" and "significant and substantial" are vacated.

Citation No. 3887306 - An $800 penalty is assessed, as proposed. This citation is affirmed as "significant and substantial" and as due to the unwarrantable failure to comply with a mandatory safety standard, pursuant to section 104(d)(1) of the Act.(Footnote 9)

Citation No. 4095664 - A $25 penalty is assessed due to the unlikelihood of an accident or serious injury. This is affirmed as a non "significant and substantial" violation.

Citation No. 4095665 - A $200 penalty is assessed. Although a $157 penalty was proposed, the likelihood of an accident and likely consequences of an accident warrant a higher penalty. This is affirmed as a "significant and substantial" violation.

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9This Citation was issued as a section 104(d)(1) order, predicated on the findings of "significant and substantial" and unwarrantable failure made with regard to Citation No. 3887305 (Exhibit P-6, pages 1 and 3, block 14). Since I have vacated those characterizations with regard to Citation Nos. 3887305, 3887306 is a citation rather than an order issued pursuant to section 104(d)(1) of the Act.

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Respondent is hereby directed to pay civil penalties in the amount of $1,297 within 30 days of the date of this decision.

Arthur J. Amchan
Administrative Law Judge

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