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SOL (MSHA) BUFFALO CRUSHED STONE
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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. YORK 92-117-M
	:	A.C. No. 30-00012-05516
v.	:	Docket No. YORK 92-128-M
	:	A.C. No. 30-00012-05517
BUFFALO CRUSHED STONE, INC., Respondent	:	Wehrle Quarry

DECISION

Appearances: James A. Magenheimer, Esq., U.S. Department of Labor, New York, New York, for Petitioner; Mr. Salvatore Castro, Safety Director, Mr. Gary Blum, Executive Vice-President, Mr. Jamie Hypnarowski, Senior Vice-President, Buffalo Crushed Stone, Inc., Buffalo, New York for Respondent.

Before: Judge Weisberger

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations of various mandatory safety standards. Subsequent to notice, the cases were scheduled and heard in Buffalo, New York, on May 5, 1993. Joseph Michael Denk, and Richard Leon Duncan, testified for Petitioner. Thomas Rashford, and Russel Price testified for Respondent. Post-hearing briefs were filed by Petitioner and Respondent, on May 24, and May 25, 1993, respectively.

Findings of Fact and Discussion

I. Citation No. 3869974

At the hearing, Petitioner made a motion to approve a settlement that the parties had agreed to regarding Citation No. 3869974, which alleges a violation of 30 C.F.R. 56.1001. A penalty of $50 was proposed initially by Petitioner. According to the parties' agreement, Respondent has agreed to pay the proposed penalty in full. Based upon the representations

presented at the hearing, including the statements made by the inspector who issued the citation, I find that the settlement is appropriate, considering the terms of the Federal Mine Safety and Health Act of 1977 ("the Act"). Accordingly, the motion is granted, and Respondent is ORDERED to pay $50 for this violation.

II. Citations Nos. 3869950, 3869955, 3869956, 3869957, 3869958, and 3869959

A. Citation No. 3869950

1. Findings of Fact

(a) Respondent operates a stone quarry, known as the Wherle Quarry, which is an open pit.

(b) On May 5, 1992, Respondent was mining the second cut of the north face.

(c) Euclid R-50 haul trucks traversed a haul road from the plant to the north face where a Komatsu WA-800 front-end loader ("WA-800 loader") loaded crushed and broken limestone onto the trucks. The trucks then traveled the haul road back to the plant. This process was repeated continuously throughout the day. In addition, the WA-800 loader also traveled the haul road from the plant to the face at the beginning of the shift. At the end of the shift it traveled from the face back to the plant.

(d) A 300 foot single-lane section of the haul road was approximately 20 feet wide.

(e) The bucket of the WA-800 loader is approximately 16 to 18 feet wide.

(f) The Euclid R-50 haul trucks are approximately 15 feet wide.

(g) A vertical highwall, approximately 30 feet high, was on the right side of the haul road going from the face to the plant. On the left side there was a drop off of approximately 30 feet.

(h) On May 5, 1992, a berm on the left side of the road extended approximately 2 feet from the edge of the road. The berm consisted of large quarry stone approximately 1 foot in diameter, and loose material.

2. Further Findings of Fact and Discussion

(a) Violation of 30 C.F.R. 56.9300(b)

At approximately 9:00 a.m., May 5, 1992, the subject site was inspected by MSHA inspector Joseph Michael Denk, in the company of his supervisor, Richard Leon Duncan, along with Russel Price, the miners' representative, and Thomas Rashford, the superintendent at the site.

According to Denk, the height of the berm on the haul road varied between 1 foot and 2 feet. Duncan indicated that in

limited areas the berm could have been more than 2 feet high, but that in most areas it was less than 2 feet. According to both Duncan and Denk, the berms were not as high as the mid-axle of the Euclid R-50 haul trucks,(Footnote 1) and were much lower than the mid- axle point of the WA-800 loader which was approximately 50 inches. Neither Denk nor Duncan measured either the height of the berm, the mid-axle point of the Euclid trucks, or the WA-800 loader.

Denk issued a citation alleging a violation of 30 C.F.R. 56.9300(b) which provides as follows: "Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." Rashford and Price, in essence, opined that the berm was adequate. Rashford indicated that the berm was up to the mid-axle height of the haul trucks "through the majority of the area". (Tr.100) However, he conceded that "the berms" may not be as high as "mid-axle height" in "spots", due to water run off. (Tr.96)

Based on all the above, I find that in the 300 foot section of the haul road that was limited to one lane of traffic, the berm did not reach the mid-point of the axle of the WA-800 loader which travels the road twice a day.(Footnote 2) I thus find that the evidence establishes that Respondent herein did violate Section 56.9300(b) as alleged.

(b) .Significant and Substantial

In essence, according to Duncan, who was with Denk on May 5, 1992, he had investigated two fatal accidents and numerous other accidents, resulting in injuries, wherein trucks had fallen down the edge of a road. He indicated that the narrow width of the one-lane portion of road in question, increases the hazard that a truck would not have been impeded by the berm that was in place. According to Duncan, driver inattention, or mechanical malfunction, could cause a truck to swerve off the road. On the other hand, Rashford testified that in the past 14 years that he has been employed at the quarry in question, no trucks have accidentally gone off the haul road.

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1Subsequent to the issuance of the citation in issue, measurements taken indicated a mid-axle height of approximately 31 inches.

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2Denk testified that he was told that the WA-800 loader travels the haul road at the beginning of the shift, and at the end of the shift. Neither Rashford nor Price nor any other witness contradicted or impeached this testimony, therefore I accept it.

I conclude, based on the above, that the hazard of a vehicle going off the haul road was contributed to by the violation herein, i.e., a berm that was not as high as the mid-axle height of the WA-800 loader. Also, considering the width of the vehicles in question, and the narrowness of the single-lane section of the haul road, I conclude that an injury producing event, i.e. a vehicle going off the haul road as consequence of the low berm, was reasonably likely to have occurred. I thus find that the violation herein was significant and substantial, (See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984); U.S. Steel Mining Co., 6 FMSHRC 1834, 3826 (1984)).

(c) Penalty

Rashford testified, in essence, that in the last 14 years there have not been any accidents involving trucks that fell off the haul road. The MSHA Mars Field Office was first given responsibility over the subject quarry on October 1, 1991. The first inspection by an inspector from this field office, was that performed by Denk on May 1992. According to Rashford, when the quarry was subject to the responsibility of the previous MSHA field office, he had always had been informed that the berm on the haul road had to be "adequate". He said that no one had told him that it had to be a specific height. Rashford indicated that it is Respondent's policy that employees are instructed to maintain the berm daily. Rashford's testimony in these regards was not contradicted. I thus find that Respondent's level of negligence herein was only "moderate". Taking this into account, as well as the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty of $100 is appropriate for the violation of Section 56.9300(l), supra.

B. Citation Nos. 3869955, 3869956, 3869957, 3869958, and 3869959

1. Violation of 30 C.F.R. 56.9301

In May 1992, five stockpiles of stone were located in the north quarry portion of Respondent's mine. These stockpiles were conical in shape, approximately 25 feet high, and accessed by way of a ramp. The top surfaces of the stockpiles were approximately 50 feet wide, and 50 to 60 feet long, and were flat on top. A vertical highwall abutted each stockpile on one side. A berm was located around the outer perimeter of each of the stockpiles. The berm consisted of stone from the stockpiles.

A WA-500 loader was used daily to maintain the berms. The mid-axle height of the WA-500 loader is approximately 36 inches. Denk estimated the height of the berm in question, in the highest areas, as approximately 1 foot. He did not measure the height of the berms.

On May 5, Denk observed a Mack 30 haulage truck dumping material over the edge of the stockpile. He did not measure the mid-axle point of this truck. Duncan observed the berms from a truck. At some point he was about 5 to 10 feet from the berms. According to Duncan, the stockpile berms were only about 12 inches high.

According to Rashford, the berms were 2 to 3 feet high along the "majority" of the perimeter of the stockpiles (Tr.110) (sic). Both Rashford and Price termed the berms "adequate", and Price said that he thought the berms were high enough for haul trucks.

Denk issued five citations alleging violations at each stockpile of 30 C.F.R. 56.9301 which, as pertinent, provides that berms, "...shall be provided at dumping locations where there is a hazard of overtravel or overturning."

Both Duncan and Denk testified regarding the hazards of a vehicle going over the edge of a stockpile, and causing serious injuries to the driver of the vehicle. In this connection, Duncan indicated, in essence, that in backing up, it is very easy to misjudge the location of the edge of the top of the stockpile.

Taking into account the height of the stockpiles, and the fact that vehicles were observed dumping at the edge of a stockpile, I find that there was a hazard of overtravel or overturning. Section 56.9301, supra, provides, that in this situation a "berm" shall be provided. In order to evaluate whether the berms that were in place complied with Section 56.9301, reference is made to 30 C.F.R. 56.9000 which defines a "berm" as "A pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway." Section 56.9300(b) supra, provides that a berm shall be at least mid-axle height of the largest equipment that usually travels the roadway. According to the testimony of Denk, the berms in issue were not more than 12 inches high along the perimeter of the stockpiles. Duncan corroborated this estimate. In essence, Duncan opined that a berm less than the height of the mid-axle point of a vehicle used at the dump, would be insufficient to impede the progress of the vehicle.

Price opined that the berms were adequate, but did not specifically contradict Denk's estimate of the berms' height. Rashford's estimate that the berms were 2 to 3 feet high along the "majority" of the perimeter of the stockpiles, does not specifically contradict Denk's testimony, that in some area the berms were only 1 foot high. Further, even if the berms were between 24 and 36 inches high, they still were still less than the mid-axle point of the WA-500 loader, which is 36 inches. Accordingly, I conclude that the berms were inadequate as they were less than the mid-axle point of the vehicles that travel on

the stockpiles. Hence, I find that Respondent did violate Section 56.9301.(Footnote 3)

2. Significant and Substantial

A WA-500 loader maintains the berms once a day. Also, in the normal operation of Respondent's quarry, haul trucks back up to the edge of the stockpiles. There is a 25 foot drop-off from outer edge of the stockpiles. Hence, the lack of adequate berms contributed to the hazard of a vehicle going beyond the edge of the stockpiles and turning over. Such an injury producing event certainly could have occurred. However, the top of the surface of each of the stockpiles was flat. There is no evidence that any of the vehicles in use on the stockpiles had any breaking or steering problem. Also, there is no direct testimony in the record, from anyone having personal knowledge based on observation, as to how close the various vehicles in use actually, in the normal course of operation, travel to the edge of the berms. Further, there is no evidence in the record that any vehicles have gone beyond the berms and dropped off the stockpiles. Within this framework, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event. Hence, I conclude that it has not been established that the violations were significant and substantial. I find that a penalty of $50 is appropriate for each of the violations cited herein.

IV. Citation Nos. 3869961, 3869962, 3869963, and 389965

A. Citation No. 3869961

1. Violation of 30 C.F.R. 56.14107(a)

As observed by Denk, the pinch point of the self-cleaning tail pulley for the C-11 conveyor and its hub were exposed on both sides, because there was a gap of approximately 4 feet by 6-inches in the guard for the pulley. The opening was waist high and, according to Denk, a person greasing the pulley, or cleaning under the conveyor with a high pressure hose, would be within inches of contact with the pinch-point. Also, there was exposure to the protrusions on the wings of the self-cleaning belt which, according to Denk, can cause injury by sucking a

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3In essence, it is Respondent's argument, inter alia, that the failure of Denk to take measurements of the berms should provide the basis for finding no violation. Although I took this fact into consideration, I reject Respondent's argument since the weight of the evidence before me, as set forth above, establishes the height of the berms relative to the mid-axle point of the WA-500 loader (See, BethEnergy Mines, Inc., 15 FMSHRC 981, (June 29, 1993)).

person into the pulley, or tearing an extremity. He estimated the distance of the wing from the guard face as approximately 6 inches. Denk indicated that a walkway was within inches of the opening.

Denk issued a citation alleging a violation of 30 C.F.R. 56.14107(a), which, as pertinent, provides that moving machine parts shall be guarded to protect persons from contacting gears, pulleys, and similar moving parts that can cause injury.

Rashford, in essence, testified that, normally, repairs and greasing are performed when the belt is shut down. Rashford opined that a person would have to intentionally reach into the opening 6 inches past the guard to be injured, and that a person falling accidentally against the conveyor would be protected from injury by the guard. He also testified that in the 14 years that he had worked at the quarry, no one was injured as a result of coming in contact with a pulley. Price testified that he was not aware of any accidents resulting from the opening in the guards.

Based upon the testimony of Denk, I conclude that inadvertent contact with the exposed pulleys can occur due to the proximity of the walkway, the large gap in the guarding which exposed the pulleys, and the location of this gap at waist level. Based on Denk's testimony, I conclude that an injury can result from inadvertent contact with the exposed pulleys. Accordingly, I conclude that Respondent violated 30 C.F.R. 56.14107(a) as alleged.

2. Significant and Substantial

In the Citation at issue, Denk alleged that the violation was significant and substantial. At the hearing, Petitioner did not adduce evidence specifically addressed to this point. Although the record herein does establish the violation of a mandatory safety standard, and that this violation contributed to hazard of inadvertent contact with the exposed pulleys, the record fails to establish the reasonable likelihood of the occurrence of an injury producing event, i.e., inadvertent contact with the pulleys.(Footnote 4) In this connection, I note Rashford's testimony that those most likely to come in contact with the exposed pulleys i.e., the persons who grease and repair the pulleys, perform their duties while the conveyor is not running. Also, the exposed pulleys are located six inches beyond the gap in the guarding. Further, there have not been any accidents at the conveyor resulting from inadvertent contact with the pulleys through openings in the guarding material. Thus,

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4Denk testified as follows on cross-examination regarding the likelihood of an injury producing event, i.e., a portion of a person's body inadvertently going through the hole in the guarding: "I can't even guess of the likelihood". (Tr.202).

considering these factors I conclude that the record as a whole fails to establish that an injury producing event was reasonably likely to have occurred. Accordingly I conclude that it has not been established that the violation herein was significant and substantial. (See U.S. Steel, supra, and Mathies, supra)

The record establishes the following: (1) there have not been any injuries in the past 14 years as a result of inadvertent contact with the pulleys through the exposed portion of the guarding; (2) employees who would be most likely to contact the pulley while applying grease or performing repairs perform these functions when the belt is not running; and (3) according to the uncontradicted testimony of Respondent's witnesses, the guards with openings have been in place for many years, and no citations had been issued on previous MSHA inspections. Taking these facts into account, I conclude that Respondent herein exhibited only a moderate degree of negligence regarding the violation herein. Also, considering the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty herein of $50 is appropriate.

B. Citation No. 3869962

This Citation alleges a violation of Section 56.14107(a) in that there was a hole in a guarding approximate 6 inches by 6 inches on both sides of the guarding of a self-cleaning tail pulley, and that a pinch point was exposed. Respondent did not rebut the testimony of Denk with regard to the particulars of the Citation. Accordingly, for the reasons set forth above, (IV(A)(2), infra), I conclude that Respondent herein did violate Section 56.14104(a) as alleged.

Denk alleged this violation to be significant and substantial. For the reasons set forth above, (IV(A)(2), infra), I conclude that it has not been established that the violation was significant and substantial. A penalty of $50 is appropriate for this violation.

C. Citation No. 3869963

As observed by Denk on the date of his inspection, a pulley for the No. 3 conveyor belt was located on the top level of the 2-E 2-W tower. Access to the tower was by way of a ladder. According to Denk, when a person gets off the ladder at the top of the tower, he is then approximately three feet from the guarding for the pulley. When observed by Denk, a half of the pulley was exposed i.e., there was a gap in the guarding approximately 4 feet by 6 feet. The pinch point of the pulley was exposed.

For the reasons set forth above, (IV (A)(1)(2) infra), I conclude that Respondent herein did violate Section 56.14107(a),

supra, as alleged, but that the violation was not significant and substantial. Also for the reasons set forth above (IV (A)(2), infra), I conclude that a penalty of $50 is appropriate.

D. Citation No. 3869964

In essence, Denk testified that he saw two openings in the guarding of the self-cleaning tail pulley on the 4-X conveyor belt which exposed the pinch-point. He said one opening was approximately 6 inches by 1 1/2 feet, and another was 6 inches by a foot. Respondent did not specifically contradict this testimony. Essentially, for the reasons set forth above, (IV (A)(1)(2) infra), I conclude that Respondent did violate Section 56.14107(a), supra, as alleged, but that the violation was not significant and substantial. I find that a penalty of $50 is appropriate.

E. Citation No. 3869965

In essence, Denk testified that a guarding on the C-10 dust conveyor self-cleaning tail pulley had an opening of approximately 6 inches by 2 feet on both sides of the guarding, leaving the pinch-point of the pulley exposed. For the reasons set forth above, (IV (A)(1)(2) infra), I conclude that Respondent did violate Section 56.14107(a), supra, as alleged but that the violation was not significant and substantial. I find that a penalty of $50 is appropriate.

V. Citation Nos. 3869966, 3869969, 3869970, 3869972 and 3869973

A. Citation No. 3869966

Denk indicated that the drive for the 2 1/2 foot long shaft of the fan on the dust collector was unguarded, and completely exposed. The fan was not in the normal route of travel. However, according to Denk, it was located on a working surface i.e., the deck, and that persons work there to repair, grease, or service the fan. Hence, according to Denk, these persons could be exposed to the hazard of being caught between the rotating shaft, and the support members of the fan, located 4 or 5 inches away, inasmuch as the shaft was located 3 to 4 inches beyond the opening. Essentially, Respondent did not contradict these statements of Denk.(Footnote 5) Accordingly, I find for the reasons set

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5It appears to be Respondent's position regarding Citation Nos. 3869966, 3869969, 3869970, 3869972, and 3869973, that inasmuch as Respondent's policy prohibits servicing this equipment during operation, and the area in question is not regularly traveled, the likelihood of contact with exposed hazards is very low. Even though contact might not be likely, it

forth above, (IV (A)(1), infra) that Respondent did violate Section 56.14107(a), supra, as alleged. I find that a penalty of $50 is appropriate.

B. Citation No. 3869969

Denk indicated that the No. 1 belt conveyor head-pulley drive shaft was unguarded. According to Denk, the shaft is located within inches of the main travelway along the belt. Hence, persons could be exposed to the hazard of inadvertent contact with the shaft, and could be hit by protrusions on the shaft and be injured. Essentially, Respondent did not contradict these statements of Denk. Accordingly I find, based upon Denk's testimony, that Respondent did violate Section 56.14107(a), supra. I find that a penalty of $50 is appropriate.

C. Citation No. 3869970

Denk indicated that as observed by him, the stacker belt conveyor head pulley drive shaft was not guarded. He explained that persons walking on the walkway would be exposed to the hazard of contact with moving parts. In the main, his testimony was not contradicted or rebutted. I thus conclude that it has been established that Respondent violated Section 56.14107(a), supra, as alleged. A penalty of $50 is appropriate.

D. Citation No. 3869972

Essentially it was Denk's testimony that the radial stacker conveyor head pulley drive shaft was not guarded. Essentially, Respondent did not rebut this testimony. Thus, I conclude that Respondent did violate Section 56.14107(a), supra, as alleged, and that a penalty of $50 is appropriate.

E. Citation No. 3869973

According to the uncontradicted testimony of Denk, there was a 6 foot by 4 inch gap on both sides of the guarding on the bottom of a self-cleaning tail pulley, exposing the pinch point of the pulley. The pulley was out of the normal path of travel, as it was above the actual travelway. It also contained an extended grease fitting. However, due to the size of the gap, and the exposure of the pinch-point, it is conceivable, though not likely, that this violation could have led to inadvertent contact with the pulley. Hence, essentially for the reasons set forth above, I conclude that Respondent did violate Section

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5...(continued)
is clear that such contact can occur. Hence, Respondent's argument is rejected in deciding the issue of the violation of Section 56.14107(a), supra.

56.14107(a), supra, as alleged. In mitigation of Respondent's negligence I note Rashford's uncontradicted testimony that the guarding came from the manufacturer with the gap as observed by Denk. A penalty of $20 is appropriate.

ORDER

It is hereby ORDERED that Respondent pay a total penalty of $820, and it is ORDERED that the following Citations be amended to reflect the finding that the violations alleged therein are not significant and substantial: Citation Nos. 3869955, 3869956, 3869957, 3869958, 3869959, 3869961, 3869962, 3869963, and 3869965.

Avram Weisberger
Administrative Law Judge

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