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SOL (MSHA) V. MOLINE CONSUMERS
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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 PROCEEDING
	:	Docket No. LAKE 92-368-M
	:	A. C. No. 11-00134-05512
v.	:	
	:	Midway Stone
MOLINE CONSUMERS COMPANY, Respondent	:	

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, IL, for the Petitioner;
Robert P. Boeye, Esq., Califf & Harper, P.C., Moline, Illinois, for Respondent.

Before: Judge Feldman

This case is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., (the Act). This matter was heard on July 13, 1993, in Peoria, Illinois. Mine Safety and Health Administration Inspector (MSHA) John E. Guthrie and Assistant District Manager John Waxvik testified for the Secretary. The respondent called Oscar Ellis, the respondent's President, James Cheville, a union steward at the Midway Stone Quarry, James Papenhausen, the Safety Director, and Scott Hanson, a mine consultant. The parties' post-hearing briefs are of record.

STATEMENT OF THE CASE

This single citation proceeding concerns Citation No. 4099296 issued on May 6, 1992, by Inspector John E. Guthrie for an alleged violation of the mandatory safety standard contained in section 56.14107(a), 30 C.F.R. 56.14107(a) with respect to the respondent's primary jaw crusher at its Midway Stone Mine (Midway). Section 56.14107(a) provides:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury (emphasis added).(Footnote 1)

The citation was designated as nonsignificant and substantial in apparent recognition of the perimeter fencing of the subject primary crusher. However, the Secretary seeks to impose a civil penalty of $700.00 under the special penalty assessment provisions in section 100.5, 30 C.F.R. 100.5.

The issues for determination are whether the respondent's perimeter fencing of the moving parts in issue satisfies the guarding requirements of Section 56.14107(a), and, if not, the propriety of the Secretary's imposition of a special assessment in this case. As noted below and at the hearing, the question of whether the respondent's perimeter fencing provides an equal or greater level of protection than that afforded by the safety standard in Section 56.14107(a) is not in issue and is beyond the scope of this proceeding. This question must be resolved in accordance with the petition for modification procedures promulgated in section 101(c) of the Act, 30 U.S.C. 811(c).

STIPULATIONS

At the hearing, the parties entered the following stipulations in the record (tr. 9-13):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

2. Respondent, Moline Consumers Company, owns and operates the Midway Stone Mine.

3. The Midway Stone Mine extracts dolomite which is crushed and broken.

4. The Midway Stone Mine is located in Rock Island County, Illinois.

5. Respondent's operations affect interstate commerce.

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1 Subsection (b) of section 56.14107 specifies that guarding of exposed moving parts is not required where the parts are at least seven feet away from walking or working surfaces. The parties have stipulated that the primary crusher parts in question are less than the requisite distance of seven feet. (Stipulation No. 19). Therefore the guarding requirements of section 56.14107(a) are applicable in this matter.

6. The Midway Stone Mine worked 25,008 production hours from January 1, 1991 through December 31, 1991.

7. Respondent, worked less than 700,000 production hours at all of its mines from January 1, 1991 through December 31, 1991.

8. Respondent had 12 violations during the preceding 24 months ending on July 15, 1992.

9. The payment of the $700 special penalty assessment will not affect Respondent's ability to continue in business.

10. On May 6, 1992, John E. Guthrie,(the "inspector") an authorized representative of the Secretary of Labor, issued Citation No. 4099296 at Respondent's, Moline Consumers Company's, Midway Stone Mine, in Rock Island County, Illinois, alleging a violation of 30 C.F.R. 56.14107 in that Respondent had failed to provide guarding for its primary jaw crusher drive sheaves and belts and flywheel.

11. A complete and accurate copy of Citation No. 4099296 is attached hereto as Exhibit A.

12. The correct Mine Identification Number for the Midway Stone Mine is 11-00134.

13. On May 6, 1992, Respondent did not have pending a Petition for Modification for this mine identification number.

14. Respondent has not, to date, filed a Petition for Modification for this mine identification number.

15. Respondent was aware that MSHA required the primary crusher to be guarded.

16. On May 6, 1992, the primary jaw crusher, which is the subject of Citation Number 4099296, was guarded by a fence and a gate which was locked, bolted, and had a starter wire connection at the gate.

17. Respondent's workers leave the gate unlocked at night so that greasing can be performed prior to start up.

18. On may 6, 1992, the electric motor, drive sheave and belts and the flywheel on the primary jaw crusher, which are the subject of Citation No. 4099296, did not have individual guarding inside the fenced enclosure.

19. The exposed moving parts on the primary jaw crusher, which are the subject of Citation No. 4099296, are less than seven feet above walking or working surfaces.

20. Contact with the moving parts on the primary jaw crusher, which are the subject of Citation No. 4099296, could result in entanglement, crushing and/or death.

PRELIMINARY FINDINGS

The essential facts are not in dispute and can be briefly stated. The respondent operates the Midway Stone Quarry in Rock Island County, Illinois. The primary crusher machine at this facility has drive assemblies which include drive belts which run between sheaves and/or flywheels. Pinch points occur when the belts pass over the flywheels. The respondent has erected a chain link fence approximately 12 feet wide by 17 feet long by 6 1/2 feet high around the perimeter of the crusher blocking access to the area where the belts and drives are located. The only entrance into the area is through a gate. The gate is secured by a strap and bolt locking system and, in addition, the gate is locked with a padlock. The key to the padlock is located in a separate structure approximately 250 feet from the crusher. As a further measure of protection, the respondent has installed an interlock electrical system at the gate. This system requires the unplugging of an electrical cord whenever the gate is opened which automatically shuts down the crusher.

Finally, the respondent has established a "lock-out" procedure which requires all employees to first shut off the main power source to the primary crusher before entering the fenced in area. In order to shut off the main power source, it is necessary to go to a separate structure located approximately 250 feet from the machinery. This procedure prevents exposure of personnel to parts that continue to move for a short period of time even though power has been turned off. (Tr. 210, 211, 216, 219-221).

The respondent utilizes a similar method of area fencing of its primary crusher at its Valley Plant No. 7 (Valley) facility. (Tr. 34). On October 17, 1990, Administrative Law Judge George A. Koutras issued a decision wherein he concluded that the respondent's perimeter fencing of its primary crusher at Valley did not satisfy the guarding requirements of Section 56.14107. Moline Consumers Company, 12 FMSHRC 1953 (October 1990). Judge Koutras' decision was based on the fact that the crusher ". . . belt drive was not individually physically guarded at the time of the inspection, and the gate which served as guard was unlocked and opened, thereby allowing free access to the crusher belt drive area immediately inside the gate." Id. at 1965. MSHA Supervisory Inspector Ralph D. Christensen permitted the respondent to abate the citation in Judge Koutras' case by replacing the padlock with the installation of a nut and bolt to secure the gate. Judge Koutras questioned the effectiveness of

this solution. Id. at 1967. Consequently, Judge Koutras, noting that "[t]he belt drive itself continues to be unguarded," urged the respondent to initiate modification proceedings under section 101(c) of the Act.

On November 30, 1990, in response to Judge Koutras' decision and the nut and bolt use allowed by Christensen, MSHA specifically addressed the issue of remote barriers and issued a memorandum to North Central District enforcement personnel informing them that perimeter guarding, regardless of how gates are secured, does not comply with the guarding requirements of section 56.14107. (P's Ex. C). The memorandum noted that affected operators should be given an opportunity to comply before being cited. Christensen is a Field Office Supervisor in Peru, Illinois and does not have the authority to establish MSHA policy. (Tr. 132-134, 169, 170-173).

By petition dated July 12, 1991 (amended July 26, 1991), the respondent sought to be relieved of it obligations under section 56.14107 for its crushers at its Valley and Allied Stone (Allied) plants. The respondent requested a variance from the standard in order to use perimeter or area guarding by fence, gate and padlock. The respondent's petition was initially denied by MSHA's district manager on October 2, 1991 and was denied on reconsideration on November 20, 1991. Thereafter, on December 17, 1991, the respondent filed a notice of appeal. The hearing on the respondent's petition for modification was ultimately scheduled for June 3, 1992, before Department of Labor Administrative Law Judge Robert S. Amery.(Footnote 2)

In the interim, on or about April 30, 1992, Inspector Guthrie inspected the respondent's Midway facility. At that time, the primary crusher was not in operation. Guthrie noted that the pinch points of the primary crusher were not individually guarded. (Tr. 50-51). Guthrie advised Spud Reiling, the plant supervisor, that the respondent must ". . . guard the moving parts at the point of contact rather than area guarding," once production resumed. (Tr. 60).

Guthrie returned to Midway on May 6, 1992, and determined that individual guarding had not been installed at the crusher's moving parts despite his earlier warning that point of contact guarding was required. Consequently, Guthrie issued Citation No. 4099296 and concluded that the respondent's underlying negligence associated with the violation was high. (Tr. 56-57).

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2 A hearing on a petition for modification is held before a Department of Labor Administrative Law Judge. 30 C.F.R. 44.20-44.35 (hearings).

The modification hearing for the Valley and Allied crushers was held on June 3, 1992, before Judge Amery. On September 28, 1992, Judge Amery decided that the respondent's alternative method of guarding, which consists of a fence with a gate equipped with a padlock, plus a bolt and nut to form a barrier, as well as an electrical interlock system, warning signs and the respondent's lockout procedure, assures at least the same measure of protection as that afforded under the provisions of section 56.14107. Judge Amery imposed the additional requirement that the respondent place a box or cage over the rotating motor shaft during annual vibration tests to check the bearings when the drive belts are removed. Petition for Modification Hearing, Moline Consumer's Company v. MSHA, (Amery Decision) DOL No. 92-MSA-10 (September 28, 1992); Joint Ex. No. 3.

FURTHER FINDINGS AND CONCLUSIONS

Fact of Occurrence of violation

As noted above, the only dispositive issue is whether the respondent's system of area guarding satisfies, not equals, the mandatory safety standard in section 56.14107. In this regard, the respondent has acknowledged, in its petition for modification proceeding before Judge Amery, that its system of area guarding is an alternative to the MSHA approved point of contact guards of the primary crusher's moving parts. Amery Decision, Joint Ex. 3, pp. 4-5, 7. Having argued that its area guarding affords equal, if not better, protection than the mandatory standard at Valley and Allied, the respondent is estopped from asserting that its area guarding at Midway meets the mandatory standard. (Tr. 107-108).(Footnote 3)

However, the respondent asserts that it reluctantly participated in the modification proceeding to avoid further enforcement action although it firmly believes that its area guarding meets the mandatory standard. (Tr. 99-103). Therefore, estoppel notwithstanding, I shall address this issue on the merits.

In resolving this question, it is fundamental that we look to the language and purpose of the standard. Where the terms of a statutory or regulatory provision are clear, such terms must be given effect unless the legislative or regulatory body clearly

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3 Although I noted that I was inclined to conclude that the respondent was estopped from asserting that its area guarding meets the mandatory safety standard contained in section 56.14107, I withheld final judgment on this issue and permitted the respondent to present its entire case concerning whether area guarding satisfies the mandatory standard. (Tr. 107-108, 114-115).

intended the words to have a different meaning. See Utah Power and Light Company, 11 FMSHRC 1926, 1930 (October 1989) citing Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842-843 (1984); United States v. Baldridge, 677 F.2d 940, 944 (D.C. Cir. 1982); Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1192-1193 (9th Cir. 1982). Turning to the language of section 56.14107, it is noteworthy that this section is entitled "Moving Machine Parts". This mandatory standard is obviously intended to protect individuals from moving component parts rather than the machine itself. This standard protects individuals who perform maintenance. It also protects against injury from parts that continue to move even after equipment is de-energized. Significantly, Judge Amery recognized this distinction by imposing the requirement to shield (guard) the motor shaft as a component part during annual vibration testing in addition to the respondent's system of area guarding the entire piece of equipment.

Moreover, Scott Hanson, the respondent's consultant witness, recognized that section 56.14107 is intended as a safety standard to be applied to moving parts rather than an entire machine. (Tr. 286-287). Therefore, the plain and unambiguous language of section 56.14107 fails to support the respondent's contention that its area guarding meets the standard.

Consistent with the plain meaning of this mandatory safety standard, Commission Administrative Law Judge Morris has also concluded that a gate 4 to 5 feet from an unguarded chain drive assembly on a hopper feeder conveyor belt does not satisfy the standard in 56.14107. See Yaple Creek Sand & Gravel, 11 FMSHRC 1471 (August 1989). Similarly, Department of Labor modification proceedings have recognized that area guarding is an alternative to the required guarding of moving parts contained in section 56.14107. See Petition for Modification Hearing, Richem Construction Co., Inc. v. MSHA, DOL No. 92-MSA-18, (March 10, 1993) (ALJ Vittone); Amery Decision, Joint Ex. 3.

While I am cognizant of the respondent's sincere and apparently effective efforts to protect its employees from exposure to the crusher's moving parts, it is the respondent's responsibility to pursue alternative safety measures through the petition for modification procedure contained in section 101(c) of the Act. If an operator fails to do so it must be subject to civil penalty sanctions. Any other approach would permit the operator, rather than the Secretary, to unilaterally determine whether alternatives to mandatory safety standards are effective. Otis Elevator Company, 11 FMSHRC 1918, 1923 (October 1989). Thus, the respondent's area guarding of its primary crusher at its Midway facility, for which it has not filed a petition for

modification, constitutes a violation of the mandatory standard contained in section 56.14107. Accordingly, Citation No. 4099296 shall be affirmed.

Special Assessment

Having determined the fact of the violation, the remaining issue is whether a waiver of the regular assessment formula and the imposition of a special assessment is appropriate in this case. The Secretary proposes a civil penalty of $700.00 for this non-significant and substantial violation under the special assessment criteria in section 100.5(h) which permits special assessments for "[v]iolations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances."

A special assessment was imposed by MSHA on May 22, 1992, because "[t]he company continues to use a fence and gate system of guarding on primary crushers. A petition for variance was denied on November 21, 1991. Therefore, Citation 4099296 should be special assessed." (Tr. 138-139; Petitioner's Ex. D). However, the respondent's hearing before Judge Amery was not heard until June 3, 1992. The respondent is entitled to exhaust its administrative remedies in an effort to prevail on the merits of its modification petition. The respondent's failure to comply with MSHA's directive to install pinch point guarding during the pendency of its modification petition under circumstances where there is no likelihood of serious injury is not indicative of high negligence.

However, the respondent acts at its own peril with respect to the imposition of civil penalties if it fails to seek modification authority for a particular mine.(Footnote 4) Had the respondent included Midway in its Valley and Allied modification petition prior to the issuance of Citation No. 4099296, section 44.4(c) would provide a basis for vacating the citation in issue.(Footnote 5) The respondent's failure to a seek a pertinent modification in this case does not constitute the requisite gross

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4 Although the respondent filed a petition for modification for its area guarding at Valley and Allied, section 44.11, 30 C.F.R. 44.11, requires that all mines affected must be identified i the petition. For reasons best known to the respondent, it failed to include the Midway primary crusher in its petition for modification.

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5 Section 44.4(c), 30 C.F.R. 44.4(c), provides that the granting of a modification shall be considered as a factor in the resolution of any enforcement action previously initiated for claimed violation of the subsequently modified mandatory safety standard.

negligence or other aggravating conduct necessary for a special assessment. Significantly, the Secretary has conceded that the respondent's failure to install site-specific guarding at pinch points, in view of the respondent's alternative measures, did not expose personnel to any significant risk of injury. (Tr. 180). Consequently, Waxvik's characterization of high negligence as "[t]he mine operator's flagrant disregard for the mandatory safety standard by substituting area guarding for point of contact guarding" is not supported by the evidence. (Tr. 149). The respondent cannot be charged with a "flagrant disregard" of a mandatory standard when it has acted to provide its employees with equivalent protection. Therefore, the Secretary has failed to demonstrate that the facts of this case warrant the imposition of a special assessment. Accordingly, considering the criteria of section 110(i) of the Act, including the low degrees of gravity and negligence associated with the subject violation, I am assessing a civil penalty of $20.00 in this matter.

Finally, the respondent must file a pertinent petition for modification for its Midway primary crusher within 45 days from the date of this decision. If a petition for modification is timely filed, MSHA should defer enforcement of the provisions of section 56.14107 pending the outcome of the petition.

ORDER

Accordingly, Citation No. 4099296 IS AFFIRMED. IT IS ORDERED that the respondent pay a civil penalty of $20.00 within 30 days of the date of this decision and, upon receipt of payment, this proceeding IS DISMISSED. IT IS FURTHER ORDERED that the respondent shall file, within 45 days of the date of this decision, a petition for modification of the provisions of section 56.14107 as they apply to its primary crusher at its Midway Stone Quarry.

Jerold Feldman
Administrative Law Judge
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