CCASE:
SOL (MSHA) V. ASPHALT, INC.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 26, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 92-526-M
	:	A.C. No. 04-02251-05524
v.	:	Slaughterhouse Canyon
ASPHALT, INCORPORATED, Respondent	:	

DECISION

Appearances: J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California. for Petitioner;

Ray E. Ehly, Jr., President, ASPHALT INC., El Cajon, California, appearing pro se, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA"), charges Respondent Asphalt Incorporated ("Asphalt") with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the "Act")

A hearing on the merits was held in San Diego, California, on August 25, 1993. The parties waived the filing of post-trial briefs.

SETTLEMENTS

At the commencement of the hearing, Asphalt moved to withdraw its contest as to Citation Nos. 3930399, 3930400, and 3930681.

Pursuant to Commission Rule 11, 29 C.F.R. 2700.11, the motion to withdraw was GRANTED and it is FORMALIZED in this decision.

Citation No. 3930396

This citation alleges Asphalt violated 30 C.F.R. 56.11002.(Footnote 1)
The citation issued under Section 104(a) of the Act, alleged the violation was significant and substantial.

The citation reads as follows:

> A section of planking in the elevated wooden walkway, alongside the base belt was rotten.
>
> A person walking in this area could step through this section and injure a foot or ankle.
>
> [If] there was a handrail located alongside, a person would not fall through to the ground below.
>
> Although persons were seldom in the area an injury was likely to occur.

Based on the evidence, I enter the following:

FINDINGS OF FACT

1. ALLEN BRANDT, a federal mine inspector, conducted an investigation of the Slaughterhouse Canyon Mine on April 23, 1991. (Tr. 8, 9).

2. Asphalt is a sand and gravel crushing operation. (Tr. 9).

3. When the Inspector arrived at 7 a.m., the plant was not running as it was down for maintenance. (Tr. 10).

4. The Inspector identified Citation No. 3930396. (Tr. 11, 12).

5. Employees would use the elevated walkway on an as-needed basis. (Tr. 12).

6. The walkway constructed of two by ten planking was eight to ten feet from the ground. (Tr. 13).

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56.11002. Handrails and toeboards.

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

7. The planking at one end of the plank was in a splin- ered condition. There was a 3- to 4-inch by 10-inch hole in the planking. (Tr. 14).

8. The condition of the planking had existed for a month or so. It could cause slips, trips, and/or falls. (Tr. 15).

9. The Inspector believed a person could suffer a lost- time injury. Although a worker could not fall through the plank- ing, he could injure a leg or an ankle. On this basis, the In- spector considered the gravity as "reasonably likely." The In- spector further believed the violation was "S&S." (Tr. 15, 16).

CONTENTIONS, DISCUSSIONS, AND FURTHER FINDINGS

RAY E. EHLY, JR., President of Asphalt, argues that on the day prior to the MSHA inspection, the company conducted a routine monthly safety inspection. Upon finding some safety defects, the plant was closed and the following morning the first order of work was to repair the safety deficiencies.

Mr. Ehly argues that it seems self-incriminating, unreason- able, and unfair to be cited while the company was in the process of doing repairs. (Tr. 3, 4).

I am not persuaded by this argument. In this case, the evi- dence shows the defective planking, the missing stop-cord, and the step-off existed for more than several days. In this period of time, workers were exposed to the violative conditions. In ad- dition, daily and not monthly inspections are required. In fact, Asphalt's evidence in Exhibits R-1 and R-2 shows the company did, in fact, conduct daily inspections.

ASPHALT'S EVIDENCE

JERRY RICHESON, superintendent and plant manager for Asphalt since 1970, testified for the company. (Tr. 38).

I find Mr. Richeson's uncontroverted testimony supported by the daily reports to be credible. On the day of Mr. Brandt's inspection the plant had been shut down so repairs could be made. In particular, Mr. Richeson intended to repair the stop-cord and the step-off at the stairs.(Footnote 2) (Tr. 39). The defective planking "did not catch his eye." (Tr. 39, 44).

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2 These violations are discussed, infra.

Mr. Richeson establishes statutory good faith for Asphalt. However, the evidence shows the violative conditions existed for at least a few days before the MSHA citations were issued.

Based on the uncontroverted evidence, this citation should be affirmed. The S&S allegations are discussed infra.

Citation No. 3930397

This citation, issued under 104(a) of the Act, alleged Asphalt violated 30 C.F.R. 56.14109(a).(Footnote 3)

The citation reads as follows:

> The stop-cord located along the #2 dust belt had not been reinstalled after construction work was completed.
>
> If a person fell onto or into the belt, it would not be able to be stopped.
>
> People were seldom in the area; there were no other conditions present that would make an injury likely to occur.

FINDINGS OF FACT

10. A dust belt is a conveyor belt which delivers fine sand into a pile. (Tr. 17, 31).

11. The dust belt is about 50 feet long and 36 inches wide. (Tr. 17).

12. The belt is not protected with any type of guard or cover over the top. (Tr. 17).

13. After the walkway was extended, Asphalt failed to replace the stop-cord. (Tr. 17, 18). However, the stop-cord was lying on the walkway. (Tr. 29).

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56.14109 Unguarded conveyors with adjacent travelways.

> Unguarded conveyors next to the travelways shall be equipped with--
>
> (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor;

14. The walkway is for people to walk to the head of the belt to perform maintenance repairs. Employees would use this walkway. (Tr. 18).

15. The dust belt conveyor was equipped with a railing on the outside portion. However, there was no railing between the walkway and the conveyor. (Tr. 18, 19).

16. At the time of the inspection there was no stop-cord, nor any other emergency device to de-activate the conveyor drive motor. (Tr. 19, 20).

17. The company representative, ROGER JANSSEN, stated the plant had been running for about a week after the construction involving the walkway. (Tr. 20, 21).

18. If an individual fell against the conveyor, he could sustain broken bones or a dislocated shoulder. (Tr. 21).

19. The Inspector considered the gravity to be "unlikely." Since there were no tripping hazards, the possibility of a person falling would also be unlikely. As a result, the violation was not S&S. (Tr. 22).

20. Asphalt properly abated the violation. (Tr. 22).

Based on the uncontroverted evidence confirmed by Mr. Rich- eson's testimony, it is established that emergency stop-cords were not provided. Accordingly, this citation should be affirmed.

Citation No. 3930398

This citation alleges Respondent violated 30 C.F.R. 56.11001.(Footnote 4

The citation reads:

> The stairway located alongside the #2 dust belt leading to the elevated walkway did not extend to the ground. After the construction to lengthen the conveyor belt was completed, there was a 36- to 42-inch drop from the bottom step to the ground. Although

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4 The cited regulation reads:

> 56.11001. Safe access.
>
> Safe means of access shall be provided and maintained to all working places.

people were seldom in this area, a person getting off especially, could injure an ankle or leg.

FINDINGS OF FACT

21. Mr. Brandt read the citation into the record and testified workers would use this stairway to gain access to the length of the belt to do any repairs or maintenance. (Tr. 23).

22. An ankle sprain or maybe a broken leg could result from this condition.

23. Slips, trips, and falls are the most common injury in any workplace. (Tr. 24).

24. The Inspector considered the violation to be S&S. (Tr. 24).

25. The violation was abated by extending the stairway to the ground. (Tr. 24).

The uncontroverted evidence shows that the 36- to 42-inch step-off existed at the end of the stairway. Accordingly, safe access was not provided to a working place and this citation should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the 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, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further that:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of Section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1575-1575 (July 1984).

The Secretary designated the planking citation (No. 3930396) and the 24- to 36-inch step-off citation (No. 3930398) to be S&S.

The "rotten planking" described in Citation No. 3930396 was a hole 3 to 4 inches by 10 inches. The Inspector indicated a person could not fall through the planking; however, he believed a worker could injure an ankle or leg.

Based on these facts and in applying the Commission's decisions I am unable to conclude that an injury would be reasonably serious based on this minimal record.

Accordingly, the S&S allegations as to Citation No. 3930396 are stricken.

Citation No. 3930398 involves a step-off of 36 to 42 inches from the bottom step of a walkway to the ground. By comparison, most business desks are less than 36 inches in height. If a worker stepped 36 to 42 inches from the end of a walkway, I believe there would be a reasonable likelihood that his injury would be reasonably serious. In sum, I agree with Inspector Brandt that an ankle sprain or broken leg could result. An ankle sprain is certainly more likely from such a step-off than from a worker somehow becoming entangled in a 3 by 10 inch hole in planking through which he could not fall.

The S&S allegations should be affirmed as to Citation No. 3930398.

CIVIL PENALTIES

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

The proposed assessment indicates Asphalt is a small operator since it annually produced 18,377 tons.

The record does not present any information concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I find that the payment of penalties will not cause Respondent to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 164 (1974).

There is no evidence of the operator's history of previous violations.

The operator was negligent since the defective planking, missing stop-cord, and the 36- to 42-inch step-off were open and obvious.

Concerning gravity: the planking has been previously discussed. Based on the hazard involved, I believe the gravity is low.

The failure to provide a stop-cord for the short space involved presents a situation of moderate gravity.

The step-off, as previously discussed, involves a situation of high gravity.

Asphalt demonstrated good faith both by prompt abatement of the violative conditions. While the conditions should have been abated when they were discovered by the company, the company somewhat enhanced its good faith by scheduling repairs the day the MSHA Inspector arrived.

I believe the penalties set forth in this order are appropriate and accordingly, I enter the following:

ORDER

1. Citation No. 3930399 and the proposed penalty of $157 are AFFIRMED.

2, Citation No. 3930400 and the proposed penalty of $252 are AFFIRMED.

3. Citation No. 3930681 and the proposed penalty of $267 are AFFIRMED.

4. Citation No. 3930396 is AFFIRMED and a penalty of $150 is ASSESSED.

5. Citation No. 3930397 is AFFIRMED and a penalty of $150 is ASSESSED.

6. Citation No. 3930398 is AFFIRMED and a penalty of $275 ASSESSED.

John J. Morris
Administrative Law Judge

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