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SOL (MSHA) V. JAMIESON COMPANY
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 17, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 92-314-M
	:	A.C. No. 04-01924-05527
	:	
	:	Docket No. WEST 92-319-M
v.	:	A.C. No. 04-01924-05529
	:	
	:	Docket No. WEST 92-389-M
JAMIESON COMPANY, Respondent	:	A.C. No. 04-01924-05530
	:	
	:	Pleasanton Pit and Mill

DECISION

Appearances: Jan N. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; William R. Pedder, Esq., Alameda, California, for Respondent.

Before: Judge Lasher

In these three proceedings, the Secretary of Labor (MSHA) originally sought assessment of penalties for a total of seven Citations pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1977).

After the commencement of hearing in Pleasanton, California, on May 26, 1993, MSHA moved to vacate Citation No. 3912067 in Docket No. WEST 92-314-M, for good and sufficient reason and based thereon this Citation was vacated from the bench (T. 35-38). That disposition is here AFFIRMED. The six remaining citations were litigated.

Preliminary Penalty Assessment Criteria Findings

Based on stipulations received at the hearing, it is found that Respondent is a medium-sized, one plant, 50-employee, sand and gravel operation with a history of 36 previous violations

during the pertinent two-year period preceding the issuance of the citations involved in these proceedings. It is also found that Respondent proceeded in good faith after notification of any violations found to abate such promptly and that Respondent's ability to continue in business would not be adversely affected by imposition of reasonable penalties for any violations found herein.

The Two Safety Standards Involved

30 C.F.R. 56.14107 is the regulation involved in Citations numbered 3912068, 3912072, 3912077, 3912079, and 3912080. It 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.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

30 C.F.R. 56.12008 is the regulation involved in Citation No. 3912075. It provides:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Respondent challenges the occurrence of the violations charged by Petitioner, Petitioner's position on negligence and gravity, and the "Significant and Substantial" (S&S) designations indicated on three of the Citations.

Docket No. WEST 92-314-M

Citation No. 3912068 (T.38-79)

This violation consists of a piece of metal which had been welded at the end of the shaft on the head pulley not being guarded (T.45, 50, 60-61, 70-71, 75). The shaft with the piece welded to it is a moving machine part and is thus covered by the regulation (T. 46). The welding piece protruded 1/16 of an inch (T. 58).

The hazard created was that a workman's sleeve could be caught in the moving part resulting in loss of a finger or arm, a permanently disabling injury (T. 47-51). It was unlikely that the hazard would have occurred (T. 51, 61-64, 65) since the only reason an employee would come in close proximity to the hazard would be for maintenance or for oiling the gearbox (T. 56-58, 70-71, 75).

Respondent's witness, Operations Manager Richard Kelly, concedes that the part in question was not guarded (T. 60-61). While he felt that the condition would not pose a danger since the gear box should be locked out before maintenance was performed, Mr. Kelly also conceded that accidents have occurred where lockout procedures have not been followed (T. 62, 64).

It is concluded that the violation occurred as charged in the Citation except that the welded piece stuck out only 1/16th of an inch.

The violation was obvious and involved, as indicated by the Inspector, moderate negligence. The violation, which is not charged to be (S&S), was not likely to result in an injury but did pose the threat of serious bodily harm had the hazard envisioned come to fruition. Accordingly, the violation is found to be moderately serious.

A penalty of $50 is ASSESSED.

Citation No. 3912080 (T. 79-123)

This Citation, not designated S&S, alleges that the tail pulley on the No. 2 feeder was not "adequately" guarded in that the guard was "too far back."

Respondent contends that the guard system was that which had been approved by another inspector previously in early 1991 and that the guard is in compliance with the standard in question.

The Inspector who issued the Citation testified that the face of the pulley was approximately 12 inches from the edge of the guard which was a "dangerous" distance since a person's sleeve could become entangled (T. 83). The pinch point was 20-32 inches (T. 84-85) from the edge of the guard. This, again, was a distance which could be reached by a person's arm or shovel (T. 84, 87, 91-92, 95). The hazard of entanglement could result in loss of a body part (arm). The violation was observable by management (T. 88, 114) and thus a result of moderate negligence (T. 88, 114) and thus a result of moderate negligence (T. 88) since it had existed for some time (T. 88-89).

Petitioner established three of the four prerequisites of a "Significant and Substantial" violation by establishing that there was a violation of the safety standard cited; that there was a discrete safety hazard (entanglement and loss of a body part) contributed to by the violation; and that there was a reasonable likelihood that any injury would be of a reasonably serious nature (loss of an arm). Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). There was no showing, however, of a reasonable likelihood that the hazard contributed to would result in an injury, that is, the third prerequisite of Mathies. Petitioner's only evidence was the weak testimony of the Inspector at pages 86 and 87 of the transcript which is insufficiently clear as to its meaning. Such testimony is rejected as remote and not probative. On the other hand, the testimony of Respondent's witness, that there was only a mere possibility of injury was clearer and more credible and such is credited. The S&S designation will be stricken.

Since it was not reasonably likely that an injury would have occurred--even though such injury would have been serious in nature--the gravity of the violation will be deemed only moderately serious.

Respondent established that to abate a prior citation some six months previously (T. 106) it installed the guarding system cited in the instant Citation and there had been no changes either to the guards or to the location of the pulley during the interim (T. 106-110). I find and infer from Respondent's evidence that MSHA approved the subject guarding system in approving the manner of abatement of the previous violation. In Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Commission generally rejected the doctrine of equitable estoppel. However, it also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty, stating:

> The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power and Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Georgia-Pacific Co., 521 F.2d 92, 95-103 (9th Circ. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability

> without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.
>
> Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty ... .

Accordingly, the doctrine of equitable estoppel will not be applied to the enforcement action of the Secretary here. However, the Respondent's evidence in this connection will be considered in mitigation of penalty.

After consideration of such, and in view of the modifications in the severity of the violation discussed above, a penalty of $10.00 is found appropriate and is here ASSESSED.

Citation No. 3912075 (T. 124-141)

This Citation, as modified, charges that the electrical cable for the vibrator on the sand tank was not properly fitted where it came out of the main switch box. The occurrence of the violation was clearly established.(Footnote 1)

The hazard was that a person could trip on the cable which was lying on the ground and pull it out of the electrical box since it was secured only with tape instead of a clamp (T. 126, 127, 133). Had such hazard occurred, electrocution could result (T. 127, 129). Since the only miners who had occasion to work in proximity to the hazard were electricians, the likelihood of injury was unlikely and the Inspector did not designate the violation as "S&S" (T. 127-128, 134). Only moderate negligence was involved in the commission of this violation (T. 128, 134). The condition was obvious (T, 127) and should have been checked by management (T. 128).

Although the occurrence of injury was not likely, had such an injury occurred, the injury could have been fatal. The violation is found to be moderately serious and a penalty of $50 (T. 140) is found appropriate and here ASSESSED.

1 Respondent produced no witnesses.

Docket No. WEST 92-319-M

Citation 3912072 (T. 141-192)

This citation, as modified, is designated "Significant and Substantial" and charges that the drive chain on the No. 2 scrub- ber was not adequately guarded to prevent a person from contact- ing the chain and becoming entangled. Respondent, as previously noted, challenges the occurrence of the violation, the "S&S " designation, and the degree of gravity charged. The violation itself was clearly established. The drive chain in question was not adequately guarded since there was a gate--not a guard--used to prevent exposure (T. 145, 146, 147, 148). The entire drive chain was a hazard since a person could get entangled (by sleeve or pant's leg) anywhere along the chain (T. 146). The walkway was less than seven feet from the hazard (T. 178). Persons could reach the exposed moving chain by opening the gate (T. 147) or by stepping over the motor (T. 149, 151, 161) and there was foot- print evidence observed by the Inspector that persons had done so (T. 150, 153).

Employees were exposed to the hazard on a daily basis to perform maintenance work (T. 145, 154, 163, 191-192). Had an injury occurred from the hazard contributed to by the violation such would have been permanently disabling or fatal (T. 155). It is concluded that a violation occurred and that such was "Signi- ficant and Substantial," since as noted herein, there was a rea- sonable likelihood that an injury would have occurred due to the frequency of exposure, the ease of exposure, and the proximity of exposure to a considerable hazard, and the evidence that there had been exposure to such as evidenced by the footprints observed by the Inspector. The other elements of Mathies, supra, have been delineated herein above. The violation is found to be serious.

The violation was visible and obvious and the Inspector's determination of moderate negligence is found warranted. A pen- alty of $400 is found appropriate and is here ASSESSED.

Docket No. WEST 92-389-M

Citation No. 3912077 (T. 192-221)

This "S&S" Citation alleges that the tail pulley on the No. 14 conveyor belt was not adequately guarded.

While there was a guard in place, it was not adequate since the nip point on the tail pulley could be reached (T. 196, 202). Thus, assuming as Respondent maintains (T.214, 217), that the

distance from the edge of the guard to the nip point was 34 inches, a miner could reach the nip point or could reach it with a tool (T. 197, 198, 199, 200, 211).

It was not reasonably likely that a workman would sustain injury from contacting the nip point (T. 200, 201) even though employees did engage in "cleaning material spillage" on a daily basis. There was only a "possibility" that an employee might try to dislodge materials by reaching into the hazardous area delib- erately (T. 200, 201) and such latter factor would be the result of "an extremely conscious effort" (T. 214, 215). Official no- tice is taken that a person with an advertised 34-inch shirt sleeve length would not actually have an arm- and hand-length of 34 inches (see T. 214-215, 218-218), but rather approximately 30 inches.

The conditions described constitute a violation of the standard, and resulted from a moderate degree of negligence on the part of Respondent (T. 203) since it was obvious and since supervision failed to check the installation of the guard to determine if it had been installed correctly (T. 203, 204).

Based on the foregoing findings, it is found that the vio- lation was only moderately serious since it was unlikely that injury would ensue from exposure to the hazard. The "gravity" of the violation indicated in the citation will be modified to reflect this change and to delete the "S&S" designation. Upon consideration of the various penalty assessment factors, a pen- alty of $50 is here ASSESSED.

Citation No. 3912079 (T. 222-245)

This "S&S" Citation charges that the tail pulley on the No. 28 conveyor belt was not adequately guarded to prevent a person from getting his hand or shovel caught. The violation was clearly established.

The nip point was only 25 inches from the guard (T. 231, 241) and this created a hazard since it could be contacted by a miner (T. 226), since a miner possibly could reach it by bending down or kneeling and then by leaning forward and reaching it with his body or a tool (T. 226, 238-239, 245). The nip point could not be reached by a standing person (T. 242).

The hazard was in an area where miners performed cleaning duties (T. 227). Miners were exposed to the hazard on a daily basis (T. 227). Had an injury occurred as a result of the hazard contributed to by the violation, it could have resulted in the loss of a miner's arm (T. 228) or other serious injury (T. 229).

Moderate negligence was involved since the violation should have been observable by management (T. 228, 240).

From the evidence of record it is concluded that it was possible but not "reasonably likely" that an injury would occur as a result of the occurrence of the hazard contributed to by the violation (T. 237-239, 242, 245). The record lacks probative evidence of the third element of the Mathies "S&S" formula and this designation on the citation will be stricken. Likewise, the gravity of the violation will be modified to show that an injury would be "unlikely" to occur.

Upon consideration of the various mandatory assessment factors, a penalty of $50 is found appropriate and is here ASSESSED.

ORDER

1. Citation No. 3912067 in Docket No. WEST 92-314-M is VACATED.

2. Citation No. 3912080 in Docket No. WEST 92-314-M is MODIFIED to change the "Gravity" designation in paragraph 10 A thereof from "Reasonably Likely" to "Unlikely"; and to delete the "Significant and Substantial" designation in paragraph 10C.

3. Citation No. 3912077 In Docket No WEST 92-389-M is MODIFIED to change the "Gravity" designation in paragraph 10A thereof from "Reasonably Likely" to "Unlikely and to delete the "Significant and Substantial" designation in paragraph 10C.

4. Citation No. 3912079 in Docket No. WEST 92-389-M is MODIFIED to change the "Gravity" designation in paragraph 10A thereof from "Reasonably Likely" to "Unlikely" and to delete the "Significant and Substantial" designation in paragraph 10C.

5. Respondent SHALL PAY to the Secretary of Labor within 30 days form the date of issuance hereof the penalties herein- above assessed in the total sum of $510.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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