CCASE:
SOL (MSHA) V. WOODRING
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 94-84-M
	:	A.C. No. 24-01873-05504
v.	:	
	:	Docket No. WEST 94-131-M
	:	A.C No. 24-01873-05505
WOODRING COMPANY, Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Mark L. Stermitz, Esq., Warden, Christiansen, Johnson, & Berg, Kalispell, Montana, for Respondent.

Before: Judge Amchan

Overview of the Case

Earl Woodring is the sole proprietor of Respondent. He works intermittently crushing rock at two sites near Kalispell, Montana, and sells it to his sons, who are in the road construction business, and a few other people (Tr. 6, 251-52, 293). He generally works alone but in late July, 1993 he hired an employee, Joseph Hartley, to assist him in preparations for a move from his Batavia Lane site to his other work location on Blackmore Lane (Tr. 250-56).

On the afternoon of July 27, 1993, MSHA Inspector Ronald Goldade drove by Respondent's Batavia Lane worksite and noticed that the crusher was operating (Tr. 199, 307). He returned the next morning to conduct an inspection. Respondent had to crush a certain quantity of rock in order to extricate its crusher from the Batavia site to move it (Tr. 256, 295). Despite working 8 hours on the July 28, Respondent had to continue crushing rock at the site on July 29 and 30, before it could move its equipment (Tr. 316).

By the end of the inspection, Goldade had issued Respondent 17 citations, many for failure to guard or adequately guard a

number of pulleys, drive shafts, and pinch points. The issue with regard to most of these citations is whether there was sufficient miner exposure to these unguarded or insufficiently guarded areas to mandate guarding under MSHA standards. MSHA proposed a civil penalty totalling $1,389 for the alleged violations. I affirm most of the citations and assess civil penalties totalling $818.

The individual citations

Citation 4331562: Inspector Goldade observed the tail pulley to the crusher feed conveyor system which was completely unguarded (Tr. 14-15, Exhibits 2a-2c). This pulley was 2 feet above ground level and was adjacent to a narrow walkway (Tr. 15, 18). A guard had been in place over the pulley prior to July 28. Mr. Woodring apparently removed the guard on the morning of July 28 to remove mud and debris from the conveyor and did not replace it (Tr. 259-60). Mr. Hartley was observed by the inspector in all areas around the crusher, including near the cited tail pulley (Tr. 15-16, 210).

Goldade issued citation No. 4331562 to Respondent alleging a significant and substantial violation of 30 C.F.R. 56.14112(b). That standard requires that guards be securely in place while machinery is operated. Contact with the unguarded pulley was reasonably likely in that a person could trip or fall on the rubble in the walkway and touch the pulley while reaching out to break his fall (Tr. 21). In the event of such an accident, it is reasonably likely that one would incur a disabling injury to his finger or hand (Tr. 21).

The fact that Respondent had guarded this pulley prior to July 28, suggests that it recognized that guarding was required. Even if that were not the case, the possibility that an employee may trip or fall into an unguarded moving machine part is sufficient to mandate guarding under MSHA standards, even if the unguarded moving machine part is not in an area in which employees normally perform work Brighton Sand & Gravel, 13 FMSHRC 127 (ALJ January 1991).

I find that the Secretary has established the violation as alleged, although it may have been more appropriately cited under section 56.14107(a), the provision requiring the guarding of moving machine parts. I also find that the violation was significant and substantial ("S&S").

To establish an "S&S" violation the Secretary must show 1) a violation of a mandatory safety standard; 2) a discrete safety hazard; 3) a reasonable likelihood that the hazard contributed to will result in an injury in the course of continued normal mining operations; 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); U. S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 1984). These elements have been established with regard to citation No. 4331562.

I assess a $111 penalty, the same as that proposed by the Secretary. I conclude that Respondent's negligence, in failing to replace a guard when it planned to operate the crusher, and the gravity of the injury that would likely occur if the unguarded pulley was contacted, warrant such a penalty. This penalty is consistent with the other section 110(i) penalty criteria. Respondent has stipulated that the total proposed penalty will not compromise its ability to stay in business (Tr. 5). Woodring's prior history of violations (Exh. P-1), its size, and good faith in abating the violation, do not make such a penalty inappropriate.

Citation No. 4331563: On the primary crusher feed conveyor, Inspector Goldade observed a guard over a pulley and drive shaft which was hinged on one side and not affixed to the other side so that it could be lifted up to lubricate the shaft (Tr. 22-26, 263, Exh. 3a, 3b).

The citation was issued pursuant to section 56.14112(b), which requires guards to be securely in place while machinery is being operated. I vacate this citation because I conclude that the guard was securely in place. Contact with the drive shaft could not occur accidently. The moving machine part could be exposed only if an employee purposely lifted the guard (Tr. 29).

In the past MSHA accepted hinged guards (Tr. 31-32). However, its policy changed with regard to such guards due to injuries incurred by miners moving these guards. MSHA policy changes are not binding on the Commission or the regulated community, See e.g., King Knob Coal Company, 3 FMSHRC 1417 (June 1981). As the standard does not by its express terms prohibit hinged guards, and MSHA at one time interpreted its standard to allow them, a change in this substantive requirement can only be made through notice and comment rulemaking.

Citation No. 4331569: This citation alleges that the guard on the under conveyor system on the primary jaw crusher was not provided with a means to secure the guard in place in that the guard was constructed with hinges. The last sentence of the citation states, "The guard provided adequate coverage of the tail pulley area but must be secured in place during operation."

At hearing the Secretary introduced photographic exhibit P-9 in support of the alleged violation. Inspector Goldade testified that material build-up had pushed the guard away from the conveyor frame, exposing the pulley (Tr. 34-36). Nothing in the citation itself, however, indicates that the pulley cited was exposed. The essence of the violation described in the citation

is that the guard was of a hinged construction. Given this apparent discrepancy, I am not persuaded that Exhibit P-9 depicts the condition described in citation No. 4331569.

As with citation No. 4331563, I do not believe that the Secretary can prohibit the use of a hinged guard under section 56.14112(b) without rulemaking. I, therefore, vacate citation No. 4331569.

Citation No. 4331564: Inspector Goldade observed the bull wheel drive to the jaw crusher in motion (Tr. 39-42). Although most of this wheel was guarded, the bottom two feet, which was 4 feet 10 inches above the ground was not (Tr. 42-49, exhibits P-4, 4b). Goldade concluded that the wheel had spokes because he could see through it (Tr. 212). Mr. Woodring, however, testified that the wheel was solid (Tr. 265-66), which would clearly make it less dangerous. Given the fact that Exhibit P-4 makes it appear that the wheel was solid, I credit Mr. Woodring's testimony.

Their remains the issues of whether there was sufficient exposure to the wheel and whether a solid wheel can cause injury, thus, requiring guarding under section 56.14107(a). In this regard I credit the testimony of the inspector that contact with the wheel was possible if an employee tripped or fell (Tr. 49) and conclude that an employee could sustain a minor injury, such as a burn (Tr. 301-02). I, therefore, affirm the citation and assess a $25 civil penalty--given the low gravity and negligence of Respondent.

Citation No. 4331565: In one area of the crusher there was a 3 1/2 foot high stairway leading to an elevated platform (Tr. 52, Exh. P-5a). Inspector Goldade observed Mr. Hartley used this stairway and platform (Tr. 216). Underneath this platform and stairway was an unguarded drive shaft with protruding bolts, 3 feet above the ground, and nearby was an unguarded set of trunion wheels rotating in the opposite direction of a large roto vater drum (Tr. 50-59, 68, Exh 5a-5c).

The preponderance of the evidence is that the roto vater drum rotated upwards which made injury by getting caught between the drum and the trunion wheels unlikely (Tr. 267). Although I find that this violation is not "S&S", the potential hazard is sufficient to affirm a violation under the standard.

Similarly, although the drive shaft could be contacted by an employee who fell or tripped in his normal route of travel, such an accident was unlikely because the drive shaft was underneath the elevated walkway. I, therefore, find this also to be non "S&S" and assess a $25 civil penalty for this citation.

Citation No. 4331567: At the end of the crushing process, the green stacker conveyor expels the crushed rock onto a stockpile (Tr. 70). On this conveyor the head pulley was completely unguarded and the tail pulley was partially guarded (Tr. 70, 76, Exh. 7c). The head pulley area had a protruding shaft as well as an unguarded chain drive (Exhs. 7a and 7b).

As to the tail pulley, which was 18 inches above the ground and accessible to employees, Respondent concedes that the guard did not extend forward sufficiently to protect the protruding shaft from contact (Tr. 310-311). On this basis alone I affirm this citation as an "S&S" violation with regard to the tail pulley.

With respect to the head pulley, the parties disagree as to whether it was within 7 feet of the ground. If it was more than 7 feet above the ground it did not have to be guarded under section 56.14107. Inspector Goldade testified that he held a tape from the ground directly below to the head pulley and measured a distance of 4 feet (Tr. 72, 85). Respondent contends that the pulley was at least 8 feet above the ground and the point from which Goldade measured is not directly below the pulley (Tr. 269-272, Exhs. 7a and 7b). Because Mr. Woodring did not take measurements himself on the day of the inspection, I credit the testimony of Mr. Goldade and find an "S&S" violation with regard to the head pulley area.

The shaft and chain drive were completely unguarded and it is reasonably likely that in the normal course of mining operations an employee could contact these hazards and sustain a serious injury. Given the criteria in section 110(i), particularly the negligence and gravity of Respondent, I assess the $111 civil penalty proposed by the Secretary.

Citation No. 4331568: Next to a 16-inch wide walkway on the crusher, Inspector Goldade observed a head pulley drive shaft that was guarded on the side but not on the top (Tr. 87-99, 220-24, Exh. P-8b). He issued a citation alleging a violation of section 56.14107(a) because he was concerned that an employee might slip or fall and accidently reach behind the guard and contact the universal joint of the drive shaft (Tr. 223-24).

I conclude that there was sufficient exposure to the hazard to affirm a violation but that it was not reasonably likely that someone would contact this shaft. I, therefore, affirm the violation as a non-significant and substantial violation. As I also think the need for a guard on the shaft was not obvious, I consider Respondent's degree of negligence to be very low. I assess a $25 civil penalty for the violation.

Citation No. 4331571: At the secondary crusher system, Inspector Goldade found a pulley and drive shaft that were

exposed because part of the guard covering them had been cut away (Tr. 101-105, 227-228, Exhs. 10a and 10b). If an employee slipped or fell while walking through this area they could contact either the pulley or the drive shaft, although they would have to reach up under the guard to touch the drive shaft (Tr. 228).

Given the fact that an employee who slipped would be kept away from the shaft and pulley by the upper portion of the guard that remained, I conclude that injury was not reasonably likely and affirm this citation as a non-significant and substantial violation. Also considering Respondent's negligence in not extending the guard as low, I assess a $25 civil penalty for this violation.

Citation No. 4331566: This citation was issued pursuant to section 56.11002 because two elevated walkways and a staircase were not provided with railings (Tr. 108-116, Exhs. 5a & 5b, 6a & 6b). One of the walkways and the staircase were located over the unguarded shaft and near the trunion wheels discussed with reference to citation No. 4331565. The handrails in this area had been removed by Respondent the previous day in preparation for moving the crusher (Tr. 277). Given the fact that work other than breaking down the crushing machine continued at the site on the day of the inspection, the impending move is not a mitigating circumstance.

The other walkway without handrails was 8 feet above ground level and, therefore, a fall from it was reasonably likely to result in serious injury (Tr. 109-110, 116). I affirm the citation as a significant and substantial violation and assess a $75 penalty, which I deem appropriate giving particular consideration to what I believe is the moderate gravity of the violation.

Citation No. 4331572: Inspector Goldade cited Respondent for failure to make available to MSHA records of his daily examinations of the workplace for hazardous conditions pursuant to section 56.18002(b). Goldade testified that he asked Mr. Woodring for the records and that Woodring said he didn't have any (Tr. 119). Mr. Woodring testified that he does maintain such records but couldn't produce them on July 28 because he had sent them to his other worksite in anticipation for his move (Tr. 278).

If Respondent made such records, kept them at a different location, and offered to make them available to the Secretary, I would vacate the citation. Section 56.18002(b), unlike section 50.40, for example, does not require that the subject records be kept at the mine site. I, therefore, conclude that, if Respondent made the records and kept them at another site, it would not necessarily violate the instant regulation.

However, I affirm this citation. Respondent is required to make an examination of the worksite every day and make a record of it. Woodring worked at the Batavia Lane site on July 27 and there is no evidence that would lead me to believe that if an examination was made on the 27th that the record made of it was sent that evening or the following morning to the other worksite. I find that, at least for July 27, Respondent violated the cited regulation in failing to keep a record of its workplace examination and making it available to the Secretary. I assess a $25 civil penalty.

Citation No. 4331573: Respondent was cited for failure to have adequate first aid supplies, including stretchers and a blanket, pursuant to section 56.15001. Although Mr. Goldade's testimony suggests that Respondent had no first aid supplies on site, I credit Mr. Woodring's testimony that he had all the required items except for the stretchers and blanket (Tr. 124, 278-29).

Nevertheless, the standard requires that stretchers and blankets be kept convenient to working areas. Therefore, a violation of the regulation has been established. I assess a $25 civil penalty for this violation.

Citation No. 4331574: Inspector Goldade observed a compressed oxygen and a compressed acetylene cylinder in the back of a pick-up truck at the site. The valves of these cylinders were not covered (Tr. 127-131). He, thus, cited Respondent for a violation of section 56.16006, which requires that such valves be covered while being transported or stored.

Mr. Woodring testified that he used these cylinders on July 28 for about a half-hour to weld a guard (Tr. 279, 311-12). This raises the issue of what is "stored" within the meaning of the regulation. In FMC Corporation, 6 FMSHRC 1566, 1569 (July 1984), the Commission held that the word "storage" includes short-term storage, Also see Phelps Dodge Corporation, 6 FMSHRC 1930 (ALJ, August 1984). I conclude that when Respondent finished using the cylinders in this case they were "stored" within the meaning of the regulation. There is nothing in the record to indicate that Respondent had an imminent need or intention to reuse the cylinders. I, therefore, affirm the violation and assess a $25 civil penalty.

Citations No. 4331720 and No. 4331561: On July 28, Mr. Woodring operated a front end loader at the worksite which did not have an operational reverse signal alarm and which was not equipped with a seat belt (Tr. 133-147, 244, 280-81). The loader had been used at the worksite for several days but the alarm apparently worked prior to July 28 (Tr. 147, 280-81).

With regard to the reverse signal alarm, Inspector Goldade cited Respondent for a significant and substantial violation of 30 C. F. R. 56.14132(a). The parties disagree as to how many people were exposed to the hazard of being hit by the front end loader while it was being operated in reverse. Mr. Woodring contends that only he and Mr. Hartley were at the worksite on July 28 (Tr. 280-81). The inspector insists that he observed several trucks come to the site to be loaded by Mr. Woodring and that the drivers got out of their trucks and walked around (Tr. 137-38). I credit the testimony of Inspector Goldade on this point. When pressed on his recollection, Mr. Woodring admitted that, while he did not remember any trucks coming to the site that day, he was not be sure (Tr. 280-84).

I conclude that injury was reasonably likely and was likely to be serious. I, therefore, affirm an "S&S" violation with regard to the reverse signal alarm and assess a $100 penalty in view of the gravity of the violation and Mr. Woodring's awareness of the violation.

The absence of the seat belt is undisputed. Apparently, Mr. Woodring, Respondent's owner, was the only person exposed to a hazard due to this violation. An individual or individuals who own a mine are "miners" within the meaning of the Act, 30 U.S.C. 802(g), Marshall v. Kraynak, 604 F.2d 231 (3d Cir. 1979). Thus, the fact that only Mr. Woodring was exposed to the violation is no impediment to affirming the citation.

I also have no difficulty in finding this violation to be significant and substantial. Vehicle accidents are common at mines and similar worksites. The absence of a seat belt is reasonably likely to result in an injury of a serious nature.

The Secretary proposed a $136 civil penalty for this violation. I assess a $75 penalty in part because on this record it appears that only Respondent's owner was exposed to the hazards created by the violation. I would consider Respondent's negligence to be much greater and would assess a much larger penalty if the record indicated that an employee was assigned to use equipment which Respondent knew was not equipped with a required safety device.

Citation No. 4331570: Inspector Goldade looked inside a van in which Respondent stored flammable and combustible greases and oils. He saw no sign prohibiting smoking or open flames (Tr. 148-151). Goldade, therefore, issued Respondent a citation alleging a violation of section 56.4101, which provides that, "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists."

Mr. Woodring testified that there were signs on the outside doors of the truck which prohibited smoking (Tr. 285-87). He

concedes that they did not mention open flames (Tr. 287). While Goldade recalls that there were no signs on the outside of the van, his testimony reveals sufficient uncertainty that I credit Mr. Woodring (Tr. 149).

The requisite signs on the outside of the vehicle would appear to satisfy the standard if the doors to the van were kept closed when the greases and oils were not being used. However, since there was admittedly no sign prohibiting open flames I affirm the violation.

I assess a $10 civil penalty because I consider the gravity and negligence for this violation to be very low. The presence of a no smoking sign should have been sufficient to alert a reasonable person that open flames would be hazardous in the back of the van as well.

Citation No. 4331575: During the inspection Goldade sampled the noise exposure of miner Joseph Hartley and Mr. Woodring (Tr. 153-162, Exh. P-15). Woodring's exposure was well under the permissible exposure limit (PEL) in section 56.5050(a) of 90 dba averaged over an 8-hour shift. However, Hartley was exposed to 677% of the PEL, or average of 103 dba (Tr. 158-59, Exh. G-15).

This violation was cited as non-significant and substantial because Mr. Hartley was wearing earplugs which would reduce the noise reaching his inner ear by 31 dba--if he was wearing them properly (Tr. 163, citation 4331575, block 8). A violation is established because there is a feasible engineering control by which Mr. Hartley's noise exposure could have been brought within the limits of the standard. That control is an insulated, air-conditioned crusher control booth, which is used by many other operators (Tr. 163-64).

I conclude that the inspector's unrebutted testimony that such booths are employed on many crushers establishes the feasibility of this control method under existing Commission precedent, Callanan Industries, Inc., 5 FMSHRC 1900 (November 1983). Given the fact that Mr. Hartley was wearing ear protection and that the evidence indicates that normally

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FOOTNOTE 1

Respondent at page 8 of its post-trial brief suggests that MSHA's noise exposure calculation is flawed because it did not account for the fact that Mr. Woodring and Mr. Hartley took a lunch break at the site or that the machinery was off for about an hour due to a mechanical breakdown. Actually, sampling during these periods is to the operator's benefit as the relatively lower noise exposure of the lunch break and repair period produces a lower time-weighted average for the whole day (Tr. 238-40).

Mr. Woodring did not employ anyone who would be exposed to excessive noise levels, I assess a civil penalty of $25.

Citation No. 4331733: During the inspection samples were taken of the respirable dust exposure of Mr. Woodring and Mr. Hartley (Tr. 182). The samples taken by Mr. Goldade were analyzed by MSHA's laboratory in Denver, Colorado and were determined to consist of approximately 24% silica (Tr. 176).

MSHA's regulation, at 30 C.F.R. 56.5001, incorporates by reference the threshold limit values (TLVs) adopted by the American Conference of Governmental Industrial Hygienists in 1973. Given 24% silica the TLV allows exposure to an 8-hour time weighted average of 37 milligrams of respirable dust per cubic meter of air (Tr. 176-78). Mr. Hartley was exposed to 95 milligrams (Tr. 173-74, 178, Exh. G-16).

This violation was characterized as significant and substantial because Mr. Hartley wore only a paper dust mask, which would be virtually useless in protecting him from the effects of respirable silica (Tr. 187, 235). Exposure to excessive amounts of respirable dust containing silica is reasonably likely to contribute to the development of serious respirable disease (Tr. 185-87), and is presumed to be "S&S", Twentymile Coal Company, 15 FMSHRC 941 (June 1993).

The citation also charged a violation of section 56.5005 for failure to implement feasible engineering controls. The record establishes that the type of control booth discussed with reference to the noise violation is such a feasible engineering control (Tr. 188-89). I, therefore, affirm the citation with regard to both of the standards cited.

I assess a $136 civil penalty for this citation, as proposed by the Secretary of Labor. The gravity of the violation warrants such a penalty, as does Respondent's negligence. Virtually all crushing operations encounter some silica and one in this business should be aware that they are likely to be in violation of these standards if they do not implement engineering controls (Tr. 194-96) .

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FOOTNOTE 2

This citation is incorrectly described as number 4331437 at Tr. 169. Additionally the term "error factor" used in discussing this citation was incorrectly transcribed as "air factor" at Tr. 181.

FOOTNOTE 3

However, at Respondent's other worksite at Blackmore Lane near Columbia Falls, Montana, little dust is generated because the ground is frozen year-round (Tr. 317-18).

ORDER

The following penalties shall be paid for the citations listed below within 30 days of this decision:

Citation	Penalty
4331562	$111
4331564	$ 25
4331565	$ 25
4331566	$ 75
4331567	$111
4331568	$ 25
4331571	$ 25
4331572	$ 25
4331573	$ 25
4331574	$ 25
4331720	$100
4331561	$ 75
4331570	$ 10
4331575	$ 25
4331733	$136
Total:	$818

Citations No. 4331563 and No. 4331569 and the corresponding proposed penalties are vacated.

Arthur J. Amchan
Administrative Law Judge

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