CCASE:
SOL (MSHA) V. 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 PROCEEDING
	:	Docket No. YORK 94-51-M
	:	A. C. No. 30-00012-05522
v.	:	
	:	Wehrle Quarry
BUFFALO CRUSHED STONE, Respondent	:	

DECISION

Appearances: William G. Staton, Esq. Office of the Solicitor, U.S. Department of Labor, New York, New York for Petitioner;
Salvatore A. Castro, Safety Director, Buffalo Crushed Stone, Inc., Buffalo, New York for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Proposal for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations of various mandatory safety standards. Subsequent to notice, the case was scheduled and heard in Amherst, New York on August 2, 1994. Samuel B. Waters testified for Petitioner. Dennis T. Sullivan, and Thomas C. Rashford, testified for Respondent. Petitioner filed a Post-Hearing Memorandum on September 22, 1994. On October 3, 1994, Respondent filed a Post-Hearing Summary.

Findings of Fact and Discussion

Introduction

Respondent operates the Wehrle Quarry, a limestone operation, wherein rock is blasted, crushed, screened and sized. Samuel B. Waters, an MSHA inspector, inspected the site on December 14, 15, and 16, 1993. In the course of this inspection, he issued Respondent seven citations, which are the subject of this proceeding.

Citation No. 4289703

On December 14, 1993, Waters inspected a fuel station building located on the subject site. He observed that a metal panel or guard, approximately 20 inches by 2 feet, had been removed from the back of a fuel pump, exposing two pinch-points inside the fuel pump where a belt went around two pulleys. Waters indicated that one pinch-point was 19 inches above the ground, and the other was 16 inches above the ground. According to Waters, the pinch-points, which were recessed within the pump, were, approximately, within an arms length distance of the exposed opening of the pump. In essence, he indicated that a person going between the back of the pump and the adjacent wall to repair or service the pump mechanism inside the pump, could be injured by the exposed pinch-points. In this connection, he indicated that he had observed accidents wherein a person's pants leg had gotten caught up in an exposed pinch-point. Waters indicated that during the three days that he was on the site, he saw the pump being used. He issued a citation alleging a violation of 30 C.F.R. 56.14112(b) which provides as follows: "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

Dennis T. Sullivan, the equipment superintendent at the site, indicated that prior to Waters' inspection, one of the mechanics had told him that there was a fuel leak in the pump. Also, there were some problems with a bearing. Sullivan told him to repair the pump. Essentially, according to Sullivan, it is not possible to observe any fuel leak inside the pump with the guard panel in place. Sullivan indicated that the mechanic told him on the day of the inspection that he was waiting to replace the panel until fueling time, i.e., 3:30 p.m., so he could check for a fuel leak.

Waters indicated that one of the shop mechanics told him that he had been servicing the bearings inside the pump on December 13, and had not put the panel back.

I accept the testimony of Waters that the pump was in use when he was there. Also, his testimony that the guard was not in place exposing the pinch-points, was not contradicted or impeached. I thus find that the evidence establishes that Respondent was in violation of the first clause of Section 56.14112(b), supra. I also find that Respondent has failed to establish that the circumstances at issue fit within the exception provided for in the second clause of Section 56.14112(b), supra. There is no testimony from any person having personal knowledge that any testing or adjusting of the equipment recessed in the pump was being performed when the pump was cited by Waters. I find that a penalty of $50 is appropriate for this violation.

Citation No. 4289704.

According to Waters, on December 14, 1993, he observed a glass panel in one of the two access doors to the fuel station building.(Footnote 1) According to Waters, the glass panel, 17 inches by 27 inches, contained various intersecting fractures. He said that he could feel several sharp edges on the panel in four different areas. The bottom of the glass panel was approximately 4 1/2 feet above the ground. The glass panel was reinforced with the one inch by inch mesh.

Waters issued a citation alleging a violation of 30 C.F.R. 56.14103(b). On May 27, 1994, Petitioner moved to amend the citation to change the standard allegedly violated from 30 C.F.R. 56.14103(b) to 30 C.F.R. 56.11001.(Footnote 2) On June 16, 1994, an Order was entered granting Petitioner's motion.

Respondent has not contradicted or impeached the testimony of Waters regarding the existence of broken glass in the panel of the door at issue. Therefore, I accept his testimony. I find that the glass panel in an access door was cracked, and contained sharp edges of glass. Hence, there was some degree of diminution of safe access to the fuel station, as the condition of the glass panel could cause lacerations to persons contacting the panel as they passed through the doorway.(Footnote 3) The hazard of possible contact with the broken glass in the panel exists inspite of the fact that the glass was reinforced with wire mesh. Hence, I conclude that Respondent did violate Section 56.11001, supra. I find that a penalty of $50 is appropriate for this violation.

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1 Near the pinch-points, the door at issue led from the fuel station building to the shop.

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2 Section 56.11001 supra, provides as follows: "Safe means of access shall be provided and maintained to all working places."

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3 Sullivan testified that normally the door was kept open. This normal practice does not relieve Respondent from complying with Section 56.11001, supra. The door can be closed, and miners can thereby gain access to and from the fuel station by opening and closing this door, thus, exposing them to the hazard of the broken glass.

Citation No. 4289705

Violation of 30 C.F.R. 56.12032

According to Waters, on December 15, 1993, the front cover had come off the electric junction box that was utilized for the lighting circuits. Because the cover was off, the conductors inside the box were exposed. The conductors were part of a 120 volt system. Waters issued a citation alleging a violation of 30 C.F.R. 56.12032 which provides as follows: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Based on the testimony of Waters, I find that the junction box at issue did not have a cover plate that was in place. There is no evidence that Respondent was performing any testing or repairing at the time. I thus find that Respondent did violate Section 56.120032, supra.

Significant and Substantial

The box was located within inches of an adjacent walkway, and was one foot above the walkway surface. The surface of the walkway was composed of metal plates which were not slippery at the time. Waters opined that "material" gets spilled on the walkway surface. (Tr. 36).

Waters opined that because of the absence of the front cover, the conductors within the junction box would be exposed to ultraviolet rays from the sun which, over time, could deteriorate the conductors' insulation, leading to the junction box becoming energized. He also indicated that a person, in ascending the walkway, could slip and fall, and inadvertently place his hand inside the box. He opined that a person cleaning the walkway with a shovel, could contact energized parts inside the box with the shovel. He indicated that contact with energized parts of the junction box could be fatal, since the majority of electricity-caused fatalities occur when the voltage is at 120 volts, as is the case herein. Based on these factors he concluded that an injury was reasonably likely to occur, and that a fatality could result. For these two reasons, he concluded that the violation was 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" 30 C.F.R. 814(d)(1).

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.

I find that the factors taken into account by Waters could occur. However, the record before me fails to establish that an injury producing event i.e., contact with bare wires or other metal material energized at 120 volts, was reasonably likely to have occurred. In this connection, I note that the wires inside the junction box were secured and insulated. I conclude that the violation was not significant and substantial. I find that a penalty of $50 is appropriate for this violation.

Citation No. 4289706

The number 3A conveyor is equipped with an emergency stop cord which is located along the side of the conveyor belt. Generally, the cord is supported by metal vertical standards. According to Waters, the purpose of the stop cord is to allow a person to intentionally pull the cord in an emergency to stop the conveyor belt. Also, the conveyor belt might be stopped if the cord is inadvertently hit, and pulled down by a person accidently falling while walking on the walkway.

On December 15, 1993, Waters observed that one of the vertical support standards was loose for a distance of approximately 20 feet, and the stop cord was not in its normal location. He stated that for a distance of a couple of feet, the cord dropped 2 inches below the level of the conveyor belt. Waters said that normally the stop cord is located at the level of the conveyor, or up to several inches above it. Waters opined that since the cord was not in its normal position, should a miner slip and not be able to hit the cord to deactivate the conveyor, an injury could result.

Waters issued a citation alleging a violation of 30 C.F.R. 56.14109(a) which provides that unguarded conveyor next to travelways ". . . shall be equipped with-(a) Emergency stop devices which are located so that a person falling on or against a conveyor can readily deactivate the conveyor drive motor; . . . ".

The conveyor in question was equipped with an emergency stop cord. Waters admitted that he did not check the pull cord to see if it worked. There is no evidence that, at the location cited, a person falling could not readily deactivate the conveyor drive motor by pulling on the stop cord. There is no requirement in Section 56.14109, supra that the stop cord be at a any specific height. Within this context, I find that Petitioner has not established that Respondent violated Section 56.14109, supra. Accordingly, Citation No. 4289706 is to be dismissed.

Citation No. 4289707

Violation of 30 C.F.R. 56.11009

According to Waters, the inclined walkway adjacent to the number C8 conveyor, extends approximately 7290 feet. The surface of the walkway consists of wooden plank boards, and is not nonskid. In general, the walkway surface is provided with cleats. Waters described these as wooden boards, 1 inch square, which are nailed perpendicular to the edges of the walkway. Waters indicated these are usually placed every 12 to 18 inches. He testified that the surface of a 16 foot long section of the walkway was not cleated, nor was it nonskid. He issued a citation alleging a violation of 30 C.F.R. 56.11009, supra which, as pertinent, provides as follows: "Inclined railed walkways shall be nonskid or provided with cleats."

Rashford, who accompanied Waters, indicated that, in normal practice, the distance between the cleats allows for a person traversing the walkway to hit a cleat with every other step. He indicated that in the walkway at issue the cleats were a stride apart i.e., a little less than 3 feet. However, he did not specifically rebut Waters' testimony that a 16 foot long section of the walkway surface was not cleated or nonskid. Nor was Water's testimony impeached. I thus find that a 16 foot long section of the walkway was nonskid and there were no cleats provided. According to Waters, the surface of the walkway contained compacted material. He said that a miner's representative who accompanied him on the inspection told him that this material becomes slippery when wet. Hence, a person

traversing the 16 foot uncleated portion of the walkway, would have been deprived of the protection against the risk of slipping provided for in Section 56.11009, supra. For these reasons, I find that Respondent did violate Section 56.11009, supra.

Significant and Substantial

Waters opined that when the walkway becomes slippery, it is easy to trip and fall and hit the surface of the walkway. According to Waters, such an accident can result in fractures to fingers or wrists, or possible head injuries. He concluded that the violation was significant and substantial, because it was reasonably likely that a person traversing the area without cleats would fall, and a resulting injury would cause a loss of work days.

According to Rashford, there was no debris on the walkway. The greater portion of the walkway was properly provided with cleats. I find that in this context, an injury producing event, i.e., slipping or falling on the uncleated portion of the walkway, was not reasonably likely to have occurred. I thus find that violation was not significant and substantial. (See Mathies, supra). I find that a penalty of $50 is appropriate for this violation.

Citation No. 4289709

Waters indicated that there was a steep stairway leading to the tail of the No. 1 belt.(Footnote 4) He said that one side of the stairway was up against a wall, and the outside of the stairway was provided with a handrail. He said that handrail was between 18 to 21 inches high. Waters indicated that when he observed the handrail, he concluded that it was too low to restrain a person who might stumble while descending the stairway, and tumble over the handrail. He indicated that in this situation a person could fall, and land on the concrete surface 12 feet below the stairway. He issued a citation alleging a violation of 30 C.F.R. 56.11002 which provides, as pertinent, that stairways shall be "provided with handrails, and maintained in good condition."

The evidence establishes that the stairway was provided with a handrail. There is no evidence that the handrail was not in good condition. There is no requirement in Section 56.11002 supra, that the handrail be of a minimum height. It is clear, as indicated by Waters on cross-examination, that the optimum height depends upon the degree of incline of the stairway. I agree with

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4 The stairway was at a fifty degree angle.

Petitioner that Section 56.11002 supra, must be construed to effectuate its remedial purposes. Hence, the handrail required by Section 56.11002 supra, must be capable of providing effective protection for miners using the stairway. Waters opined that the handrail at issue was too low to restrain a person who might fall using the stairway. Respondent did not impeach or contradict this opinion. It therefore is accepted. I find that it has been established that Respondent violated Section 56.11002, supra.

The lack of a proper handrail contributed to the hazard of a person falling off the stairway. However, there are no specific facts in the record to predicate a finding that an injury-producing event, i.e., falling on the stairway, was reasonably likely to have occurred. I therefore find that the violation was not significant and substantial. (See, Mathies, supra).

I find that a penalty of $50 is appropriate.

Citation No. 4289712

A seat belt provided on a Caterpillar loader contained a tear that started at the side edge of the belt, and extended three quarters of an inch perpendicular to the length of the belt. The belt was 3 5/16 inches wide. Waters opined that there was plenty of belt left to hold a person in place, should the vehicle turn over. He issued a citation alleging a violation of 30 C.F.R. 56.14130(i) which provides as follows: "Seat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance."

Although the seat belt was torn, there is no evidence that it was not in functional condition. Nor is there any evidence that the tear was of sufficient length in relation to the width of the seat belt, as to diminish the proper performance of the seat belt. Indeed, Waters opined that should the vehicle turn over there was plenty of belt left to hold a person inside. Within this framework, I conclude that it has not been established that Respondent violated Section 56.14130(i), supra. Therefore, citation No. 4289712 shall be dismissed.

ORDER

It is Ordered as follows:

1. Citation Numbers 4289706 and 4289712 shall be dismissed.

2. Citation Number 4289705, 4289707 and 4289709, shall be amended to indicate violations that are not significant and substantial.

3. Respondent shall pay a civil penalty of $250 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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