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SOL (MSHA) V. FRIEND & RIKALO  
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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,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-90-M
Petitioner	:	A. C. No. 45-00632-05507
v.	:	
	:	Wynoochee Gravel Pit 1
FRIEND & RIKALO, INCORPORATED,	:	
Respondent	:	Docket No. WEST 94-381-M
	:	A. C. No. 45-02614-05515
	:	
	:	Portable Crusher #1

Decision

Appearances: Rochelle Kleinberg, Esq., Office of the Solicitor  
U.S. Department of Labor, Seattle, WA for  
Petitioner;  
John O. Friend, and Chuck Hulet, Aberdeen, WA  
for Respondent

Before: Judge Weisberger

Statement of the Case

These cases, consolidated for hearing, are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations by Friend & Rikalo, Incorporated (Respondent) of various mandatory safety regulations. Pursuant to notice the cases were heard in Seattle, Washington on October 4, 1994.

Findings of Fact and Discussion

Citation Nos. 4128560, 4128361 and 4128362 (Docket No. WEST 94-90-M)

Dennis Harsh, an MSHA inspector inspected Respondent's Wynoochee Gravel Pit on October 6, 1993. He testified that there were no fittings securing a 440 volt electric cable to 3 electric breaker compartments. He issued three citations alleging violations of 30 C.F.R. 56.12008 which provides, as pertinent, that cables shall enter electrical compartments ". . . only through proper fittings." Harsh's testimony was not impeached by Respondent, as Respondent did not cross examine him. Respondent did not offer any testimony or exhibits to contradict the testimony of Harsh. Therefore, I accept Harsh's testimony. Based upon his testimony, I find that Respondent did violate

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Section 56.12008, supra. Further, I accept Harsh's uncontradicted and unimpeached testimony that should an injury occur as consequence of the violation, the injury would be fatal. I find that a penalty of \$50 is appropriate for each of these citations.

Citation No. 4128363 (Docket No. WEST 94-90-M)

On October 6, 1993, Harsh continued his inspection of the subject site. He indicated that the on-off controls for the various conveyors were at the motor control center. The motor control center was located in a van where the plant operator worked. According to Harsh, when he was at the on-off controls, he was unable to observe the full length of the two conveyor systems, and the feeder that was in the pit area. Harsh indicated that there were no visible or audible warnings installed on the conveyor system. He issued a citation alleging a violation of 30 C.F.R. 56.14201(b) which, as pertinent, provides as follows: "When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started." Respondent did not impeach the testimony of Harsh. Respondent did not offer any testimony or evidence to contradict the observation of Harsh. FOOTNOTE Therefore, based upon the testimony of Harsh which I accept, I find that Respondent did violate Section 56.14201(b), supra.

According to Harsh, he observed trucks in the stock pile area. He indicated that there was "very heavy truck traffic." (Tr. 32). He also observed truck drivers standing outside their trucks approximately 30 to 40 feet from the transfer conveyor. He opined that the cited conditions would "eventually" cause an  
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1. John D. Friend, one of Respondent's owners, manages the subject pit. He testified that when the conveyor system at issue was installed approximately two years ago, he contacted MSHA for a voluntary inspection to ensure compliance. He indicated that subsequent to the inspection he was told that the system was "in full compliance." (Tr. 48). He also indicated that the system has been inspected every six months, and was not cited until the instant citation was issued by Harsh. Friend further indicated that the conveyor system has remained in the same configuration since it was installed. He also indicated, in essence, that the motor control center has been kept at the same location. The fact that previous MSHA inspectors found Respondent not to be in violation of Section 56.14201, supra regarding the subject conveyor system, has a bearing on Respondent's negligence. However, it is not entitled to any probative weight in a de novo proceeding relating to whether Respondent was in violation of Section 56.14201(b), supra.

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accident or injury. (Tr. 33). He based his opinion upon his experience working in mines, ". . . and also reading of equipment starting up without full warning to persons unaware that it's going to start, and also accident investigations that I've read about and been involved with." (Tr. 33). He indicated that he rated an injury that could reasonably be expected as permanently disabling. He concluded that the violation was significant and substantial. He said that this conclusion was based upon MSHA policy that a violation was deemed significant and substantial if as a result of a violation an injury is reasonably likely to occur resulting in loss of work days, or restricted duties.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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, 1336 (August 1984).

I find that as a result of the violation herein an injury producing event could have occurred. However, the record does not present any specific facts to base a conclusion that an injury producing event was reasonably likely to have occurred. Hence, following well established Commission precedent I find that the violation was not significant and substantial.

I accept the testimony of John D. Friend, one Respondent's owners, that the conveyor system at issue was found by MSHA to be in full compliance when it was set up two years ago, and was not cited in subsequent inspections. I thus find that Respondent's negligence herein to be mitigated to some degree. I find that a penalty of \$75 is appropriate for this violation.

Citation No. 4128364 (Docket No. WEST 94-90-M)

According to Harsh, when he made his examination on October 6, there was no guard across the bottom of the tail pulley on the sand conveyor belt. He indicated that although there was a guard on the right side of the tail pulley, it extended only to a point approximately 4 inches below the tail pulley. He also indicated that the belt was not guarded across the bottom. According to Harsh, the lack of a bottom guard, and the lack of a full guard covering the tail pulley allowed easy access to a rotating pulley. He indicated that the plant operator works in the area. He also opined that a person shoveling under the belt could get entangled in the moving parts of the belt in the absence of a bottom guard.

On cross examination, it was elicited from Harsh that a person could be injured by the exposed pulley only if he would crawl on under the belt. In this connection, Chuck Hulet, the manager of Respondent's rock pits, testified that there is no reason for a person to go under the conveyor. He indicated that if the area under the belt has to be cleaned, the cleaning is performed with a small front loader ("Bobcat"). Louigi Hanchett, a ground-man employed by Respondent, is responsible for cleaning in and around conveyors. Hanchett testified that once or twice a day he cleans under the conveyor at issue with a bobcat and shovel. He testified that he has never crawled under a conveyor while it was running. In his opinion the belt was guarded adequately.

30 C.F.R. 56.14107(a) provides as follows: "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."

Respondent did not impeach or contradict the testimony of Harsh that (1) there was no guard across the bottom of the conveyor belt at issue, and (2) the right hand side guard extended only 4 inches below the tail pulley. I therefore accept his testimony. I find that because of these two conditions, there was a possibility of contact with a moving tail pulley. I thus find that Respondent did violate Section 56.14107, supra.

Harsh indicated on cross-examination that a person could be injured by the exposed rotating pulley only if he were to crawl under the conveyor. Such an injury could occur only while the conveyor is in operation. There is no evidence that persons regularly work under the conveyor, or in very close proximity to the conveyor in the area cited, while it is in operation. In this connection, I accept the testimony of Hanchett that he never

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crawls under the conveyer while it is running. Within this context I find that it has not been established that there was a reasonable likelihood of an injury producing event, i.e., contact with a rotating tail pulley as a consequences of the violation herein. I thus find that the violation was not significant and substantial.

Citation No. 4128365

According to Harsh, the guard across the bottom of the 7/8 tail pulley left two inches exposed. Also, there was a 4 inch gap between the frame and the rear section of the guard. The tail pulley was 37 inches above the ground. In essence, this testimony was not impeached or contradicted, and I accept it. Based upon testimony of Harsh, I find that Respondent did violate Section 56.14107, supra.

Citation No. 4128366

According to Harsh, on October 6, 1993, when he inspected the Canica feed conveyer, he observed that two inches of the pulley was exposed below the guard. He also observed a hole in the left side of the guard that measured 6 inches by 6 inches. This hole was directly adjacent to the rotating pulley. He said that the bottom of the pulley was 28 inches above the ground level.

The testimony of Harsh was not impeached or contradicted, and therefore I accept it. I find that Respondent did violate Section 56.14107, supra.

Citation No. 4128801 (Docket No. WEST 94-381-M)

On November 3, 1993, Harsh observed that there was no back guard or inside guard next to the motor and gear box on the shaker screen. The lower portion of the exposed pulley was 49 inches above the ground, and the upper pulley and belt areas were 70 inches above the ground. I accept the testimony of Harsh, and  
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2. At the hearing, Petitioner indicated that the testimony Harsh would give pertaining to the issue of significant and substantial in citation nos. 4128365, 4128366, 4128801 (Docket No. WEST 94-381) citation no. 4128802 (Docket WEST 94-381), and citation no. 4128803 (Docket No. WEST 94-381) would be the same as the testimony given regarding the issue of significant and substantial in citation no. 4128364. No new evidence was presented in citation nos. 4128365, 4128366, and 4128801 on the issue of significant and substantial. Thus I find that my decision regarding the issue of significant and substantial in citation no. 4128364 is applicable also to citations nos. 4128365, 4128366, and 4128801.

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find that as consequence of the lack of adequate guarding there could have been contact with exposed moving parts. I conclude that Respondent did violate Section 56.14107(a), supra.

Citation No. 4128802 (Docket No. WEST 94-381-M)

In essence, according to Harsh, when he examined the No. 1-3 conveyor belt he observed that the belt/pulley pinch-points on the drive motor and on the gear box were exposed. He indicated that the distance between the drive motor and the guard was approximately 4 inches from the motor. Hence, contact with exposed parts was possible. Based on the testimony of Harsh, I conclude that Respondent did violate Section 56.14107(a), supra.

Citation No. 4128803

Harsh observed the 1-1 conveyor, and noted that there was no horizontal guard for the pulley. He also noted that there was a gap of approximately 3-4 inches between the guard, and the exposed motor. Based on the testimony of Harsh, I conclude that Respondent did violate Section 56.14107(a), supra.

#### Penalties

I find that a penalty of \$50 is appropriate for each of the violations of Section 56.14107(a), supra.

#### ORDER

It is hereby Ordered that the following citations are amended indicate that are not significant and substantial: (1) Citation Nos. 4128363, 4128364, 4128365, 4128366, 4128801, 4128802, and 4128803.

(2) It is further ordered that Respondent shall pay a civil penalty of \$525 within 30 days of this decision.

Avram Weisberger  
Administrative Law Judge

#### Distribution:

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