

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 27 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

DULIN CONSTRUCTION INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-655-M
A.C. No. 45-01429-349489

Mine: Pit #1

DECISION AND ORDER

Appearances: Donald S. Horn, CLR, U.S. Department of Labor, Mine Safety and Health Administration, Vacaville, CA for Petitioner¹

Mark Dulin, Dulin Construction Inc., Centralia, WA for Respondent

Before: Judge Barbour

This case is before the court upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). In his petition, the Secretary of Labor (“Secretary”) asks the court to fine Dulin Construction, Inc. (“Dulin”) \$100 for allegedly violating mandatory safety standard 30 C.F.R. § 56.11011.² The violation allegedly occurred when Dulin allowed aggregate to accumulate around and under a ladder used by one of its employees to access a work platform to service the head pulley of a conveyor belt. Section 56.11001 requires safe access to be maintained to working places and the Secretary charges that the accumulated aggregate made access to the cited area unsafe.³

After the petition was filed, the court ordered the parties to engage in discussions to determine if they could settle the matter. Although they could not reach a settlement, they agreed to forego a trial and to ask the court to decide the case based on stipulations and exhibits. Accordingly, pursuant to Commission Rule 67, 30 C.F.R. § 2700.67, the CLR filed jointly agreed upon stipulations and a motion seeking summary decision on the one citation at issue.

¹ As a preliminary matter, the Conference and Litigation Representative (“CLR”) is accepted to represent the Secretary of Labor in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

² Dulin is a small contractor that as part of its business crushes aggregate (gravel) to size at a gravel pit it operates in Lewis, Washington, and \$100 is the lowest penalty the Secretary can propose. 30 C.F.R. § 100.3.

³ Dulin was originally cited for an alleged violation of 30 C.F.R. § 56.20003(a), a mandatory standard requiring among other things, that “workplaces [and] passageways . . . be kept clean and orderly[.]” The Secretary moved the court to modify both the citation and the petition to allege a violation of section 56.11001, Dulin did not object to the motion, and it is **GRANTED**.

THE STIPULATIONS

The court accepts the following stipulated facts to be undisputed:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction over this proceeding.
2. Pit #1 is a surface mine that extracts construction sand and gravel, and is subject to the Federal Mine Safety and Health Act of 1977.
3. At all times relevant to these proceedings, Dulin Construction Inc. operated the Pit #1 Mine.
4. Joshua Mark Mathisen was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued citation number 8610507, and . . . the citation was properly served upon an agent of the respondent.
5. The violation was promptly abated.
6. Payment of the proposed penalty will not affect the Respondent's ability to continue in business.
7. [T]he Respondent's mine size is small, and . . . the employment hours documented in Exhibit A of the Petition for Assessment are correct.
8. [The] Respondent's history of violations as documented in Exhibit A of the Petition for Assessment is correct.
9. [T]he photographs submitted as Exhibits P1, P2 and P3 are authentic and are factual representations of the conditions observed by the inspector.
10. [T]he document submitted as Exhibit P4 [(a copy of Dulin's answer)] is authentic and was submitted by the Respondent to FMSHRC in response to the Secretary's Petition for Assessment.
11. [T]he area described in [the c]itation and depicted in the photographs marked Exhibit P1, P2 and P3 is a workplace.
12. [T]he material build-up described in Citation No. 8610507 blocked the base of the ladder.
13. [T]he material was measured by the inspector to be three feet deep at the base of the ladder.
14. [T]he material was sloping away from the base of the ladder for a distance of approximately five feet as measured by the inspector.
15. [T]he ladder is the only means of access to the finish belt head roller and work platform. (Exhibit P1) [(Photograph of the aggregate, ladder, and work platform.)]
16. Respondent was aware of the material build-up described in [the c]itation. (Exhibit P4)
17. Respondent was aware that a person (greaser man) would walk over this build-up of material. (Exhibit P4)
18. While the Secretary believes the cited standard, 30 C.F.R. § 56.20003(a), is appropriate, the Secretary moves to amend the citation to reflect, instead, a violation of 30 C.F.R. § 56.11001 as even more appropriate.

Motion to Amend Citation and Order for Summary Judgment 2-3

THE REGULATION

30 C.F.R. § 56.11001: Safe Access

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

SUMMARY DECISION

Commission Rule 67(b) provides that a “motion for summary decision shall be granted only if the entire record, including the pleading, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.64(b). Here, the burden is on the Secretary, as the moving party, to establish his right to summary decision, and I conclude that the Secretary has met his burden.

DISCUSSION

To prove a violation of section 56.11001, the Secretary must establish that the area involved was a “means of access” to a “working place” and that the means of access was not “safe”. The parties have stipulated to the fact that the cited area was a working place. Stip. 11. The parties have also stipulated that the material build up described in the citation blocked the base of a ladder that provided access to a belt head roller and work platform and that a greaser man would walk over the material when accessing the area.⁴ Stip. 12, 15, 17. The only question remaining is whether the cited conditions made it unsafe for the greaser to access the work platform.

The stipulations establish that the material was three feet deep at the base of the ladder and sloped approximately five feet away from that base. Stip. 13, 14. The Secretary’s photographs depict a sizable build-up of large, uneven pieces of gravel, sloping upwards toward a ladder. *See* Ex. P1, P2. There is no question that a miner navigating this area in order to access the ladder and work platform would risk injury from slipping and falling. These conditions render the area unsafe. The photographs and undisputed facts clearly establish a violation.

The company’s primary defense is that “the gravel pile arrangement is part of a worthy safety system[,]” because it acts as a “safety berm” for the ladder and for the legs of a 25 foot high overhead conveyer in that very same area. Ex. P4. The gravel protects the ladder and conveyer from a wheel loader that accesses the area daily in order to gather product. *Id.* It thereby prevents the loader from knocking over the conveyer and causing a “catastrophic event.” *Id.* In short, the company argues that the cited conditions prevent an even greater safety hazard.

⁴ The original citation describes this material as “1 ¼ inch minus crushed aggregate.” The company describes it as crushed gravel. Ex. P4. Both terms are correct.

Section 101(c) of the Mine Act allows the Secretary to modify the application of any mandatory safety standard to a mine if such application will result in a diminution of safety to the miners. 30 U.S.C. § 811(c). Dulin is effectively alleging that application of the mandatory safety standard at issue in this matter will result in a diminution of safety. However, a section 101(c) modification is solely within the jurisdiction of the Secretary, instead of the Commission. The Commission has held “that diminution of safety may not be raised as a defense to violation in an enforcement proceeding unless the Secretary has first entered a finding of such diminution in a modification proceeding.” *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989) (citing *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (Dec. 1983)). Modification cases are heard by Department of Labor Administrative Law Judges. If Dulin wishes to resolve this diminution of safety issue, the company must first raise it in a modification proceeding before the Department of Labor.

The court also agrees with the Secretary’s gravity and negligence determinations. The citation stated that “the finish belt head pulley was accessed approximately once per month for greasing.” While any injury that occurred from a slip or fall could reasonably be expected to result in lost workdays or restricted duty, the ladder was not accessed frequently enough to make an injury likely. Therefore, the court finds the gravity of the violation to be of minor seriousness. The court further finds that Mr Dulin’s awareness that a miner would have to walk over the build-up of material establishes the company’s negligence (Stip. 17), but his good faith belief that “the gravel pile arrangement [was] part of a worthy safety system” mitigates the company’s negligence to “moderate” as originally designated in the citation. Ex. P4.

CIVIL PENALTY ASSESSMENT


The court has found a violation and it must assess a civil penalty taking into account the statutory civil penalty criteria. 30 U.S.C. § 820(i). The court has further found that the violation was only slightly serious, that an accident was unlikely, and that the violation was due to moderate negligence. The parties have stipulated that the mine is small, that the violation was promptly abated, that payment of the proposed penalty will not affect the company’s ability to continue in business, and that the company’s history of violations as documented in Exhibit A of the Petition for Assessment is correct. Stip. 5, 6, 7, 8. The court finds that the exhibit reflects a small history.⁵

The Secretary has proposed a penalty of \$100, and given these findings and the civil penalty criteria, the court finds that a penalty of \$100 is appropriate.

⁵ Exhibit A of the Petition states that 13 violations have become final orders for the company in the preceding 15 months.

ORDER

Within 30 days of the date of this decision, Dulin is **ORDERED** to pay to the Secretary a civil penalty of \$100.00, and upon payment of the penalty this case is **DISMISSED**.⁶


David F. Barbour
Administrative Law Judge

Distribution:

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⁶ Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S.
DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO
63179-0390.