

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 6, 2015

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

Petitioner,

v.

TXI OPERATIONS LP,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2015-22-M

A.C. No. 41-02820-360803

Mine: Hunter Cement Plant

ORDER DENYING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977.¹ The CLR has filed a motion to approve settlement.² Of the seven citations in the docket, three have been vacated and two have been modified with reduced penalties.³ For the reasons that follow, the motion to approve settlement is denied.

Citation No. 8854618

The Secretary seeks to lower the penalty for Citation No. 8854618 from \$585.00 to \$264.00, a reduction of 55%. This citation alleges a violation of 30 C.F.R. § 56.14107(a), which requires that “[m]oving machine parts shall be guarded to protect persons from contacting . . . moving parts that can cause injury.” The regulation gives several examples of moving parts that must be guarded. In support of the penalty reduction, the justification, in its entirety, as presented by the Secretary, states:

¹ The Conference and Litigation Representative (CLR) is accepted to represent the Secretary in accordance with the notice of limited appearance she has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

² In paragraphs 2 and 3 of the Motion for Decision and Proposed Order Approving Settlement, the Secretary continues to stake out his position that he need not explain the basis for settlement, a position which is immaterial and impertinent to the issues legitimately before the Commission. Those paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

³ Two of the citations, Nos. 8776488 and 8854623, were settled at the proposed amounts, with no changes.

The Secretary requests that Citation No. 8854618 be modified from “Moderate Negligence” to “Low Negligence.” The Respondent asserts that the ball mill has been guarded in this manner for years, and that MSHA did not provide fair notice about additional guarding requirements on the mill. The Respondent further asserts that the mill is guarded well in most areas, and that injury would be unlikely to occur because of the existing guarding. Under these specific circumstances, the negligence herein is more appropriately described as “Low Negligence.”

Motion at 3.

The deficiencies in the motion are obvious. To begin, it recites only Respondent’s assertions; the Secretary does not weigh in or otherwise comment at all upon the merits of Respondent’s claims, nor does the Secretary inform if the negligence reduction sought, from moderate to low, results in the 55% reduction under the application of the Part 100 formula. More fundamentally, the Secretary does not offer anything but silence in reaction to the issue of Respondent’s claim that its negligence should be deemed “low.”

Furthermore, the text of the citation, for which the issuing inspector asserted that the conditions found were significant and substantial and reasonably likely to result in a permanently disabling injury, seems to contradict the statement, tacitly accepted by the Secretary, as provided in his motion that “the mill is guarded well in most areas.” It must be noted that such a claim is itself an unusual basis for mitigation as, for example, it would be akin to saying that “while one of our trucks had inoperative brakes, most of our other trucks have good brakes.” Beyond that flaw in reasoning, the citation, as highlighted below, seems to identify at least three and perhaps four separate places⁴ on the Finnish Mill that were not adequately guarded:

The Finnish Mill 1 & 2 Trunion **Flange interlock shaft is not guarded** to protect miners from contacting the moving machine parts. This condition is located next to the work platform between the motor drive and Mill Outlet Housing. **The unguarded bolted moving machine part has an area exposed that is about 8 ft tall and 12 inches wide.** There is lube sight glass at this location within 12 inches of the moving machine part. The Finnish Mill motor drive shaft that is about a 14 inch diameter with about 3 inches of the width not guarded. There is also a sight glass next to this moving machine part. **The Mill itself is not adequately guarded along the work platform. The existing guard does not extend out far enough to protect miners from contacting the Ball Mill housing** that is about 14 inches from the platform. **There is a 20 inch by 20 inch section of guarding missing at the end of the work platform next to the Mill Inch Drive** exposing the Mill bearing. Miners access these areas as needed for inspections and maintenance. These **conditions** exposed the miners accessing these areas to serious type injuries in the event of an accident. Standard 56.14107a was cited 7 times in two years at mine 4102820 (7 to the operator, 0 to a contractor).

⁴ If the Court misinterprets this, the Secretary should explain if this is one unguarded spot. If it is in fact three or four areas, the Secretary is directed to acknowledge that state of affairs.

Citation No. 8854618 (emphasis added).

Finally, the motion does not state whether Respondent's allegations were discussed with the issuing inspector, which is important where, as here, the settlement rationale merely presents Respondent's contradictory assertions to the findings of the MSHA inspector. For these multiple reasons, the Court cannot approve the proposed settlement of this citation.

Citation No. 8854631

The Secretary also seeks to lower the penalty of Citation No. 8854631 from \$585.00 to \$118.00, a reduction of 80%, and modify the likelihood of injury or illness from "reasonably likely" to "unlikely," in addition to removing the significant and substantial designation. In support of the settlement, the Secretary simply engages in regurgitation of Respondent's arguments:

The Respondent asserts that the hazard is minimal; the shaft in question is very small, the opening is very small, and protected from accidental contact. The Respondent asserts that the shaft is smooth, and accidental contact would be unlikely, as would the shaft's ability to cause injury. Therefore, under these specific circumstances, the gravity herein is more appropriately described as "Unlikely, and Non-Significant and Substantial."

Motion at 3.

As explained for Citation No. 8854618, above, the Secretary offers *nothing* illuminating in reaction to Respondent's claims. He does not assert that there are legitimate factual disputes, much less identify what they are. In the face of that silence, the citation contradicts Respondent's contentions:

The #2 Load Out FK Pump key way shaft is not guarded to protect miners working in the area from contacting the moving machine part. The key way shaft and tabbed bearing seal are about 41 inches off the ground level, about 3 inches in diameter and have an area about 4 inches wide of exposure. This service point for this pump is about 5 inches from the moving machine part that is **greased daily while in operation**. The *once provided guard* for this pump shaft was not in the area. This condition exposed the miner performing maintenance to serious type injuries in the event of an accident.

Standard 56.14107a was cited 10 times in two years at mine 4102820 (10 to the operator, 0 to a contractor).

Citation No. 8854631 (emphasis added).

As the citation clearly avers, the service point is a mere five inches from the exposed shaft and is accessed daily. The citation states that not only was it unguarded, but a guard had been there and was missing. Respondent, furthermore, does not provide any facts as to *why* “accidental contact would be unlikely,” nor does it give any indication of how the shaft would be protected from accidental contact.

Thus, the rationale for settlement of this citation fails due to the same shortcomings identified in Citation No. 8854618. The settlement motion merely presents Respondent’s claims, without stating the Secretary’s position regarding them, and the motion does not state whether Respondent’s assertions were discussed with the issuing inspector. The putative rationale seems to buy into Respondent’s claims, but only by inference, and it then jumps to the conclusion that the unlikely and non S&S designations are the more appropriate descriptions. With these notable, identified deficiencies, the Court cannot approve the proposed settlement of this citation.

Vacated Citations

In this settlement, the Secretary has also decided to vacate three of the seven citations. The Secretary has, of course, provided no reasoning for his decision to vacate these three citations and presently does not have such an obligation. The Court, however, can publish the text of the citations that are being vacated.

Vacated Citation No. 8776481 was issued for a violation of 30 C.F.R. § 56.11002, which requires handrails and, when necessary, toeboards, to be provided for elevated walkways. The citation states:

The provided hand rail along the right side of the stair way landing leading to the top of the Blending Silos is not provided with a top rail. There is about a 30 inch wide section without the top hand rail. The existing hand rail is about 28 inches off the landing level. The travel way/work platform for the silo inspection doors is not provided with toe plates[,] creating a 43 inch long by 8 inch wide opening. There was loose material and 1/2 inch metal pipes laying next to the opening. From this platform to the lower travel way is about 80 ft. This area would only be accessed for silo inspections/clean out activities. This condition exposed the miners that would be working or traveling in the area to fatal injuries in the event of an accident.

Standard 56.11002 was cited 1 time in two years at mine 4102820 (1 to the operator, 0 to a contractor).

The citation was abated eight days later, with the inspector stating that “[t]he provided hand rail along the right side of the stair way landing leading to the top of the Blending Silos is now provided with a top rail. The openings around the work platform at the lower landing have been closed. This citation is hereby terminated.” Citation No. 8776481-02. The inspector designated this violation as low negligence and unlikely to cause injury, but concluded that, if an injury did occur, it would be fatal.

Vacated Citation No. 8776496 was issued for a violation of 30 C.F.R. § 56.11001, which requires that a “[s]afe means of access shall be provided and maintained to all working places.” The citation provides:

Safe means of access is not being maintained around the lower work platforms and travel ways at the Limestone Storage Bins at the K2 side of the mine. There are numerous openings (Cardox Ports) in the sides of the storage bin allowing material to fall to the lower working levels. The material observed falling from about 25 ft above ranged up to about 1-2 inches in diameter. There are numerous 6 inch wide “I” beams along the storage bin tower that have an accumulation of unconsolidated material piled on/resting on the “I” beams upwards of 60 ft over the travel way below [where] rocks were also observed. The rocks that had fallen from the elevated area range up to about 3 inches in diameter. Miners travel and work in these areas daily for inspections and/or maintenance. These conditions exposed the miners working or traveling in the area to serious type injuries in the event of an accident.

Standard 56.11001 was cited 3 times in two years at mine 4102820 (3 to the operator, 0 to a contractor).

The time to abate the citation was extended once: “The mine operator has been granted an extension on the termination due date and time to allow the material to be cleaned from the “I” beams. The area is barricaded while the work is still under progress. This citation is hereby extended to 06/28/2014 @ 0700 hours[.]” Citation No. 8776496-01. The citation was terminated, with the inspector stating that “[t]he mine operator has cleared the loose material from the overhead I beams and has closed the openings in the side wall of the storage bin allowing for Safe means of access around the lower work platforms and travel ways terminating this citation.” Citation No. 8776496-02.

As noted, the area was barricaded, and the citation, which was issued on June 24, 2014, was then extended until four days later, a fact indicative of the breadth of the problem. Ultimately, it was terminated two weeks later, on July 7, 2014. The inspector found a lost workday or restricted duty injury was reasonably likely to occur and that the violation was significant and substantial and the result of moderate negligence.

Vacated Citation No. 8854627 was issued for a violation of 30 C.F.R. § 56.4603(b), which states, in part: “To prevent accidental release of gases from hoses and torches attached to oxygen and acetylene cylinders . . . cylinder valves shall be closed when . . . [t]he torch and hoses are left unattended.” The citation provides:

The oxygen and acetylene torch left unattended at the Clinker Bin Drag Chain head pulley work platform was not bleed [sic] off prior to the miners leaving the area for lunch. There were no other persons observed in the immediate area at the time of the inspection. There was grease and oils in the area from the maintenance work being performed. In the event of an accident should the hoses or valves at the torch head become damaged and the oxygen come into contact with the oils or

grease, Miners in the immediate area would be exposed to serious injuries relating from a fire or explosion due to the uncontrolled release of flammable gases.

The citation was terminated later the same day, with the inspector stating that “[t]he oxygen and acetylene lines have been bleed [sic] off.” Citation No. 8854627.

The inspector evaluated the probability of the alleged violation to cause an injury as unlikely, with the expected injury to be lost workdays or restricted duty, and he deemed that the violation was caused by moderate negligence.

The Secretary provides no reasoning for his decision to vacate the three citations above, although the Court acknowledges that, under current practice, the Secretary has the authority to vacate citations without oversight, per *RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993). As no reasoning has been provided, the Court, the issuing inspectors, and the affected miners can only guess at the Secretary’s motivation for vacating these three citations. However, the ability to vacate citations without explanation does not prevent the Court from disclosing to the public the texts of the citations, as it has done so here.

Conclusion

Because the Secretary has not provided sufficient information for the Court to approve the settlement, the Secretary’s motion to approve settlement is **DENIED**. The Court directs the Secretary to either provide additional information to support the settlement and aver that he has consulted with the issuing inspector regarding Respondent’s contentions, or to prepare for a hearing on Citation Nos. 8854618 and 8854631. The Secretary is to inform the Court within 14 days of this Order of his intention to either submit an amended motion to approve settlement or proceed with a hearing on these matters.

William B. Moran

William B. Moran
Administrative Law Judge

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