

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
(202) 434-9973

November 19, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-979-M
Petitioner,	:	A.C. No. 04-00119-147478
	:	
v.	:	Mine: AR Wilson Quarry
	:	
GRANITE ROCK COMPANY,	:	
Respondent	:	

DECISION

Appearances: John Perez, U.S. Department of Labor, Mine Safety and Health Administration, Vacaville, California, for the Petitioner,
Kevin Jeffrey, Esq., Watsonville, California, for the Respondent

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”), alleging violations by Granite Rock Company (“Granite Rock”) of 30 CFR § 56.11027¹ (Citation No. 6196739), and 30 CFR § 56.14132 (Citation No. 6196742). Subsequent to notice, the case was scheduled and heard in San Jose, California on October 19, 2010.² After both parties rested, they waived the right to file a written brief, and relied on closing arguments. A bench decision was made which, with the exception of correction of non-substantive matters is set forth below.

¹The citation was issued alleging a violation of 30 CFR § 56.11012, but was subsequently amended to allege a violation of Section 56.11027, *supra*.

²At the hearing, the parties filed a set of stipulations.

I. Citation No. 6196739

Granite Rock Company (“Granite Rock”) owns and operates a quarry known as the AR Wilson Quarry, an above-ground mining operation. This operation contains an elevated work platform where a primary rock crusher (“crusher”) is located. The work platform is approximately 32 inches above the platform located below it. The size of the work platform is approximately twenty-eight by eighteen inches. There was a rail around the perimeter of the platform except for an eighteen inch gap on the on the west side of the platform.³

The crusher, used to break rocks, is operated approximately twice during the evening shift. The operator stands in front of two joysticks that are located on the north side of the platform, and moves the joysticks to operate the crusher.

On February 4, 2008, MSHA inspector Jan Niceswanger inspected the work platform. Niceswanger indicated that he observed that there was a gap in the railing. According to Niceswanger, the platform needed to be protected by a rail, as there was an eighteen inch gap. He indicated that due to the lack of handrails, a person could fall off the elevated platform. He issued a citation alleging a violation of 30 CFR § 56.11012 which was amended to cite a violation of 30 CFR § 56.11027. The condition was abated by the placing of a removable chain which eliminated the eighteen inch gap.

A. The Company’s witnesses

Angel Mejia was the company's lead man operator for a little more than three years. He operated the primary crusher approximately twice a night. He indicated that in operating the crusher, he faces the joysticks which are on the north side of the platform, and there is not any need for him to look to his left. However, he does glance to the right to check the cone to ensure that the crusher is working properly. Mejia indicated that he had not been distracted by any rock. Also, that the area is well lit during his night shift. He said that he is not aware of any persons slipping on the platform; nor has he slipped on it. He opined that the eighteen inch gap did not create any type of a hazard.

David Clay, a heavy duty mechanic for the last four years, has been involved in some operations at the crusher. He indicated that, in his experience, he did not become disoriented by dust, did not experience any lighting problems, and has not seen frost on the platform. He indicated specifically that when he has operated the joysticks, there wasn't any need to move to the left. According to Clay, in operating the joysticks, he kept his feet shoulder length apart, and right in front of the controls. He also has never experienced any slipping or tripping, and has not been aware of anyone slipping or tripping on the platform. He opined that the absence of an eighteen inch gap did not constitute a hazard.

³The north and south sides of the platform extended for eighteen inches; the east and west sides extended for twenty-eight inches.

Henry Ramirez, the plant manager for the last six years, indicated that in his position he becomes aware of all the safety incidents. According to Ramirez, there have not been any tripping, slipping or falling accidents on the platform at issue. He stated that he also is not aware of any such accidents in his 20 years experience at the quarry. He opined that the gap did not constitute a hazard.

B. Discussion

The secretary has the burden of proof of establishing a violation. Section 56.11027, *supra*, provides, a pertinent, that working platforms shall be “provided with handrails.”

The secretary’s position is that, in essence, there should have been a handrail all around the perimeter of the platform. Thus, it is argued that an eighteen inch gap in the railing constituted a violation of Section 56.11027, *supra*. The company argues just the opposite, i.e., that there is not anything in the wording of Section 56.11027, *supra*, that requires that the handrails completely go all around the working station.

I note that the word “handrail” is defined in Webster’s Third New International Dictionary, (2002 ed.), as pertinent, as follows: “a light structure of wood or metal serving as a guard at the outer extremity of a deck.” Random House Unabridged Dictionary (1998 ed.) similarly describes a handrail as “a rail serving as a support or guard at the side of a stairway, platform, a number of other related places.” Thus, the common meaning of a handrail relates to its use as a guard at the edge of a platform, which is consistent with the clear purpose of Section 56.11027, i.e., to prevent a fall.

Thus, specific issue is whether the handrail that had an eighteen inch gap, was adequate to serve as a guard to prevent falls. I take cognizance of Respondent’s argument that, in essence, the Secretary has not met its burden of showing that a reasonable likelihood of a hazard existed.⁴ However, there is not anything in the clear language of Section 56.11027, *supra*, which requires the Secretary to prove a likelihood of injury as part of its burden of establishing a violation.

Based on the inspector’s testimony that I find credible, I conclude that there was a possibility of a fall because of the eighteen inch gap in the railing. Taking into account the purpose of Section 56.11027, *supra*, and the common meaning of the word “handrail”, I conclude that the cited handrail was not adequate. Hence, I find the Respondent violated Section 56.11027 *supra*. (See, Palmer Coking Coal Co., 26 FMSHRC 504 (June 2004) (ALJ)).

⁴I note the inspector’s testimony, in essence, that it was “unlikely” that this condition would have resulted in any injuries.

C. Penalty

I find that the violative condition was abated in good faith. The inspector indicated the area was clean, well maintained, and well lit. He indicated that should there be a fall, it would result in loss of work days. All this adds up to very low level of gravity.

With regard to negligence, there is not any evidence as to the length of time that the violative condition existed. There is not any evidence that MSHA had ever communicated to the Respondent any need for additional compliance with the standard. There is not any evidence of any history of accidents. I find that there is not sufficient evidence to establish that the negligence was any more than low.

There was no any evidence adduced relating to the operator's history of violations and its size. Hence neither of those factors play any part in either raising or lowering a penalty.

The parties stipulated that the imposition of the penalty will not have any effect on the operators' ability to continue in business.

Weighing all these factors, especially the good faith abatement, and low levels of gravity and negligence, I conclude that a penalty of \$25 is appropriate.

II. Citation No. 6196742

At the hearing, the parties, in essence, made a motion to approve a settlement of Citation No. 619674 on the ground that the operator has agreed to pay the full amount of the penalty assessed by the Secretary (\$100). The settlement was approved as follows:

I have reviewed all the documentary evidence in the trial, and the operator's agreement to pay the full amount is a reasonable resolution of this matter under the terms of the Act, especially Section 110(i) of the Act. I approve it.

Order

It is **ordered** that within 30 days of this decision, Respondent shall pay a total civil penalty of \$125.

Avram Weisberger
Administrative Law Judge

Distribution:

John Pereza, U.S. Department of Labor, (MSHA), 2060 Peabody Road, Suite 610, Vacaville, CA 95687

Kevin Jeffrey, Esq., Granite Rock, 350 Technology Drive, Watsonville, CA 95077

/cmj