FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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APR 6 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 81-172-M
	:	A.C. No. 04-04401-05002
v.	:	
	:	Camp Connell Rock Quarry Mine
CLAUDE C. WOOD COMPANY, Respondent	:	

DECISION

Appearances: Theresa Fay Bustillos, Esq., Office of the Solicitor U. S. Department of Labor, San Francisco, California for Petitioner;
Erv Rifenburg, Claude C. Wood Company, Lodi, California, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating various safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits was held on April 13, 1983 in Stockton, California.

Petitioner filed a post trial brief and respondent stated its contentions in its closing argument.

ISSUES

The issues are whether respondent violated the regulations and, if so, what penalties are appropriate.

STIPULATION

At the commencement of the case the parties stipulated as follows:

1. The Claude C. Wood Company is, and at all relevant times hereinafter, was the owner and operator of the Camp Connell Rock Quarry Mine.

2. The Claude C. Wood Company and the Camp Connell Rock Quarry Mine are subject to the jurisdiction of the Mine Safety and Health Administration (hereinafter referred to as MSHA).

3. The Camp Connell Rock Quarry Mine is a rock quarry mine which produces crushed stone.

4. The Administrative Law Judge has jurisdiction of this case.

5. Copies of the subject citations, terminations and alleged violations in issue are authentic and may be admitted into evidence for the purpose of establishing their issuance by MSHA but are not admitted into evidence for the purpose of establishing the truthfulness or relevancy of any statement asserted therein.

6. True and correct copies of the citations and terminations were served upon the representatives of the operator.

7. All alleged violations were abated in good faith.

8. Imposition of the penalty will not affect the operator's ability to continue in business.

9. During the two year period prior to June 25, 1980 (the date of the issuance of the citations) the Claude C. Wood Company had been assessed one violation.

10. The Claude C. Wood Company is a medium size operator. The Claude C. Wood Company operates at approximately 16,002 manhours per year. At the time of the issuance of the citation, the Camp Connell Rock Quarry operated at approximately 6,000 manhours per year.

11. At the time of the issuance of the citation, the Camp Connell Rock Quarry Mine had approximately 6 employees.

Citation 380433

This citation alleges a violation of 30 C.F.R. 56.14-1, which provides:

Guards

> 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The pivotal issues presented here are whether the pinch points of the head pulley were unguarded. If so, could those pinch points be contacted by workers who might be injured by that condition.

The evidence of both parties as it relates to this citation is unclear. Accordingly, it is necessary to extensively review the record.

MSHA's evidence: During the inspection MSHA Inspector McGarrah was accompanied by John Rosen, an MSHA lab technician, and Richard Ashby, the plant manager (Tr. 13, 16-19).

The plant has three rock crushers. They are known as the primary, the secondary and the final. The final crusher, known by the brand name of Kue-Ken, reduces the rock to certain dimensions. From the Kue-Ken the rock goes onto a short conveyor belt which then spills it onto a stacker conveyor belt (Tr. 21). The plant manager identified the place where the citation was issued as being "the first conveyor belt coming from the Kue-Ken crusher" (Tr. 38-40).

The day after the citation was issued Rosen made a sketch of the Kue-Ken crusher. He and the inspector "stood there" and discussed it (Tr. 21-22). The sketch was made primarily to consider dust problems at the site.

The stacker conveyor belt was setting on a short stand near the ground and the head pulley was close by (Tr. 24). The first conveyor belt came from just above ground level up to almost chest high, a distance of about four feet (Tr. 25). The head pulley was a few inches larger than the two-foot wide belt (Tr. 26).

In his direct examination, the inspector testified the head pulley was unguarded and within easy reach of anyone passing by or working in the area (Tr. 27). But when called as a rebuttal witness he amplified his testimony by stating that a frame on the conveyor would partially obstruct a person from contacting the pinch points (Tr. 211). The rebuttal also developed that there was a guarded V-belt drive between the motor and the gear reducer (Tr. 214). In addition, a worker in a crouched position would have to go around the guarded V-belt behind the speed reducer to get his hand into the head pulley (Tr. 215).

At one time the MSHA inspector observed a laborer shoveling rock on the bottom side of the stacker. But at that point the laborer was on the opposite side of the head pulley and in no danger. In addition to the laborer, the inspector also observed the plant operator near the area of the unguarded head pulley (Tr. 27, 28).

These particular head pulleys do not need to be cleaned. Possibly it is necessary to shovel the areas around them whenever rocks spill (Tr. 28).

If an employee was shoveling rock from underneath the head pulley he would be close enough, due to the lack of a guard, to catch a shovel or piece of clothing. He could be between several inches to several feet away (Tr. 29-30). The inspector observed some spill but it was not an excessive amount (Tr 29). It was obvious that the head pulley lacked a guard (Tr. 30).

Respondent's witness, Wayne Renaud, indicated this portable plant had been used in six or seven different locations. It has been inspected by MSHA and OSHA each time it has been set up (Tr. 122, 123). The citation issued here identified this as the No. 1 conveyor from the Kue-Ken crusher.

You cannot get into this area unless you crawl on your hands and knees (Tr. 126, 151). A 48 inch by 48 inch stand prevents access to the head pulley (Tr. 150). The company has never been cited for an unguarded head pulley at the location circled on exhibit P3 (Tr. 126).

Respondent's witness Rifenburg indicated it would be "extremely difficult" to reach the head pulley circled in red on exhibit P3 (Tr. 184). According to Rifenburg the moving machine parts are protected by the guard that covers the drive belt to the speed reducer (Tr. 191).

Discussion

I credit respondent's evidence concerning this citation. Respondent's personnel have assembled this equipment on numerous occasions. Further, they are constantly working with these conveyors.

On the other hand, after carefully reviewing the Secretary's evidence, I conclude that it is not persuasive. In his direct testimony the inspector indicated that a worker could readily come into contact with the unguarded pinch points. But in his rebuttal testimony he indicated the access would be, at least partially, blocked by a frame on the conveyor (Tr. 211). The witness drew an arrow to what he calls the unguarded pinch points as shown on exhibit P3. But the drawing itself fails to show the lack of a guard. In addition, the oral evidence does not develop the nature, the dimension, and scope of the unguarded area. Conversely, the evidence does not develop how a worker could contact the pinch points.

Respondent's witnesses Renaud and Rifenburg both establish that this pinch point was not accessible. Their evidence is confirmed when the inspector, in rebuttal, appears to indicate that to reach the pinch points it is necessary to reach underneath the gear drive and the bottom of the conveyor (Tr. 215).

In sum, I conclude that the pinch points of the head pulley were guarded by location. Since a worker could not contact them, it follows that such a worker could not be injured.

The Secretary's post trial brief cites John Peterson, 2 FMSHRC 3404, (1980), and Schneider's Ready Mix, Inc., 2 FMSHRC 1092, (1980), to the effect that it is not a defense to establish that the likelihood of an accident is remote. I agree. But in this case a decision upholding the citation would, in my view, rest in speculation.

It is true that the inspector observed a worker in close proximity, but he also indicated the worker was "in no danger where he was working" (Tr. 28).

The Secretary further cites his evidence that if an employee was shoveling rock from this location he would be close enough to catch a shovel or piece of clothing (Tr. 29). True, the witness develops that point but I find from the evidence that the worker did not have access even at that location. In short, I cannot ignore the inspector's testimony establishing a lack of access.

Exhibit P3, drawn by MSHA technician Rosen, the day after this citation was issued, fails to depict that the head pulley was unguarded. Further, the exhibit fails to show the obstruction which prevented partial or full access to the pinch points.

The exhibit, in combination with the oral testimony, fails to prove a violation.

In sum, I conclude that no violation has been established and the citation should be vacated.

Citations 380436 and 380437

These citations allege violations of 30 C.F.R. 56.6-20(e) at two locations. The cited standard provides:

> 56.6-20 Mandatory. Magazines shall be:
>
> (e) Electrically bonded and grounded if constructed of metal.

MSHA's evidence indicates Inspector McGarrah inspected respondent's 8 by 8 by 10 (foot) powder magazine. The metal magazine was constructed with a double hinge door (Tr. 58, 59).

On the day of the inspection blasting agents, dynamite and prill were stored inside the magazine (Tr. 59). It was one-third full (Tr. 61). The inspector and the plant manager looked around and raked the grass but they could not find any bond or ground rod for the powder magazine (Tr. 69, 70).

The detonator magazine at the site was likewise constructed of metal, setting on the ground, and about 80 percent full (Tr. 113, 114). Although the inspector did not measure it, the magazine measured approximately 3 feet in all dimensions (Tr. 114). The inspector and the plant manager checked but they could not find an electric ground rod leading from the detonator magazine (Tr. 117).

A magazine is electrically grounded when an 8 foot copper rod is driven into the ground. And the rod is connected to the metal magazine with a heavy copper wire (Tr. 69). Copper is used because it furnishes a path of least resistance to channel any electricity into the ground (Tr. 69-71).

In the absence of a ground, lightning or a stray electrical current could ignite the powder in the magazine (Tr. 72).

Respondent's witness Rifenburg indicated that the powder magazine was in compliance because it was grounded by skid contact when resting on the decompressed granite mineral soil (Tr. 180-182). In contrast, a non-mineral soil does not act as a conduit (Tr. 182).

Discussion

Respondent contends that its metal powder magazines were sufficiently and legally grounded when they rested on the organic soil.

As the Secretary notes in his brief, this contention was addressed by Judge John A. Carlson in Gallagher and Burke, Inc., 2 FMSHRC 3399, (1980). In the cited case Judge Carlson ruled that "a metal magazine merely resting on the earth is not 'grounded'. The term 'grounded' has a commonly accepted meaning when applied to electrical safety." 2 FMSHRC at 3401. Further,

> the standard for explosives magazines ... expressly mandates grounding; and we must assume that that means adherence to common grounding practice. Had the drafters of the standard believed that metal magazines needed no grounding beyond simply resting on the earth, they would not have mentioned grounding at all. 2 FMSHRC at 3401.

I concur in Judge Carlson's views. Citations 380436 and 380437 should be affirmed.

Citations 380438 and 380439

These citations allege violations of 30 C.F.R. 56.6-5 at the two magazines. The cited standard provides:

> 56.6-5 Mandatory. Areas surrounding magazines and facilities for the storage of blasting agents shall be kept clear of rubbish, brush, dry grass or trees (other than live trees 10 or more feet tall), for a distance not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet.

MSHA's evidence proves that this wooded area had dry brush and grass on all sides and within 25 feet of the powder magazine (Tr. 62, 63, 65). The grass varied in height up to 2 feet. In addition, dry brush had blown around the magazine (Tr. 63, 104). A fire in this immediate vicinity could cause the blasting agents in the magazine to explode and cause death or serious injuries (Tr. 66, 67).

The operator should have known of this condition (Tr. 68).

During the hearing the parties stipulated that all of the evidence relating to the powder magazine also applied to the detonator magazine (Tr. 112).

Respondent's witness Rifenburg does not deny the presence of brush and dry grass in the area. But he stated that the new locations of the magazines, 25 feet away, are equally subject to the hazards of a fire in this forest (Tr. 176, 177, 181, 182).

Discussion

The uncontroverted evidence establishes violations of the regulation. These violations were abated by moving the magazines. There is no grass or dried brush in their new locations as shown in exhibits R6, R8, R10 and R14.

I agree with respondent's position that these magazines are subject to a fire hazard from sources other than those in the immediate vicinity (Tr. 218). However, I decline to rule that, as a matter of law, MSHA's regulation has no relation to safety. Respondent's arguments relate to the imposition of a penalty rather than to whether the regulation was violated.

Citations 380438 and 380439 should be affirmed.

Citation 380440

This citation alleges a violation of 30 C.F.R. 56.6-20(f), which provides:

> 56.6-20 Mandatory. Magazines shall be:
>
> (f) Made of nonsparking materials on the inside, including floors.

The MSHA inspector observed that boxes of powder were stacked on a heavy steel wire on the floor of the powder magazine (Tr. 73). The bolts and steel heads all appeared to be of a sparking material. They had not been covered to make them non-sparking (Tr. 74). Nails had been driven into the walls (Tr. 74). A spark could ignite the powder (Tr. 74-76).

The inspector had not seen steel nails and bolt heads in powder magazines (Tr. 75).

Respondent's witness Rifenburg states that the sparking regulation is "left over from black powder days." Further, that due to a change in technology, the regulation no longer applies (Tr. 178).

Witness Rifenburg further filed a copy of Title 27, Code of Federal Regulations, Part 181, containing regulations dealing with commerce in explosives and published by the United States Department of the Treasury. I take official notice of such federal regulations.

Discussion

Under the regulations promulgated by the United States Department of the Treasury, it is true that blasting agents, such as ammonium nitrate fuel oil, may be stored in Type 5 storage facilities, 30 C.F.R. § 183(e). It is further true that while non-sparking materials are required in Type 1 through Type 4 storage, such materials are not required in Type 5 storage facilities, 30 C.F.R. 181, 187, et seq. However, the MSHA regulations take precedent over the Treasury Department regulations. I note the Treasury regulations yield when they state, in part, that "[T]he storage standards prescribed by this subpart confer no rights or privileges to store explosive materials in a manner contrary to state or other law," 30 C.F.R. 181, 181.

Respondent's contentions basically address the wisdom of the standard, an issue discussed, infra. Further, respondent's contentions concern gravity and negligence. These are issues to be considered in assessing a penalty.

MSHA may, under its rulemaking power, wish to reconsider its regulation. But since the facts establish a violation, I am obliged to affirm the citation.

Citations 380442 and 380443

These citations allege violations of 30 C.F.R. § 56.6-20(i) which provides that:

> 56.6-20 Mandatory. Magazines shall be:
>
> (i) Posted with suitable danger signs so located that a bullet passing through the face of the sign will not strike the magazine.

MSHA's inspector testified the powder magazine was not posted with any danger signs. The plant manager indicated that he did not know of any such signs and, although they searched in each direction, they did not find any signs (Tr. 76, 77).

One purpose of such signs is to warn hunters they are in a danger area (Tr. 77, 78).

Respondent's witness Rifenburg indicated the company posts danger signs in public access areas during any blasting. All radio transmissions are prohibited within a certain area. This is a United States Forest Service regulation (Tr. 179, 204).

Respondent asserts that its mine is within the confines of Stanislaus National Forest. Respondent's Exhibit 12, a map of the forest, supports respondent's assertion that it may be difficult to keep the public off of its property. Therefore, being unable to prevent public access they try to camouflage the magazines to keep them out of the public's eye (Tr. 219-220). Conversely, the posting signs MSHA requires can only serve to alert the public to such storage facilities. Witness Rifenburg states that a principal concern of his company and its industry is the theft of explosives (Tr. 218).

Respondent basically asserts that in view of its unique location in the national forest, it would be wiser not to enforce this regulation.

Respondent's contentions are rejected. The Commission views the regulatory scheme of the Act as being premised upon the proposition that compliance with the safety standards adopted by the Secretary protects the nation's miners, Penn Allegh Coal Company, Inc., 3 FMSHRC 1392, 1399, footnote 10 (1981).

To overturn this regulation would in effect question the wisdom of the Secretary's standard. I find no decisions by this Commission directly discussing the doctrine, but a long line of OSHA Review Commission cases reiterate that principle. In short, they do not consider it to be a portion of their adjudicatory function to question the wisdom of a standard. Cornish Dress Mfg. Co., BNA 3 OSHC 1850, CCH 1975-76 OSHD para. 20, 246 (No. 6765, December 23, 1975); The Budd Company, 7 OSAHRC 160, 165, BNA 1 OSHC 1548, 1551, CCH 1973-1974 OSHD para. 17,387 (Nos. 199 and 215, March 8, 1974, aff'd. 513 F 2d 201 (3d Cir. 1975). I adhere to that doctrine.

Citations 380442 and 380443 should be affirmed.

Civil Penalties

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(i).

The stipulation indicates respondent was assessed a single violation during the two years prior to these citations. The stipulated facts confirm that respondent is a medium-sized operator. The imposition of a penalty will not affect the operator's ability to continue in business. In those citations that are affirmed, I conclude the operator was negligent because the violative conditions could have been known to the company. Respondent demonstrated good faith in rapidly abating after notification of the violations. In relating to gravity, I conclude that the penalties proposed for Citations 380436, 380437 (electrical bonding), 380438 and 380439 (dry brush) are proper. On the other hand there appears to be no hazard and hence no gravity involved in connection with Citation 380440 (sparking material). That citation should be assessed at $1.00. There is a certain ambivalence relating to the gravity of posting the magazines. I believe the proposal for such violation should be reduced by one half.

The final computation is summarized as follows:

Citation	Original Assessment	Disposition
380433	$ 26	Vacated
380436	18	$ 18
380437	18	18
380438	28	28
380439	28	28
380440	44	1
380442	18	9
380443	18	9

Brief

The Solicitor has filed a detailed brief which has been most helpful in analyzing the record and defining the issues in the case. However, to the extent that such brief is inconsistent with this decision, it is rejected.

ORDER

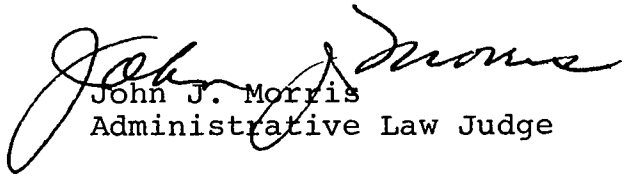
Based on the facts found to be true in the narrative portions of this decision and based on the conclusions of law as stated herein, I enter the following order:

1. Citation 380433 for the alleged violation of 30 C.F.R. § 56.14-1 and all proposed penalties therefor are vacated.

2. The following citations are affirmed and penalties are assessed as stated after each such citation:

Citation	30 C.F.R. Section Violated	Penalty
380436	56.6-20 E	$ 18
380437	56.6-20 E	18
380438	56.6-5	28
380439	56.6-5	28
380440	56.6-20 F	1
380442	56.6-20 I	9
380443	56.6-20 I	9

3. Respondent is ordered to pay the sum of $111 within 40 days of the date of this order.



John J. Morris
Administrative Law Judge

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