FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 3, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-61-M
Petitioner	:	A.C. No. 39-01328-05527
v.	:	
	:	Crusher No. 3
BOB BAK CONSTRUCTION,	:	
Respondent	:	

DECISION

Appearances: Edward Falkowski, Esq., U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Elsie Bak, Bob Bak Construction, Pierre, South Dakota, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a petition for assessment of penalty filed by the Secretary of Labor (Petitioner), seeking the imposition of civil penalties against Bob Bak Construction (Respondent), and alleging that Respondent violated various mandatory safety standards set forth in title 30 of the Code of Federal Regulations. Subsequent to notice, the case was initially scheduled for hearing on August 20, 1997. Respondent requested an adjournment, and after discussion in a telephone conference call with representatives of both parties, the case was rescheduled and heard in Fort Pierre, South Dakota on September 17, 1997.

Findings of fact and Conclusions of Law

Order No. 4410644

On August 14, 1996, Roger G. Nowell, an MSHA inspector, inspected Respondent=s crusher No. 3, a sand and gravel operation located in Wagner, South Dakota. According to Nowell, the trap feed self-cleaning tail pulley, located in an enclosed structure, was not provided with a guard. He indicated that this condition was Aeasily observable@ (Tr. 14). According to Nowell, should a person place his arm on top of the pulley brace or perpendicular to it, there is a possibility that his arm would become entangled in the fins of the pulley resulting in severe

injuries to the arm. Nowell issued an order under Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 alleging a violation of 30 C.F.R. ' 56.14107(a).

Section 56.14107(a) supra provides as follows: AMoving 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 elected not to cross-examine Nowell, and not to present any evidence to impeach or contradict his testimony. Therefore, I accept Nowell=s testimony. I find that the tail pulley can cause injury, and that it was not guarded to protect persons from contacting it. I thus find that Respondent did violate Section 56.14107(a) supra.

According to Nowell, persons entered the enclosure wherein the pulley in question was located, in order to clean, maintain, or lubricate the pulley. He indicated that a person traveling under the belt to clean it would be within six to eight inches from the belt and the pulley. In this connection, he noted the width of the entry alongside the belt and pulley was only approximately two feet wide. He concluded that the area was confined, and that a person working there would be in close proximity to the unguarded pulley. He thus concluded that it was reasonably likely for an injury such as loss of an arm to have resulted.

Inasmuch as Nowell=s testimony was not impeached on cross examination, nor was it contradicted by Respondent, as Respondent did not introduce any evidence, I accept Nowell=s testimony. I thus find that Petitioner has established a violation of a mandatory safety standard, i.e., Section 56.14107(a) supra, that this violation contributed to the hazard of an injury occasioned by contact with the unguarded pulley, that it was reasonably likely that this hazard would result in an injury, and that it was reasonably likely that the injury would be of a reasonably serious nature. I thus find that it has been established that the violation was significant and substantial (*Cement Division, Nat=l Gypsum Co.*, 3 FMSHRC, 822, 825 (April 1981)).

According to Nowell, in essence, a previous Section 104(d)(1) withdrawal order had been issued to Respondent. Nowell indicated that Respondent had been cited 16 times prior to August 14, 1996, for guarding violations. He also opined that Respondent=s foreman, Lawrence Roghair, helped set up the crusher, and was aware that the tail pulley was not provided with a guard. He opined that the violation was the result of Respondent=s unwarrantable failure.

Inasmuch as Respondent did not cross-examine Nowell, nor did it adduce any evidence to impeach or contradict Petitioner=s evidence, I accept Nowell=s testimony. I find, within the framework of his testimony, that it has been established that Respondent was negligent relating to the violation herein, and that its negligence reached the level of aggravated conduct. Hence I find that the violation resulted from the Respondent=s unwarrantable failure. (*Emery Mining Corp*., 9 FMSHRC 1997 (December 1987)).

The record establishes that the violation was abated promptly. According to Nowell, MSHA records indicate that the crusher in issue was in operation for 4,000 production hours. I find, based upon Nowell=s testimony, that the violation was of a high level of gravity, as it could have resulted in a serious injury such as a loss of a limb. I also find, as indicated above, that the level of Respondent=s negligence was high.

Respondent proffered, post-hearing, an income tax return for 1996 for Robert Bak and Elsie Bak which indicates that the former is the proprietor of Bob Bak Construction. This return indicates business income i.e., net profit, of $66,222, but a net operating loss of $251,807. Petitioner did not rebut or impeach these figures. I find that imposition of a penalty would have a negative effect, to some degree, on Respondent=s ability to continue in business.

Weighing all the above factors, I find that a penalty of $480 is appropriate.

Order No. 4410645

According to Nowell, the top portion of the stacker belt tail pulley on the crusher was not guarded. He indicated that a person coming in close proximity to the pulley could be caught up by the belt splices, and become entangled in the fins, or pinch point. Since Nowell=s testimony was neither impeached nor contradicted, I accept it. I thus find that the stacker belt pulley was not guarded, exposing persons to possible injury as a result of contact with the unguarded belt and pinch point. I thus find that it has been established that Respondent violated Section 56.14107(a) supra.

According to Nowell, the loader operator on the site, Gerry Freeman, told him that the pulley guard in issue had been removed in transporting the crusher at issue. Since it had not been replaced at the time of Nowell=s inspection, and for the reasons set forth above, infra, I find that it has been established that the violation resulted from Respondent=s unwarrantable failure. (See, Emery, supra).

For the reasons set forth above, infra, I find that Respondent=s negligence was of a high degree, and that the violation was of a high level of gravity since an injury could have resulted. Considering also the effect of a penalty on the Respondent=s ability to continue in business, as discussed above, infra, I find that a penalty of $400 is appropriate.

Order No. 4644414

MSHA inspector Jeran Sprague inspected the subject site on August 14, 1996. He indicated that he observed a 175 Clark front-end loader in operation, and that the door was open. According to Sprague, the operator of the loader did not have his seat belt on. He issued an order under Section 104(d)(2) alleging a violation of 30 C.F.R. Section 56.14130(g).

30 C.F.R. ' 56.14130(g) provides, as pertinent, that A[s]eat belts shall be worn by the equipment operator. . . @. Sprague=s testimony was not impeached or contradicted, and hence I accept it. I find that the operator of the front-end loader in question was not wearing a seat belt. Hence, it has been established that Respondent violated Section 56.14130(g) supra.

According to Sprague, the front-end loader was operated over uneven terrain, and traveled down a 15 percent grade for a distance of 50 feet on a ramp located five feet above the adjacent ground. He indicated that since the loader articulates, when the bucket is raised in normal operations, the loader could tip or turn over. In such an event, the operator not wearing a seat belt could be thrown from the vehicle especially if the door was open as observed by Sprague. Since the testimony of Sprague was not impeached or contradicted by the Respondent=s evidence, I accept it. In the context of Sprague=s testimony, I find that it has been established that the violation is significant and substantial. (National Gypsum, supra).

According to Nowell, when he inspected Respondent=s operation on June 5, 1995, Roghair was operating a front-end loader but was not wearing a seat belt. According to Sprague, Respondent had previously been cited for a violation of the same standard at issue i.e., Section 56.14130(g) supra. He indicated that the citation was issued Aprobably@ prior to 1994. Sprague testified that after he observed a Mr. Freeman operating the loader at issue without a seat belt on August 14, 1996, the former did not put on his seat belt until Roghair told him to.

Elsie Bak, Respondent=s office manager, testified that all operators are instructed to wear seat belts, and if they do not wear belts they are told Ato buckle up@ (Tr. 59).

Since Respondent did not impeach or contradict Petitioner=s evidence that Respondent had previously been cited for a seat belt violation I accept Petitioner=s evidence. For the same reason, I accept Petitioner=s evidence that on June 5, 1995, Roghair was observed not wearing a seat belt. I also accept the Inspector=s testimony that on August 14, Freeman continued to operate the loader without wearing a seat belt until told to do so by Roghair. Within this framework, I find that it has been established that the violation herein resulted from Respondent=s unwarrantable failure (See, Emery supra).

I find that the level of Respondent=s negligence was high, and that the violation was of a high level of gravity inasmuch as the operator of the loader could have been seriously injured. Considering also the effect of a penalty on Respondent=s ability to continue in business, I find that a penalty of $480 is appropriate.

Order No. 4644415

On August.14, 1996, Sprague observed a lubricating truck that was located approximately 75 to 100 feet from the stacker. According to Mrs. Bak, the truck was located in a parking area, and was used to change tires on trucks that haul material from the stockpile to locations off the subject site.

According to Sprague, he opened the side door of the truck and observed an oxygen bottle that was protected with a cap, lying on the floor. He indicated that the bottle was covered with oil, and was lying unsecured on the floor of the truck in an accumulation of oil. In addition, Sprague observed a bottle of acetylene, oil drums, and tubes of grease, inside the truck. According to Sprague, both the bottle of acetylene and the oxygen bottle were full.

Sprague issued a Section 104(d)(2) order alleging a violation of 30 C.F.R.

' 56.4601 which provides as follows: A[o]xygen cylinders shall not be stored in rooms or areas used or designated for storage of flammable or combustible liquids, including grease@.

Respondent did not impeach or contradict Sprague=s testimony that he observed an oxygen bottle on the floor of a truck that also contained oil drums and tubes of grease. I thus find that it has been established that Respondent did violate Section 56.4601 supra.

Sprague indicated that oxygen is highly volatile. He indicated that in hooking up a gauge to the oxygen cylinder should a wrench slip, it could cause sparks resulting in an explosion. He indicated that these cylinders A . . . sail like a rocket when they explode@ (Tr. 66). He indicated that such an event was reasonably likely to have occurred since, in essence, the heat generated by attaching gauges to the oxygen cylinder, could have caused a spark which, taking into account the presence of oil, could have led to an explosion.

Although the cylinders were protected with a cap, I accept the testimony of Sprague, inasmuch as it was not impeached or contradicted, that, in essence, due to the presence of oil on the cylinder at issue, an explosion was reasonably likely to have occurred. I find that, given an explosion, a reasonably serious injury could have resulted as, according to Sprague, two miners were in the area. I thus find that it has been established that the violation was significant and substantial. (See National Gypsum supra.)

I find that the violation was of a high level of gravity inasmuch as a serious injury could have resulted. I also find that the violation was of a high level of negligence. Considering also the effect of the penalty on Respondent=s ability to continue in business, I find that a penalty of $480 is appropriate.

Order

It is ORDERED that the orders at issue are affirmed as written. It is further ORDERED that within 30 days of this decision Respondent shall pay a total civil penalty of $1,840.

Avram Weisberger
Administrative Law Judge

Distribution:

Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Robert Bak Owner, Bob Bak Construction, P.O. Box 159, Pierre, SD 57501 (Certified Mail)

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