# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 26, 2000

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| v. | : | Docket No. CENT 2000-114-M |
| | : | A. C. No. 03-01597-05511 |
| CHRISMAN READY-MIX, INCORPORATED, Respondent | : | Clarksville Quarry |

**DECISION**

Appearances: David Q. Jones, Esq., Tina Campos, Law Clerk, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Lonnie C. Turner, Esq., Turner & Mainard, Ozark, Arkansas, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalties filed by the Secretary of Labor (the Secretary) against the respondent, Chrisman Ready-Mix, Inc., pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a). The petition sought to impose a total civil penalty of $571.00 for nine alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines. Only one of the nine alleged violative conditions was characterized as significant and substantial (S&S) in nature.[1] This matter was heard on October 3, 2000, in Fayetteville, Arkansas.

At the beginning of the hearing, the parties were advised that I would defer my ruling on the nine citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 58-60). This written decision formalizes the bench decision issued with respect to five of the contested non-S&S citations. The bench decision vacated three citations and affirmed two citations. During the

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[1] A violation of a mandatory safety standard is properly characterized as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an event, *i.e.*, an accident, resulting in serious injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

course of the hearing, I approved the parties' settlement agreement with respect to the remaining four citations, including the citation that designated the cited violation as S&S. With respect to the four settled citations, the respondent agreed to pay a total civil penalty of $237.00 consisting of a reduced $44.00 civil penalty for each of three non-S&S citations, and a reduced $105.00 civil penalty for the S&S violation. A total civil penalty of $64.00 was imposed for the two citations that were affirmed at the hearing. Thus, the total civil penalty imposed in this matter, including the $237.00 the respondent agreed to pay, is $301.00. This written bench decision is an edited version of the bench decision issued at trial with added references to pertinent case law.

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The respondent, Chrisman Ready-Mix, Inc., is a small mine operator that is subject to the jurisdiction of the Mine Act. The evidence reflects that the respondent has a good compliance history with respect to previous violations in that it was cited for only seven violations of mandatory health and safety standards during the previous four years preceding the issuance of the citations in issue (Ex. P-12); that the respondent abated the cited conditions in a timely manner; that the $571.00 total civil penalty initially proposed by the Secretary in this matter will not effect the respondent's ability to continue in business; and that the contested non-S&S citations involve conditions that were not serious in gravity. In this regard, the parties have stipulated to the small size of the respondent operator, to the fact that the civil penalties in this matter will not impair its ability to continue in business, and to the respondent's good compliance history. (Tr. 133).

## I. Findings and Conclusions

Chrisman Ready-Mix, Inc., is a small mine operator that has five employees at its Clarksville quarry. At the quarry, material is extracted from a rock bluff and crushed into various grades of gravel. The gravel is used by the construction industry for such purposes as road construction, concrete, roofing gravel and the installation of septic tanks. The citations that are the subject of this proceeding were issued on October 13, 1999, by Mine Safety and Health Administration (MSHA) Inspector Robert Capps, who is assigned to the Little Rock, Arkansas Field Office. The citations were issued during the course of his regular bi-yearly inspection of the respondent's Clarksville facility.

A. Citation No. 7883242

During the course of inspector Capps' October 13, 1999, inspection, Capps entered the scale house which is a small building that houses the mechanical and electronic components of the truck scale that is used to weigh customer loads. In the scale house, Capps noted a surge protector that was connected to various pieces of mechanical equipment. Generally speaking, a surge protector has a power cable that is connected to the plug on one end, and to the surge protector compartment containing the outlet receptacles on the other end. The power cable has a thick outer jacket that prevents electric shock from contact with the interior copper wires. Inside the thick outer jacket is a thinner inner rubber coated jacket that prevents the copper wires from touching each other and shorting out. The thinner inner rubber coated jacket, like the outer jacket, also provides protection from electric shock injury.

Capps determined the surge protector cable had become separated at the plug end of the cord exposing the inner protective rubber sheathing that surrounds the copper wire conductors. Capps estimated the separation distance of the outer protective cable from the plug to be approximately ½ inch. Steve Hurt, the respondent's crusher foreman, estimated the cable had separated from the plug a distance of approximately C inch. The outer protective layer of the power cable apparently had worn and had become slightly disconnected from the plug over time as a result repeatedly pulling the cable to disconnect the plug from the electrical outlet.

As a result of his observations, Capps issued Citation No. 7883242 for an alleged violation of the mandatory safety standard in section 56.12004 that requires, in pertinent part, that electrical conductors exposed to mechanical damage shall be protected. 30 C.F.R. § 56.12004. (Ex. P-1). The citation was abated by removing the surge protector from service. Capps concluded the cited violation was not S&S because the cooper wire conductors were not exposed, and the remaining inner rubber sheathing afforded a measure of protection against the electric shock hazard. The Secretary seeks to impose a civil penalty of $55.00 for Citation No. 7883242.

As a threshold matter, the bench decision addressed the respondent's assertion that the scale house, despite its location on mine property, is not a mine subject to Mine Act jurisdiction. The bench decision noted the definition of a "mine" in section 3(h)(1) of the Act is "sweeping," and "expansive." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). Under section 3(h)(1), a "mine" includes "lands, . . . structures, facilities, equipment, machines, tools or other property . . . used in, or to be used in, . . . the work of preparing . . . minerals." 30 U.S.C. § 802(h)(1). In view of the expansive nature of the statutory language in section 3(h)(1), it is clear that the scale house is subject to Mine Act jurisdiction.

Notwithstanding its jurisdictional objection, the respondent contends that the citation is defective because Capps issued the citation during the early morning of October 13, 1999, before mining activities occurred. However, an inspector may cite a violation based on his reconstruction of past events. Put another way, an inspector does not have to personally observe a violation of a mandatory safety standard to conclude that a violation had occurred. *Emerald Mines Co. v. FMSHRC*, 863 F. 2d 51, 57 (D.C. Cir. 1988). In this instance, it was appropriate for Capps to conclude that the cited violative condition, that apparently occurred over a period of time as a result of pulling the plug of the power cable from the electrical outlet, existed during mining operations for a substantial period preceding Capps' October 13, 1999, inspection.

Weighing Capps' testimony that the cable had separated approximately ½ inch, and Hurt's testimony that the cable had separated approximately C inch, I conclude that the damage to the cable was somewhere in between at a distance of approximately ¼ inch. However slight, the damaged cable did compromise the protection of the electrical conductors that is required by the cited mandatory standard. Accordingly, **the Secretary has established the fact of the violation cited in Citation No. 7883242**.

With respect to the negligence associated with the cited violation, I view the ¼ inch damage to the cable as *de minimis* and difficult to detect. Thus, there is virtually no negligence to be attributed to the respondent. However, "[t]he Mine Act is a strict liability statute and an operator may be held liable for violations without regard to fault." *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (January 1994). The Secretary proposes a $55.00 civil penalty for this non-S&S violation. While I recognize that even *de minimis* violations have the potential to cause serious injury, **the civil penalty for Citation No. 7883242 shall be reduced to $20.00** in recognition of the low gravity, the obscure nature of the cited condition, and the absence of negligence. (Tr. 70-74).

B. <u>Citation No. 7883245</u>

During the course of his inspection, Capps observed a wet wash screening plant used to clean rock material that had a ladder approximately eight feet in length leaning against the metal structure. The ladder provided a means of access to a horizontal metal frame that could be used as a walkway to service or observe the screening facility. The horizontal metal frame was approximately six to eight feet above ground level depending on the amount of spilled rock material on the ground. There was an unguarded v-belt located approximately twelve feet above ground level and four feet above the metal frame walkway. Capps noted spilled material on the surface of the metal frame. Capps was concerned that if someone used the ladder to access the metal frame walkway while the wash screen was in operation, he could slip or fall, and, in so doing, he could contact the moving belt and pulley.

Based on his observations, Capps issued Citation No. 7883245 alleging a non-S&S violation of the mandatory safety standard in section 56.14107(a) that requires moving pulleys and similar pinch points to be guarded to protect against injury. 30 C.F.R. § 56.14107(a). (Ex. P-4). Capps concluded the cited condition was non-S&S because he was told employees did not access the metal frame walkway when the washer screen was operating. Although Capps cited the condition as a section 56.14107(a) violation that requires the guarding of moving parts, the citation was abated by removing the ladder from the metal frame. (Tr. 98-101). Capps admitted the metal walkway was not frequently traveled. He also testified the only time the ladder would be used to access the walkway was to perform maintenance such as greasing and repairing gear boxes. Capps conceded his primary concern was that the washer screen must be de-energized prior to performing maintenance as required by the mandatory safety standard in section 56.12016. 30 C.F.R. § 56.12016.

The bench decision noted that section 56.14107(b) provides that the guarding requirements of section 56.14107(a) do not apply where the exposed moving parts are at least seven feet away from walking or working surfaces. Here the cited unguarded v-belt is approximately 12 feet above the ground. Thus, the question is whether the exception in section 56.14107(b) applies. The Secretary finds herself in the unenviable position of asserting that guarding is required despite permitting abatement of the citation without requiring the installation of guarding.

In determining whether the guarding requirements of section 56.14107(a) apply, the focus must be on the regulation's language that the unguarded condition must be one that "can cause injury." While the Secretary is normally entitled to deference when interpreting her own mandatory safety standards, deference cannot be accorded to the Secretary's interpretation if it is plainly wrong and inconsistent with the purpose of the cited regulation. *Dolese Brothers Co.*, 16 FMSHRC 689, 693 (April 1994) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).

In addressing the question of when guarding is required by the safety standard, it is helpful to examine the Commission's decision in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984) that addressed the purpose of section 77.400(a), a similar mandatory guarding standard governing coal mining. The Commission stated:

> We find the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention or ordinary carelessness. Applying this test requires taking into consideration all relevant exposure and injury variables. For example, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis.

6 FMSHRC at 2097.

Thus, stumbling and inadvertent contact are the concerns that the standard addresses. The standard is not intended to require moving parts to be guarded in order to prevent intentional contact by maintenance personnel who have used a ladder to access a walkway that is used for the exclusive purpose of performing maintenance or repair. Of course maintenance personnel must de-energize the washer screen prior to accessing the walkway. The Secretary has the burden of proving the occurrence of a violation. Here it appears that Capps' real concern was that equipment must be de-energized prior to maintenance. The Secretary cannot prevail in a case where it cites an operator for a failure to install guarding while permitting abatement of the citation without the installation of guarding. **Accordingly, Citation No. 7883245 shall be vacated**. (Tr. 104-09).

C. Citation No. 7883247

Capps' inspection included determining if all fire extinguishers had been visually checked on a monthly basis to ensure that they were fully charged and operable as required by the mandatory safety standard in section 56.4201(a)(1). Capps noted two fire extinguishers that were hanging on walls on mine property that had neither been timely checked, nor taken out of service. The tags on the subject fire extinguishers reflected one was last checked in April 1999 and the other was last visually inspected in August 1999. As a result of his findings, Capps issued Citation No. 7883247 citing a non-S&S violation of section 56.4201(a)(1). 30 C.F.R. § 56.4201(a)(1). (Ex. P-6). Capps designated the violation as non-S&S because the cited fire extinguishers appeared to be in good working condition. The respondent asserts the fire extinguishers were in a shed awaiting service.

The bench decision noted that, to be enforceable, the monthly visual inspection requirements section 56.4201(a)(1) must be read in conjunction with section 56.4201(b) that requires written dated certification by the person making the visual inspection. In the absence of evidence that the fire extinguishers were taken out of service by storing them at a location where functioning fire extinguishers would not ordinarily be kept, I have no alternative but to conclude that the fire extinguishers were not removed from service. Moreover, this conclusion is consistent with inspector Capps' testimony that the fire extinguishers were in good working condition. In view of Capps' testimony that the majority of fire extinguishers had been visually inspected on a monthly basis, I am reducing the respondent's degree of negligence from moderate to low. **Accordingly, Citation No. 7883247 is affirmed and the civil penalty imposed is reduced from $55.00 to $44.00**. (Tr. 124-26).

D. Citation No. 7883248

Capps observed the power cord for the No. 2 conveyor motor had been sliced with what he considered to be a thin layer of electrical tape. The cord was located on the east side of the conveyor near the head pulley at a location where the top of the conveyor is approximately

15 feet from the ground. The spliced area of the power cable was approximately ten feet off the ground. Capps noted that electrical plastic or vinyl tape was used to accomplish the splice rather than thicker rubberized electrical tape. However, Capps conceded that because the cable was suspended ten feet above ground, he could not determine the adhesion of the tape or the extent to which the tape was wound around the cable. As a result of his observations, Capps issued Citation No. 7883248 citing a violation of section 56.12013. 30 C.F.R. § 56.12013. (Ex. P-7). This standard requires that splices and repairs to power cables must be "mechanically strong with electrical conductivity as near as possible to that of the original." The standard also requires damage protection and resistance to moisture equal to that of the original. Capps designated the violation as non-S&S because the location of the splice ten feet above ground level was not likely to cause injury.

The bench decision noted that due process requires the Secretary to establish, by a preponderance of the evidence, the fact of a violation. Here Capps' observations of the spliced area of a cable suspended ten feet in the air occurred approximately one year ago. As distinguished from several of the other cited violations where photographs have been admitted depicting the conditions, there is no photograph of the splice to judge whether the splice approaches the functionality of the original cable jacket. Although rubberized electrical tape is thicker than plastic or vinyl electrical tape, it has neither been contended nor shown that splicing with plastic or vinyl tape violates electrical industry standards. The regulatory standard in section 56.12013(a) requires that the splice must provide equal protection "as near as possible to that of the original [cable]." The protective capability of the splice is a function of the adhesion quality of the tape as well as its thickness. On balance, Capps' testimony, based on his observations from the ground, does not adequately demonstrate that the amount and condition of the electrical tape used to accomplish the splice resulted in the requisite diminution of protection contemplated by section 56.12013(a). **Accordingly, Citation No. 7883248 shall be vacated**. (Tr. 153-56).

E. <u>Citation No. 7883250</u>

Capps observed the primary jaw crusher. A photograph of the crusher was admitted at trial. (Ex. P-11). The crusher was driven by a horizontal drive belt located approximately 12 feet above ground level. (Tr. 172-74; Ex. P-11). Capps was concerned that, if the belt snapped, it could fly off the pulleys causing injury to anyone traveling in the vicinity of the crusher. However, Capps testified that there was "[n]o real evidence of foot traffic . . . its a low traffic area normally during crusher hours." (Tr. 177). Capps testified that he was not aware of any previous injuries that had occurred as a result of circumstances and conditions that were similar to the conditions that he observed at respondent's primary jaw crusher. *Id.*

As a result of his observations, Capps issued Citation No. 7883250 citing an alleged violation of the mandatory safety standard in section 56.14108. 30 C.F.R. § 56.14108. This regulatory standard states:

> Overhead drive belts shall be guarded to contain the whipping action of a broken belt **if that action could be hazardous to persons**. (Emphasis added).

Capps designated the cited condition as non-S&S because, as previously noted, there was "no real evidence of foot traffic" in the area. (Tr. 177). The citation was abated by installing a horizontal metal bar under the drive belt. Capps opined that the metal bar would reduce the velocity of the belt if it broke.

The bench decision noted that the provisions of section 56.14108 do not require the guarding of all overhead drive belts to "to contain whipping action." Rather, there is a condition precedent for section 56.14108 to apply. Namely, guarding is required only if a broken belt "could be hazardous to persons." The degree of potential hazard to persons is a function of the height of the drive belt and the amount of foot traffic in the area. In this case, the belt is approximately 12 feet above the ground in an area with "no real evidence" of foot traffic. (Tr. 177). In fact, the degree of hazard was sufficiently remote for inspector Capps to conclude that it was unlikely that an injury would result because of the cited condition.

Section 56.14108 is a broad regulatory standard that applies to overhead drive belts on a case-by-case basis depending on whether the failure to guard the drive belt could pose a hazard to persons. In applying broad regulatory provisions, the Commission looks to whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982).

While the Secretary is not estopped from citing this condition simply because the condition had not been cited as a violation during the past nine years of MSHA inspections at the respondent's Clarksville facility, the failure of MSHA to cite this condition in the past is material in applying the "reasonably prudent person" test. In addition, the height of the subject drive belt 12 feet above the ground, the lack of foot traffic in the area of the crusher, and Capps' admission that injury was unlikely, all support the conclusion that a reasonably prudent person familiar with the mining industry would not have recognized the presence of a hazard requiring corrective action. Accordingly, the Secretary has failed to satisfy her burden of proving the fact of the cited section 56.14108 violation. **Consequently, Citation No. 7883250 shall be vacated**.

F. The Settlement Agreement

As previously noted, at the hearing the parties agreed to settle four of the citations that were in issue in this proceeding for a total civil penalty of $237.00. Specifically, the respondent agreed to pay a reduced total civil penalty of $132.00 consisting of three $44.00 civil penalties for Citation Nos. 7883243, 7883244 and 7883249 that cited, respectively, non-S&S violations for a missing circuit breaker in the scale house, a failure to identify circuit breakers located in the scale house, and a failure to have a weather resistant cover plate on the J-box motor of the primary feed conveyor. Finally, the respondent agreed to pay a reduced $105.00 civil penalty for Citation No. 7883246 that cited an S&S violation for an electrical control cable that was improperly installed through a hole in the frame of an aluminum window.

**ORDER**

In view of the above, **IT IS ORDERED THAT** Citation Nos. 7883245, 7883248 and 7883250 **ARE VACATED**.

**IT IS FURTHER ORDERED THAT** the respondent shall pay a total civil penalty of $64.00 in satisfaction of Citation Nos. 7883242 and 7883247 that **ARE AFFIRMED**.

**IT IS FURTHER ORDERED THAT**, pursuant to the parties' agreement, the respondent shall pay a total civil penalty of $237.00 in satisfaction of Citation Nos. 7883243, 7883244, 7883246 and 7883249.

Accordingly, the respondent shall pay a total civil penalty of $301.00 within 45 days of the date of this decision. Upon timely receipt of payment, Docket No. WEVA 2000-114-M **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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