# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 5, 2000

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-35-M |
| Petitioner | : | A. C. No. 34-01781-05509 |
| v. | : | |
| | : | Allied Custom Gypsum Fairview |
| ALLIED CUSTOM GYPSUM INC., | : | Mine |
| Respondent | : | |

## DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Peter T. VanDyke, Esq., McAfee & Taft, Oklahoma City, Oklahoma, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Allied Custom Gypsum, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of $165.00. A hearing was held in Oklahoma City, Oklahoma. For the reasons set forth below, I vacate the three citations and dismiss the proceeding.

## Background

The Fairview Mine is a small gypsum mine, owned and operated by Allied Custom Gypsum, near Fairview, Oklahoma. Eight employees usually work at the mine, which consists of a mine and crusher plant. The crusher is portable and can be moved on mine property.

The mine and crusher were inspected on July 29, 1999, by MSHA Inspector W. DeWayne Thompson and the supervisor of the local MSHA Field Office, Art Ellis. During the inspection, Thompson issued several citations. The company contested three of them, which are discussed below.

## Findings of Fact and Conclusions of Law

Citation No. 7878361

Inspector Thompson observed a portable diesel fuel tank on a trailer. The tank had a sign on it which stated: "Danger Flammable." (Govt. Ex. 4, Resp. Ex. G-2.) Part of the sign was partially obscured by dust which had adhered to diesel fuel apparently spilled during the loading of the tank. It was extremely windy and dusty on the day of the inspection.

The inspector issued Citation No. 7878361, alleging a violation of section 56.1401 of the Secretary's regulations, 30 C.F.R. § 56.1401, because: "The portable diesel fueling trailer was not provided with the proper warning to alert others to 'no smoking or using open flames.' At present, only flammable liquids signs are provided." (Govt. Ex. 2.) Section 56.1401 provides that: "Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists."

There is no dispute that the Respondent's sign did not specifically state that smoking and open flames were prohibited. Thus, it would appear that the company violated the regulation. However, the inspectors permitted the company to abate the violation by posting a sign that stated: "Danger Diesel No Smoking." (Tr. 186.) On its face, this sign does not prohibit open flames.

The regulation is clearly designed to prevent fires or explosions. I find that a sign that says "Danger Flammable" is just as likely to serve that purpose as is a sign that states "Danger Diesel No Smoking." A reasonable person seeing a "Danger Flammable" sign would know that smoking and open flames should be kept away from the area. Moreover, it is inconsistent on MSHA's part to cite the company for not having a sign specifically prohibiting smoking and open flames, and then to find that they have satisfied the regulation with a sign that specifically prohibits smoking, but not open flames.

I conclude that Allied Gypsum's sign complied with the intent and purpose of section 56.4101. Accordingly, I will vacate the citation.[1]

[1] Although mentioned neither in the citation nor the inspector's notes about the violation, the inspector gave as one of the reasons for issuing the citation that the sign was partially obscured by dust and fuel. However, it is apparent from the picture of the tank, (Resp. Ex. G-2), that the sign could still be read through the dust. In addition, it is also apparent that the windy, dusty conditions on the morning of the inspection contributed to the obscurity. Consequently, I do not find that this condition was a violation.

Citation No. 7878359

During the inspection, Inspectors Thompson and Ellis asked Alan Robinett, the plant manager, who was accompanying them on the inspection, how the diesel fuel tank for the crusher's primary drive motor was filled. After he showed them, Thompson issued Citation No. 7878359 alleging a violation of section 56.11001, 30 C.F.R. § 56.11001, because:

> The company has not provided a safe means of access to the top of the fueling hatch for the diesel holding tank for the primary drive motor. At present, to gain access they must stand on the mid-rail of the set of hand railing that surrounds the drive engine for the primary and reach over to remove the cover. The hatch cover is approximately ten feet above the ground level and from the platform of the drive motor, about three feet from the hand railing that they use to stand on.

(Govt. Ex. 5.)

Section 56.11001 requires that: "Safe means of access shall be provided and maintained to all working places." The Commission has held, with regard to an identically worded regulation, that "the standard requires that each 'means of access' to a working place be safe." *Hanna Mining Co.*, 3 FMSHRC 2045, 2046 (September 1981); *accord Homestake Mining Co.*, 4 FMSHRC 146, 151 (February 1982). In this case, the evidence is that there were two means of access to the filler neck on the fuel tank. One was the one described in the citation and the other was by reaching through an opening in the hand railing instead of standing on it.[2]

Inspector Thompson testified that reaching through the opening was a safe means of access. (Tr. 124-26.) He also testified that standing on the mid-rail, holding on to the top rail, and using the free hand to unscrew the top off of the filler neck and stick the nozzle of the hose used to fill the tank into the filler neck was a safe means of access. (Tr. 129-30.) Thus, if it was unsafe at all, the method demonstrated to the inspector was unsafe only if the top rail was not held on to.

The obvious conclusion to be drawn from this is that the company provided safe means of access to the filler neck, but that shorter employees may not always have availed themselves of that means. Consequently, I conclude that the company did not violate the regulation and will vacate the citation.

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[2] The evidence also indicated that only shorter employees had to stand on the hand railing; the taller ones could reach the filler neck standing on the platform. (Tr. 258-59.)

Citation No. 7878362

Inspector Thompson issued Citation No. 7878362, charging a violation of section 56.14107(a), 30 C.F.R. § 56.14107(a), because:

> The head pulley to the Main Reversible Conveyor Belt for the primary was not guarded to prevent a persons [*sic*] from contacting the moving machine parts. The ten inch smooth pulley was approximately 6.5 feet (2 meters) above the spillage. This condition expose [*sic*] employees to an entanglement hazard. The moving machine parts could be accessed, but not easily, because of height of the head pulley, making the chance of an accident in [*sic*] unlikely.

(Govt. Ex. 8.) The regulation states:

> **§ 56.14107 Moving machine parts.**
>
> (a) Moving 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.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The head pulley in question moves a conveyor belt which carries material from the crusher and deposits it on a belt below it.[3] The material is conveyed on the lower belt to a pile where it is removed by front-end loader. Inspector Thompson testified that he measured six feet eight inches from the top of the head pulley to the top of the spillage under it. He admitted that the "6.5 feet" measurement in the citation was a mistake. (Tr. 136.) The company terminated the violation by removing the spillage so that the distance from the ground to the pulley was "about 7.5 feet." (Govt. Ex. 8.)

According to the inspector's notes, the head pulley is "located in [a] remote section away from [a] common travelway" and "no one is assigned to work on the ground" in the area. (Govt. Ex. 10.) It is apparent from the evidence that any work performed in the immediate area of the head pulley would be to adjust the lower belt. The higher belt would not be operating while that work is being discharged. (Tr. 267-68.) Moreover, it was the company's policy to clean up the spillage at least once a day. (Tr. 270-71.)

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[3] Contrary to the inspector's belief, the belt was not reversible.

Although there is nothing to prevent miners from walking in the vicinity of the head pulley, it is clearly not a common walk way. Someone would have to go out of his way to walk under the head pulley and there is no reason why someone would just walk in that area. Consequently, the head pulley is not within seven feet of a walking surface. In addition, when work is being performed on the lower belt, the upper belt is shut down and would not be a hazard. Accordingly, while operating, the head pulley is not within seven feet of a working surface. Finally, most of the time, even if the area below it were a working surface, the head pulley comes within the seven foot exception to the regulation. Therefore, I conclude that the Respondent did not violate section 56.14107(a) and will vacate the citation.

## Order

It is **ORDERED** that Citation Nos. 7878359, 7878361 and 7878362 are **VACATED** and this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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