

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 25, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-192-M
Petitioner	:	A.C. No. 39-00993-05517
	:	
v.	:	Screener Plant No. 1
	:	
HIGMAN SAND & GRAVEL, INC.,	:	
Respondent	:	

**DECISION**

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (AMSHA), against Higman Sand and Gravel, Inc. (AHigman), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' ' 815 and 820 (the AMine Act). The petition alleges one violation of the Secretary's safety standards. A hearing was held in Sioux City, Iowa.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Screener Plant No. 1 (the Aplant) is in Union County, South Dakota. It is a small operation that typically employs two individuals. One employee operates the pay loader. The other employee, Mark Rasmussen, operates the screening plant. Higman uses a portable generator as the source of electricity for the plant. This generator was purchased by Higman during the 1980s and it has been used at this plant since the late 1980s. The generator is in a covered trailer to protect it from the elements. This trailer is of the type that is attached to a tractor for the transportation of goods over highways. The trailer has two sets of doors. The door on the side of the trailer is equipped with stairs for access to the trailer and the controls for the generator inside the trailer. The doors at the back of the trailer are opened to provide ventilation for the generator when it is operating. The generator's large cooling fan exhausts out the back of the trailer.

The generator sits near the center of the trailer from side-to-side but is closer to the back of the trailer than the front. The controls for the generator are at the end of the generator that is near the front of the trailer. The control box for the plant is also in the front of the trailer. The only person who regularly enters the generator trailer is Mr. Rasmussen, who enters the trailer to start the plant at the beginning of the shift, to shut down the plant at the end of the shift, and to shut down the conveyors or the power in the event that major repairs are required.

On May 22, 1997, MSHA Inspector John R. King inspected the plant. During this inspection he issued Citation No. 4644726 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. ' 56.14107(a). The condition or practice section of the citation states as follows, in pertinent part:

The V-belt drives on the Caterpillar generator set ... in the power generation van were not guarded. The unguarded belts were approximately three feet from the throttle and three feet off the deck. A trip, fall, or loose clothing could cause an employee to come into contact with the unguarded pinch points on the V-belts.

Section 56.14107(a) provides, in pertinent part, that A[m]oving machine parts shall be guarded to protect persons from contacting gears, ... drive, head, tail, and takeup pulleys, flywheels, ... and similar moving parts that can cause injury. @ Inspector King determined that the violation was serious and of a significant and substantial nature (AS&S@). He also determined that Higman's negligence was moderate with respect to this citation. The Secretary proposes a civil penalty of \$128 for the alleged violation.

#### **A. Fact of violation**

I find that the Secretary established a violation of section 56.14107(a) in this case. The belt drives at issue were the type of moving machine parts that are covered by the safety standard. Unguarded V-belt drives can cause injury to an employee working in the area. Loose clothing can get caught between the belt and the drive and the employee can be pulled into the pinch point. Higman contends that employees do not travel to the back of the trailer where the belt drives are located while the generator is operating. I find that the floor of the generator trailer is a Awalking or working surface, @as these terms are used in section 56.14107(b). While it may not be the practice of Mr. Rasmussen to travel near the belt drives while the generator is operating, the area is open to travel. It is likely that Mr. Rasmussen or another employee walked near these belt drives while they were turning on at least one occasion. The drives are within seven feet of a walking or working surface and the exception set forth in section 56.14107(b) does not apply.

The most logical construction of a guarding standard Aimports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. @ *Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (September 1984). The construction of safety standards that involve a miner's behavior Acannot ignore the vagaries of human conduct. @ *Id.* In finding a violation, I have

considered the Accessibility of the machine parts, work areas, ingress and egress, [and employee] work duties. @ *Id.*

Finally, the Mine Act imposes strict liability on a mine operator. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

*Allied Products Co.*, 666 F.2d 890, 892-93 (5<sup>th</sup> Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. ' 820(i).

#### **B. Significant and Substantial Nature of the Violation**

An S&S violation is described in section 104(d)(1) of the Mine Act as a violation of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard. @ A violation is properly designated S&S if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. @ *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming continued normal mining operations. @ *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

In order to establish that a violation is S&S, the Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

I find that the Secretary established the first two elements of this test. There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation will result in an injury. I find that the Secretary did not establish that an injury was reasonably likely in this instance.

In reaching the conclusion that an injury was not reasonably likely, I rely on a number of factors. First, the only employee who regularly enters the trailer is Mr. Rasmussen. He enters the trailer in the morning to start the generator and the conveyors and in the late afternoon to shut down the conveyors and the generator. He estimates that he is in the trailer about ten minutes per day. Occasionally, he enters the trailer in the middle of the day to shut down the conveyors and the generator if the plant is shut down for repairs. He also enters the trailer on occasion to get oil or grease that are stored at the front of the trailer. The generator is at the opposite end of the trailer near the back. He enters and exits the trailer by walking up the metal steps at the door on the side of the trailer. He does not enter the trailer through the back doors because the deck of the trailer is four to five feet above the ground. The controls for the generator and the plant are near the side door. The control box for the plant is about 15 feet from the belt drives and the control panel for the generator is 10 to 12 feet from the belt drives. (Tr. 47, 71, 111). These controls are not along the side of the generator adjacent to the belt drives.

When starting the generator Mr. Rasmussen checks to see if the throttle is properly adjusted before he starts the generator. The throttle is within a few feet of the unguarded V-belt drives. After he starts the generator, he turns on the conveyors and exits the trailer. There is no need for Mr. Rasmussen or anyone else to walk to the back of the trailer while it is operating. One cannot easily exit the trailer through the back doors. In addition, the noise of the generator and the wind produced by the cooling fan make the back of the trailer an unpleasant place to exit. Maintenance to the generator is performed while it is shut down. For example, the fuel filter, which is near the belt drives, cannot be changed except when the generator is off. There are no grease fittings near the V-belt drives. There are no stumbling hazards near the belt drives except a set of small wooden blocks or wedges under the generator that stick out a little. Although it would be possible for someone to trip over these blocks, I find that it is unlikely that anyone's body or clothing would come in contact with the belt drives in such an event.

The Secretary disputes Mr. Rasmussen's testimony that he does not travel within seven feet of the belt drives while the generator is running. Inspector King testified that Rasmussen told him during the inspection that the belt drives should be guarded. (Tr. 136; Ex. G-1). The inspector also testified that Rasmussen told him that he sometimes adjusts the throttle after he has started the generator. (Tr. 53, 137-38). At the hearing, Mr. Rasmussen testified that he never adjusts the throttle while the generator is running.

I find that Mr. Rasmussen has adjusted the throttle after starting the generator, but that this is a rare event. The proper operating procedure for this generator is to set the throttle before it is started. (Tr. 72-73). Mr. Higman testified that the person starting the generator would not want to touch the throttle when it is running. (Tr. 74). Mr. Rasmussen stated that he has been running this generator for Higman since it was a brand new and he knows from that experience exactly where to set the throttle before he starts the generator. (Tr. 119). I credit this statement. Rasmussen does not readjust the throttle while the generator is operating except in extraordinary circumstances. Thus, his exposure to the moving belt drives was not very significant. The control panel is at one end of the generator, the belt drives are near the opposite end, and the throttle is close to the belt drives in between. It is unlikely that his clothing or body

would come into contact with the pinch points if he stumbled. The Secretary argues that because the doors to the trailer were open, the floor could be wet and present a slipping hazard. I find that the floor would not usually be wet because the ventilation produced by the fan would quickly dry out the trailer. In addition, the floor was grooved, which would tend to make the floor less slippery.

As a general matter, I believe that unguarded moving machine parts present a significant and substantial hazard to employees. In this case, however, I find that an injury was not reasonably likely. Although I find that the floor throughout the trailer was open for travel and constituted a walking or working surface, the floor near the belt drives was not generally used as a travelway or a working surface while the generator was operating. I recognize that Rasmussen may have occasionally traveled near the belt drives while the generator was operating. I find, however, that his exposure was insignificant and that an injury was highly unlikely, taking into consideration continued normal mining operations and the unpredictable nature of human conduct. Inspector King stated that a guarding violation may not be S&S if "An individual is seldom, if ever, in the particular area." (Tr. 26). Mr. Rasmussen was the only person who entered the trailer on a regular basis, he was only in the trailer about ten minutes a day, and he rarely walked within ten feet of the unguarded belt drives while the drives were operating.

I find that the Secretary established the fourth element of the *Mathies* test because if an injury were to occur, the injury would be of a reasonably serious nature. Accordingly, I hold that the violation was not S&S because the hazard contributed to by the violation was not reasonably likely to result in an injury.

## II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that eleven citations were issued at the Screener Plant No. 1 between May 1995 and May 1997. (Ex. G-5). The plant is a small facility that employed two miners and worked 3,602 man-hours in 1997. Higman is a small operator that worked 9,510 man-hours in 1997. The violation was rapidly abated. The penalty assessed in this decision will not have an adverse effect on Higman's ability to continue in business. Although the violation was not S&S, I find that it created a moderately serious safety hazard. Higman's negligence was moderate. Although the generator had been inspected by MSHA on a number of occasions and the belt drives had never been cited, Higman had received three citations for unguarded moving machine parts in the two years preceding the date of the citation at issue. (Ex. G-5; *Higman Sand and Gravel, Inc.*, 18 FMSHRC 951 (June 1996)(ALJ)). Thus, Higman was on notice that guarding was required for moving machine parts. Based on the penalty criteria, I find that a penalty of \$100.00 is appropriate for this violation.

### III. ORDER

Accordingly, Citation No. 4644726 is **AFFIRMED** as modified above and Higman Sand and Gravel, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$100.00 within 40 days of the date of this decision.

Richard W. Manning  
Administrative Law Judge

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