FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 26, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 95-190-M
	:	A.C. No. 47-00792-05508
v.	:	
	:	Cedar Lake Sand & Gravel Pit
CEDAR LAKE SAND & GRAVEL, Respondent	:	

DECISION

Appearances: Ruben R. Chapa, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for the Petitioner;
Bruce Gilbert, President, Cedar Lake Sand & Gravel Co., Hartford, Wisconsin, for the Respondent.

Before: Judge Weisberger

This case is before me based on a Petition for Assessment of a Penalty filed by the Secretary of Labor alleging a violation by Cedar Lake Sand & Gravel Company, Incorporated ("Cedar Lake") of 30 C.F.R. ' 56.16006 and 30 C.F.R ' 56.2003(a). Pursuant to notice, the case was heard in Milwaukee, Wisconsin, on May 31, 1995.

Findings of Fact and Discussion

Violation of 30 C.F.R. ' 56.16006

On June 22, 1994, Robert Taylor, an MSHA Inspector [1], inspected the Cedar Lake Sand and Gravel Pit (Cedar Lake Pit), a sand and gravel operation located in Washington County Wisconsin. Taylor observed a compressed gas cylinder that was attached to a portable cart, and located outside adjacent to a shack where gas and grease were stored. The cylinder was not covered. Taylor issued a citation alleging a violation of 30 C.F.R. ' 56.16006,

[1]Taylor retired as an MSHA Inspector on December 31, 1994.

which provides as follows: "[v]alves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use."

Cedar Lake did not present any testimony to impeach or contradict the testimony of Taylor that the cylinder was not covered. Further, the parties stipulated that the cylinder "was being stored," (Joint Stipulation 1, Paragraph 8(a)). Clint Gerlach, Cedar Lake's Foreman, testified that in the past MSHA inspectors only examined those cylinders located in a storage facility to see if they were covered. He said that the cylinder at issue was set up for use, and that to the best of his recollection cylinders are used daily. He could not remember when the cylinder at issue had last been used prior to June 22, 1994. He indicated that when a cylinder is put to use, a regulator is installed. The cylinder at issue had such a regulator. Gerlach indicated that in his more than 18 years experience he had not been aware of the need to cover cylinders that had regulators installed on them.

Based upon the uncontradicted testimony of Taylor, I find that the cylinder in question was not covered. Further, the parties have stipulated that it was being stored, and there is no evidence that it was in use. Indeed, Gerlach could not recall when it was last used. I thus find that Cedar Lake did violate section 56.16006, supra. I note Respondent's allegation that MSHA in the past had not cited Cedar Lake for not covering its cylinders that were not stored in the storage area. I find this allegation not to be a defense to the violation of Section 56.16006, supra (see U.S. Steel Mining Co., Inc., 15 FMSHRC 1541, 1546-1547 (1993)).

Taylor explained that should the valve of the cylinder be knocked off as a consequence of its not being covered, the cylinder then would become like a missile, and could cause serious injuries, a fire, or an explosion. However, the gravity of the violation is mitigated to some degree by the fact that the cylinder was secured to a cart. Also, I find credible Gerlach's testimony that until the instant citation was issued, he, in good faith, was not aware that cylinders not stored in the storage area had to be covered. I thus find Cedar Lake's negligence to have been mitigated somewhat. Considering these factors, as well as the remaining factors set forth in Section 110(i) of the Act as stipulated to by the parties, I conclude that a penalty of $200 is appropriate.

Violation of 30 C.F.R ' 56.20003(a)

On June 22, 1994, as Taylor continued his inspection, he climbed up a flight of stairs to a catwalk (walkway) that led to a sizing screen. A handrail was located on one side of the walkway. There was a toe plate approximately 2 inches high on the edge of the walkway. Taylor testified that he observed a buildup of rocks on the walkway. According to Taylor, the rocks and the accumulated rocks were 8 inches deep, and covered the entire walkway.

Taylor issued a citation which initially alleged a violation of 30 C.F.R. ' 56.11001, but which was amended on June 27, 1994, to instead allege a violation of 30 C.F.R. ' 56.20003(a). Section 56.20003(a), supra, provides that at all mining operations, "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." Gerlach, who was present with Taylor, testified regarding the accumulation of rocks as follows: "I don't think it was quite 8 inches" (Tr. 90). He opined that, due to the presence of a 2 1/2 inches high toe plate on each side of the edge of the walkway it was not likely that the material accumulated 8 inches. However, since Gerlach indicated that he was not on the walkway on the day the citation was issued, I find that his testimony is inadequate to impeach or dilute the testimony of Taylor based upon his actual observations. I thus find that, based upon Taylor's testimony, the walkway did have an accumulation of rocks. According to Gerlach and Tony Wagner, the crusher plant operator, no one works on the walkway when the plant is in operation. However, the walkway is the means of access to the sizing screen. A miner uses the walkway once a day to access the screen in order to grease it and observe its condition. Also, the walkway provides access to the screen, when its cloth has to be changed. I thus find that the walkway, which is the means of access to the screen, is a passageway as that term is commonly understood. In this connection, I note the following definition of the term passageway as set forth in Webster's Third New International Dictionary (1986 edition): "[a] way that allows passage to or from a place or between two points." Since the walkway is considered a passageway, and since it contained an accumulation of rocks to the extent testified to by Taylor, I conclude that Cedar Lake did violate Section 56.20003(a), supra.

Taylor noted footprints in the dust on the floor of the walkway. He also noted dust on the accumulated rocks. He opined that the accumulation of rocks had existed for at least a day. On the other hand, Wagner testified that each morning he checks the screen, and cleans the walkway. Gerlach testified that earlier in the day Wagner had told him that when Taylor had issued his citation, clay had covered up the holes on the screen

causing the materials on the belt feeding the screen to fall on the walkway. Also, Gerlach indicated that, in general, crushers produce dust which extends about 1000 feet from the crushers. In this connection, he noted that the walkway at issue was located approximately 15 feet from two crushers. Based upon this essentially uncontradicted testimony, I find that the level of Cedar Lake's negligence to have been mitigated to some degree. According to Taylor, a person walking to the screen on the walkway while carrying tools or other materials could have tripped on the accumulated rocks causing a sprain or a bruise. I thus find the violation was only of a moderate degree of gravity. I find that a penalty of $150 is appropriate for this violation.

ORDER

It is ORDERED that Cedar Lake pay a civil penalty of $350 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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