FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 5, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 95-59-M A.C. No. 09-00265-05520
v.	:	
	:	Junction City Mine
BROWN BROTHERS SAND COMPANY, Respondent	:	

DECISION

Appearances: Robert L. Walter, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Steve Brown, Partner, Brown Brothers Sand Company, Howard, Georgia, for the Respondent.

Before: Judge Feldman

This matter is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, (the Act). The petition seeks total civil penalties of $269 for five alleged violations of mandatory standards in Part 56, 30 C.F.R. Part 56. The proposed $269 penalty consists of a proposed $69 penalty for an alleged handrail violation designated as significant and substantial, and, proposed $50 penalties for each of four alleged nonsignificant and substantial guarding violations.

This case was heard on July 26, 1995, in Butler, Georgia. Mine Safety and Health Administration (MSHA) Inspector Kenneth Pruitt testified on behalf of the Secretary. Partner Greg Brown, who accompanied Pruitt on his inspection, testified for the respondent. The parties stipulated the respondent is a small operator subject to the jurisdiction of the Act, and, that all cited violations were abated in a timely manner. At the hearing, the Secretary moved to vacate nonsignificant and substantial Citation No. 4302159. Thus, the Secretary now seeks a total civil penalty of $219 in this matter.

The respondent=s Junction City Mine is comprised of two plants which are approximately one mile apart. Sand is extracted by shooting a high pressure water gun on an embankment washing

sand off into a pit. The sand is then washed down to a barge in the pit where a powerful sump pump is located. The pit material is pumped to shaker screens where debris is removed. The sand and is then pumped to a classifying plant where it is stockpiled by a conveyer belt. The stockpiled sand is transported through a tunnel on belts. At Plant No. 1 the sand comes out of the tunnel onto a conveyer belt and goes directly into rail cars for shipment. At Plant No. 2, the sand is transported from a tunnel up an incline conveyer belt and into storage bins.

Findings of Fact and Conclusions

As a general matter, in his post-hearing filing, Steve Brown, does not expressly deny the fact of occurrence of the cited violations. Rather, Brown objects to MSHA=s purported inconsistent enforcement standards because different inspectors have differing interpretations regarding whether a given condition constitutes a violation. Brown is also dismayed by the fact that the same inspector may overlook a violation during prior inspections only to cite the same condition on a subsequent inspection.

Thus, in the instant case, Brown complains the cited conditions were never cited before. Brown summarizes his predicament as follows: ALiving with MSHA is like having 6 or 8 wifes (sic). It sure is hard to please all of them all of the time. We comply with one and the next one changes.@ (Brown letter dated Sept. 19, 1995).

Brown=s analogy of MSHA enforcement to the rigors of domesticated life is misplaced. The past failure of inspectors to cite violative conditions, although potentially dangerous, is fortuitous rather than burdensome. Surely, Brown would not argue he is immune from a speeding citation simply because a police officer who had previously observed him speeding did not issue a citation. Similarly, the Commission has repeatedly held that a lack of previous enforcement of a safety standard does not constitute a defense to a violation and that estoppel does not generally apply to the Secretary. *See U.S. Steel Mining Company, Inc.*, 115 FMSHRC 1541, 1546-47 (August 1993), *and cases cited therein*. Any other approach would be contrary to the Act=s fundamental purpose of promoting safety by immunizing operators from enforcement of safety violations that were previously overlooked.

Citation No. 4302153

Inspector Pruitt inspected the respondent=s mine site on September 13, 1994. Pruitt observed two employees working on the sand pump barge which is located in the pit at the No. 2 Plant. The barge was elevated approximately nine feet above the pit's surface at the time of the inspection. The barge has a smooth metal floor which was on a slight decline in the direction of the sump pump. The barge floor is subject to becoming wet and slippery due to moisture from the operation of the pump. The outer perimeter of the barge platform did not have handrails to prevent an employee from falling off.

Pruitt observed the end of the barge in accumulated pit water approximately three feet in depth. The end of the barge is in close proximity to the high powered suction pump that pumps approximately 100 tons of sand per hour. Employees use the platform at the rear of the barge on a regular basis to observe the functioning of the pump, to grease its bearings, and, to clear roots or other debris from the suction area. Greg Brown conceded that if an employee fell from the rear of the barge, serious if not fatal injuries could occur because it would be difficult to disengage a victim from the powerful pump suction. (Tr. 38-39).

Based on Pruitt=s observations, the respondent was cited for a violation, characterized as significant and substantial, of the mandatory safety standard in section 56.11002, 30 C.F.R. ' 56.11002. This standard provides, in pertinent part, that elevated walkways shall be of substantial construction and provided with handrails.

It is undisputed that employees routinely traverse the barge floor and that there was no guardrail installed along the outer perimeter of the barge. This condition is depicted in photographs P-1 and P-2 which show the post-inspection installation of guardrails. It is not uncommon for floating structures to have railings to prevent individuals from falling overboard. Thus, the Secretary has established a violation of the mandatory standard in section 56.11002.

Resolving the issue of whether this violation was properly designated as significant and substantial requires an analysis of whether there is Aa reasonable likelihood that the hazard contributed to will result in an event in which there is [a serious] injury.@ *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). In addressing the significant and substantial question, the Commission has noted the likelihood of injury must be evaluated in the context of an individual=s continued exposure during the course of continued normal mining

operations to the hazard created by the violation. *Halfway, Inc.*, 8 FMSHRC 8, 12 (August 1986); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985); *U.S. Steel Mining Company*, 6 FMSHRC 1573, 1574 (July 1984).

Here, employees regularly traveled the barge platform, which is frequently wet and slippery, to observe and service the sump pump. The photographs in P-1 and P-2 illustrate that employees would have to position and extend themselves at the end of the barge in order to reach the sump pump lines and motor. They would also have to extend over the outer perimeter of the barge to clear debris from the sump pump area. It is therefore reasonably likely that an employee performing such functions would slip given the wet and muddy condition of the barge floor. In the absence of railings, there is nothing to prevent such an employee from falling into the pit and sustaining serious or fatal injuries as a result of exposure to the powerful suction of the sump pump. Consequently, the record adequately establishes this violation was properly characterized as significant and substantial. Accordingly, the Secretary=s proposed $69 civil penalty for Citation No. 4302153 is affirmed as issued.

Citation Nos. 4302156, 4302157 and 4302158

Citation Nos. 4302156, 4302157 and 4302158 were issued by Pruitt for alleged nonsignificant and substantial violations of the standard in section 56.14107(a), 30 C.F.R. ' 56.14107(a), for guarding failures on the No. 2 shaker screen flywheel, the No. 2 storage tank takeup pulley, and the No. 1 shaker screen v-belt drive, respectively. Section 56.14107 requires:

> (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 (emphasis added).
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

In considering the fact of occurrence of alleged guarding violations, the dispositive issue is whether the cited unguarded moving part can cause injury. The potential for injury requires exposure to the subject moving part by personnel who must pass within a reasonable proximity to the hazard. In this regard, the Commission has stated:

> [T]he most logical construction of [a guarding] 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 human carelessness. . . . Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, 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. (Emphasis added). *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (September 1984).

Thus, the hazard sought to be avoided by mandatory guarding standards is the sudden inadvertent contact of extremities with moving equipment parts. It is the possibility of exposure rather than the likelihood of exposure that establishes a violation of section 56.14107. Consequently, the Secretary has moved to vacate Citation No. 4302159 for an unguarded v-belt drive on the south masonry sand conveyor because of its location high above working surfaces. (Tr. 4).

With regard to the remaining citations in this matter, the testimony, as well as the photographs in P-3 through P-7, demonstrate the cited unguarded flywheel, takeup pulley and v-belt drive are all in close proximity to walkways or working surfaces. Although Pruitt concluded, given the nature and frequency of exposure, that it was unlikely that employees would inadvertently contact these unguarded pinch points, the condition and location of the cited moving parts near working surfaces establish the fact of the cited violations. Accordingly, the $50 proposed civil penalty for each of the nonsignificant and substantial violations cited in Citation Nos. 4302156, 4302157 and 4302158 are affirmed.

ORDER

In view of the above, Citation No. 4302159 **IS VACATED**. Citation Nos. 4302153, 4302156, 4302157 and 4302158 **ARE AFFIRMED**. Consequently, **IT IS ORDERED** that the respondent pay a total civil penalty of $219 in satisfaction of the four affirmed citations in this matter. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision.

Upon timely receipt of the $219 payment, Docket No. SE 95-59-M

IS DISMISSED.

Jerold Feldman
Administrative Law Judge

Distribution:

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