

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

November 26, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2007-350-M
Petitioner	:	A.C. No. 40-00811-122454
v.	:	
	:	
SANGRAVL COMPANY, INC.,	:	Sangravl Company, Inc.
Respondent	:	

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, Robert A. Simms, Conference and Litigation Representative, and Kirby G. Smith, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Madisonville, Kentucky, for Petitioner; John B. Herbert, President, Sangravl Company, Inc., New Johnsonville, Tennessee, *pro se*, 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 Sangravl Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges five violations of the Secretary’s mandatory health and safety standards and seeks a penalty of \$4,097.00. A hearing was held in Nashville, Tennessee. For the reasons set forth below, I vacate one citation, affirm the four remaining citations, while modifying three of them, and assess a penalty of \$1,626.00.

Background

Sangravl Company, Inc., operates a sand and gravel plant on the banks of the Tennessee River near New Johnsonville, Tennessee. It was inspected by MSHA Inspector Paul Scott on March 19, 2007. The plant was not running on the day it was inspected due to a shortage of sand. (Tr. 17)

On the day of the inspection four employees were working at the plant. (Tr. 18.) One of the employees operates a large crane with a “clam shell” bucket used to dig for gravel and sand as well as load it on the truck. (Tr. 18.) Another employee is the plant operator, who is situated at the top of the plant. (Tr. 18.) The remaining employees are a truck driver and a front-end

loader/operator who is responsible for loading trucks and other miscellaneous tasks. (Tr. 18-19.) Mr. Parnell is the foreman at Sangravl. (Tr. 19.)

Findings of Facts and Conclusions of Law

Citation No. 6097267

The citation alleges a violation of section 56.14107(a) of the Secretary's regulations, 30 C.F.R. § 56.14107(a). The "Condition or Practice" alleged to result in this violation was stated as: "A return roller located on the No. 9 conveyor in the screening plant was not guarded. The moving parts were approximately 4 to 5 feet above ground level and the roller was 4 to 5 inches in diameter." Section 56.14107(a) requires that: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

On his March 19, 2007, inspection, Inspector Scott observed a return roller on the No. 9 conveyor that was not properly guarded. (Tr. 19.) As shown in the photograph taken by the inspector, the return roller was protected by a partial guard on each side of the conveyor, but the bottom portion of the roller was unguarded. (Govt Ex. 3.) The inspector believed that miners working in the area, or who were in the area to clean or to fix the roller, could have a limb or loose clothing become entangled in the roller causing serious injury. (Tr. 20-21.)

John Herbert, President of Sangravl, stated that the existing guarding had been approved by a previous inspector. (Tr. 67.) He further testified that "we don't clean up or work on or go under the plant while it's running." (Tr. 68.)

The chance of a miner inadvertently coming in contact with the roller, while not impossible, was extremely unlikely. There is no evidence that the roller was worked on while it was operating. As previously noted, there were only four miners in the entire operation. Each had a specific job and not one was located near the roller. The chances of one of them checking the roller, doing a workplace inspection while it was operating, or just walking by, falling and coming in contact with the roller were remote at best.

Moreover, the operator did not have notice that the roller was not properly guarded. The Commission has held, with respect to notice, that in determining whether a broadly worded standard that is intended to be applied to many factual situations, applies to a specific situation, "it is appropriate to evaluate the evidence in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citations omitted).

The evidence supports the company's assertion that the previous inspector had approved the guard. The negligence in this citation was modified from "high" to "moderate" because "[t]hey had been told by the previous inspector how to guard this and they complied." (Govt. Ex. 2 at 2.) Thus, the operator guarded the roller in the manner advised by the inspector, a person

familiar with the mining industry and the protective purpose of the standard, and until he was advised by the new inspector that additional guarding was needed, there was no way the operator knew, or should have known, that his guarding was inadequate.

To abate the violation, the operator added additional guarding to the roller as required by Inspector Scott. Nonetheless, in view of the operator's lack of notice, I will vacate the citation.

Citation No. 6097268

This citation also alleges a violation of section 56.14107(a). The "Condition or Practice" alleged to result in this violation was stated as: "The south side portion of the No. 8 conveyor head pulley was not guarded. The 24 inch diameter roller was approximately 4 to 5 feet above ground level. Bolts holding the bushing in place were protruding from the pulley. The concrete had loose gravel near the moving parts." (Govt. Ex. 5.)

Inspector Scott testified that he observed that a portion of a pulley on the No. 8 conveyor had an exposed head roller, which was about 24 inches in diameter. (Tr. 26.) He said that the exposed parts could be easily contacted by those walking by. (Tr. 26.) In addition, there were bolts which held the flange and axle that were protruding. (Tr. 26.) Mr. Herbert did not dispute that there was a violation, rather he disputed the significant and substantial designation. (Tr. 67-68.) Consequently, I find that Sangravl violated section 56.14107(a) as alleged.

Significant and Substantial

The inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other 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." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

While Inspector Scott speculated that miners would be in the area of the No. 8 conveyor to observe for proper operation of the equipment, he did not testify that it was in the regular work area of any of the four employees. (Tr. 28.) Mr. Herbert testified that employees do not frequent this area when the plant is running. (Tr. 68.) When the plant is running water flows over the top of this equipment. (Tr. 67.) In an effort to stay dry, employees actively avoid the equipment. (Tr. 68.) Based on this testimony, I conclude that employees will infrequently be found in proximity to the No. 8 conveyor head pulley. Therefore, it is unlikely that a miner would contact the machine parts. The violation is not reasonably likely to cause injury. Accordingly, the violation is not “significant and substantial.”

Citation No. 6097269

This citation alleges a violation of section 56.14100(b) of the Secretary’s regulations, 30 C.F.R. § 56.14100(b). The “Condition or Practice” alleged to result in this violation was stated as:

An unsafe condition exists at the screening tower in the plant. An eight inch steel “H” beam was badly deteriorated with rust. This beam is part of the over-all support system for the tower. The tail sections for two conveyors were supported by the beam. Employees are in the plant regularly to perform service, maintenance and clean up as needed.

(Govt. Ex. 8.) Section 56.14100(b) requires that: “Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.”

Inspector Scott testified that on the day of the inspection he observed that the H beam had accumulated significant rust in the area between the two lateral runners. (Tr. 38-39.) The beam is about 15 feet above the ground. (Tr. 43.) When whole, the web is about 3/8 inches deep and prevents the beam from going sideways or sagging. (Tr. 38- 39.) A 10 to 12 foot long section of the webbing was missing entirely. (Tr. 38.) Inspector Scott speculated the beam was probably in this state for six months, given the wet conditions. (Tr. 45.) The violative condition was visible, although the mine had not been issued a citation for the beam in the past. (Tr. 44.) It was abated the next day through replacing the beam with two pieces of channel (two types of metal bolted together). (Tr. 45.) I find that the condition of the beam was in violation of the regulation.

Significant and Substantial

Inspector Scott testified that if the beam continued to rust it could fall. (Tr. 41.) The plant operator worked from a control house, located approximately 15 feet above the H beam and a few feet to the south. (Tr. 40.) Inspector Scott testified that the area would collapse if the beam failed. (Tr. 40.) There was an electrical box next to the control house. (Tr. 41.) The collapse of the control house could result in an electrical hazard. (Tr. 41.) The plant operator would be the only person affected. (Tr. 43.) Additionally, the inspector theorized that a collapsing beam could injure

an employee who happened to be walking under it when it collapsed. (Tr. 40.)

Mr. Herbert testified that the beam was not necessary to support the control plant. (Tr. 68.) The Secretary did not offer any evidence to the contrary. Moreover, the redundancy of the beam was demonstrated when it was replaced, for no additional measures were taken to secure the control house. (Tr. 68.) The replacement of the beam did not result in the toppling of the control house. Mr. Herbert's assertion that additional support was not necessary during the replacement of the beam gives credence to his argument that the beam was not supportive of the control house. I find that it is unlikely that the violative condition would result in the collapse of the control house and the creation of an electrical hazard. Even less likely is the striking of an employee, who did not work in the area, by a falling beam. Therefore, I conclude that the violation was not "significant and substantial."

Citation No. 6097270

The citation alleges a violation of section 56.14107(a) of the Secretary's regulations. The "Condition or Practice" alleged to result in this violation was stated as:

The tail pulley guard on the north side of the conveyor feeding the twin screens in the plant was not covering all the moving parts. The tail pulley was approximately 1 to 2 feet above the walk way and was 14 to 16 inches in diameter. The pinch point between the pulley and the conveyor belt could be contacted.

(Govt. Ex. 10.)

Inspector Scott observed an unguarded tail pulley in the screening plant. (Tr. 48.) A partial guard was located between the walkway and the tail pulley. (Tr. 50.) However, the inspector testified that: "There is enough room between this guard and the belt for a person, their hand, to go in, down to the very bottom of this roller, and be pulled into this" (Tr. 50.) Inspector Scott determined that the violation existed for a minimum of four to six shifts. (Tr. 53.) The screen bar mesh in the lower left corner and upper section had been removed, and the exposed parts were covered with sand dust. (Tr. 53.) The condition was abated when the moving parts were covered with screen wire. (Tr. 54.) I find that the company violated the regulation as alleged.

Significant and Substantial

The main operator passes by this condition on the way to work each day. (Tr. 49.) Inspector Scott testified that enough room exists for a person to get stuck in the roller. (Tr. 50.) He hypothesized that if a person was to become stuck in the pinch point, they would be enveloped around the tail pulley and crushed to death. (Tr. 52.) Inspector Scott testified that tail pulleys, head pulleys, and return rollers are the biggest killers in concern to moving machine parts. (Tr. 51.)

The Secretary has established that an employee would regularly be in the area proximate to the violative condition since the main operator passes by the tail pulley on a daily basis. The loose sand and gravel in the area could cause a person to slip. (Tr. 50.) If he slipped on the loose gravel he could fall into the unguarded portion of the tail pulley. In the context of continued normal mining operations, it was reasonably likely that the violative condition would contribute to a serious accident. Accordingly, I find that the violation was “significant and substantial.”

Citation No. 6097271

This citation alleges a violation of section 56.14132(a) of the Secretary’s regulations, 30 C.F.R. § 56.14132(a). The “Condition or Practice” alleged to result in this violation was stated as:

The automatic reverse-activated signal alarm provided on the Caterpillar front end loader, model 980G, was not maintained. The alarm would not sound when the reverse gear was used. The operator of the loader has an obstructed view to the rear and there is no one posted to tell him when it is safe to back up. The loader is used to load customer trucks, move stock piles and other chores as needed. The work areas are shared with other company equipment, customer trucks and employees on foot.

(Govt. Ex. 14.) Section 56.14132(a) requires that: “Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.”

The front-end loader was located between the shop and the main screening plant at the time it was inspected. (Tr. 59.) Inspector Scott testified that when the operator put the machine in reverse, the automatic reverse alarm signal did not work. (Tr. 57.) There was a signal on the loader, but it was not operational. (Tr. 57.) This piece of equipment was used all over the plant, around both employees and customers. (Tr. 57.) On occasion a customer might come in to pickup a load of sand or gravel accompanied by small children. (Tr. 57.) From his seat, the operator had an obstructed view to the rear. (Tr. 58.) If the loader ran over someone the injury would be fatal. (Tr. 61.) The condition was abated when a new back-up alarm was installed. (Tr. 63.)

Mr. Herbert does not dispute the violation of section 56.14132(a). Instead, he testified that the noise of the back-up alarm is so pervasive at the plant that it becomes background noise. (Tr. 69.) He speculated that the load operator may not have noticed that the back-up alarm was not operating. (Tr. 69.) The citation is affirmed as written.

Civil Penalty Assessment

The Secretary has proposed penalties of \$3,379.00 for the four violations being affirmed. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-484 (Apr. 1996).

In this connection, I find that the Sangravl is a very small company operating a very small mine. I further find from the Assessed Violation History Report that the operator has a poor history of previous violations. (Govt. Ex. 1.) The parties have stipulated that payment of these penalties will not adversely affect the company's ability to remain in business and I so find. (Tr. 9-10.) There is no evidence that the operator did not demonstrate good faith in attempting to abate the violations, so I find that the company did demonstrate good faith.

Turning to gravity, I find that Citation Nos. 6097268, 6097269 and 6097271 are not very serious. Citation No. 6097270, however, is a more serious violation that could result in a significant injury. I agree with the inspector's assessment that the negligence involved in Citation Nos. 6097269 and 6097271 was "moderate" and "low," respectively. I disagree with his assessment of Citation Nos. 6097268 and 6097270, finding that in both cases the negligence was only "moderate."

Taking all of these factors into consideration, I conclude that the following penalties are appropriate: (1) Citation No. 6097268, \$325.00; (2) Citation No. 6097269, \$290.00; (3) Citation No. 6097270, \$725.00; and (4) Citation No. 6097271, \$286.00.

Order

In view of the above, Citation No. 6097267 is **VACATED**; Citation No. 6097271 is **AFFIRMED**; Citation No. 6097268 is **MODIFIED**, by deleting the "significant and substantial" designation and reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Citation No. 6097269 is **MODIFIED**, by deleting the "significant and substantial" designation, and is **AFFIRMED** as modified; and Citation No. 6097270 is **MODIFIED**, by reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified. Sangravl Company, Inc., is **ORDERED TO PAY** a civil penalty of **\$1,626.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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