FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 20, 1999

NOLICHUCKEY SAND COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. SE 99-101-RM
v.	:	Citation No. 7777862; 1/28/99
	:	
SECRETARY OF LABOR,	:	Docket No. SE 99-102-RM
MINE SAFETY AND HEALTH	:	Citation No. 7777863; 1/28/99
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. SE 99-103-RM
	:	Citation No. 7777864; 1/28/99
	:	
	:	Docket No. SE 99-104-RM
	:	Citation No. 7777865; 1/28/99
	:	
	:	Docket No. SE 99-105-RM
	:	Citation No. 7777866; 1/28/99
	:	
	:	Docket NO. SE 99-106-RM
	:	Citation No. 7777867; 1/28/99
	:	
	:	Pit No. 436
	:	Mine ID 40-00806

DECISION

Appearances: Thomas A. Bewley, President, Nolichuckey Sand Company, Inc., Greeneville, Tennessee, pro se, for the Contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Respondent.

Before:Judge Weisberger

These case are before me based on a Notices of Contest filed by Nolichuckey Sand Company, Inc. ("Nolichuckey") contesting the issuance by the Secretary of Labor ("Secretary") of six citations on January 28, 1999, alleging violations of 30 C.F.R. § 56.14109(a).[1]

Pursuant to notice, the cases were heard on March 9, 1999, in Johnson City, Tennessee. Nolichuckey filed a Brief on April 29, 1999. On June 15, 1999, the Secretary filed a Brief and Argument.

I. Statement of the Facts

Elton Hobbs, an MSHA Inspector, inspected the subject sand and gravel operation on January 19, 1999. He observed that conveyor belts did not have either stop cords or railings, and he discussed these conditions with Jerry Knight, the foreman, and Nolichuckey's President, Thomas Anthony Bewley. Hobbs was told by Bewley that in the past MSHA had informed him (Bewley) that if the conveyor was a 42-inch structure, it did not need to have a railing or stop cord.[2] Hobbs then spoke with his supervisor, Larry Nichols, who informed him to allow Nolichuckey to fix its belts, and not to issue any citations. Hobbs indicated that Bewley refused his request to install stop cords or railings on the belts at issue. When Hobbs returned on

[1]/ 30 C.F.R. § 56.14109(a) provides that "[u]nguarded conveyors next to the travelways shall be equipped with - (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor motor; or (b) Railings which - (1) Are positioned to prevent persons from falling on or against the conveyor; . . . ."

[2]/ The Secretary stipulated that Bewley was in fact told in the past by MSHA inspectors that a 42-inch belt structure would constitute a guard on the belts at issue, and that MSHA had not issued Nolichuckey any citations for violations of 30 CFR § 56.14109(a).

January 28, he issued citations for the belts at issue citing the lack of stop cords or railings.[3]

Hobbs explained that the section 56.14109(a), supra, is designed to protect persons from falling on or against the conveyor. He explained that a miner inspecting the belt from the travelway might lose his footing and fall onto the conveyor. Hobbs indicated that material on the

[3]/ Government Exhibit 2 depicts a belt in issue. "A" is the support structure (known as a 42-inch deep truss) which has a vertical height of 42 inches. "B" depicts the idler rollers supporting the belt. "C" depicts the conveyor belt itself which conveys the material. "D" depicts the travelway or catwalk that runs alongside the conveyors. "E" depicts the hand rail on the travelway, which is 42 inches from the bottom of the catwalk or travelway. The horizontal distance to the nearest point where the belt rides on the rollers is 8 inches; the distance to the nearest point on the rollers is approximately 6 inches.

travelway, or accumulated snow or ice could be a tripping hazard. He stated that one falling against the belt could get caught in a pinch point between the conveyor and the support rollers, and could fracture his fingers or his hand.

Hobbs opined that a railing on top of the belt is necessary to keep someone from falling against the belt, and that the 42-inch structure itself would not prevent one from falling against the belt. He explained that there is approximately 12 inches between the belt structure and the top of the belt, and that someone falling could fall into the moving rollers or the belt itself.

On cross-examination, Hobbs indicated that there is no danger of falling to the ground below as the result of the lack of a railing or stop cord, because the handrail of the 42-inch truss was sufficient to keep this from happening.

Larry Nichols, the field office supervisor of MSHA's field office in Knoxville, opined that the belt structure itself is not a guard as it is does not prevent a person from falling against the belt.

Bewley agreed that, once a day, one man walks up and down each catwalk that runs alongside the conveyor to inspect the belt and check the rollers. He opined that if railings would be installed on the 42-inch structures, it would be hazardous for a person to reach over the belt in order to change a roller. In this connection, Guy Morgan indicated in a unsworn statement made on a vedio tape that he would be less safe if there would be a rail installed for most of the length of the structure at issue. Bewley indicated that he contacted various conveyor manufacturers "if they would warrant any of their conveyors to meet MSHA standards for guarding, specifically under this standard and to a man and manufacturer[,] [t]hey all said, no, we can't do that because it varies with the inspector as well as varying within districts" (sic) (Tr. 148-149).

Bewley opined that the catwalk at issue is really a maintenance platform as it is attached to the conveyor to ease maintenance, but is not used to allow men and machinery to go from one place to another.

II. Nolichuckey's Defenses

Nolichuckey does not contest the fact that the conveyors at issue did have either stop devices or railings. Nolichuckey's position that the citations at issue should be dismissed is based upon the following arguments: that the catwalk or walkway along which a Nolichuckey employee walks to carry out daily inspections is not a "travelway" within the meaning of section 56.14109(a) supra; that it is not required, as a matter of law, to have emergency stop devices or railings for its conveyors because these conveyors are guarded by a 42-inch truss or

belt structure; that the Secretary is estopped from issuing citations for violations of section 56.14109(a) supra, because in the past other MSHA inspectors had not enforced this regulation against it, and that equipping the conveyors or belts with stop devices or railings would result in a "greater hazard" to the safety of miners.

III. Discussion

Essentially, it is Nolichuckey's position that the catwalk located alongside the conveyor is not a travelway, and hence the cited conveyors are not within the scope of section 56.14109(a) which requires the guarding of conveyors that are located next to "travelways." Nolichuckey in this connection refers to the fact that the catwalks are not used by miners as part of the normal traffic pattern at the mine to go from one point to another.

The term "travelway" is defined in 30 C.F.R. § 56.14000 as follows: "[a] passage, walk, or way regularly used or designated for persons to go from one place to another." Since this definition applies to section 56.14109(a), supra, it must be adhered to in the case at bar. According to this definition, a walkway or catwalk is considered to be a travelway if it is designated for persons to go from one place to another or "regularly used." Although the walkway in question was not designated for persons to go from one place to another, it was used by miners daily to carry out inspections of the belt conveyors. Accordingly, it clearly falls within the definition of a travelway as set forth in section 56.14000, supra. Hence, it follows that the cited conveyor belts are within the purview of section 56.14109(a), supra.

I find that there is not any merit to Nolichuckey's argument that since in the past MSHA has not cited it for the conditions at issue, and has allowed the conveyors to be considered guarded based upon the height of the 42-inch belt structure, the Secretary should be estopped from presently enforcing section 56.14109(a), supra, against Nolichuckey. I find that although the failure in the past of MSHA to enforce section 56.14109(a), supra, against Nolichuckey has a bearing on the level of Nolichuckey's negligence and hence the level of a penalty to be assessed, it does not constitute a defense to the issuance of the citations at issue. Aside from stipulations that Nolichuckey had been told by MSHA inspectors that a 42-inch belt structure would constitute a guard, and that MSHA had not issued it any citations for violations of section 56.14109(a), supra, there is no evidence that any such MSHA "policy" was incorporated as part of its official policy manual, or promulgated pursuant to notice, and normal APA rule making procedures. Accordingly, any past practices by MSHA are not binding in litigation before the Commission. In the same fashion, the lack of previous enforcement does not support a claim of estoppel (See, *Secretary of Labor* v. *Walker Stone Company, Inc*., 16 FMSHRC 337, 359 (Judge Koutrus) (February 16, 1994), and cases cited therein. See also, *Emery Mining Corporation* v. *Secretary of Labor*, 744 F 2nd 1411, 1416 (Tenth Cir. 1984) affirming *Emery Mining Corporation* 5 FMSHRC 1400 (August 1983).

MSHA's past practices of not citing the belts at issue might have been based upon a rationale that a 42-inch belt structure constitutes a guard within the meaning of section 56.14109(a), supra, and that no stop device or railing is required. However, I note that there is nothing in the language of section 56.14109(a) which in any way even suggests such an exception (See, Hinkle Contracting Corporation, 12 FMSHRC 431, 433 (Judge Melick) (March 1990). Moreover, as explained by Hobbs, the 42-inch structure itself would not prevent one from falling against the belt because there is approximately 12 inches between the belt structure and the top of the belt, and that accordingly someone falling could fall onto the moving rollers or the belt itself. Nolichuckey does not dispute these distances. I therefore accept Hobbs testimony in these regards, and find that the structure itself would not adequately guard a stumbling or falling miner from falling against the belt.

Lastly, Nolichuckey argues, in essence, that if it were to be required to comply with section 56.14190(a), supra, a greater hazard would be created for miners. It argues that the vedio demonstration, Petitioner's Exhibit 1, specifically demonstrates that installing a railing on top of the 42-inch truss changes what is now a safe and routine roller changing procedure "into an opportunity for falling from the conveyor." This defense is also without merit. The Commission, in *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (December 1983), held, in essence, that a defense of "diminution of safety," is not available to an operator unless the operator had first filed a petition for modification, and that the Secretary had granted the modification, but nonetheless continued the enforcement proceedings. Since no evidence was presented here that these conditions have been met, I find that Nolichuckey can not raise the defense of diminution of safety before the Commission at this time.

Therefore, for all the above reasons, I conclude that the citations in these cases were properly issued, and shall be affirmed.

ORDER

It is **ORDERED** that the citations issued in these proceedings shall be **AFFIRMED** as written, and the Notices of Contest shall be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

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