FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

May 26, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 93-376-M A.C. No. 04-02710-05509
v.	:	Docket No. WEST 93-380-M A.C. No. 04-02710-05510
ARCATA READIMIX, Respondent	:	Arcata Pit & Mill

DECISION

Appearances: Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
William J. O'Neill, President, Arcata Readimix, Arcata, California, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Arcata Readimix ("Arcata"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815 and 820. The petitions allege six violations of the Secretary's safety standards. For the reasons set forth below, I affirm the citations and assess civil penalties in the amount of $170.00.

A hearing was held in these cases before Administrative Law Judge John J. Morris, in Eureka, California. The parties presented testimony and documentary evidence, but waived post-hearing briefs. These cases were reassigned to me on April 25, 1995, for an appropriate resolution.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Preliminary Matters

The Arcata Pit & Mill is a small, sand and gravel pit in Humboldt County, California. The citations that are the subject of these proceedings were issued at Arcata's crushing and screening plant (the "plant") by MSHA Inspector Dennis Harsh on February 2 and 3, 1993.

Arcata maintains that its plant was shut down for the winter at the time of the inspection. Lawrence Frank, a former supervisor at the plant, testified that the main power center for the plant was at a "remote shack" that was locked, and that only three people had a key to this shack: William O'Neill, the president, Jim O'Neill, the president's brother, and Mr. Frank. (Tr. 38-39, 47-48; Ex. R-2). He further stated that a lock or a lockout sign was on the electrical switch box inside the shack. Id. He further testified that the plant was "in a state of semi-disassembly." (Tr. 40). Mr. Frank stated that during the shutdown, equipment at the plant was being taken apart and serviced with the guards removed, "so when things pick up in the spring, we don't have to deal with that." (Tr. 41). He stated that the plant had not been in production since about December 1992. (Tr. 42-43). This testimony was supported by the testimony of William O'Neill. (Tr. 53). Mr. O'Neill stated that the plant was shut down and that he thought everyone knew that it was shut down, including Inspector Harsh. (Tr. 53-55). He testified that all of the conditions observed by the inspector would have been corrected before the plant was put into operation in the spring. (Tr. 53-55; 70-71). On that basis, Arcata argues that the citations should be vacated.

Inspector Harsh testified that, although the plant was not operating at the time of the inspection, he believed that the shutdown was only temporary. He testified that he was told by Arcata employees that the "plant was down for repairs, clean-up, and [a shaker] screen change." (Tr. 23). Inspector Harsh testi= fied that these types of repairs are frequently made at crushing and screening plants. (Tr. 65-66). He believed that "it was just a temporary shutdown for these things which are necessary from time to time." Id. In addition, he stated that no Arcata employee advised him, at the time of the inspection or during the close-out conference, that the plant was shut down for the winter. (Tr. 28, 65-66). It was his understanding that the "plant would be restarted or stopped as product was needed at any time." (Tr. 66). Inspector Harsh also did not see any evidence that Arcata was performing a major renovation of the plant or that any equipment was being dismantled or torn apart for service. (Tr. 63-64). Finally, he testified that the power had not been disconnected from the plant and that all that was required to start the plant was to "throw" a few switches. (Tr. 64).

I credit the testimony of Inspector Harsh. I believe that if the plant was totally shut down for the entire winter, someone from Arcata would have advised Inspector Harsh of that fact during his inspection or the close-out conference. Mr. O'Neill testified that he saw Inspector Harsh "writing for two hours" immediately following the inspection, but that he did not "anticipate any type of problem [because] we were shut down." (Tr. 56-57). Arcata's witnesses did not offer any explanation as to why

the inspector was not notified of the shutdown except that "everybody" knew about it and the plant was "pretty quiet." Id. Upon receiving the citations, one would expect a mine operator to say to the issuing inspector, "Wait a minute, you shouldn't issue us any citations because we are shut down for the winter and are servicing our equipment." Apparently, this issue was not raised by Arcata until it filed its answer in these proceedings. As stated above, Inspector Harsh testified that he did not see any evidence that the plant was on a long-term shutdown or that equipment was being torn apart and repaired. He stated that he would not issue citations on equipment that was torn apart. (Tr. 63).

Inspector Harsh testified that the plant could have been started by throwing a few electrical switches. Mr. O'Neill did not seriously dispute that testimony. (Tr. 57-58). Thus, even if one assumes that the plant had not been operating for some time, it could have been restarted very quickly if more product was needed. In addition, equipment could have been operated for testing purposes during the repair process and Arcata's employees could have been exposed to the conditions cited by the inspector. Thus, I conclude that the citations issued by Inspector Harsh should not be vacated on the basis that the plant was shut down or that the conditions cited would have been corrected before the plant was placed in production.

B. Docket No. WEST 93-376-M

1. Citation No. 3913936 alleges that a bare electrical conductor was within two inches of a metal start/stop switch in the shaker power room. The citation states that the power cable had been pulled from the fitting in the bottom of the switch, exposing the electrical conductors. Bare wire was exposed in one 220= volt conductor. The safety standard cited, 30 C.F.R. ' 56.12030, provides that, "when a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

There is no dispute that the conditions observed by the inspector existed. Inspector Harsh estimated that someone enters the shaker power room to turn on or off the switch about twice a day. (Tr. 19-20). He said that the condition created a shock and electrocution hazard because the bare wire was about two inches from the switch. (Tr. 20-21) He determined that it was reasonably likely that someone would contact the exposed wire and suffer a severe shock or burns. Id. He further stated that the Arcata employee who accompanied him on the inspection, Earl Norris, indicated that the bare wire could seriously hurt someone. (Tr. 18-19, 22).

Arcata contends that Mr. Norris, a loader operator, was not

Mr. Frank testified that he pulled on electrical cables periodically to determine if they are firmly attached. (Tr. 39). He believes that he exposed the wire when performing this test at the cited location. (Tr. 39-40). He further testified that he made a notation to have it repaired before the plant resumed operation. Id.

Based on the record as a whole, I find that the Secretary established a violation of the safety standard. I also find that the violation was of a significant and substantial nature ("S&S") because there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1994). I find that the violation was serious.

2. Citation No. 3913937 alleges that the cover for the splice box on top of the cone crusher feed belt was loose and dislodged, exposing the electrical conductors to weather conditions and mechanical damage. The conductors were not damaged. The safety standard cited, 30 C.F.R. ' 56.12032, provides that "inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

There is no dispute that the conditions observed by the inspector existed. The inspector testified that "the cover had worked its way loose and was hanging there by one screw with the box wide open, exposing the inner conductors ... to any kind of adverse weather condition." (Tr. 14-15). Mr. Frank testified that, more than likely, the cover had been removed intentionally during the shutdown when equipment was being repaired, and that the cover is always in place during operation. (Tr. 39-40).

Based on this evidence, I find that the Secretary established a violation of the safety standard. There was no evidence that the cover was off because the subject equipment was being repaired or tested. I agree with the inspector that the violation was not S&S. The conductors and the splice were not damaged. In addition, there was no evidence that miners were likely to be in the immediate area or that the metal splice box would become energized as a result of the violation. Accord-

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authorized to be its walk around representative during the inspection. William O'Neill, Mr. Frank and Jim O'Neill were not available at the time of the inspection. Apparently, Mr. Norris accompanied the inspector because nobody else was available. This issue is not relevant and I have based my decision on the testimony of the witnesses, not statements made by Mr. Norris to Inspector Harsh.

ingly, I find that the violation was not serious.

3. Citation No. 3913939 alleges that there was no guard covering the pinch point on the smooth tail pulley of the cone-crusher feed belt. It alleges that the exposed pinch point was adjacent to the screen portion of the walkway, about 16 inches above the walkway and about two feet from the inside edge of the walkway. The citation states that the pulley was in a remote area of the plant, but was still readily accessible. The safety standard cited, 30 C.F.R. ' 56.14107, provides, in pertinent part, that "moving machine parts shall be guarded to protect persons from contacting ... drive, head, and takeup pulleys ... and similar moving parts that can cause injury."

There is no dispute that the conditions observed by the inspector existed. Mr. O'Neill stated that the guards were off so that the area could be cleaned out and the bearings underneath the pulley checked. (Tr. 30-31). Mr. Frank testified that shaker screens were being repaired and that welders from a contractor were coming to repair supports for the shaker screens underneath the shaker plant. (Tr. 40). He further stated that aggregate had accumulated under the plant and the guards were removed to clear the area out. (Tr. 40-41). He testified that during the shutdown, all of the bearings were inspected and pulleys were pulled apart as part of Arcata's preventive maintenance program. Id. He testified that everything would have been replaced, including the guards, when "things pick[ed] up in the spring." (Tr. 41).

Based on the record as a whole, I find that the Secretary established a violation of the safety standard. As stated above, Inspector Harsh did not see any evidence that the equipment he inspected was in the process of being repaired or "pulled apart." There is no dispute that the pinch point was not guarded. It could have been operated during the repair process without the guard. I agree with the inspector that the violation was not S&S. The parties concede that the pinch point was in a remote area of the plant. I find that the violation was not serious.

B. Docket No. WEST 93-380-M

1. Citation No. 3913935 alleges that the fire extinguisher for the crushing plant had not had the required yearly maintenance check since December 1991. The citation also states that the extinguisher appeared to be operational and fully charged. The safety standard cited, 30 C.F.R. ' 56.4201(a)(2), provides, in pertinent part, that "at least once every twelve months, maintenance checks shall be made of [each fire extinguisher] to determine that the fire extinguisher will operate effectively."

There is no dispute that the maintenance check had not been made. Inspector Harsh testified that the inspection tag on the extinguisher had not been initialed during the previous 12 months. (Tr. 16-17). He further stated that the extinguisher appeared to be operational and fully charged. Id. Mr. Frank testified that Arcata had a contract with a fire extinguisher service company to conduct the annual inspection but that it had not been inspected because the son of the contractor had recently died. (Tr. 37-38). He further stated that the inspection was only two months overdue and that Arcata has entered into a new service contract with another company. Id.

Based on this evidence, I find that the Secretary established a violation of the safety standard. The Mine Act is a strict liability statute and a mine operator is legally responsible for any violation that occurs at its mine. I agree with the inspector that the violation was not S&S. Since it appears that the extinguisher was in working condition, the violation was technical in nature and was not serious.

2. Citation No. 3913938 alleges that there was no guard covering the spoke-type pulley and drive belt of the No. 4 conveyor belt. It alleges that the exposed pinch point was about 64 inches above and adjacent to the wooden walkway on the west side of the shaker screen. The citation states that the amount of exposure could not be established, but that the pulley was accessible. The safety standard cited, 30 C.F.R. ' 56.14107, provides, in pertinent part, that "moving machine parts shall be guarded to protect persons from contacting ... drive, head, and takeup pulleys ... and similar moving parts that can cause injury."

There is no dispute that the conditions observed by the inspector existed. Inspector Harsh testified that he observed an unguarded V-belt pulley within reach of and no more than seven feet above a walkway. (Tr. 11). He stated that an injury was unlikely because the pinch point was about 64 inches above the walkway. Id. Mr. Frank testified that during the shutdown, all of the bearings were inspected and pulleys were pulled apart as part of Arcata's preventive maintenance program. (Tr. 40). He testified that everything would have been replaced, including the guards, when "things pick[ed] up in the spring." (Tr. 41).

Based on the record as a whole, I find that the Secretary established a violation of the safety standard. As stated above, Inspector Harsh did not see any evidence that the equipment he inspected was in the process of being repaired or "pulled apart." There is no dispute that the pinch point was not guarded. It could have been operated during the repair process without the guard. I agree with the inspector that the violation was not

S&S. Given the height of the pinch point and the fact the inspector could not establish the amount of the exposure, I find that the violation was not serious.

3. Citation No. 3913940 alleges that continuity and resistance testing of the electrical grounding system had not been conducted since September 1991. The citation also stated that the weather in the area is highly corrosive to metal and that corrosion is one of the factors that can render the electrical grounding system ineffective. The safety standard cited, 30 C.F.R. ' 56.12028, provides, in pertinent part, that "continuity and resistance of grounding systems shall be tested immediately after installation ... and annually thereafter." A record of the tests is required to be kept.

There is no dispute that the required test had not been made. Inspector Harsh testified that when he uncovered a portion of the grounding electrode, it showed signs of heavy corrosion. (Tr. 25). Although the inspector marked the citation as S&S, he stated at the hearing that it should not be considered S&S because he did not perform a test to see if the integrity of the grounding system had been compromised by the corrosion. (Tr. 26, see also 7). Mr. Frank testified that Arcata must depend upon its contractor to conduct the inspections on an annual basis. (Tr. 41). Because the contractor was four months late in conducting the inspection, Arcata changed contractors. Id.

Based on this evidence, I find that the Secretary established a violation of the safety standard. The Mine Act is a strict liability statute and a mine operator is legally responsible for any violation that occurs at its mine. I agree that the violation was not S&S. The violation was serious because, without conducting the test, Arcata did not know if its grounding system would protect its employees.

II. Civil Penalty Assessments

Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. I find that Arcata was issued four citations in the 24 months preceding the inspection in this case. (Tr. 6). I also find that Arcata is a small operator, employing about 23 people, with about 19,350 man-hours worked over the previous year. (Tr. 6, 44). I also find that the civil penalties assessed in this decision would not affect Arcata's ability to continue in business. The conditions cited by the inspector were all timely abated. I find that Arcata is concerned about the safety of its miners and made good faith efforts to comply with MSHA's safety standards.

I also find that Arcata's negligence was very low with respect to each violation. As stated above, the Mine Act is a strict liability statute. Asarco, Inc. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). A citation issued by MSHA for a violation of a safety standard must be affirmed if the facts show that the standard was violated, even if the mine operator was not negligent. The degree of the mine operator's negligence, however, is an important factor in determining the civil penalty. I find that Arcata was only slightly negligent with respect to the violations discussed above because its managers believed, in good faith, that these conditions did not need to be corrected until it resumed production and there is no evidence that these conditions existed while the plant was operating, even for testing purposes.

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), I assess the following civil penalties, as discussed above:

Citation Nos.	30 C.F.R. '	Assessed Penalty
3913936	56.12030	$60.00
3913937	56.12032	20.00
3913939	56.14107	20.00
3913935	56.4201(a)(2)	10.00
3913938	56.14107	20.00
3913940	56.12028	40.00
	Total Penalty	$170.00

III. ORDER

Accordingly, the citations listed above are **AFFIRMED**, and Arcata Readimix is **ORDERED TO PAY** the Secretary of Labor the sum of $170.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2999 (Certified Mail)

William J. O'Neill, President, ARCATA READIMIX, P.O. Box 4657, Arcata, CA 95521 (Certified Mail)

RWM