FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 10, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-220-M A.C. No. 24-01951-05508
v.	:	Red Pioneer Portable Crusher
A.M. WELLES, INC., Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Alfred Hokanson, President, A.M. Welles, Inc., Norris, Montana, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against A.M. Welles, Inc. ("A.M. Welles"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges two violations of the Secretary's safety regulations. Orders of withdrawal were issued under section 104(b) of the Mine Act alleging that A.M. Welles failed to timely abate the cited conditions. For the reasons set forth below, I affirm the citations and orders, and assess penalties in the amount of $330.00.

A hearing was held in Butte, Montana. The parties presented testimony and documentary evidence, but waived post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A.M. Welles operates the Red Pioneer Portable Crusher. It

is a very small operation that recorded about 4,360 hours worked in 1993. It has a history of four citations in the two years preceding the inspection in this case.

A. Citation No. 4405454

On May 12, 1994, MSHA Inspector Ronald Goldade inspected the Red Pioneer Portable Crusher. At the time of his inspection the crusher was at the Belgrade Pit near Bozeman, Montana. He issued Citation No. 4405454 alleging that the guard on the fin type tail pulley on the product discharge conveyor system needed to be extended on the sides of the conveyor frame. The citation states that the existing guard needed to be extended about ten inches to provide sufficient coverage of the moving machine parts. The citation alleges a violation of 30 C.F.R. § 56.14107(a). Inspector Goldade determined that it was unlikely that anyone would be injured and that the violation was not of a significant and substantial nature ("S&S"). A guard was present at the time of the inspection, but the inspector did not believe that it provided sufficient protection against the moving parts. The safety standard states that "moving machine parts shall be guarded to protect persons from contacting ... head, tail, and takeup pulleys, ... and similar moving parts that can cause injury."

The tail pulley was about two feet above the ground. (Tr. 12; Ex. G-2). Inspector Goldade testified that he was concerned that someone could inadvertently come in contact with the moving pulley when cleaning around the area. (Tr. 13). He determined that the negligence was moderate because the violation was obvious. (Tr. 14). The conveyor had been recently purchased and the existing guard was installed by the manufacturer. (Tr. 14; Ex. G-2).

Inspector Goldade discussed the condition with William Haugland, the crusher superintendent, and told him that it should be abated by 8:00 a.m. on May 16, a period of four days. (Tr. 15). The inspector also wrote that abatement date on the citation. The condition could have been abated by welding or wiring old screening material over the open area. (Tr. 16). He estimated that it would take an hour to abate the condition. Neither Mr. Haugland nor anyone else from A.M. Welles told the inspector that the time set for abatement was too short.

On August 1, 1994, MSHA Inspector Seibert Smith inspected the crusher, which had been moved to a pit near Big Sky, Montana. He issued Order No. 4410028 under section 104(b) of the Mine Act because he believed that the condition described in Citation No. 4405454 had not been abated. The order states that no apparent effort was made by the operator to extend the guard to cover the

moving parts of the fin type tail pulley on the product discharge conveyor under the pioneer crusher by the termination due date of May 16, 1994. He issued the order to Mike Nunn, who did not know anything about the citation. (Tr. 32). Inspector Smith left the mine shortly thereafter. When he returned on August 5 a guard made of solid metal and screening was in place, so he terminated the order. (Tr. 33).

A.M. Welles contends that the conveyor pulley observed by Inspector Smith on August 1, was not the same pulley that Inspector Goldade cited on May 12. (Tr. 46-50, 60). It states that it abated the citation issued by Inspector Goldade and that the withdrawal order issued by Inspector Smith was for a different conveyor at the crusher. Id. Mr. Haugland and Alfred Hokanson, President of A.M. Welles, believe that they abated the condition cited by Inspector Goldade before August 1, 1994.

I credit the testimony of Inspectors Goldade and Smith, and find that the condition cited on May 12 had not been abated on August 1. Inspector Smith testified that the tail pulley he observed was the same pulley that was cited by Inspector Goldade and that no abatement effort had been made. (Tr. 63).

An MSHA inspector is authorized to issue an order under section 104(b) of the Mine Act if he determines on a subsequent inspection that: (1) the violation described in the citation has not been totally abated within the period of time originally fixed in the citation; and (2) the period of time for abatement should not be further extended. Upon discovering a failure to abate, an inspector must apply a rule of reason in determining whether to issue a section 104(b) order or to extend the abatement time. Martinka Coal Co., 15 FMSHRC 2452 (December 1993). I find that Inspector Smith did not abuse his discretion in issuing the order. Accordingly, I affirm the citation and the order.

Ordinarily, an operator's failure to timely abate a citation warrants a substantially greater penalty than the citation. An unabated violation presents a potential threat to the safety and health of miners. When an inspector does not require that the condition be abated on the day of the inspection, it is important for the mine operator to abate it within the reasonable period of time set forth in the citation. If the operator fails to do so a significantly higher penalty is warranted.

With respect to this violation, however, I believe that there are several mitigating circumstances that compel a reduction in the penalty. I find that A.M. Welles genuinely believed

that it corrected the condition cited by Inspector Goldade within the time set for abatement. A number of other guarding citations were issued during the same inspection and A.M. Welles believed that it abated all of them. I credit the testimony of Mr. Haugland that it is the practice of A.M. Welles to immediately correct conditions found by MSHA inspectors. (Tr. 50, 70). I believe that this citation inadvertently fell between the cracks, in part because of the fact that different names are often used for the same conveyor. Apparently, A.M. Welles often refers to the conveyor cited by Inspector Goldade as the "stacking conveyor" rather than the product discharge conveyor. (Tr. 46).

MSHA proposed a penalty of $1,500.00. The Commission is not bound by the MSHA's penalty assessment regulations or practices. The Commission assesses penalties *de novo* by applying the statutory criteria set forth in section 110(i) of the Mine Act to the evidence of record. Sellersburg Stone Co., 5 FMSHRC 287, 292 (March 1983), aff'd 736 F.2d 1147, 1151-52 (7th Cir. 1994). I agree with Inspector Goldade that the violation was not S&S. There is no dispute that A.M. Welles is a small operator and that it has a history of only four prior violations. I find that the gravity was low. With respect to the citation, I find that the negligence of A.M. Welles was not as great as the inspector believed. The cited equipment was new, had been recently purchased, and was extensively guarded by the manufacturer. It was not unreasonable for A.M. Welles to have relied on this guarding. Based on the criteria in section 110(i), I find that a penalty of $130.00 is appropriate.

B. Citation No. 4405457

On May 12, 1994, Inspector Goldade issued Citation No. 4405457 to A.M. Welles at the Red Pioneer Portable Crusher alleging that a guard was not provided around the alternator and V-belt drive for the cooling drive motor on the Caterpillar generator. The citation was issued at the Belgrade Pit and charged a violation of 30 C.F.R. § 56.14107(a) The citation states that the height of the contact area is between two and five feet above the ground, and the pinch point was within four inches of the motor frame and two feet of the throttle control. The citation further alleges that employees are exposed to the hazard on a daily basis.

Inspector Goldade testified that he measured the distances set forth in the citation with a tape measure. (Tr. 20). He testified that an employee would have to start and stop the gen-

erator at least once a day and would be exposed to the hazard created by the pinch points of the V-belt drives if he were to trip or stumble. (Tr. 21-22). The only guard present on the generator was around the fan blades. (Tr. 23; Ex. G-4). The inspector determined that the violation was S&S because, based on his experience, it was reasonably likely that someone would eventually be injured by the unguarded V-belt drives. (Tr. 23). He determined that the violation was caused by A.M. Welles' moderate negligence because the condition was clearly visible.

Inspector Goldade discussed the citation with Mr. Haugland and required abatement by May 16. (Tr. 24). The inspector believed that the condition could be abated with a fabricated guard in a couple of hours. Id. Mr. Haugland did not tell the inspector that the time for abatement was too short. Id.

On August 1, 1994, Inspector Smith inspected the crusher after it had been moved to another pit near Big Sky, Montana. He issued Order No. 4410029 under section 104(b) of the Mine Act because he believed that the condition described in Citation No. 4405454 had not been abated. The order states that a guard was not installed on the alternator and V-belt drive system by the termination due date of May 16. The generator was running and Mike Nunn did not know anything about the citation. (Tr. 36). When Inspector Smith returned on August 5 a guard made of solid metal and screening was in place, so he terminated the order. (Tr. 36-38: G-5).

A.M. Welles contends that it abated the citation before the generator was moved from Belgrade to Big Sky by installing a solid metal guard in front of the cited area. (Tr. 41, 45, 51-52, 70-72). It contends that it merely added some screening material after Inspector Smith issued the order on August 1. (Tr. 45, 51-54).

I credit the testimony of Inspectors Goldade and Smith, and I find that the condition cited on May 12 had not been totally abated on August 1. Inspector Smith testified that he did not observe any guard on August 1. (Tr. 63, 65-66). Messrs. Haugland and Hokanson testified that part of the guard was installed prior to the time the generator was moved to Big Sky. In any event, there is no question that additional guarding material was installed after August 1 and the order was terminated on August 5. I find that Inspector Smith did not abuse his discretion in issuing the order. Accordingly, I affirm the citation and the order.

I also affirm that the violation was serious and S&S. The evidence establishes that 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 1984).

MSHA proposed a penalty of $2,200.00. As stated above, an operator's failure to abate a citation generally mandates a high penalty. In this instance, however, I believe that there are mitigating circumstances. With respect to the citation, I find that the negligence of A.M. Welles was not as great as the inspector believed. The record as a whole makes clear that A.M. Welles tries in good faith to quickly abate all citations. Its managers genuinely believed that they had abated the cited condition. I have also taken into consideration that the violation created a serious safety hazard and A.M. Welles is a small operator with a history of four previous violations. Based on the civil penalty criteria, I assess a penalty of $200.00 for this violation.

II. ORDER

Accordingly, the citations and section 104(b) orders of withdrawal are **AFFIRMED** and A.M. Welles, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $330.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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