FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 7, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 95-194-M
	:	A.C. No. 46-00007-05550
v.	:	
	:	Docket No. WEVA 95-221-M
CAPITOL CEMENT CORP., Respondent	:	A.C. No. 46-00007-05551
	:	
	:	Docket No. WEVA 95-321-M
	:	A.C. No. 46-00007-05554
	:	
	:	Martinsburg Plant

DECISION

Appearances: Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Dana L. Rust, Esq., and E. E. Matthews, III, Esq., McGuire, Woods, Battle and Boothe, LLP, Richmond, Virginia, for the Respondent.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the AAct,@ to challenge two citations and a withdrawal order issued by the Secretary of Labor to the Respondent, Capitol Cement Corporation (Capitol), under Section 104(d)(1) of the Act and to challenge the civil penalties proposed for the violations charged therein.[1] The general issue

[1] Section 104(d)(1) of the Act provides as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such

before me is whether the violations and the charging documents at bar should be affirmed and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

"Section 104(d)(1)" Citation No. 4294023 alleges a Asignificant and substantial@ violation of the standard at 30 C.F.R. ' 56.12016 and charges as follows:

> On 10/21/94 an employee suffered a disabling injury (electrical burns) when he inadvertently contacted a 480 VAC energized circuit (overhead crane hot rail) while checking the rail mounting bolts in the clinker shed. Electrically powered equipment shall be de-energized and locked out before work is done on such equipment.

The cited standard provides as follows:

> Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

"Section 104(d)(1)" Order No. 4294024 alleges a Asignificant

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operator to comply with such mandatory health or safety standards, he shall include such finding in any citation

Footnote 1 Continued

given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

and substantial@ violation of the standard at 30 C.F.R. ' 56.15005 and charges as follows:

> It was learned during the investigation of a disabling injury (electrical burns) which occurred on 10/21/94 that
>
> the injured employee was not wearing a safety belt and line where there was a danger of falling. This violation was not a contributing factor to the injury.

The cited standard provides in relevant part that Asafety belts and lines shall be worn when persons work where there is danger of falling.@

It is undisputed that on October 21, 1994, an accident occurred at the clinker shed in Capitol=s Martinsburg plant in which shift supervisor Gregory Bonfili suffered disabling electrical burns. He inadvertently contacted a 480 volt alternating current energized circuit on the overhead crane Ahot rail@ while checking the rail mounting bolts. The clinker shed within which the crane operates is 600 feet long, 80 feet wide and 75 feet high. It is used to store material and two cranes with clamshell buckets run on rails across the building powered by Ahot rails@. It is approximately 60 feet from the crane runway to the ground but the height varies depending on the amount of stored material.

At the beginning of the shift, crane operator Charles Cook found that his crane was shaking and therefore called the maintenance department. When no one appeared to correct the problem Cook called his foreman, Bonfili, who climbed onto the craneway to investigate. Bonfili told Cook to cut the power to the crane. However, as noted by the issuing Inspector, Edward Skvarch of the Mine Safety and Health Administration (MSHA), de-energizing the crane alone does not in fact de-engergize the "hot rail" since they are on separate power feeds. The disconnect switch for the "hot rail" is located in the same building but one level below the crane. While investigating the problem Bonfili reached over the side and contacted the 480 volt energized Ahot rail@ suffering significant burns. There is no dispute that the "hot rail" was not de-energized or locked out and that Bonfili, while on the 3 foot craneway some 50 feet above ground, was not wearing a safety belt. (Respondent=s Brief p. 11).

Skvarch opined that the violations were Asignificant and substantial@. In the former case he opined that it could reasonably be expected that a person working in close proximity to the Ahot rail@ could suffer fatal electrocution. In the

latter case he opined that working on a three-foot cat walk 50 feet above ground without a safety belt could also reasonably be expected to result in fatal injuries. The inspector concluded that in both cases the violations were also the result of high negligence and "unwarrantable failure" because the injured party himself was a supervisory agent of the operator committing an "obvious serious violation in the presence of a subordinate."

Respondent does not dispute the violations nor that they were Asignificant and substantial@ and serious but contests only that the violations were the result of its "unwarrantable failure" or negligence and disputes the amount of proposed penalties. (Respondent=s Brief p. 11). "Unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.,* 9 FMSHRC 1997 (December 1987). Unwarrantable failure is Aintentional misconduct,@ Aindifference@ or a Alack of reasonable care.@ *Id.* At 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 194-194 (February 1991).

The Secretary maintains in her brief, as to the violation charged in Citation No. 4284023, that it was the result of "unwarrantable failure" because "[i]t is undisputed that Mr. Bonfili failed to de-energize and lock-out the power to the craneway prior to performing work thereon in direct violation of 30 C.F.R. ' 56.12016." At oral argument the Secretary further maintained that all three violations were the result of "unwarrantable failure" because they were obvious and dangerous and because they were committed by foremen who are held to a high standard of care in safety matters. See *Midwest Material Company*, 19 FMSHRC 30, 35 (January 1996).

In this regard it is undisputed that after Bonfili rode back-and-forth on the crane in an effort to identify the source of the problem but before working in the vicinity of the "hot rail" Bonfili directed the crane operator only to de-energize the crane. It may reasonably be inferred from Respondent=s training records that Bonfili knew that de-energizing the crane alone would not also de-energize the "hot rail". Moreover he failed to lock out any of the power sources.

The violation was also obvious, extremely dangerous and committed by a foreman held to a high standard of care. The violation was therefore the result of "unwarrantable failure" and high negligence. *Midwest Material* at p. 35. Under the circumstances, the Secretary has clearly sustained her burden of proving the necessary aggravating circumstances to justify

"unwarrantable failure" and high negligence.

The Secretary similarly alleges that the violation charged in Order No. 4294024 was the result of "unwarrantable failure" because "[i]t is undisputed that Mr. Bonfili failed to wear a safety belt and line while working where there was a danger of falling, in direct violation of 30 C.F.R. ' 56.15005." Clearly it again may reasonably be inferred from Respondent=s training records that Bonfili knew that the failure to use a safety belt under the circumstances of this case was a violation.

Respondent next argues, citing the so-called *Nacco* defense, that, in any event, the negligence of shift supervisor Bonfili is not imputable. See *Nacco Mining Company* 3 FMSHRC 848, 849-850 (April 1981). Under the *Nacco* defense the negligence of a supervisor is not imputable to the operator if the operator can demonstrate that no other miners were put at risk by the supervisor=s conduct and that the operator took reasonable steps to avoid the particular class of accident. The Commission has emphasized however that even an agent=s unexpected or willful and intentional misconduct may result in a negligence finding where his lack of care exposed others to risk or harm. *Id* at 851; *Rochester and Pittsburgh Coal Co.* 13 FMSHRC 189, 197 (February 1991).

In this case it is clear that, by his negligent misconduct, Bonfili not only put himself at risk but also placed crane operator Charles Cook at risk. According to MSHA Special Investigator Charles Weber, when Cook saw what happened when Bonfili contacted the 480 volt Ahot rail@, he exited the crane, ran along the exposed craneway some 50 feet above ground and down to the next level to cut power to the Ahot rail@. In running along the exposed craneway, Cook was thereby exposed to the hazard of falling from the 50 foot craneway and suffering potentially fatal injuries. It may also reasonably be inferred from the record evidence that if Bonfili had slipped or otherwise lost control on the exposed craneway without a safety belt and was thereby placed in a precarious position and Cook had therefore come to his rescue he too would have been exposed to a falling hazard with its potentially fatal consequences. It may reasonably be inferred therefore that the negligence of Bonfili in failing to de-energize the Ahot rail@ and in failing to wear a safety belt, indeed exposed crane operator Charles Cook to the significant risk of fatal injuries. Accordingly the *Nacco* defense is inapplicable on these facts and Bonfili=s negligence may be imputed to the Respondent.

In assessing a civil penalty herein I do consider, however, what appears to have been a responsible training program in effect before the incident herein and that Bonfili=s actions were contrary to Respondent=s own work rules. I also note that, consistent with Respondent=s written disciplinary rules, Bonfili was subjected to a five day suspension and written warning for his violations of the company safety rules. Bonfili was further advised that further disregard for these rules would lead to more progressive discipline up to and including discharge (Respondent=s Exhibit No. 11). Finally, there is no evidence to suggest any negligence in the hiring of Bonfili. Thus, while the violations were of a serious nature and the negligence of Bonfili is imputable to Respondent, these factors warrant some mitigation of the penalty amount. Considering all the criteria under Section 110(i) of the Act I find that civil penalties of $2,500 for the violation charged in Citation No. 4294023 and $1,250 for the violation charged in Order No. 4294024 are appropriate.

"Section 104(d)(1)" Citation No. 4294714 alleges a Asignificant and substantial@ violation of the standard at 30 C.F.R. ' 12016 and charges as follows:

> On March 15, 1995, a shift supervisor was injured when his right hand and arm became caught between the No. 2 collecting belt and head drum. The supervisor was attempting to Atrain@ the belt by installing duct tape to lag the east side of the head drum while the belt was running. The pulley guard had been moved out of position, and the conveyer had not been de-energized and locked out as is required when doing such work. There is an unwarrantable failure violation.

As previously noted, that standard provides as follows:

> Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked our or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posed at the lower switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only the persons who installed them or by authorized personnel.

Inspector Skvarch discovered the instant violation while reviewing injury reports at the mine on April 18, 1995. The record shows that shift supervisor Arthur Lozano injured his hand while using duct tape to Atrain@ a conveyer belt. The injury

resulted in four days of restricted duty for Lozano but Skvarch opined that, by placing his hand in close proximity to the moving belt, Lozano subjected himself to permanently disabling injury. Skvarch also opined that it was reasonably likely that Lozano could have suffered the loss of a finger or hand. This evidence is undisputed and I therefore find this violation also to be Asignificant and substantial" and serious. Skvarch also found the violation to have been the result of high operator negligence and Aunwarrantable failure@ on the grounds that Lozano, as shift supervisor, was the operator=s agent and intentionally committed a serious and obvious violation. Respondent again claims the *Nacco* defense. *Nacco Id.* pps. 849-850.

Jeffrey Miller was working as a general laborer on March 15. He had been directed to assist Lozano. He was shoveling beneath the belt when Lozano told him Acome here, I want to show you a trick@. Miller testified that he did not know what Lozano planned to do but observed that Lozano placed his hand between the head pulley and the moving belt. Lozano=s left arm was then caught and pulled into the head pulley. The belt was then shut down.

This violation was of an obvious and dangerous nature and was committed by a shift supervisor, a person held to a high degree of care. Even without the cited regulatory standard it shows reckless disregard to do what the shift supervisor did here. The violation was clearly the result of aggravated circumstances constituting "unwarrantable failure" and high negligence. *Midwest Material* p. 35.

Miller testified, however, that he was not placed in any danger by Lozano=s action. MSHA Special Investigator Charles Weber disagreed, observing that Miller was only 3 or 4 feet from Lozano when Lozano was pulled into the moving belt. Weber observed that if Lozano had been further engaged by the belt Miller may then have attempted to extract Lozano from the belt thereby also exposing himself in the same way thereby also suffering potentially serious injuries. I agree that Weber=s analysis may reasonably be inferred from the evidence and, under the circumstances, I must again conclude that the *Nacco* defense is inapplicable. In assessing a civil penalty however I also consider in mitigation the absence of negligence in Lozano=s hiring, the operator=s training program, and the fact that Lozano was disciplined with a 3-day suspension for violating its safety rules. I also note that Lozano was warned that further disregard of company safety rules would lead to more serious discipline, up to and including discharge.

Considering the criteria under Section 110(i) of the Act I find that a civil penalty of $1,600 is appropriate for this violation.

ORDER

Citation No. 4294023, Citation No. 4294714 and Order No. 4294024 are hereby affirmed. Capitol Cement Corporation is directed to pay civil penalties of $5,350 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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