FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 4, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-392-M
Petitioner	:	A. C. No. 45-03338-04297
v.	:	
	:	
PALMER COKING COAL COMPANY,	:	Mine: Morgan Kame Terrace
Respondent	:	

DECISION

Appearances: John D. Pereza, Conference and Litigation Representative, Office of the Solicitor, MSHA, U S. Department of Labor, Vacaville, California
Bruce L. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Seattle, Washington
William Kombol, Manager, Palmer Coking Coal Company, Black Diamond, Washington, for Respondent

Before: Judge Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) against Palmer Coking Coal Company (Palmer), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§ 815, 820) (Mine Act or Act). The Secretary seeks the assessment for an alleged violation of 30 C.F.R § 56.11027, a mandatory safety standard for surface metal and nonmetal mines, that requires, inter alia, that working platforms be provided with handrails.[1] The violation allegedly occurred at the Morgan Kame facility of Palmer Coking

[1] Section 57.11027 states:

> Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floorboards shall be laid properly and the scaffolds and working platform shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

Coal Co. (Palmer), a facility where sand and rock are processed. A hearing was held in Tacoma, Washington.

THE EVIDENCE AND FACTS

Ronald Jacobsen, who testified on behalf of the Secretary, is an MSHA inspector who has been employed by the agency for approximately three years. Prior to joining MSHA, Jacobsen worked for 12 years in the mining industry, primarily in sand and gravel operations (Tr. 11-12). Jacobsen identified a legal identity report Palmer filed on December 7, 2000 (Gov. Exh. P-1). In the report, Palmer described itself as a partnership. William Kombol, who represented Palmer at the hearing and who testified on the company's behalf, was listed as the company's manager (Gov. Exh. P-1). Jacobsen also identified Palmer's Employment and Incident Rate Information Report (Gov. Exh. P-2). The report was generated from Palmer's quarterly reports (Tr. 13). The report showed that in 2003, Palmer had an average of eight employees, who worked a total of 3,678 hours. Further, Jacobsen identified a printed copy of Palmer's web page (Gov. Exh. P-4). The page stated in part:

> "Palmer is a producer, supplier, and retailer of a wide selection of sand, gravel, topsoil, . . . red cinder, lava rock and other construction and landscaping products. All . . . products are sold either picked up or delivered. Palmer serves both commercial dump trucks and trailers and the small pick-up trade."

(Gov. Exh. 4a).

Jacobsen believed the Morgan Kame facility was subject to the Mine Act. He noted that Palmer "dig[s] minerals [i.e., sand and rock] from the ground and . . . [sizes] them with a screening and crushing operation" and, therefore, is "considered a mining operation" (Tr. 14, see also Tr. 45). He also stated that some aggregate produced at the operation is used as a base for private and state roads (Id.). Further, at Morgan Kame, front end loaders fill trucks with processed material, and Jacobsen believed some of the equipment was manufactured by Caterpillar (Tr. 17, 45; see also Tr. 50).

On May 20, 2003, Jacobsen inspected the facility. The inspection included an examination of the facility's rock crusher. There was a metal work platform around the cone of the crusher. A ladder lead from the ground to the platform. Employees accessed the platform by climbing the ladder, grabbing the handrails and stepping onto the platform's metal deck (Tr. 24). Jacobsen observed that all of the platform was surrounded by a railing, except the area where the ladder met the platform. At that point, there was a gap (Tr. 18, 32).[2] Jacobsen explained that most other such platforms have a gate at the top of the ladder. An employee can swing open the

[2] The railing around the platform was between 36 and 48 feet long. The gap was 3 feet long (Tr. 32, 19).

gate to access the platform and swing it shut after stepping onto the work area (Tr. 25). When the gate is swung shut, it "totally encloses" the platform (Id.)

Through discussions with a company employee, Jacobsen determined that a miner must use the platform at least twice a week to tighten the cone on the crusher and to grease the conveyors that dump into the crusher. The cone requires tightening because, as crushing continues, wear loosens it. Tightening allows the crusher to produce material of a uniform size (Tr. 19-20).

The cone was about three feet from the opening (Tr. 21). When an employee tightened it, the employee would use a large tool – a four-foot pipe wrench. The procedure required the employee to come close to the opening (Tr. 18-19; Gov. Exh. 7). If the employee were to fall through the opening, he or she would drop between 2 feet and 6 feet, depending on the direction of the fall (Id.; Tr. 23). Jacobsen testified that at the time of the inspection, there were loose rocks on the platform, making a slip or a fall more likely (Id., 43; Gov. Exh. 8). Jacobsen also noted that it frequently rained in the area and that a wet deck enhanced the likelihood of a slip and fall (Tr. 22).[3] Based on what he saw and was told, Jacobsen concluded that a handrail was required around the entire platform and that the gap violated section 56.11027 (Tr. 18-19).

Kombol, on the other hand, testified that the employee who designed the platform for Palmer did not believe a railing was required at the top of the ladder because employees would have to have climb over or under it to get to work (Tr. 55, 57). He stated, "[T]he person who constructed . . . [the platform] . . . didn't realize . . . you have to have a handrail on a passageway" (Tr. 55).

Jacobsen believed as mining activities continued, it was reasonably likely a serious accident would occur. He reiterated that miners regularly used the platform as a work station, that some of their tools were large and that their use brought the miners near the opening. The miners could slip and fall, and if the platform was wet and there was mud on the miners' shoes, the likelihood of a slip or fall was even greater (Tr. 26-27). In addition, during major repair work, discarded crusher parts, e.g., nuts and bolts and other parts, might be lying on the platform and these, too, could cause a slip or a fall (Tr. 28). If a miner were to fall two feet, a sprain or broken bones was likely. If a miner were to fall six feet, the fall could be fatal (Tr. 27, 37).

For Kombol, it was a "stretch" to think a fall of six feet was likely (Tr. 54). Rather, if a miner were to fall through the gap, he or she would fall two feet at most (Id.; see Resp. Exh. 7).

In Jacobsen's view, the company was moderately negligent (Tr. 29). The condition was not brought to the attention of management by the crusher operator who conducted the workplace

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[3] Jacobsen stated that the leading causes of injury in metal and nonmetal surface mines are slips and falls. In fiscal 2003, there were 18 such injuries in the State of Washington (Tr. 22).

examination, and the platform was newly installed (Id., Tr. 31).

Kombol stated he had not seen the gap prior to Jacobsen's inspection, but, if he had, he "would not have thought the first thing about it" (Tr. 66). It seemed logical to leave open the passageway to the platform (see Tr. 67).

The condition was corrected when mine management installed a chain across the opening (Tr. 30). According to Jacobsen, a chain was used because, when hooked, it could prevent a fall and because it could be unhooked easily to provide access to the platform (Tr. 47-48). Jacobsen viewed the chain as equivalent to a handrail (Tr. 48).

STIPULATIONS

The parties jointly stipulated as follows:

1. Ron Jacobsen was acting in his official capacity as an authorized representative of the Secretary . . . when he issued [C]itation [N]umber 6350614 . . . and the citation was properly served upon an agent of [Palmer].

2. The violation was promptly abated.

3. Payment of the proposed penalty will not affect . . . [Palmer's] ability to continue in business.

4. [Palmer's] mine size is small, and . . . the employment hours documented in Exhibit A of the Petition . . . are correct.

5. [Palmer's] history of violations as documented in Exhibit A of the Petition . . . is correct.[4]

Joint Exh. 1; Tr. 7.

JURISDICTION

After the Secretary's witness testified, Kombol moved to dismiss on the basis the Secretary had not proven Palmer engaged in interstate commerce. I denied the motion, primarily on the basis of Jacobsen's unrefuted testimony that the material produced at the facility was used to build state roads. Such roads facilitate the transportation of interstate goods and services, and being engaged in the building of state roads by producing materials for their construction qualifies as interstate commerce (Tr. 51-52). I also note that Kombol confirmed Palmer's

[4] Exhibit A indicates 12 violations in the two years preceding the alleged violation, a history the Secretary's representative termed, "not . . . excessive" (Tr. 63).

ownership and use of Caterpillar equipment and I take judicial notice of the fact that Caterpillar equipment is manufactured in Illinois.

THE VIOLATION

Section 57.11027 states that "working platforms shall be . . . provided with handrails." Jacobsen and Kombol agreed the crusher platform was used by miners working at the crusher and by miners servicing it and the conveyor belts. Thus, the crusher platform was a "working platform" within the meaning of the standard.

In addition, Jacobsen and Kombol agreed that the handrail surrounding the platform contained a gap of approximately 36 inches where the ladder accessed the platform. Therefore, all of the platform was not provided with a handrail as required by the standard, and the violation existed as charged.

S&S AND GRAVITY

Although Jacobsen found the violation was a significant and substantial contribution to a mine safety hazard (S&S), I do not agree. The only way one could have fallen from the platform was through the 36-inch gap. The total perimeter of the platform measured between 36 and 48 feet (Tr. 32). The gap represented only about 7% or 8% of the area that required protection. The limited nature of the opening reduced the chance a miner would fall through it to the point where it was not reasonably likely.

Despite the fact the violation was not S&S, it was serious. I credit Jacobsen's testimony that the leading causes of injury in metal and nonmetal surface mines are slips and falls (Tr. 22). I also credit his testimony that at the time he observed the violation, the work platform was littered with rock, making it easier for a miner to slip and fall. If a miner in fact were to fall through the opening, he or she would fall between two feet and six feet, and, no matter which distance the miner fell, contusions, sprains, or broken bones could result.

NEGLIGENCE

The violation was due to the operator's moderate negligence. Kombol testified he did not know of the gap (Tr. 66), and Jacobsen testified he was told that the miner who performed the on-shift examination of the platform did not report the gap to mine management (Tr. 66, 29). While these factors are to some extent exculpatory, the fact remains that the gap was visually obvious. A reasonably prudent operator should have been aware that the entire perimeter of the platform had to be protected, even the space through which access was provided. In other words, the condition should have been known to management and should have been corrected.

OTHER CIVIL PENALTY CRITERIA

The parties stipulated the violation was promptly abated, that payment of the proposed penalty would not affect the company's ability to continue in business and that Palmer is a small operator (Joint Exh.1; Tr. 7). Further, in the two years preceding the subject violation, Palmer was cited for 12 violations, a relatively small history (Tr. 63).

ASSESSMENT OF PENALTY AND ORDER

Based on the foregoing findings and conclusions, and taking into account the statutory civil penalty criteria as required by section 110(i) of the Act (30 U.S.C. §820(i)), I assess a civil penalty of $60 for the violation of section 57.11027. Palmer **SHALL PAY** the civil penalty within 30 days of the date of this decision. Within the same 30 days the Secretary **SHALL MODIFY** Citation No. 6350614 by deleting the S&S finding. Upon payment of the penalty and modification of the citation, this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

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