# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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August 24, 2004

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 2003-264-M<br>A.C. No. 48-01605-05501 |
| v. | : | |
| MELGAARD CONSTRUCTION CO., Respondent | : | Rock Crusher #2 |

## DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, and Fred Fernandez and Ronald D. Pennington, Conference and Litigation Representatives, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
John E. Melgaard, President, Melgaard Construction Company, Gillette, Wyoming, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Melgaard Construction Company. John E. Melgaard is the company president.[1] The petition seeks to impose a total civil penalty of $365.00 for six alleged violations of mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines.

Four of the cited violative conditions allege inadequate guarding in violation of the mandatory standard in section 56.14107(a), 30 C.F.R. § 56.14107(a). This safety standard requires moving machine parts, such as gears and pulleys, to be guarded to protect persons from injury. Only one of the guarding violations is characterized as significant and substantial (S&S) in nature. Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

[1] John E. Melgaard appeared on behalf of the company and he was its only witness. Thus, all references to "Melgaard's" contentions refer either to Melgaard's testimony or his assertions advanced on behalf of the company.

The two remaining violations, both designated as non-S&S in nature, concern the mandatory safety standard in section 56.14132(a), 30 C.F.R. § 56.14132(a), that requires manually-operated backup audible warning devices to be maintained in functional condition. This matter was heard on July 27, 2004, in Gillette, Wyoming. During the hearing, Melgaard stipulated to the fact of the non-S&S backup alarm violations in Citation Nos. 7913794 and 7913795. Melgaard agreed to pay the $55.00 penalty proposed by the Secretary for each of these citations. (Tr. 81-83). **Accordingly, Citation Nos. 7913794 and 7913795 shall be affirmed**.

At the beginning of the hearing, the parties were advised that I would defer my ruling pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties opted to waive post-hearing briefs in favor of a bench decision. (Tr. 83-84, 137-38). This decision summarizes and supplements the bench decision with respect to the four remaining guarding violations.

## I. Pertinent Penalty Criteria

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(I), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty to be assessed, Section 110(i) provides, in pertinent part:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Melgaard Construction Company is a small mine operator that is subject to the jurisdiction of the Mine Act. The company has no history of previous violations as it had recently begun operations at its No. 2 Rock Crusher site. Melgaard Construction Company abated the cited conditions in a timely manner. The cited conditions were not serious in gravity. Finally, the civil penalty proposed by the Secretary will not impair the company's ability to continue in business.

## II. Background

On February 15, 2002, Donald B. Wagoner, Melgaard Construction Company's Safety Representative, notified the Mine Safety and Health Administration's (MSHA's) field office in Green River, Wyoming, of its intention to begin rock crushing operations at its No. 2 Crusher facility as of February 20, 2002. The No. 2 Crusher facility is located in Gillette, Wyoming. The Melgaard Construction Company is a small mine operator that employs approximately

15 people its No. 2 crusher facility. At the facility, rock material is removed from hilltops by dozer. The material is transported from the hilltop to a feeder by a front-end loader whereupon the material drops onto a conveyor that carries the material to be sorted by screen. The sorted material is conveyed to a rolls crusher or a jaws crusher where it is crushed into various grades of gravel. The crushed gravel is conveyed to a pay belt that serves a stacker conveyor. The gravel is sold to oil companies and ranchers who use the material for road construction.

On May 8, 2002, MSHA Inspector Joel Tankersley became aware of the Rock Crusher #2 facility after he observed the surface mine from his vehicle while driving on Interstate 90. Although Wagoner had advised MSHA of start-up operations, Tankersley was unaware of the facility's operation. Tankersley drove to the mine site where he encountered three workers. Tankersley initially met loader operator Ed Peyser. Peyser directed Tankersley to Master Mechanic Kent Lucschow, who was the supervisor and crusher operator. A third unidentified employee was operating a Caterpillar dozer. Lucschow accompanied Tankersley on his inspection. Tankersley did not have a camera because his inspection was unplanned.

Although the Caterpillar and loader were moving material at the stockpile, the conveyor system was not operating because it was being repaired. Consequently, the conveyor and crushers were de-energized as the diesel generator that powers the system was shut off. Lucschow did not provide Tankersley with any information concerning the maintenance status of the conveyor system or when startup was contemplated. Both Tankersley and Melgaard described Lucschow as a courteous, non-confrontational gentleman. (Tr. 70, 136-37).

John Melgaard testified that the rolls crusher jammed on May 3, 2002, causing the belts to spin off of the feeder. Melgaard further testified that a new belt was installed on the feeder on May 8, 2002, and that significant welding repairs were subsequently made on the rolls crusher. Melgaard stated the system was out of service for extensive repairs from May 3, 2002, until crushing operations resumed on August 1, 2002. Melgaard's testimony is consistent with Tankersley's testimony that the mine site was not staffed or operating on July 17, 2002, when Tankersley returned to the site to terminate a previously issued citation. (Tr. 40, 86-87).

## III. Findings and Conclusions

### A. Citation No. 7913790

Upon inspection of the feed drive motor, Tankersley observed the drive v-belt was not guarded to protect the belt from contact. The v-belt is at the side of the drive motor. The drive motor is located approximately three feet off of the ground. Tankersley was concerned that the crusher operator could contact the exposed v-belt while checking on the operating condition of the motor. In such an event, serious injuries to the fingers or the extremities would be sustained. Consequently, Tankersley issued Citation No. 7913790 citing a violation of the mandatory

guarding standard in section 56.14107(a).[2] (Gov. Ex. 2). However, given the location of the exposed belt drive, Tankersley believed that such an accident was unlikely. He therefore characterized the cited violation as non-S&S.

The citation was terminated shortly after it was issued after the guard, which was lying on the ground, was re-installed. Tankersley did not consider the conveyor system as "out of service" because Lucschow did not assert the system was inoperable. (Tr. 62). However, Tankersley conceded the equipment was de-energized and Lucschow was working on the rolls crusher which is in line with the feed drive motor as well as the other components of the conveyor system. (Tr. 64).

Melgaard testified that the rolls crusher "plugged-up" on May 3, 2002, causing extensive damage to the entire conveyor system. Melgaard stated the belts had to be removed to enable welding repair of the rolls crusher. On May 8, 2002, Melgaard asserts that the v-belt drive motor guard had been removed to facilitate the repairs.

The bench decision noted that the Secretary has the burden of proving the alleged violation of a mandatory safety standard by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989). Consistent with Tankersley's testimony, Melgaard concedes that the v-belt guard on the drive motor had been removed and that it was lying on the ground. Thus, the Secretary has presented a *prima facie* case that the guarding standard was violated.

However, Melgaard has rebutted the Secretary's showing by demonstrating that the conveyor system was inoperable and that the guard had been removed to facilitate repairs. In this regard, Tankersley candidly admitted that the diesel generator had been turned off, that repair work was being performed, and, that the guard was in close proximity to the drive motor and readily available to be re-installed. Melgaard stated that the lock-down handle on the generator had been "tagged-out." Tankersley did not recall whether the generator had been locked out, however, he did not dispute Melgaard's testimony. (Tr. 85-86). Obviously, guards may be removed to perform repairs on de-energized equipment. Under such circumstances, a violation of the guarding standard in section 56.14107(a) has not occurred. (Tr. 142-47). **Accordingly, Citation No. 7913790 shall be vacated**.

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[2] Section 567.141079(a) provides:

> (a) moving parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades; and similar moving parts that can cause injury.

B. Citation No. 7913791

Upon inspection of the generator drive motor, Tankersley observed the power takeoff (PTO). The PTO is approximately eight feet long and it transfers power from the generator drive motor to the rolls crusher. The eight foot length of the PTO varies in height from eight feet off the ground at the rolls crusher angling down to four feet off of the ground where it connects to the generator motor. There is a knuckle or joint assembly in the middle of the PTO. The PTO's moving parts were guarded on three sides - - the top and both sides. However, Tankersley noted that the bottom of the PTO was unguarded exposing anyone walking underneath the PTO to the hazard of a contact injury.

Tankersley believed that anyone traveling under the PTO to inspect the belts could be exposed to injury. However, Tankersley believed an injury was unlikely because of the location of the unguarded area. Consequently, Tankersley issued Citation No. 7913791 citing a non-S&S violation of the mandatory safety standard in section 56.14107(a). (Gov. Ex. 3). The citation was terminated shortly after it was issued after the guard was re-installed at the bottom of the PTO.

Melgaard conceded that a bottom guard was required. However, Melgaard asserted the guard had been removed temporarily to grease the knuckle joints. (Tr. 95). In fact, Melgaard stated the guard was removed daily to grease the universal joint in the PTO. (Tr. 96-97). Tankersley did not dispute that the guard was temporarily removed or that it was routinely removed to service the universal joint. (Tr. 95-97, 98-99).

Similar to the decision in Citation No. 7913790, the bench decision in Citation No. 7913791 noted that the evidence demonstrated that the lower PTO guard was temporarily removed during the maintenance and repair process. As discussed above, it is undisputed that the conveyor system was de-energized and repair work was being performed. As such, a violation of the guarding standard in section 56.14107(a) has not been shown. (Tr. 142-47). **Consequently, Citation No. 7913791 shall be vacated**.

C. Citation No. 7913792

Upon inspecting the return belt, Tankersley observed that the tail roller was guarded on the top and both sides. However, the bottom of the tail roller was unguarded. (Tr. 110). The tail roller was located at ground level adjacent to the PTO on the generator side of the rolls crusher. There is a walkway area next to the tail roller that is approximately six feet wide. (Tr. 118). The crusher operator traversed this area to examine the stacker belt and the rolls crusher.

Tankersley also noted that the return belt head roller did not have a guard that protected the pinch point. The head roller was located on the other side of the rolls crusher approximately seven feet above the ground. (Gov. Ex. 10, pp. 2-3). Tankersley believed that, given continued mining operations, it was reasonably likely that an individual passing by the return belt will

sustain serious injuries as a result of his hand, foot or clothing contacting exposed moving parts. Specifically, with respect to the unguarded bottom of the tail roller, Tankersley was concerned that someone could get his foot caught under the roller or catch his clothing on a pin or splice area protruding from the belt. Consequently, Tankersley issued Citation No. 7913792 citing an S&S violation of the guarding standard in section 56.14107(a). (Gov. Ex. 4). The citation was terminated on May 8, 2002, after the cited missing guards were constructed and installed on the return belt.

Melgaard did not dispute Tankersley's testimony with respect to the unguarded portion of the tail roller. Melgaard contended the head roller was seven feet above the ground. (Tr. 119). Tankersley's illustration of the return belt notes that the head pulley is "about 7 feet" above the ground. (Gov. Ex. 10, p.3). Section 56.14107(b) of the cited guarding standard provides that "[g]uards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces."

The bench decision noted that Tankersley admitted the head roller was approximately seven feet above ground. Melgaard testified the head roller is at least seven feet high. Tankersley did not take an actual measurement. In the absence of actual measurement, the Secretary has failed to demonstrate that the "seven feet high" exception to the guarding requirements specified in Section 56.14107(b) does not apply. Therefore, the bench decision vacated the portion of Citation No. 7913792 concerning the unguarded head roller. (Tr. 147-48).

With respect to the guarding standard as it applies to the tail roller, the bench decision noted that it is instructive to examine the Commission's decision in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984) that addressed the purpose of the Secretary's guarding standard. The Commission stated:

> We find the most logical construction of the standard is that it imports the concepts of *reasonable possibility of contact and injury*, including contact stemming from inadvertent stumbling or falling, momentary inattention or ordinary carelessness. Applying this test requires *taking into consideration all relevant exposure and injury variables*. For example, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis.

6 FMSHRC at 2097 (emphasis added).

Thus, as a general proposition, stumbling and inadvertent contact are the concerns that the guarding standard addresses. Consequently section 57.14107(b) exempts "moving parts [that] are at least seven feet away from walking or working surfaces," although such areas may be accessible by ladder. The standard is not intended to require moving parts to be guarded in order to prevent contact by personnel who may climb up to inaccessible areas, or, intentionally crawl, or reach, under inaccessible areas near ground level to perform maintenance. Under such circumstances, section 56.14105, 30 C.F.R. § 56.14105, requires maintenance of equipment to be performed only after the power is turned off and the equipment is blocked against motion. Moreover, guarding such inaccessible areas may require removing the guard to accomplish cleaning.

Unlike the previous two cited conditions where guards were temporarily removed during maintenance and repairs, Melgaard concedes the bottom of the tail roller was unguarded. Although the conveyor system was de-energized during Tankersley's inspection, the cited condition must be viewed in the context of renewed ongoing mining operations. Putting aside the question of the likelihood of inadvertent contact, the exposed bottom of the tail roller creates a potential hazard that someone may jam his foot or catch his clothing on a splice point. **Accordingly, Citation No. 7913792 shall be affirmed**.

Turning to the issue of the likelihood of serious injury, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *National Gypsum*, 3 FMSHRC at 825. The Commission has explained further that to demonstrate that a violation is S&S the Secretary must establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984). (Emphasis in original).

In the instant case, the nature and extent of the partially unguarded tail roller, given its location in a six feet wide walkway, fails to demonstrate that it is reasonably likely that an accident resulting in serious injury from contact with the bottom of the roller will occur. In other words, although the partially unguarded tail roller can contribute to a serious accident, such an accident is unlikely. Consequently, Citation No. 7913792 shall be modified to reflect the cited violation was non-S&S in nature.

The Secretary proposes a $90.00 civil penalty for Citation No. 7913792. Given its modification to a non-S&S citation, a civil penalty of $55.00 shall be imposed. (Tr. 147-52).

D. Citation No. 7913793

Tankersley inspected the Caterpillar generator referred to as the Genset.[3] The Genset is connected by electrical cables to the generator drive motor. (Gov. Ex. 10, p.2). The Genset creates the electricity that powers the drive motor that transfers the energy through the PTO to the crusher. The crusher operator station is located between the generator drive motor and the Genset where a box is located housing punch buttons that operate various parts of the crusher. The generator motor is at the rear of the Genset. The motor is powered by v-belts and alternator belts. There is a radiator fan that draws air into the radiator to cool the motor. The moving belts are approximately chest high. There is a cowling that guards the belts. A cowling is similar to the guard that covers the radiator fan on an automobile.

Tankersley noted that the factory installed cowling for the v-belts was not long enough or wide enough to cover all of the pinch points. Tankersley testified the cowling was approximately 12 inches too short on either side of the v-belts which protrude outside of the motor. (Tr.127-28).

Tankersley was concerned that anyone examining the crusher could sustain serious injuries by inadvertently contacting the exposed portion of the v-belt. However, Tankersley did not believe such an accident was likely because it was in a low travel area. (Tr. 128-29). Consequently, Tankersley issued Citation No. 7913793 citing a non-S&S violation of the guarding standard in section 56.14107(a). (Gov. Ex. 5).

Melgaard testified that a factory installed guard protected the v-belt from contact. Although Melgaard believed the cowling was adequate, to abate the citation Melgaard installed a spacer at the cowling's mounting site to extend the guard over the v-belt. (Tr. 130).

The citation was terminated by Tankersley on July 17, 2002, when he returned to the mine site and observed that the cowling had been extended to protect the pinch points from contact. (Gov. Ex. 5). As previously discussed, there were no mining activities occurring at the site at that time.

As previously discussed, the Secretary has the burden of proof. The bench decision noted that the Secretary is at a disadvantage in this case because Tankersley did not photograph the cited guarding violations. In this regard, the Secretary proffered drawings of the cited guarding conditions that were drawn by Tankersley approximately one month before the July 2004 trial. (Tr. 59). These drawings are based on Tankersley's recollections of conditions he observed more than two years before. As such, Tankersley's drawings are of little evidentiary value.

[3] Tankersley erroneously cited the generator as a Murphy generator based on information provided to him by Lucschow. The generator was manufactured by Caterpillar. (Tr. 124).

In guarding cases it is essential that the MSHA inspector photograph the cited conditions. In addition, measurements should be taken to describe the location and quantify the area that poses a contact injury hazard. In the instant case, Citation No. 7913793 alleges the cowling covering the v-belts "was not long or wide enough to cover all pinch points." (Gov. Ex. 5). In the absence of photographs or measurements quantifying the alleged inadequacy of the factory installed guard, the evidence presented by the Secretary is insufficient to demonstrate a violation of the cited guarding standard. **Accordingly, Citation No. 7913793 shall be vacated**. (Tr. 152-54).

## ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 7913790, 7913791 and 7913793 **ARE VACATED**.

**IT IS FURTHER ORDERED** that Citation Nos. 7913794 and 7913795 **ARE AFFIRMED** and Citation No. 7913792 **IS MODIFIED** to delete the significant and substantial designation.

**IT IS FURTHER ORDERED** that Melgaard Construction Company **shall pay a total civil penalty of $165.00** in satisfaction of Citation Nos. 7913792, 7913794 and 7913795. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket No. WEST 2003-264-M **IS DISMISSED**.

_____Jerold Feldman
Administrative Law Judge

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