FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 7, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-220-M
Petitioner	:	A.C. No. 04-03007-19403
	:	
v.	:	
	:	Ralston Quarry
ASPHALT PAVING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Lydia Tzagoloff, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David Z. Gerganoff, Safety Coordinator, Asphalt Paving Company, Golden, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Asphalt Paving Company ("Asphalt Paving"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). An evidentiary hearing was held in the Commission's courtroom in Denver, Colorado.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Asphalt Paving operates a quarry in Jefferson County, Colorado. The quarry is on about 6 acres of land and it has 62 conveyors, 4 crushers, and 7 screens. (Tr. 41-42). On September 9, 2003, MSHA Inspector Laurence Dunlap inspected the Ralston Quarry. During his inspection, Inspector Dunlap investigated an accident that occurred at the quarry on May 29, 2003. The inspector issued Citation No. 6298212 in conjunction with the accident investigation. At the hearing, the parties announced that they reached a settlement for Citation No. 6298211, the other citation at issue in this case, which I approved.

Inspector Dunlap issued Citation No. 6298212 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a). The body of the citation states:

> The return roller that is 2 feet 6 inches from ground level, located in the secondary tunnel, is not guarded. Spillage occurs on a regular basis in the tunnel and is cleaned weekly. On May 29, 2003, a worker shoveling material from under the moving belt caught his arm between the return roller and the conveyor belt. The worker received a serious injury that resulted in restricted duty.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and, if an injury were to occur, it could result in permanently disabling injuries. He determined that the violation was of a significant and substantial nature ("S&S") and that Asphalt Paving's negligence was low. The cited safety standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of $154.00 for this citation.

Inspector Dunlap testified that Marc Crowe, an Asphalt Paving employee, was shoveling accumulations in a tunnel under the surge pile when he got his arm stuck between the return roller and the conveyor belt. (Tr. 12-13). He received second degree burns on his arm as a result of this accident. The accident occurred when the shovel got caught in the pinch point, which pulled his arm between the roller and belt. Crowe gained access to the tunnel by squeezing through an opening adjacent to the conveyor on the west side of the tunnel. (Ex. 4, p. 2). Crowe told Inspector Dunlap that he had been entering tunnel through that opening for about four years. (Tr. 14). He also told the inspector that the accumulations are cleaned out about once a week. The inspector was able to enter the tunnel through this opening, which he estimated to be about 16-18 inches wide. (Tr. 21-22). Material builds up under the conveyor belt and must be shoveled onto the belt. (Tr. 16; Ex. 4, pp. 3-4). The pinch point for the conveyor was two feet six inches from the floor of the tunnel. (Tr. 16).

Inspector Dunlap testified that Asphalt Paving has a lock-out procedure that employees are supposed to follow when shoveling up accumulations around the belt. (Tr. 18). As a consequence, before a miner works in the tunnel, he is required to shut down and lock out the conveyor. Inspector Dunlap testified that the pinch point on the return roller where Crowe got his arm caught is the type of moving machine part that is covered by the safety standard. (Tr. 21). He stated that Crowe's injuries could have been much worse. (Tr. 23-24). Crowe told him that, when he got his arm caught between the roller and the belt, he knew that the metal splice for the belt would be coming around so he pushed his feet against a solid surface and pulled his arm out before the splice arrived. Inspector Dunlap determined that Asphalt Paving's negligence was low because Crowe told him that the quarry superintendent was not aware that he was shoveling accumulations in the tunnel while the conveyor was operating. (Tr. 29-30). Nevertheless, Inspector Dunlap believes that management should have been aware that Crowe was shoveling

accumulations in this manner because Crowe told him that he had been doing it this way every week for four years. (Tr. 31).

Ray Wright, superintendent at the quarry, is in charge of production, safety, and environmental compliance. Wright testified that Crowe had worked at the quarry for 17 years prior to the accident. (Tr. 41). Wright also testified that Crowe was aware that the company's safety rules prohibited miners from entering the tunnel while the belt was operating. Wright testified that he did not know that Crowe was entering the tunnel by squeezing through an opening on the west side of the tunnel and shoveling accumulations while the belt was running. He admitted, however, that during his employment in the mining industry he has seen miners taking shortcuts. (Tr. 51).

Wright testified that the proper procedure for cleaning up accumulations is to lock out and tag out the conveyor system before entering the tunnel. (Tr. 43). He does not want anyone entering the tunnel when the belt is running. Because the east gate to the tunnel was kept locked and employees were prohibited from entering the tunnel until the belt was locked out, Wright does not believe that the tunnel should be considered to be a work area. (Tr. 49). The opening on the west end of the tunnel that Crowe used is 12 inches wide. (Tr. 45; Ex. A). Most people could not fit through the opening and it was not the normal entrance to the tunnel. Most employees entered the tunnel through the gate on the east end of the tunnel. (Tr. 45-46; Ex. B). The surge pile is quite large and the tunnel goes beneath it. (Ex. G). Accumulations in the tunnel are not shoveled out on a fixed schedule but on an as-needed basis. Crowe returned to work after he was treated by a physician. Crowe was suspended three days without pay for failing to follow company safety rules. (Tr. 48; Ex. F).

The condition was abated by placing a guard around the roller. (Tr. 52). Asphalt Paving also bolted wire mesh across the opening at the west end of the tunnel so that employees could no longer enter the tunnel at that location.

The Secretary argues that she established an S&S violation of the safety standard. (Tr. 55). Inspector Dunlap took into consideration the fact that management did not know that Crowe was shoveling accumulations in the tunnel while the belt was running by designating Asphalt Paving's negligence as low. Asphalt Paving argues that the citation should be vacated because management was not aware that Crowe was violating the company's safety rules by shoveling accumulations in the tunnel while the belt was running. (Tr. 56). Crowe's actions were intentional and Asphalt Paving should not be held liable for intentional safety violations committed by its employees. It maintains that an employer cannot guard against the intentional misconduct of employees. (Tr. 57-58).

I find that the Secretary established a violation of section 56.14107(a). The cited pinch point was required to be guarded under the requirements of that safety standard. Section 14107(b) of the safety standard provides that guards are not required "when the exposed moving parts are at least seven feet away from walking or working surfaces." I find that the tunnel was a walking or working surface because at least one employee regularly worked in the tunnel while

the conveyor system was operating. The pinch point was only two and a half feet from the floor of the tunnel. Although Asphalt Paving thought that the unguarded pinch point was in an inaccessible area, at least one miner was working in the tunnel on a regular basis to shovel accumulations onto the belt while the belt was moving. Although Wright testified that he did not expect miners to slip through the one-foot wide opening on the west side of the tunnel, he acknowledged that miners will take often shortcuts.

Asphalt Paving argues that because the alleged violation was the direct result of an intentional safety violation committed by Crowe, the citation should be vacated. I reject this argument. It is well established that operators are liable without regard to fault for violations of the Mine Act. *See e.g., Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc*., 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc*., 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The Commission and the courts have also consistently held that a miner's misconduct in causing a violation is not a defense to liability. For example, in *Allied Products*, the court held that the operator is liable for violations even where "significant employee misconduct" caused the violations. 666 F.2d at 893-94. The court concluded: "If the act or its regulations are violated, it is irrelevant whose act [precipitated] the violation . . . ; the operator is liable." Id. at 894. Similarly, in *Ideal Cement Co.*, 13 FMSHRC 1346, 1351 (September 1991), the Commission observed that, "[u]nder the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct." Indeed, the Commission has held that an operator is liable for a violation of the safety standard requiring adequate service brakes on mobile equipment where the brakes were defective because disgruntled employees intentionally tampered with the slack adjusters for the brakes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995).

I also find that the Secretary established that the violation was S&S. A violation is classified as S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary established the underlying violation of the safety standard and that a discrete safety hazard was created. There was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. The undisputed evidence establishes that Crowe was entering the tunnel on a regular basis to shovel accumulations onto the belt while the conveyor system was operating. Assuming continued normal mining operations, it was reasonably likely that the unguarded pinch point would injure him. Crowe sustained an injury of a reasonably serious nature and it is clear that his injuries could have been much more serious. The belt could have pulled off his arm or ripped skin and muscles off his arm. The parties do not contest the inspector's negligence finding.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation. The Ralston Quarry is a medium-sized mine that worked 31,981 man-hours in 2003. MSHA issued about 21 citations at the Ralston Quarry in the two years preceding September 9, 2003. Both violations were abated in good faith. The total penalty assessed in this decision will not have an adverse effect on Asphalt Paving's ability to continue in business. My findings on gravity and negligence are discussed above.

III. ORDER

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

Citation No.	30 C.F.R. §	Penalty
6298211	§103(d) of Act	$60.00
6298212	56.14107(a)	154.00
	TOTAL PENALTY	$214.00

Accordingly, the citations contested in this case are **AFFIRMED** and Asphalt Paving Company is **ORDERED TO PAY** the Secretary of Labor the sum of $214.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

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