

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

May 18, 2006

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2006-219-M |
| Petitioner | : | A. C. No. 35-03600-76169 |
| v. | : | Freeman Brookings Wash Plant |
| | : | |
| FREEMAN ROCK, INC., | : | Docket No. WEST 2006-220-M |
| Respondent | : | A. C. No. 35-01041-76016 |
| | : | Freeman Portable Crusher |

DECISION

Appearances: John D. Perez, Conference and Litigation Representative, U.S. Department of Labor, Vacaville, California, on behalf of the Petitioner;
 Catherine Yocum and Michelle McCormick, Freeman Rock, Inc., Brookings, Oregon, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act,” charging Freeman Rock Inc. (Freeman Rock) with three violations of mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Freeman Rock violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

Docket No. WEST 2006-219-M

Citation No. 6383282

Citation No. 6383282 alleges a violation of the standard at 30 C.F.R. § 56.14107 (a) and charges as follows:

A guard was not provided on the V-belt drive unit on the air-compressor located in the shop area. Guards shall be provided and maintained to prevent persons from contacting the moving machine parts. The unit was about five feet above ground level, about a 2 foot by 3 foot opening and turns at a high rate of speed. Employees are not required to be in the area when the unit is running. A person could be seriously injured if they where [sic] to get entangled in the V-belt drive unit.

The cited standard, 30 C.F.R. § 56.14107 (a) provides that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys, fly wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.”

David Small, an inspector for the Department of Labor’s, Mine Safety and Health Administration (MSHA), has five and a half years experience as a mine inspector and 30 years experience in the mining industry. He inspected the Freeman Brookings Wash Plant in November 2005 accompanied by foreman Greg Dexter. He observed that the cited compressor had no guard on the V-belt drive unit. Small observed that the moving parts rotate “fast”. He further observed that the building in which the compressor was housed was not locked nor was there a warning sign on the door. He further observed that the compressor would start automatically and noted that the compressor must be periodically drained by an employee. The drain was located about five feet lower on the tank and not near the V-belt drive (See Government Exhibit 219-4). Small also noted that the V-belt drive unit was located behind the compressor only two feet from the wall but the drive motor could nevertheless be reached by an individual who could get a finger caught therein. He found that it was unlikely for someone to be in the area and also unlikely for anyone to get their finger caught in the V-belt drive. He therefore found the violation to be of low gravity.

According to the operator’s receptionist, bookkeeper and safety secretary, Michelle McCormick, the cited compressor was located in a small room and that the State of Oregon “OSHA” inspector had not commented on nor cited the same compressor while it was located in a more exposed area.

Considering the above evidence, I conclude that, while there was indeed a violation of the cited standard, it was of low gravity. Based on the somewhat remote and protected location of the cited V-belt drive unit and the fact that a state safety inspector had not cited or commented on the V-belt drive unit when it was located in a more exposed area, I find the operator chargeable with but little negligence.

Docket No. WEST 2006-220-M

Citation No. 6383251

Citation No. 6383251 alleges a violation at 30 C.F.R. § 56.14100 (b) and charges as follows:

The front lights where [sic] not maintained in a functional condition on the D8H cat dozer, company # 4608. Defects affecting safety shall be repaired in a timely manner as not to create a hazard to the operator. This piece of mobile equipment operates on mine property during daylight hours. The equipment is exposed to outside conditions such as a [sic] rain and fog. The dozer works in the area of the highwall and there was no foot traffic or smaller vehicles in the area. A person could be seriously injured if struck by the dozer. The condition had not been reported.

The cited standard, 30 C.F.R. § 56.14100 (b), provides that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.”

Inspector Small testified, and it is undisputed, that the cited bulldozer in fact did not have functioning front lights. Small observed that the wiring and brackets for the lights were still in place and only needed light bulbs to become functional. According to Inspector Small, the bulldozer operates in fog and rain and returns where other persons work to the pit floor after the shift. Small testified that the foreman told him that the light bulbs had been removed because they did not think they needed them. Small reiterated that the bulldozer operated in dusty conditions and in foggy weather and noted that the mine was located only four to five miles from the ocean where it regularly experiences both light and heavy fog. He noted that the bulldozer also operated in the rain and he recalled that on the date of the inspection, October 27, 2005, the weather was overcast with rain.

Small testified that it was important during fog or rain to turn the headlights on so that others could see the bulldozer and for the bulldozer operator himself to see how close he is to the edge of the highwall. Small concluded that injuries were unlikely but that fatal injuries were possible if the bulldozer went over the highwall. He found the operator chargeable with moderate negligence in light of evidence that the company had been previously cited for failing to maintain headlights on a scraper at the mine on April 15, 2003. Under the circumstances, I conclude that indeed the violation was committed as alleged but that it was of low gravity and the result of moderate negligence. In connection with these findings I have also considered the testimony of Ms. McCormick that when the bulldozer was acquired some one and a half years before the condition herein was cited, it was not furnished with light bulbs although it did come equipped with the wiring and frame for the lights. In reaching the above findings, I have also considered the testimony of Ms. McCormick that the company stops operations when the weather is too inclement.

Citation No. 6383253

Citation No. 6383253 alleges a violation of the standard at 30 C.F.R. § 56.9300 (a) and charges as follows:

A berm or a gate with delineators was not provided on the access road leading to the upper benches of the highwall. A berm or other means such as a guard rail, [sic] gate with delineators shall be provided on the edge of roadways where the road is in-frequently [sic] traveled by small vehicles or service vehicles. The area is about 200 feet long, about three foot to 15 foot drop off's [sic] along the edges, about a 10 degree grade and exposed to outside conditions. The area is normally traveled by the dozer but small vehicles access the area in-frequently [sic]. A person could be seriously injured if a vehicle were to overturn.

The cited standard, 30 C.F.R. § 56.9300, provides that “[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.”

Inspector Small testified that, as he drove down the quarry access road, he observed that there were no berms or guardrails and that drop-offs from three to fifteen feet existed at various places along the road. He also observed that, in certain places, the road had a 10% grade. Small also observed that a pickup truck was being driven by operations manager Jake Jacobson on the lower part of the road. According to Small, Jacobson acknowledged that he was aware that there were no berms and admitted that he frequently used the road in his pickup truck. According to Small, the lack of berms or guardrails created a hazard of a vehicle overturning. He noted, however, that injuries were unlikely due to the infrequency of vehicles using the road. He also noted however that injuries, if sustained, could be fatal. According to the inspector, the road was 18 feet to 40 feet wide and the shoulders were muddy.

Ms. McCormick testified that the road was only 17 feet wide and no public access was permitted. Indeed she testified that the only person permitted to use the road was Jacobson and that a four-wheel-drive vehicle was needed to operate on the road.

Within the above framework of evidence, I conclude that indeed the violation is proven as charged. I accept the inspector's testimony, supported by the testimony of Ms. McCormick, that access to the road was limited and that injuries were unlikely. I therefore find that the violation was of low gravity. I accept the inspector's findings that the violation was the result of moderate negligence in light of operations manager Jacobson's admission that he was aware that the road did not have berms and in light of the obvious need for berms or guardrails along the road.

Civil Penalties

Under Section 110 (i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the operator is small in size with a minor history of violations at only one of the facilities cited. There is no dispute that the violations were abated in a timely and good faith manner and no evidence has been presented as to the effect the penalties would have on the operator's ability to continue in business. The negligence and gravity findings have previously been discussed in the instant decision. Under the circumstances, the Secretary's proposed penalties of \$60 for each of the violations are appropriate.

ORDER

Citations No. 6383282, 6383251 and 6383253 are hereby affirmed and Freeman Rock Inc. is directed to pay civil penalties of \$180.00 (\$60.00 for each violation) within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
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Distribution: (Certified Mail)

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