FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 22, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-190-M
Petitioner	:	A.C. No. 05-04422-05508
	:	
v.	:	Docket No. WEST 99-304-M
	:	A.C. No. 05-04422-05510
HI VALLEY CRUSHING INC.,	:	
Respondent	:	Portable Plant #1

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
John Carroll, owner, Hi Valley Crushing Inc., Villa Grove, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Hi Valley Crushing ("Hi Valley"), 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"). A hearing was held in Denver, Colorado, on October 1, 1999.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hi Valley operates Portable Plant No. 1, which was in Chaffee County, Colorado, at the time of the MSHA inspection. On October 15, 1998, MSHA Inspector Steven Ryan inspected the portable plant. Mr. John Carroll, the owner of the plant, was the only person present at the time of the inspection. Mr. Carroll employs one other person, his son, at the plant. Inspector Ryan issued one citation and four orders under section 104(d)(1) of the Mine Act.

A. Citation No. 7923099

Citation No. 7923099 alleges a violation of 30 C.F.R. § 56.14107(a), as follows:

> There is no guard to the self-cleaning tail pulley of the Kolberg stacker conveyor that feeds the plant screen, to protect a person

> from making contact with the moving machine part that can cause a serious injury to a person. The tail pulley is approximately two feet up off the ground, and there is a shovel in the area, and the area has been shoveled out under the tail pulley. One other employee normally works around the plant while in operation. The owner-operator stated that he and his son, the other employee, know what is wrong with the plant and do not go around these areas when the plant is in operation. The owner also stated that he knew that the pulley should be guarded, but just had not got around to building a guard. The plant has been in operation at this location for at least one month.

Inspector Ryan determined that the violation was of a significant and substantial nature ("S&S") and was the result of Hi Valley's high negligence. He issued the citation under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.14107(a) provides, in part, that "[m]oving machine parts shall be guarded to protect persons from contacting ... drive, head, tail, and takeup pulleys ... and similar moving parts that can cause injury." The Secretary proposes a penalty of $500 for this alleged violation.

There is no dispute that the tail pulley was not equipped with a guard. The conveyor belt was running at the time of the inspection and material was being dumped onto the moving belt. (Tr. 19-20; Ex. 7). Inspector Ryan testified that the pinch points of the tail pulley were very accessible and that he could see a shovel in the area. The inspector determined that the violation was the result of Hi Valley's unwarrantable failure because Mr. Carroll told him he knew that the tail pulley was not guarded and that a guard was required. (Tr. 27). The inspector testified that Mr. Carroll told him that he did not have time to make and install a guard. (Tr. 23). He also testified that Mr. Carroll told him that the pulley had been protected by a guard when the plant was at the previous job site.

Mr. Carroll testified that a guard was in place when he was crushing at the Henderson Mill in Grand County, Colorado. (Tr. 109, 141-42). He removed the guard after the plant was transported to the Chaffee County location because he needed to construct a new hopper for that conveyor. (Tr. 114). He stated that the "hopper is a structural part of the guard." *Id.* He stated that he had just finished constructing the hopper and had not yet installed a guard when the inspector arrived. He indicated that, although the plant had been at the Chaffee County location for about 30 days, he had run the plant for only about half a day. (Tr. 113). He testified that he was running material to test the hopper and other components at the plant. *Id.* He said that "we weren't in full-blown operation." *Id.* Upon examination by the judge, Mr. Carroll stated that he had been running for about two weeks on an intermittent basis to check everything out. (Tr. 115). He stated that he may have also been running material for a gradation test to check the quality of the product. *Id.* Mr. Carroll testified that neither he nor his son would have shoveled accumulated material from around the pulley while the plant was running. (Tr. 127). Mr. Carroll contends that the violation was not serious and that Hi Valley's negligence was not high, given these circumstances. (Tr. 123).

There is no dispute that the tail pulley was not guarded. It is also clear that the pulley was near the ground and was directly accessible to anyone walking through the area. Although Mr. Carroll testified that he knew that a guard was required, he believed that there was a provision that allowed an operator to test his equipment before he replaced the guards. (Tr. 129). I agree with Mr. Carroll that if Inspector Ryan issued a citation while Hi Valley was installing and testing the new hopper assembly, it might be appropriate to vacate the citation. *See* 30 C.F.R. § 56.14112(b). In this case, however, the new hopper had been in place for two weeks and the plant was being operated intermittently during that period. (Tr. 134). This period is too long to be considered a "test" that would allow the pulley to remain unguarded. A crusher operator cannot permit a pulley to remain unguarded during the shakedown period for the plant. Hi Valley was required to provide a guard once the hopper was installed. The "testing" exception requires that the area be guarded as soon as possible after changes are made so that employees are not exposed to the hazard. Inspector Ryan testified that Hi Valley had crushed a considerable quantity of material during this two-week period. (Tr. 147-48). I find that the Secretary established a violation.

I also find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that 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).

There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. As discussed below, I find that the Secretary established that an injury was reasonably likely in this instance and that such an injury would be of a reasonably serious nature, assuming continued normal mining operations.

Hi Valley argues that because only two people were employed at the crusher, Mr. Carroll and his son, the possibility of an injury was remote. Mr. Carroll argues that both he and his son

knew that the unguarded pulley presented a hazard when the plant was operating and, consequently, they would not work around when the plant was running. He argues that the safety standard is more applicable to large mines because employee exposure is greater. I agree that Mr. Carroll and his son would not purposefully take actions that would endanger their own safety. Nevertheless, employees frequently come in contact with moving machine parts by accident, or as a result of momentary inattention or ordinary human carelessness. (Ex. 10 through 13). Inspector Ryan testified that during MSHA accident investigations, it is often discovered that the employee who was seriously injured by an unguarded pinch point was not supposed to be working near the equipment when the accident occurred. (Tr. 60-61). I must take into consideration the vagaries of human conduct when analyzing the S&S issue. The fact that only two people are employed at the crusher does not mitigate the hazard. Inspector Ryan testified that MSHA's records show that the accident rate at sand and gravel mines with five or fewer employees is greater than accident rates at larger mines. (Tr. 148-49). In addition, other people are occasionally at the plant, including truck drivers and employees of the company that owns the property on which the crushing plant was operating. (Tr. 59). The violation was S&S.

The more difficult issue is whether the violation was the result of Hi Valley's unwarrantable failure to comply with the safety standard. The Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission stated that "a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted). The Commission also takes into consideration the mine operator's knowledge of the existence of the dangerous condition. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (August 1994).

Inspector Ryan based his unwarrantable failure determination on the fact that Mr. Carroll knew that the pulley was not guarded and also knew that tail pulleys are required to be guarded. (Tr. 23, 34). The inspector testified that Mr. Carroll advised him that the pulley had been guarded at the Henderson Mill before the plant was moved to the present site. Mr. Carroll testified that both he and his son knew where the hazards were at the plant and that they had sufficient judgment to avoid these hazardous areas when the plant was operating. (Tr. 60, 126-28). Mr. Carroll apparently believed that he could run the plant during the plant's shakedown period without guards in place, as long as the plant was not "in production."

I find that the violation was obvious and had existed for at least two weeks. Hi Valley received nine citations for violations of section 56.14107 since 1990. (Ex. 2). Mr. Carroll knew that the violation existed and also knew that it created a hazardous condition. His argument that Hi Valley's negligence was low because everyone knew that it was hazardous is not credible. A

mine operator cannot comply with the requirements of the Secretary's safety standards by pointing out all of the hazards at the mine and telling employees to stay away from them. Hi Valley's argument that it did not know that it could not "test" the plant with the guard off is also not convincing. Section 56.14112(b) provides that guards "shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." This is a very narrow exception. A reasonably prudent person would not interpret this exception to allow a mine operator to run machinery for an extended period of time without guards on the basis that the operator was "testing" the plant to make sure that it was capable of producing crushed rock to the customer's specifications. I credit Inspector Ryan's testimony that there were large piles of material at the site that had been crushed by Hi Valley during the two week "testing" period. (Tr. 161-63). Once the new hopper was in place, it was clear that a guard was required. I find that the Secretary established that Hi Valley's failure to install a guard to protect the cited tail pulley was a result of a serious lack of reasonable care that constitutes aggravated conduct.

B. Order No. 7923105

Order No. 7923105 alleges a violation of 30 C.F.R. § 56.14112(b), as follows:

> There is no guard on the top portion of the tail pulley guard of the fines stacker conveyor that allows a person to make contact with the moving machine part that can cause serious injury. Guards shall be securely in place when machinery is in operation, except when adjusting or testing that cannot be performed without the removal of the guard. The owner-operator stated that he knew the guard was off but did not go near the area when the plant was in operation.

Inspector Ryan determined that the violation was S&S and was the result of Hi Valley's high negligence. He issued the order under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.14112(b) provides that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guards." The Secretary proposes a penalty of $600 for this alleged violation.

There is no dispute that the top of the guard was missing. Inspector Ryan testified that only side guards were provided for the tail pulley and that the pinch points on the pulley were easily accessible. (Tr. 30). He stated that if someone were to slip, trip, or fall in the area, he could easily come into contact with the moving parts and sustain a serious injury. (Tr. 32). The inspector further testified that Mr. Carroll told him that the top part of the guard was torn off when the plant was at the Henderson Mill. Finally, he testified that Mr. Carroll knew that the top of the guard was missing but that he and his son stayed away from the area. (Tr. 34).

Mr. Carroll testified that the cited conveyor was not being used at the Henderson Mill but a loader operator backed into the equipment and damaged the guard. (Tr. 110). After the equipment was transported to Chaffee County, Mr. Carroll built a new guard for the tail pulley except for a top piece. (Tr. 122). Mr. Carroll did not provide any explanation as to why he did not construct a top for the guard.

I find that the Secretary established a violation of section 56.14112(b) because a complete guard was not securely in place while the conveyor was operating. I also find that the violation was S&S for the same reasons described above for Citation No. 7923099. The Secretary established that an injury was reasonably likely and that such an injury would be of a reasonably serious nature, assuming continued normal mining operations. The area was readily accessible and it was reasonably likely that someone would slip, trip, or fall into the moving machine parts.

I also find that the Secretary established that the violation was the result of Hi Valley's unwarrantable failure to comply with the safety standard. Mr. Carroll knew that the top of the guard was missing and that it presented a hazard. Hi Valley argues that, because everyone knew to stay away from the area when the plant was operating, it's negligence was low. I reject this argument for the reasons set forth above. Its failure to replace the top of the guard constitutes a serious lack of reasonable care that demonstrates aggravated conduct.

C. <u>Order No. 7923100</u>

Order No. 7923100 alleges a violation of 30 C.F.R. § 56.12028, as follows:

> The owner-operator of the crushing plant did not do a continuity and resistance test of the electrical systems of the plant after setting up in this new location, nor did the operator have a ground rod driven into the earth to provide a low resistance earth connection. These tests shall be conducted immediately after installation, modification, or repair. The operator stated that he knew that a continuity and resistance test was required upon each move and set up. He stated that the last grounding test was good. He also stated that sometimes you just have to crush rock and that he did not get around to doing the test.

Inspector Ryan determined that the violation was not S&S, but that it was the result of Hi Valley's high negligence. He issued the order under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.12028 provides, in part, that "[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification ...." This standard also requires the operator to keep a record of the required tests. The Secretary proposes a penalty of $400 for this alleged violation.

Inspector Ryan testified that there were no records showing that the required resistance and continuity test had been performed after the plant had been moved to Chaffee County. He

further stated that when he asked Mr. Carroll about the test, he replied that the test had not been done. (Tr. 42). Inspector Ryan testified that Mr. Carroll "said it was good at the last place he set up, he had no need to do it [again], he had just moved from there and it was good at the last operation ... where he had done the test." *Id.* The inspector also noticed that a grounding rod was not installed at the diesel generator for the plant. (Tr. 45-46). Ronald Renowden, an electrical specialist with MSHA, testified that continuity and resistance tests are important in order to ensure that electrical circuits are grounded. (Tr. 69-70). He stated that grounding wires and connections can loosen when a crushing plant is moved and set up at a new site. MSHA has always required that portable plants be tested whenever they are moved. (Tr. 87). He testified that people have been killed and injured as a result of ungrounded circuits. (Tr. 73).

Mr. Carroll testified that he did not test the grounding system. (Tr. 123). He said that he tested the circuits at the Henderson Mill but that he had not gotten around to it at the Chaffee County site. (Tr. 124). Mr. Carroll testified that the electrical system on the plant is in "top-notch" shape and that his failure to test did not create a safety hazard. *Id.* He stated that when he performed the test to abate the citation, the grounding system was functioning properly. *Id.*

I find that the Secretary established a violation of section 56.12028. There is no dispute that the test was not performed and recorded. I find that the test was required under the safety standard after the plant was moved to the new location. The Inspector determined that the violation was not S&S, although he testified that he thought it was serious. (Tr. 44). Although I agree that a violation of this standard can often create a serious safety hazard, I find that in this case the violation was not particularly serious. I accept Mr. Carroll's testimony that the system passed the continuity and resistance test and that the electrical system was in good shape.

I find that the Secretary established that the violation was a result of Hi Valley's aggravated conduct. Mr. Carroll admitted that he failed to perform the test. He did not offer any reasons for not doing it except that he did not think it was important. Although the test revealed that the grounding system was functioning, it was impossible to know that without the required testing. The test is necessary to make sure that the grounding circuits are functioning properly after the crusher is moved to a new location. I credit Mr. Renowden's testimony as to the importance of this test. He testified that this safety standard is one of MSHA's most important electrical regulations because it helps ensure that employees will not be exposed to an electric shock hazard. (Tr. 69). Hi Valley's failure to perform this test demonstrates a serious lack of reasonable care that constitutes aggravated conduct.

D. Order No. 7923104

Order No. 7923104 alleges a violation of 30 C.F.R. § 56.18002(a), as follows:

> The owner-operator of the crushing plant did not have a record of the required work place examination. A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. . . . The owner stated that he and his son both know what is wrong at the plant and stay away from the area when in operation, and that he kept records at the last job for TIC at the Henderson Mill operation. [Mr. Carroll] knew that records were to be kept and that conditions that adversely affect safety need to be corrected. The plant has been in operation for at least one month at this location.

Inspector Ryan determined that the violation was not S&S, but that it was the result of Hi Valley's high negligence. He issued the order under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. Section 56.18002(a) provides, in part, that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." This standard also requires the operator to promptly initiate action to correct any hazardous conditions found during the examination. Subsection (b) of the standard requires the operator to keep a record of the required examinations. The Secretary proposes a penalty of $400 for this alleged violation.

Inspector Ryan testified that Hi Valley did not have any records of the required work place examinations. (Tr. 49). He stated that Mr. Carroll told him that he did not need to keep such records because he and his son knew what was wrong at the plant and they kept away from those areas when the plant was in operation. (Tr. 49-50; Ex. 5). Inspector Ryan testified that the guarding citation and order he issued cited conditions that existed for more than one shift. He stated that these obvious conditions help demonstrate that the required examinations were not taking place or that the hazardous conditions found during such examinations were not being corrected. (Tr. 51). He further testified that these examinations are important to detect hazardous conditions and Hi Valley's failure to do them constitutes an unwarrantable failure.

Mr. Carroll testified that Hi Valley's practice is to not keep this type of record. (Tr. 124). He stated that he kept records of examinations at the Henderson Mill because TIC, the general contractor at that site, required them. (Tr. 124-25). Mr. Carroll testified that because he and his son are the only employees at the plant, they know about any equipment defects or other safety problems and they fix it. He stated that "writing it down on a piece of paper ... would not make it any safer for us than not writing it down...." (Tr. 125). Finally, he testified that "I know full well that it's a regulation ... [but] I don't think it applies so much in this case." *Id.*

I find that the Secretary established a violation of section 56.18002. While it appears that Hi Valley informally has been conducting safety checks from time to time, there is no established procedure for conducting the examinations or recording the results. (Tr. 126). Mr. Carroll stated that neither he nor his son "make a walk-around" or "do an inspection." *Id.* Examinations were performed at the Henderson Mill because the general contractor and mill operator required such examinations.

I find that the violation was of a reasonably serious nature. Examinations are important because they reveal safety problems before anyone is endangered. Recording the results of the examinations is important, even at a small mine, so that anyone can look to see what hazards may exist before equipment is started or energized. For example, on the morning of the inspection, Mr. Carroll's son was not at the plant. The son could have observed a safety hazard near the end of the previous day. He might forget to tell his father and his father could be injured because he had no knowledge of the condition. If Hi Valley maintained records of examinations, the son could record the condition which would alert the father in his son's absence. Although no system is perfect, a written record of on-shift safety examinations greatly reduces the chances of serious injury. (*See* Exs. 23 through 25).

I also find that the Secretary established that the violation was a result of Hi Valley's aggravated conduct. Mr. Carroll admitted that Hi Valley did not comply with this safety standard. He stated that he knew that such examinations were required and that records of the examinations were also required. Indeed, he had complied with this regulation at the Henderson Mill. He believed that the examinations and records were not important at a small two-man operation. I find that this conduct demonstrates a serious lack of reasonable care that constitutes aggravated conduct.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that two citations were issued at the plant during the two years prior to this inspection. (Ex. 1). Hi Valley is a very small operator that worked about 2,000 man-hours annually and employed two people. (Tr. 5). The violations were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on Hi Valley's ability to continue in business. My findings with regard to gravity and negligence are set forth above. The penalties proposed by the Secretary were specially assessed under 30 C.F.R § 100.5. Based on the penalty criteria, I find that the penalties set forth below are appropriate. The reduction in the penalties is based primarily on the small size of the operator.

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/Order No.	30 C.F.R. §	Penalty
WEST 99-190-M		
7923100	56.12028	$100.00
7923104	56.18002(a)	200.00
7923105	56.14112(b)	300.00
WEST 99-304-M		
7923099	56.14107(a)	300.00

Accordingly, the citation and orders contested in these cases are **AFFIRMED** as set forth above, and Hi Valley Crushing Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $900.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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