FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

March 26, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. YORK 94-51-M
	:	A. C. No. 30-00012-05522
BUFFALO CRUSHED STONE, Respondent	:	Wehrle Quarry

DECISION ON REMAND

Before: Judge Weisberger

On February 18, 1997, the Commission issued a decision in this case (19 FMSHRC ___) in which it, inter alia, remanded this matter to me for determination whether the violation of 30 C.F.R. ' 56.14109(a)[1] by Buffalo Crushed Stone, Inc. (ABuffalo@), was S&S, and assessment of a civil penalty. The Commission further reversed my initial holding (16 FMSHRC 2154, (October 1994)), that Buffalo=s violation of 30 C.F.R. ' 56.11009[2] was not S&S, and remanded the matter for reassessment of the civil penalty.

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[1]Section 56.14109 states, in relevant part:

> Unguarded conveyors next to the travelways shall be equipped with --
> (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor . . . .

[2]Section 56.1109 states:

> Walkways with outboard railings shall be provided wherever persons are required to walk alongside elevated conveyor belts. Inclined railed walkways shall be nonskid or provided with cleats.

I. Violation of Section 14109(a).

A. Significant and Substantial

A "significant and substantial" 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 coal or other mine safety or health hazard." 30 C.F.R. ' 814(d)(1). A violation is properly designated significant and substantial "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." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary 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., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), 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, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The record establishes that a portion of the stop cord at issue had become slack, and had fallen two inches below a conveyor belt. This condition, found by the Commission to have been violative of Section 56.14109(a) supra, contributed to the hazard of a miner who falls coming in contact with a moving conveyor belt. Thus, the evidence establishes the first two elements of S&S set forth in Mathies, supra. The next issue for resolution is whether the Secretary established that the third element set forth in Mathies, supra, i.e., the likelihood of an injury producing event -- a miner falling in the area where the stop cord was slack.

In general, the evidence adduced at the hearing relating to the issue of S&S, and the likelihood of an injury consists of the following testimony by the MSHA Inspector:

Q. Now, in terms of your evaluation of this condition, you=ve indicated that injury would be reasonably likely. What=s the basis for that?

A. Any time the stop cord is not where it=s supposed to be, even for a short length of distance, you=ve got the possibility of someone slipping and falling or slipping and falling and not having immediate access to either grab the cord and deactivate the equipment or to automatically hit the cord during their fall on the way down and deactivate the equipment. So over time, although this was a short length of distance, over time, if any stop cord is out of place, I believe there=s a reasonable likelihood that that could occur and I marked it as such.

QQ. You=ve also indicated that the type of injury that could reasonably be expected would be lost work days or restricted duty. What=s your basis for that conclusion?

A. An arm, for example, that=s caught up between a conveyor belt and the troughing that the belt rides on could have devastating injury, burn type frictional type injury to an arm, for example.

Q. You=ve indicated that the condition was significant and substantial. What=s your basis for that conclusion?

A. In my judgment, a reasonable likelihood existed because the cord was not intact everywhere along the belt as it should be. With a reasonable likelihood and with the possibility of a permanent injury, by definition the violation was significant and substantial.

Q. You=ve indicated that the number of persons affected would be one. What=s that based on?

A. If anyone were injured because of the stop cord being out of place, it would be one person (Tr. 46-48).

In addition, the Inspector testified on cross-examination as follows:

Q. Okay. In your opinion, if there was a gentleman on that catwalk, a medium sized man or average sized, somewhere between me and you I would guess, fell up against that conveyor, the likelihood of him not being able to pull that cord in your opinion is -- would be what?

A. I think there would be a reasonable likelihood of him not being able to pull the cord before becoming entangled (Tr. 89).

Thus, the Inspector opined as to what could occur should a miner fall, and not to be able to grab the stop cord. However, no evidence was adduced regarding the likelihood of a miner falling in the area of the cord that was cited. There is no evidence in the record of the conditions in the area which would have made a fall reasonably likely to have occurred. I find that the Secretary has failed to establish the third element set forth in Mathies supra. Accordingly, I conclude that it has not been established that the violation of Section 56.14109(a) supra was S&S.

B. Penalty

There is no evidence in the record that the Secretary had, prior to the inspection at issue, communicated to Buffalo her interpretation that Section 56.14109(a), supra, requires that a stop cord be tight and located Asomewhere near the side edge of the belt to as much as four inches above the side edge of the belt@ (Tr. 44, 115). As such, the Secretary had not previously communicated to Buffalo that a stop cord located below the side edge of the belt, the condition cited herein, would be considered a violation of Section 56.14109(a), supra. I note that Section 56.14109(a), supra, does not require a particular placement for the stop cord. Hence, I find that Buffalo was not negligent to any degree. As such, the penalty for this violation is to be mitigated to a high degree.

According to the testimony of the Inspector, the type of injury to be expected as result of their violation is as follows: AAn arm, for example, that=s caught up between a conveyor belt and the troughing that the belt rides on could have devastating injury, burn type frictional type injury to an arm, for example@ (Tr. 47). I accept the Inspector=s testimony in this regard, as it was not contradicted or impeached. I find that the level of gravity of this violation was moderate. The condition cited was timely abated. Considering the lack of Buffalo=s negligence, I find that a penalty of $20 is appropriate.

II. Reassessment of a penalty for the Violation of 30 C.F.R. ' 56.11009

I take cognizance of the holding of the Commission that this violation was S&S (Slip op. P. 7-8, supra). Further, Buffalo did not impeach the Inspector=s testimony that should one fall on an inclined walkway that was not provided with cleats, possible head injuries or fractures of fingers or wrists can result. Thus, I find that the violation was of a moderate level of gravity. The Inspector could not determine how long the cited conditions had existed. The Secretary did not contradict or rebut the testimony of Buffalo=s witness Rashford that it was intended by Buffalo to replace the cited catwalk. I find that Buffalo=s negligence was of a low level. I find that a penalty of $50 is appropriate.

III. Order

It is ordered that within 30 days of this decision, Buffalo pay a total civil penalty of $20 for the violation of section 56.14109(a), and $50 for the violation of Section 56.11009, supra.

Avram Weisberger
Administrative Law Judge

Distribution:

William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, 201 Varick Street, Room 707, New York, NY 10014 (Certified Mail)

Salvatore A. Castro, Safety Director, Buffalo Crushed Stone, Inc., 2544 Clinton Street, P.O. Box 710, Buffalo, NY 14224 (Certified Mail)

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