

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 16, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-65-M
Petitioner	:	A. C. No. 43-00196-05521
	:	
v.	:	Docket No. YORK 2000-66-M
	:	A. C. No. 43-00196-05522
	:	
VT UNFADING GREEN SLATE CO., INC.,	:	
Respondent	:	Blissville Quarry & Mill

DECISION ON REMAND

These cases are before me on remand from the Commission. *Vermont Unfading Green Slate Co., Inc.*, 24 FMSHRC 439 (May 2002). The Commission instructed that the record be reopened and the company be permitted “to present [Inspector] Tango’s testimony relating to the guarding hazard on the trimmer [Citation No. 7720771].” *Id.* at 443. The Commission also directed the judge to “reconcile any conflicting evidence and determine if the guarding was adequate to protect a miner standing or working on the platform next to the trimmer.” *Id.* at 443-44. For the reasons set forth below, I affirm the citation and reassess a penalty of \$55.00.

In accordance with the Commission’s instructions, a hearing was scheduled for September 19, 2002, for the purpose of taking Inspector Tango’s testimony. Notice of Hearing, June 27, 2002. However, because Inspector Tango no longer worked in the New England area, but instead had been reassigned to Iowa, the parties were “directed to confer and attempt to arrive at [a] method of presenting Mr. Tango’s testimony” that would not require his presence at a hearing. *Id.* The parties were ordered to inform the judge on or before August 2, 2002, whether an agreement had been reached on the testimony. *Id.*

On August 2, the Secretary, by counsel, filed a Motion to Cancel Hearing and Close the Record because the company had not responded to counsel’s July 18, 2002, letter concerning methods of presenting Tango’s testimony. The Respondent did not file anything in response to the Notice of Hearing, nor did it respond to the Secretary’s motion.

Order to Show Cause

Commission Rule 66(a), 29 C.F.R. § 2700.66(a), provides that: “When a party fails to comply with an order of a Judge or these rules . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal. The order shall be mailed by

registered or certified mail, return receipt requested.” Accordingly, since the operator did not respond to the Notice of Hearing or the Secretary’s motion, an Order to Show cause was mailed by certified mail, return receipt requested, to the operator on August 16, 2002. It Ordered the company to show cause, within 21 days of the date of the order, why the “hearing should not be canceled and a remand decision rendered based on the record evidence, for the company’s failure to prosecute.” It warned that: **“Failure to respond to this order within the time provided will result in the above actions being taken.”**

The return receipt card, signed by “Ranae Wood,” shows that the order was received by the operator on August 19, 2002. As of the date of this decision, no response to the order has been received. Therefore, it is **ORDERED** that the hearing scheduled for September 19 to take Inspector Tango’s testimony is **CANCELED** and the record is **CLOSED**.

Reconsideration of Citation No. 7720771

This case involved an inspection by MSHA Inspector Brett Budd and Robert Tango, at the time, an MSHA Inspector-trainee. Budd testified at the hearing that the citations were written by Tango, but signed by him. Budd testified at the hearing; Tango was not present.

Citation No. 7720771 alleges a violation of section 56.14107(a), 30 C.F.R. § 56.14107(a), because: “A machine guard was not provided to prevent accidental contact with the V-belt drive system, exposing pinch points that are about 5 feet from ground level, located on the left side of the slate trimmer in the garage building and was not in use at the time of this inspection, but is used daily.” (Govt. Ex. 5.) Section 56.14107(a) requires that: “Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.”

Inspector Budd testified that the area of concern was:

[T]he V-belt that’s used to drive or make this trimmer move. The V-belt areas are not guarded, where there was a potential to, for someone, mainly the operator of the trimmer, to stick their hand into the V-belt drive or get drawn in from clothing, and potentially maybe have their fingers cut off or an amputated hand.

(Tr. 64.) He further testified that the machine operator would be standing “within a foot” of the unguarded V-belt. (Tr. 67.)

Budd related that there were two pinch points on the V-belt, “you would have the top exposure where the V-belt drive contacts the upper drive pulley, plus the lower electrical pinch point hazard where the V-belt comes in contact with the drive pulley onto that system.” (Tr. 67.) He said that the lower pinch point was “between ankle and knee high” and the upper one was “from shoulder-high to waist-high” of the operator. (Tr. 69.)

Finally, Budd testified with regard to whether Respondent's Exhibit A, a sketch of the trimmer, was a true and accurate description, that: "He marked there was an existing guard on this there, and there was no guard, that's why the violation was cited." (Tr. 77.)

While a great deal of the operator, Shawn Camara's, testimony had to do with whether someone standing on the ground could be caught in the pinch points, he did testify as follows concerning the V-belt drive:

THE COURT: Is the pulley guarded?

MR. CAMARA: The pulley was certainly guarded. There was a guard that came from – see?

THE COURT: Here's the diagram [Resp. Ex. A.] of it.

MR. CAMARA: I know, but it's hard for me to explain this. Only that here's a building here, let's say this is the building, just pretend there's a big wall right here. When a trimmer sits in there, it's guarded from the top of the wheel to the bottom. Where the guy sits or where the guy stands, that's where it's guarded. It's guarded from clothing getting caught in the wheel. It's guarded from a pinch into the wheel.

Normally what happens is, why they don't want – if a shirt gets caught, you put your hand in the trimmer, and it gets chopped off if you get pulled down. That's why they are talking about that.

(Tr. 165.)

On cross examination, Camara admitted that a person operating the trimmer would be standing on the pallets on which the trimmer was placed. (Tr. 167.) When specifically asked: "Are you saying the V-belt he cited was in fact guarded?" He responded: "I'm a little unclear. When you are talking about the V-belt, you are saying the belt is on top like this, and curved like this?" Then he said: "If a guard was there, there was no possible way – trimming the chips, there's no possible way he could have gotten caught." (Tr. 167-68.)

Finally, the following colloquy took place:

A: There's that wheel, it comes down the front. The front part where the motor is, is guarded.

Q: What about the V-belt?

A: *Was not guarded.* But again, there's only one way a person could get caught there, and that's by taking a stick and trying to – the trimmer wheel is not a V. It's a solid piece that's two inches wide. And the wheel is a big wheel that's about the size of a tire, and it's wide like this. The V-belt runs the wheel like this. This trimmer used to be run by a foot, and it's weighted so the trimmer blade comes round like this.

Q: Why does someone have to use a stick to get in the area you are talking about?

A: Eight feet above the ground, do you think you could get your hand up there?

(Tr. 169, emphasis added.)

As Commissioner Jordan noted in her dissent, Camara's testimony can best be characterized as "muddied and inconsistent." 24 FMSHRC at 449. Even when talking about the pulleys, he continually returned to having to be nine feet tall, or having to use a stick to reach it, which clearly was directed towards coming in contact with the pinch points from the ground. He talked about the trimmer blade being guarded, the pulley being guarded on the front and the pulleys being guarded on the outside by walls or benches, but he never directly addressed the concerns expressed by the inspector, that of the V-belt and the pulleys being guarded on the inside where the operator would be sitting or standing. In fact, he appeared to admit that it was not guarded there. (Tr. 169.)

In view of Camara's disjointed, ambiguous testimony, I credit the testimony of Inspector Budd on this citation. Accordingly, I again conclude that the operator violated section 56.14107(a).

Order

Citation No. 7720771 is **AFFIRMED** as modified in my original decision. *VT Unfading Green Slate Co., Inc.*, 23 FMSHRC 310, 315, 320 (March 2001). Vermont Unfading Green Slate Co., Inc., is **ORDERED TO PAY** a civil penalty of **\$55.00**, for this violation, within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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