FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 4, 2005

TAMKO ROOFING PRODUCTS, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. YORK 2005-87-RM
	:	Citation No. 6027243;03/01/2005
v.	:	
	:	Docket No. YORK 2005-88-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Citation No. 6027244;03/02/2005
	:	Docket No. YORK 2005-89-RM
	:	Citation No. 6027245;03/02/2005
	:	Tamko Frederick
	:	Mine ID 18-00750
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 2005-115-M
	:	A.C. No. 18-00750-54441
v.	:	
TAMKO ROOFING PRODUCTS, Respondent	:	Frederick Grinding Plant

DECISION

Appearances: Brian J. Mohin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;
Tonya Osborne, Esq., and Kathleen Pontone, Esq., Miles & Stockbridge, P.C., Baltimore, Maryland, on behalf of Tamko Roofing Products.

Before: Judge Melick

These cases are before me pursuant to Section 105 (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. "the Act", to challenge three citations issued to Tamko Roofing Products (Tamko) by the Secretary of Labor and the civil penalties proposed for each. The general issue before me is whether the violations have been committed as alleged and, if so, what is the appropriate civil penalty for such violations. Additional specific issues are addressed as noted.

At hearing, the Secretary moved to settle Citation No. 6027243 and Tamko agreed to pay the proposed penalty in full. The proposed settlement was accepted at hearing and an order directing payment will be incorporated in the decision herein.

Citation No. 6027244 alleges a violation of the mandatory standard at 30 C.F.R. § 56.12028 and charges, in essence, as follows:

> A continuity and resistence test had not been performed on the ground electrode and its adjacent ground field area. Plant supervisor stated that it had not been done for over two years according to the record. Testing needs to be done to assure grounding system is working properly to prevent serious injury.

The cited standard, 30 C.F.R. § 56.12028, provides as follows:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

The facts supporting the alleged violation are essentially undisputed. Tamko purchased the grinding plant at issue on May 5, 1994 from the previous owner/operator, Florida Rock Industries (Florida Rock). It is undisputed that at the time of the inspection herein and the issuance of the citation at bar on March 2, 2005, more than one year had elapsed since the test had last been performed in compliance with the cited standard. Tamko nevertheless argues that the computation of time for the "annual" testing required by the cited standard should commence with the date it assumed ownership i.e. on May 5, 2004, and not on the last date of testing which was performed by Florida Rock, the previous owner/operator. Under this computation of time, Tamko would therefore have had until May 2005 to complete the testing and there would have been no violation of the cited standard.

The Secretary argues, on the other hand, that annual testing within the meaning of the cited standard means just that and that ownership of the grinding plant is irrelevant. She argues that under her interpretation of the standard the requisite tests must be performed within a year of the previous tests. I find that I am in agreement with the Secretary on this issue. I find no ambiguity in the requirement that the test be performed annually, i.e. within 365 days of the prior testing. See *Secretary v. Cactus Canyon Quarries of Texas, Inc., 23 FMSHRC 280, 289 (ALJ March 2001).* There is no exception or waiver in the standard to account for a change in mine ownership. Clearly, the objective of maintaining safe conditions requires that testing be performed annually without exception as to ownership of the mine.

Under the circumstances, I find that the Secretary has proven the violation as charged. The inspector's findings that injuries were "unlikely" as a result of the violation and that the operator was chargeable with "low" negligence are undisputed. Under the circumstances, I find that the Secretary's proposed minimal penalty of $60.00 is appropriate for the violation.

Citation No. 6027245 alleges a violation of the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

> The east approach of the take-up pulley and counter-weight of the inclined belt conveyor was not guarded. Pulley and counter-weight was [sic] within 6 feet of the ground, do [sic] to the build-up of spillage. Guards were provided on all other approaches. The pulley and counter-weight were only being suspended by tension of the conveyor belt and no safety cable or chains were provided. Employees approaching the east side of the take-up pulley are exposed to the hazard of moving machine parts and the falling of the counter-weight in the event that the belt brakes [sic].

The cited standard 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." The cited standard, in part (b), also provides an exception to the above requirement in that "guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces."

As noted, the citation at bar actually charges two violations. The first alleged violation concerns a lack of guarding at the take-up pulley. Tamko argues that the cited take-up pulley was at least seven feet away from any walking or working surface and maintains that under the exception noted above, there was no violation. According to Inspector Richard Burkley of the Department of Labor's Mine Safety and Health Administration (MSHA), there was spillage on the ground approximately one and one half feet horizontally from the counterweight and about one foot in height. Standing on top of the spillage with his arms raised, Burkley had an MSHA colleague estimate the distance from the top of the spillage to the bottom of the cited roller. Burkley's colleague, apparently knowing Burkley's height and approximate arm length, thereby estimated that it was about six feet between the top of the spillage and the bottom of the cited pulley. Burkley therefore concluded that the exposed moving parts on the cited take-up pulley were less than seven feet from the walking or working surface below.

Robert McNally, Tamko's general manager, has a Bachelor of Science degree in engineering from the United States Military Academy and a Masters degree in Business Administration from Baylor University. McNally credibly testified that, using a 10 foot tape measure, he measured from the bottom of the take-up pulley to the slab below and found the distance to be seven feet. Using the same tape, he measured eight and a half feet from the top of the spillage to the bottom of the cited take-up pulley. In light of such actual measurements, in contrast to MSHA's rough estimates, I must give greater weight to the testimony of Mr. McNally. Accordingly, I find that the take-up pulley was at least seven feet from any walking or working surface. The exception to the requirement for guarding set forth in the cited standard therefore applies and I conclude that the take-up pulley at issue was not in violation of that standard.

Tamko argues, with respect to the second violation alleged in the citation, that the counter-weight was not a "similar moving part" within the meaning of the cited standard. Under the rule of statutory and regulatory construction, *ejusdem generis,* when specific examples set forth in a statute or regulation are followed by general words, the general words are construed to embrace only objects

similar in nature to the specific examples. *Garden Creek Pocahontas Company,* 11 FMSHRC 2148 (November 1989); 2A *Sutherland Statutes and Statutory Construction* § 47.17 (6th ed.). Clearly, counterweights are not of the same or similar nature as the specific items listed in the standard i.e. "gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly wheels, couplings, shafts, [and] fan blades" all of which have the potential for creating dangerous pinch points and/or entanglements. Counterweights are therefore not within the scope of items covered by the standard. Accordingly, there was no violation of the standard as alleged and the citation must be vacated.

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 effect the operator's ability to continue in business. The record shows that the operator is small in size with a minor history of violations. 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. Under the circumstances, the Secretary's proposed penalty of $60.00 for the violations charged in Citations No. 6027243 and 6027244 are appropriate.

ORDER

Citation No. 6027245 is vacated. Citations No. 6027243 and 6027244 are hereby affirmed and Tamko Roofing Products is directed to pay civil penalties of $60.00 for each violation within 40 days of the date of this decision. Contest Proceeding Docket No. YORK 2005-89-RM is accordingly granted. Contest Proceedings Docket Nos, YORK 2005-87-RM and YORK 2005-88-RM are accordingly dismissed.

Gary Melick
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Distribution: (Certified Mail)

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