FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 16, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-293-M
Petitioner	:	A. C. No. 41-03920-05502
v.	:	
	:	
HIGHWAY 195 CRUSHED STONE, INC.,	:	
Respondent	:	Highway 195 Crushed Stone

DECISION

Appearances: David C. Rivela, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of the Petitioner;
John Yearwood, Safety Coordinator, Highway 195 Crushed Stone, Inc., Georgetown, Texas, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against Highway 195 Crushed Stone, Inc. (Crushed Stone) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*., the "Act," alleging three violations of mandatory standards and seeking civil penalties of $191.00 for those violations. The general issue before me is whether Crushed Stone violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

James Goodale, a "metal/non-metal" inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) was performing a regular inspection at the Crushed Stone facility on March 26, 1998. Goodale has been employed by MSHA since 1987 and has 17 years mining industry experience. The subject facility is a crushed stone operation. Material is hauled from a pit area to a feeder and crusher and is then screened for size and stockpiled for sale and distribution. At the time of Goodale's inspection the plant was temporarily shut down for maintenance.

Citation No. 7709180

This citation alleges a violation of the standard at 30 C.F.R. § 56. 14107(a) and charges as follows:

The right side of the self cleaning tail pulley for the under crusher belt was

not guarded to prevent contact with the pinch points or moving parts. The tail pulley was at ground level. The area was located where no travel by employees when the plant is operating.

The cited standard provides, in relevant part, that "[m]oving machine parts shall be guarded to protect persons from contacting . . . tail, and takeup pulleys, . . . and similar moving parts that can cause injury."

According to Inspector Goodale there was no guard on the right side of the cited tail pulley. Although Goodale believed that a fatal injury could occur if someone fell into the pulley, he acknowledged that any injury was unlikely. The tail pulley was admittedly in a remote area and no one would be expected to be in the vicinity of this pulley while the plant was in operation. Goodale also acknowledged that it would, in any event, be difficult for anyone to be exposed to this condition because it was a "tight fit - - you would have to shinny down" to get close enough to be hazardous.

John Yearwood, co-owner of the cited facility, testified that he began construction of this facility in July 1996 and began production in September 1996. Before commencing operations MSHA Inspector Ed Lilly twice visited the plant for Courtesy Assistance Visits (CAV's). Yearwood was new to the business and wanted to start out "correctly and in compliance." On his first post-CAV inspection on September 25, 1996, Lilly gave Yearwood what Yearwood characterized as a "good-to-go" inspection. Lilly made it clear to Yearwood that he was in compliance with the regulations. It is undisputed that the condition now cited was the same as when Lilly inspected the premises and at the time of subsequent MSHA inspections on January 30, 1997, April 30, 1997 and January 15, 1998 (See Resp.'s Exhs. Nos. 2, 3, 4 and 5). In spite of those inspections no citations had ever been issued for the presently cited condition.

Yearwood argues that there was no violation of the cited standard because the condition comes within two exceptions provided by MSHA. The first exception, set forth in 30 C.F.R. § 56.14107(b), provides that only moving parts within seven feet of walking/working surfaces must be guarded. The Secretary acknowledges this exception but claims that the record evidence does not support Respondent's factual claims. I disagree. Yearwood's credible testimony that the cited area was seven feet eleven inches from the walkaway is not directly disputed in the record. Accordingly, Respondent has established this affirmative defense.

The second exception is explained in MSHA's pamphlet entitled "Guide to Equipment Guarding for Metal and Non-metal Mining" (Resp.'s Exh. No. 9 pg. 8). It is stated therein that "remote areas protected by location need not be guarded." According to Inspector Goodale's own testimony the subject tail pulley was in a remote location. Accordingly this exception also provides a valid defense to the alleged violation in this case.

Under all the circumstances I do not find a violation as charged in Citation No. 7709180

and the citation must be vacated.

Citation No. 7709183

This citation alleges a "significant and substantial" violation of the same standard, 30 C.F.R. § 56.14107(a), and charges as follows:

> The back and underneath of the self cleaning tail pulley for the over screen belt was not provided with a guard to prevent contact with the pinch points or moving parts. The tail pulley was approximately four and one-half feet above ground level. Employees travel this area daily by bending over and walking under the tail pulley.

It is undisputed that the cited pulley was partially guarded by wire mesh (See Gov. Exhs. Nos. 3 and 4). However, it is also undisputed that an area of about four inches on each side of the pulley between the self cleaning fins and the guard, remained exposed from below. It is further undisputed that the area below the pulley was used as a travelway with only four and a half feet of clearance from the ground to the pulley.

Goodale concluded that the violation was of high gravity and "significant and substantial" because of the limited clearance between the walkway and the exposed hazard directly above and because of the likelihood of persons slipping, tripping or falling in this area and attempting to grab onto something. Under the circumstances he concluded that permanently disabling or fatal injuries were reasonably likely.

A violation is "significant and substantial" if, based on 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. *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:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary 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.

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

The testimony of Inspector Goodale in this regard is undisputed and I therefore conclude that the violation was indeed, "significant and substantial" and of high gravity.

Goodale also believed that the operator "should have known" of this violation as it was "readily visible" and therefore concluded that it was the result of "moderate" negligence. However, it is undisputed that this same condition existed at the time of the two prior CAV's and four prior regular inspections without being cited. It is clear that the operator relied upon these prior CAV's and inspections in setting-up and operating his plant. I therefore conclude that it is chargeable with but little negligence.

Citation No. 7709187

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56. 9300(a) and charges as follows:

> The elevated roadway going onto the scales and exiting the scales were not provided with a berm to prevent overtravel of equipment being used on the roadway. The roadway was approximately five to six feet above the ground. The scales area used daily by haul trucks. [*sic*].

The cited standard 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."

It is undisputed that this condition had also existed at the time of the two CAV's and the four prior MSHA inspections and had never previously been cited. According to the undisputed testimony of Yearwood, similar conditions also existed at mine sites throughout the area.

According to Inspector Goodale there was no berm or other guarding as he charged in the citation. He made a "judgment call" that a vehicle could roll over the sloped embankment thereby causing serious injuries. Trucks including 18-wheel tractor trailers traveled this area on a daily basis. Yearwood disagreed that the slope presented a hazard noting that it was only elevated four feet two inches above the surrounding area and not the five or six feet the inspector estimated. Yearwood also testified that the trucks traveled very slowly in this area - - only 3.2 to 3.9 miles per hour on average. He noted that there was also a "dog leg" on the road designed to slow down traffic.

I find that the cited standard suffers from ambiguity and vagueness and therefore to provide adequate notice must be viewed from the position of a reasonably prudent person

familiar with the mining industry and the protective purposes of the standard. *Ideal Cement Company*, 12 FMSHRC 2409, 2416 (November 1990); *Lanham Coal Company*, 13 FMSHRC 1341, 1343 (September 1991). While it is implicit in Yearwood's testimony that he did not believe there was any hazard in the unguarded elevated roadway at issue, I give greater weight to the testimony of Inspector Goodale who has significantly more experience both as an inspector and in the mining industry. Clearly, Goodale qualifies as a "reasonably prudent person" and under the circumstances I give his testimony on this issue the greater weight. Accordingly, I find that the violation is proven as charged. Based on Goodale's testimony I also find that the violation was "significant and substantial" and of high gravity. However, in light of the prior CAV's and inspections of this condition without citations and the evidence that other operations in the area had similar unbermed roadways, I find that the operator is chargeable with but little negligence.

In assessing civil penalties herein, I have also noted the small size of the operator, the absence of any prior violations, evidence of good faith abatement and the absence of evidence that the penalties herein would affect the operator's ability to remain in business.

ORDER

Citation No. 7709180 is vacated. Citations No. 7709183 and 7709187 are affirmed and Highway 195 Crushed Stone Incorporated is hereby directed to pay civil penalties of $60.00 for each violation within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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