CCASE:
SOL (MSHA) V. RIVCO DREDGING
DDATE:
19880908
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 87-147 A.C. No. 15-12672-03506
v.	
RIVCO DREDGING CORPORATION, RESPONDENT	Docket No. KENT 87-151 A.C. No. 15-12672-03505 Docket No. KENT 87-158 A.C. No. 15-12672-03507 Docket No. KENT 88-35 A.C. No. 15-12672-03508 River Dredge Mine

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Gene A. Wilson, Esq., President, Rivco Dredging Corporation, Louisa, Kentucky, appearing on his own behalf.

Before: Judge Maurer

STATEMENT OF THE CASE

These proceedings were filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (hereinafter the Act), to assess civil penalties against the Rivco Dredging Corporation (Rivco).

Pursuant to notice, these matters were heard on April 27, 1988 in Huntington, West Virginia. Both parties appeared, introduced evidence and submitted post-hearing arguments which I have considered in making this decision.

With regard to the history of previous violations by Rivco, I find the number of violations in the two years previous to the inspections at issue to be few and that the size of Rivco can be considered small. Furthermore, in the

absence of any specific evidence to the contrary, I find that the proposed penalties, if they are assessed, will not effect the ability of Rivco to continue in business.

I. Docket No. KENT 87Ä147

Citation No. 2776057

The inspector alleged in the citation that:

> The tail roller of the stacking belt at the dredge screening plant is not adequately guarded in that the entire back of the roller is exposed and the sides approx. 50% exposed whereby a worker engaged in maintenance or cleanup can contact such roller thereby incurring a serious injury.

30 C.F.R. 77.400(a) provides that: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

Inspector Hatter, a mine inspector employed by MSHA for approximately thirteen years, had occasion to issue the above citation on October 8, 1986. He testified that the tail roller of the stacking belt at the dredge screening plant wasn't provided with an adequate and proper guard in the tail area. He considered this to be a violation because the tail roller was supposed to be guarded in accordance with 30 C.F.R. 77.400(a).

Inspector Hatter allowed thirty days for abatement of this citation, but when he returned on February 18, 1987, he found that the tail roller had been only partially guarded and was still in non-compliance with the mandatory standard. The inspector thereupon issued section 104(b) Order No. 2769993 for failure to abate the subject citation. The condition was abated on or before the inspector's next visit to the site on March 23, 1987.

Rivco does not dispute these facts, but states that the conveyor had been completely disassembled for moving to a new dredging location and was not in a condition for inspection when Inspector Hatter appeared while this was in progress and wrote the citation. In any event, Rivco disputes that this

is a significant and substantial ("S & S") violation as marked by the inspector.

Inspector Hatter testified that where rollers are not properly guarded, persons working in the area may get a piece of clothing caught in one or might get a tool caught in one, resulting in a personal injury type accident. He assessed the risk of the occurrence of this condition and such an injury as reasonably likely if a proper guard wasn't provided. I find Hatter's testimony to be credible concerning both the fact of violation and "S & S", assess the negligence of the operator to be moderate and the gravity as serious. Furthermore, I credit Hatter's testimony that the operator was producing coal on the morning the citation was written.

Accordingly, Citation No. 2776057 is affirmed as issued and I find an appropriate civil penalty to be $150, as proposed.

Citation No. 2776060

The inspector alleged in the citation that:

> A sign warning against smoking and use of open flame is not posted at the diesel fuel storage tank outby the screening plant. The sign thereon is so weathered as to be illegible.

30 C.F.R. 77.1102 provides that: "Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist."

The respondent essentially admits the violation, stating that the sign was "not very legible". However, the respondent also introduced evidence to the effect that the tank in question is actually owned by the Ashland Oil Company. The tank is brought into them by Ashland and they do not always get the same fuel tank. Mr. Wilson testified that some of them are well-marked and others are not so well-marked. This particular one was not so well-marked and therefore was in violation of the cited standard. However, under the circumstances I find only slight negligence on the part of the operator. Accordingly, I am going to affirm the non "S & S" citation, but assess a civil penalty of only $50, vice the $122 proposed.

Citation No. 2784423

The inspector alleged in the citation that:

> Safe access is not provided on the deck or walkway on each side of the dredge where workers are required to travel from and to the dredge itself as well as the engine and control rooms and various locations for examination and maintenance. The dredge deck is of more or less smooth metal construction which can become slick in inclement weather or frost. No hand rail, safety chain or cable is provided for prevention of a worker falling or falling overboard.

30 C.F.R. 77.205(a) provides that: "Safe means of access shall be provided and maintained to all working places."

It is undisputed that there was no handrail, safety chain or cable provided to prevent a worker from slipping and falling off the dredge. However, the respondent disputes the need for any such safety devices. I concur with the inspector that some means is necessary to assure safe access to the dredge, at least in inclement weather. I take administrative notice that smooth sheet metal would become slick in wet conditions such as rain, sleet or snow. I also find that the violation is "S & S" because in such weather conditions, it is reasonably likely that someone would slip and fall and sustain a serious injury, without some sort of handrail to hold onto.

I accordingly affirm Citation No. 2784423 as an "S & S" violation but reduce the operator's negligence to "low" from "moderate" because I feel the operator genuinely felt that any sort of handrail was unnecessary and they have operated in that configuration for seven years with no one previously suggesting otherwise. Therefore, I find that a civil penalty of $110 vice the $150 proposed is more appropriate.

Citation No. 2784425

The inspector alleged in the citation that a violation of 30 C.F.R. 77.400(a) had occurred and the condition or practice was alleged to be:

> The back portion and the LT.(inby) side of the plant feed belt tail roller is not adequately guarded in that the back is guarded only by X-bracing of the plant feeder hopper structure and the LT. side is exposed just inside the feeder base structure whereby a worker can contact such roller and incur a serious injury during maintenance or cleanup.

The respondent, through Mr. Wilson, admitted that the tail roller did not have a wire mesh guard on the one side, but argued that it was unnecessary as it would be difficult for someone to get into this area. Inspector Hatter, on the other hand, testified that a person could reach in there with a tool to contact the roller and thereby incur injury. I find a non "S & S" violation herein and moderate negligence on the part of the operator. As in all the citations issued in this case, a 104(b) order subsequently had to be issued to persuade Rivco to abate the citation. Accordingly, I find that a civil penalty of $122, as proposed, is appropriate.

Citation No. 2784426

The inspector alleged in the citation that a violation of 30 C.F.R. 77.400(a) had occurred and the condition or practice was alleged to be:

> A guard is not provided for the v-belts and pulleys of the coal elevator where a person is required for examination and maintenance. Such v-belts and pulleys are located immediately adjacent to the catwalk where personal contact therewith can cause a serious injury.

The record establishes a violation of the cited standard. However, because this unguarded pulley is in a very remote area of the plant where no one goes except for the foreman to grease on occasion and the electrical inspector to inspect, and they only when the plant is not in operation, I find that the probability is very slight, i.e., unlikely that a worker would be injured in the area where the belt is exposed. Therefore, I affirm Citation No. 2784426, only as a non "S & S" citation. Also, because of the remoteness of this particular violation and its foreseeable consequences, I find only slight operator negligence. Accordingly, I will reduce the proposed civil penalty of $195 to $75.

Citation No. 2784427

The inspector alleged in the citation that a violation of 30 C.F.R. 77.205(a) had occurred and the condition or practice was alleged to be:

> Safe access is not provided to the coal elevator drive in that a worker is required to climb over a handrail adjacent to the upper shaker catwalk to gain access to the travelway leading to the elevator, which can result in a slip or fall and serious injury.

Although this is not a regular work area, workers must use this travelway for the monthly electrical inspection or on an as needed basis to perform other tasks such as to repair belt breakage or to service the head drive. The record establishes a violation of the cited standard and I agree with the inspector that a slip and fall hazard existed. I likewise assess the operator's negligence as moderate and find the proposed civil penalty of $122 to be appropriate to the offense.

Citation No. 2784428

The inspector alleged in the citation that a violation of 30 C.F.R. 77.205(a) had occurred and the condition or practice was alleged to be:

> Two holes exist in the main plant floor about 16þ wide x 26" long x 5" deep, of which approx. 8þ of each hole is covered by wire mesh screen, the remainder being left open where a worker can step into either hole and fall resulting in serious injury.

The cognizant standard only requires that a safe means of access shall be provided to all working places. I find the respondent's evidence to be credible to the extent that these two drainage holes in the floor are in an area completely outside the normal flow of foot traffic and usual access to any working place. A usable, safe walkway is provided through, or rather around and over the cited area. There is no reason apparent to me that a worker would be in the area of the drain holes cited by Inspector Hatter. Accordingly, Citation No. 2784428 will be vacated.

II. Docket No. KENT 87Ä151

Citation No. 2776055

Inspector Hatter alleged in this citation that:

> The dredge engine and pump access travelway where a worker is required to travel for maintenance and/or repair, is not kept free of extraneous material whereby a worker can trip-stumble and fall, thereby incurring a serious injury in that a length of approx. 3/8" chain, a length of water hose and a 5 gal lube bucket lying on its side are found therein.

30 C.F.R. 77.205(b) provides that: "Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

The inspector testified consistently with his written allegation, including his "S & S"special finding. The respondent doesn't dispute the fact that this clutter existed, but rather its purported defense is that they were still in the process of setting up, they were not producing coal at the time and basically were not ready for an inspection. That is in reality no defense at all. Accordingly, Citation No. 2776055 will be affirmed and a civil penalty of $50, as proposed, assessed.

Citation No. 2776056

The inspector alleged in the citation, as modified, that:

> Flammable liquid is not being stored in a safety can in that approx. 3/4 gal. of gasoline for fueling the bilge pump on the dredge, located in the engine room, is found in a "lawn mower" type can with no spring closing lid or spout cover.

30 C.F.R. 77.1103(a) provides that: "Flammable liquids shall be stored in accordance with standards of the National Fire Protection Association. Small quantities of flammable liquids drawn from storage shall be kept in properly identified safety cans."

Again, the respondent does not deny the gas can was on the dredge but avers that it was only on the dredge temporarily for transportation and would have been unloaded off the dredge in due time. It was not intended to be left aboard. I find a violation of the cited standard and assess a civil penalty of $20, as proposed.

Citation No. 2776059

The inspector alleged in the citation that:

> No type of fire extinguisher is provided at the above ground diesel fuel storage tank located outby the screening plant.

30 C.F.R. 77.1109(e)(1) provides that: "Two portable fire extinguishers, or the equivalent, shall be provided at each of the following combustible liquid storage installations: (1) Near each above ground or unburied combustible liquid storage station."

Mr. Wilson testified that there were probably six fire extinguishers being transported on the dredge and they were only approximately 150 feet away from the fuel storage tank. A fire extinguisher could have been taken over there in a "couple of minutes" per Mr. Wilson. I find that that is not "near" enough to comply with the standard and accordingly, I find a violation of the cited standard, affirm the citation and assess a civil penalty of $20, as proposed.

Citation No. 2784421

The inspector alleged in the citation that:

> The Clark/Michigan 125B Loader being used for loading coal is not provided with adequate brakes in that the parking brake falls to hold repeatedly on a slight grade.

30 C.F.R. 77.1605(b) provides that: "Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes".

Equipped with parking brakes implies that those parking brakes be capable of holding the equipment, even on a grade. The parking brakes at issue admittedly would not do that. Therefore, I find the record herein establishes a violation

of the cited standard. I affirm the citation, as issued, and assess a civil penalty of $20, as proposed.

Citation No. 2784422

The inspector alleged in the citation that:

> The Clark/Michigan 125B loader, being used for coal loading at the screening plant is not provided with a fire extinguisher continuously maintained in a usable condition in that the extinguisher provided thereon is discharged.

30 C.F.R. 77.1109(c)(1) provides that: "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

The regulation that the respondent is actually charged with being in violation of in this instance, 30 C.F.R. 77.1110, provides: "Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher."

The fire extinguisher the inspector found on the subject loader was discharged. Respondent did not contest this fact, but explained that this would have been found by them and exchanged for a charged one if they had been given the opportunity to do so. This is not a viable defense.

I find the Secretary has sustained her burden of proving the existence of the instant violation and I affirm the citation and assess a civil penalty of $20, as proposed.

Citation No. 2784429

The inspector alleged in the citation that a violation of 30 C.F.R. 77.205(a) had occurred and the condition or practice was alleged to be:

> The RT.(inby) side catwalk adjacent and providing access to the upper shaker screen at the plant is punctured with the expanded metal loose in an area approx. 30" long x 18" wide whereby a worker

> engaged in examination or maintenance can step through the screen and incur a serious injury.

Rivco essentially admits the violation, but asserts that there were two other means of access to the same area and that the only person that goes up there anyway is the foreman. Nevertheless, I concur with the inspector that a violation of the cited standard occurred, and there was a reasonable likelihood that an injury accident could have happened. Furthermore, I find that a civil penalty of $50, as proposed, is appropriate under the circumstances.

Citation No. 2784430

Inspector Hatter alleged in this citation that yet another violation of 30 C.F.R. 77.205(a) had occurred in basically the same location and the condition or practice was alleged to be:

> Safe access is not maintained to the picking belt on the RT. (outby) side in that to gain access thereto, a worker must traverse (1) the upper shaker catwalk which has a hole about 30 x 18" therein, (2) or use an unanchored crossover with no steps on the Rt. (outby) side which causes a worker to climb up about 52" and swing around the shaker catwalk ladder to get to the crossover and go down the LT. (outby) side about 48" with only a 3" wide metal plate to step on. A worker is on each side of the belt picking rock and trash from coal.

Respondent raised the issue at hearing of duplicitous pleading concerning this citation and the previous one (No. 2784429). I agree. Abatement of Citation Nos. 2784429 and 2784430 required exactly identical action. The hole in the right side of the upper shaker catwalk was repaired. These two citations charge exactly the same violation. I have already affirmed Citation No. 2784429. Therefore, I will vacate Citation No. 2784430 as pleading a multiplicitous violation, for which a civil penalty has already been assessed.

III. Docket No. KENT 87Ä158

Citation No. 2784424

The inspector alleged in the citation dated October 9, 1986 that a violation of 30 C.F.R. 77.400(a) had occurred and the condition or practice was alleged to be:

> A guard is not provided for (5) five troughing rollers on the plant feed belt where a worker is observed picking rock and trash from coal and contact with such rollers can cause a serious injury. The condition exists on either side of such belt and no stop cord is provided.

Subsequently, on November 21, 1986, section 104(b) Order No. 2775975 was issued for failure to abate the instant citation. At a close out conference on November 25, 1986, agreement was had to terminate the order and citation on the basis that this particular area was no longer a work area, and that there was no foreseeable use for this area again. Mr. Wilson purportedly stated that if there ever was a need for this work area again, that guards would be installed before the work began. He also supposedly has instructed his work force not to work in this area.

Respondent admits a worker was picking rock off a moving belt in close proximity to unguarded rollers, but nonetheless argues that there was no violation of the mandatory standard at 30 C.F.R. 77.400(a) because it was not a "regular" work area. The cited standard, however, does not differentiate between regular work areas and irregular work areas. It merely requires moving machine parts which may be contacted and thereby cause injury to be guarded. Therefore, I find that a violation of section 77.400(a) has been established.

The record further establishes that the violation was a "significant and substantial" one. It doesn't take much imagination to follow Inspector Hatter's theory that if this worker was inattentive or slipped while reaching for a heavy piece of rock moving on this beltline, that she could catch her clothing or her arm in one of those unguarded rollers. I believe that this is a reasonably likely occurrence and if it in fact occurred would be reasonably likely to result in a serious injury to her.

Applying the statutory criteria to the facts and circumstances at hand, I find that the $150 civil penalty proposed by the Secretary is appropriate.

IV. Docket No. KENT 88Ä35

Citation No. 2985265

The inspector alleged in the citation that a violation of 30 C.F.R. 77.400(a) had occurred on September 14, 1987 and the condition or practice was alleged to be:

> A guard is not provided for the v-belt and pulleys at the head drive of the plant discharge belt where a worker engaged in examination or maintenance can contact such components with a serious injury resulting or if on the platform below, be struck by a broken belt fragment.

The testimony of Hatter and Cantrell as well as the photograph marked and received in evidence as Government Exhibit No. 13 establish a violation of the cited mandatory standard. However, I accept as more credible the respondent's evidence as to the remoteness of the site of the unguarded belt and therefore find it unlikely that any worker would be injured by it.

Therefore, I am going to modify the instant citation and affirm it as a non "S & S" citation and reduce the proposed civil penalty of $42 to $20.

Citation No. 2985267

The inspector alleged in the citation that a violation of 30 C.F.R. 77.205(a) had occurred on September 14, 1987 and the condition or practice was alleged to be:

> A safe means of access is not maintained on the LT. shaker catwalk adjacent to the shaker drive in that lack of support for the catwalk flooring metal allows the flooring to sag under a workers weight such that a foot will go under the flywheel guard and can contact the moving drive belt with serious injury. A worker is required to be in this area for cleaning and maintenance.

Government Exhibit No. 14 illustrates that the flooring in the cited area sagged to the extent that a worker's foot could come into contact with the drive belt. Therefore, I find a violation of the cited mandatory standard. However, I regard the likelihood of this actually occurring as slight and the operator's negligence to be slight as well.

Accordingly, I will reduce the civil penalty from the amount proposed, $42, to $20, and affirm the citation only as a non "S & S" citation.

The "Jurisdictional" Issue

Periodically while these cases have been on my docket Mr. Wilson has raised, subsequently abandoned and then raised again an issue loosely described as "jurisdictional".

Respondent concedes that his coal processing plant does process coal and is therefore a "coal mine" within the meaning of the Act. However, Mr. Wilson contends that dredging coal is not a "coal mine", and while he concedes MSHA has jurisdiction under the Act to inspect his dredging operation, he believes that he should be inspected by the Sand and Gravel Division and not the Coal Division of MSHA. The reason for all of this being his belief that Inspector Hatter, who is a coal mine inspector, doesn't know anything about dredging operations or dredges and this lack of knowledge has caused Hatter to issue the instant flood of citations. Mr. Wilson points out that before Hatter and after Hatter, there were very few citations issued to the Rivco Dredging Corporation and in fact, several of the Hatter citations were subsequently vacated as "issued in error" before they came before this Commission. I note that several more have been vacated since, some of them by this decision.

Be that as it may, I have no authority to order any particular MSHA division or office or any specific inspector to inspect or not inspect the respondent's facilities. That is a matter strictly within MSHA's purview. What I can and do decide herein is that the respondent's sand and coal extraction and processing operations are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 and this Commission plainly has jurisdiction over this proceeding.

Civil Penalty Assessments

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of civil penalties is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
2776057	10/8/86	77.400(a)	$150
2776060	10/8/86	77.1102	50
2784423	10/9/86	77.205(a)	110
2784425	10/9/86	77.400(a)	122
2784426	10/9/86	77.400(a)	75
2784427	10/9/86	77.205(a)	122
2776055	10/8/86	77.205(b)	50
2776056	10/8/86	77.1103(a)	20
2776059	10/8/86	77.1109(e)(1)	20
2784421	10/8/86	77.1605(b)	20
2784422	10/8/86	77.1110	20
2784429	10/9/86	77.205(a)	50
2784424	10/9/86	77.400(a)	150
2985265	9/14/87	77.400(a)	20
2985267	9/14/87	77.205(a)	20

ORDER

Accordingly, IT IS ORDERED that Citation Nos. 2784426, 2985265 and 2985267 be, and hereby are, MODIFIED to delete the issuing inspector's findings that the cited violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

IT IS FURTHER ORDERED that Citation Nos. 2784428 and 2784430 be, and hereby are, VACATED.

Respondent IS ORDERED TO PAY civil penalties totaling $999 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge