

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 8, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-11-M
Petitioner	:	A.C. No. 10-01634-05517
	:	
v.	:	Portable Plant No. 1
	:	
WESTERN CONSTRUCTION, INC.,	:	
Respondent	:	

DECISION

Appearances: Megan J. Green, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Maurice O. Ellsworth, Esq., Howard, Ellsworth, Ipsen & Perry, Boise, Idaho, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (AMSHA), against Western Construction, Inc. (Western Construction), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815 and 820 (the Mine Act). The petition alleges one violation of the Secretary's safety standards. A hearing was held in Boise, Idaho.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Western Construction operates Portable Plant No. 1 (the plant), which was in Elmore County, Idaho, at the time of MSHA's inspection. The plant was being used to produce aggregate for a road construction project. The plant includes a jaw crusher and a feeder conveyor (the feeder). The feeder is at an angle and is used to convey rock to the crusher. (Ex. R-1). The feeder is about 25 feet long and about 4 feet wide. Heavy metal aprons are attached to the frame of the feeder to keep the rock from spilling off the sides of the feeder. These aprons are at an angle so that the feeder assembly resembles a large AV with a flat bottom. A metal bar connects the top of the aprons on each side of the feeder near the discharge end. The conveyor itself consists of metal cleats or slats, sometimes called flights, that are similar to the track on a dozer. The slats move rock that is pushed onto the feeder at the feeder trap up to the top of the feeder where the rock dumps into the jaw crusher. The vertical distance between the slats and the top of the aprons is about four feet.

Rock is pushed onto the feeder at the bottom with dozers operated by Claude Sarbaum and other employees. The dozer operators are instructed to push rock that is four feet in diameter or less onto the feeder. When the jaw crusher becomes plugged with material, it is shut down to free the material.

On June 23, 1997, MSHA Inspector Robert Capps arrived at the plant to conduct an inspection. Soon after he arrived, he observed Mr. Sarbaum standing on the feeder near the discharge end. At the time Inspector Capps observed this condition, he was about 150 feet away near the tool trailer. He became quite excited and motioned to Mr. Sarbaum to get off the feeder. Sarbaum walked back to his dozer and waited. Inspector Capps walked to the dozer and asked Mr. Sarbaum to step down. The inspector put his hands on Sarbaum's shoulders and told him that he was an MSHA inspector and that it was a violation of MSHA regulations to walk on the feeder.

Inspector Capps issued a combination 104(a) citation and 107(a) imminent danger order (the citation) soon after he observed the condition. It alleges a violation of 30 C.F.R. § 56.11001, as follows:

A Cat D10N dozer operator was observed using an unsafe means of access to go from the primary feeder trap to the primary jaw crusher to assist in the removal of an oversized rock from the jaw. The dozer operator walked/climbed across the primary feeder, which was mostly full of loose material, to the jaw area. The jaw was still rotating as he arrived at the opening above it. He could have fallen into the moving jaw. He was not secured from fall with a safety belt and lanyard (56.15005). There was an imminent danger of falling into the jaw.

Inspector Capps determined that the violation was of a significant and substantial nature (AS&S) and was the result of the mine operator's high negligence. Section 56.11001 provides that a safe means of access shall be provided and maintained to all working places. The citation was terminated when Mr. Sarbaum was removed from the feeder and instructed on safe access. On June 26, 1997, Inspector Capps modified the citation to add [an] additional violative evaluation for section 56.15005. That safety standard provides that safety belts and lines shall be used where there is a danger of falling.

The Secretary filed a petition for assessment of civil penalty for this citation on November 3, 1997, charging Western Construction with a violation of section 56.11001. The proposed penalty of \$1,500 was specially assessed under 30 C.F.R. § 100.5. The Secretary conducted an investigation to determine whether any agent of Western Construction should be assessed a penalty under section 110(c) of the Act, but no charges were filed.

A. Fact of Violation

1. Summary of the Testimony

The facts in this case are in dispute. Inspector Capps testified that he was standing at the main controller's booth at the plant when he observed Mr. Sarbaum on the feeder. (Tr. 12). Although he was about 150 feet away, the inspector was at an elevated position and his view was not obstructed except by dust in the air. (Tr. 13). He stated that the feeder is about 15 feet above the ground at its highest point. (Tr. 16). The inspector stated that he saw Mr. Sarbaum walking up the feeder towards the discharge end near the jaw crusher. (Tr. 17). The feeder was not running and the jaw crusher had been turned off. The crusher was still rotating from its own momentum. Inspector Capps described the metal bar connecting the aprons on both sides of the feeder assembly as a spreader bar. (Tr. 15). He stated that it was made of tubular steel, that it keeps the aprons in position, and that it can also be used to lift the feeder assembly. *Id.* He stated that the vertical distance between the slats of the feeder and the spreader bar is about six feet.

Inspector Capps testified that Mr. Sarbaum traveled beyond the spreader bar and looked down into the jaw crusher that was still rotating. (Tr. 17). He was not tied off. The inspector testified that he could clearly see that Mr. Sarbaum was between the spreader bar and the discharge end of the feeder despite the fact that he was 150 feet away. He also testified that the feeder was mostly full of rock. (Tr. 18). The rock was more than half way up the sides of the aprons. (Tr. 19). Thus, the inspector believes that Mr. Sarbaum walked on top of the uneven rocky surface to reach the discharge end of the feeder.

Inspector Capps believes that Western Construction violated the standard because a safe means of access was not provided. Mr. Sarbaum could have fallen off the sides of the feeder as he walked up the feeder and he could have fallen into the jaw crusher as he looked down into the crusher. (Tr. 19). The inspector believes that Mr. Sarbaum could have tripped on the rough, uneven surface of the rocks on the feeder. (Tr. 21).

MSHA Inspector Robert Palmer conducted an investigation of the incident. He testified that the rocks on the feeder presented a tripping and falling hazard. (Tr. 54-55). He stated that if Mr. Sarbaum had fallen, he could have been seriously injured. He stated that a fall into the crusher could have been fatal.

Mr. Sarbaum, an experienced heavy equipment operator, testified that on June 23 he was gathering rocks with the dozer and pushing them onto the feeder trap. (Tr. 99). He stated that he pushes a new load onto the feeder every five to ten minutes. Another dozer operator was also pushing rock into the feeder on that day. (Tr. 102). When he was getting ready to push one load onto the feeder, he saw that the feeder was empty and it was not running. (Tr. 101). He looked at the feeder operator, who works in a booth past the discharge end of the feeder, and she signaled that the jaw crusher was plugged. Mr. Sarbaum did not push any more rock onto the feeder. He was concerned that something that he had pushed onto the feeder could have caused the crusher to become plugged, so he got off his dozer, walked onto the feeder, traveled up the

feeder to look down into the crusher, and saw a big rock in the crusher that was causing the problem. (Tr. 102)

Mr. Sarbaum testified that before he went into the feeder, he signaled to the crusher operator who sits in the control house. (Tr. 104). Through hand signals, he indicated to the crusher operator that he was going onto the feeder. *Id.* The crusher operator, Jake Chavarria, waved back. Mr. Chavarria disappeared for a short time, returned to the control house, and waved a second time. (Tr. 119). Mr. Sarbaum understood this to mean that the feeder had been locked out. Mr. Sarbaum then walked onto the feeder. He was not instructed to travel up the feeder by his supervisor and he did not expect to assist in freeing the plug. Mr. Sarbaum testified that he ~~was~~ just curious to see what happened. @ (Tr. 110).

Mr. Sarbaum testified that he walked only as far as the spreader bar, which he called the ~~Asafety bar.~~@ (Tr. 103). He stated that he would never travel past the safety bar because to do so would be unsafe, particularly when the jaw is moving. He also testified that the feeder was virtually empty of rock when he walked on it. Mr. Sarbaum stated that there was very little rock on the feeder when he approached it in his dozer. *Id.* As he walked up the feeder, he did not have to step over rocks because there ~~wasn't~~ any material@on the feeder. (Tr. 106). He stated that he could see the slats of the feeder. He testified that there was some rock and dirt on the feeder and that he could see 90% of the slats. (Tr. 122).

Mr. Sarbaum testified that when he reached the safety bar, he was able to look over the end of the feeder and see part of the crusher. (Tr. 108). He could see a large rock lodged in the crusher. (Tr. 106). He stated that the safety bar was at about the level of his chest and that he did not travel beyond the bar. The bar was about five feet from the discharge end of the feeder. (Tr. 107). Mr. Sarbaum testified that he was not in any danger when he walked up the feeder because it was nearly empty and the four-foot high aprons on the feeder would keep him from falling off the feeder even if he were to stumble. In addition, he was not in danger of falling off the end of the feeder into the jaw crusher because he did not travel beyond the safety bar.

He stated that he has walked up the feeder in similar circumstances on a number of occasions and that he normally walks back down the feeder and returns to his dozer once he sees what is plugging the crusher. In this instance, he saw someone waving his arms at him near the tool trailer. (Tr. 111). After Mr. Sarbaum returned to his dozer, the man approached him and motioned him to step down from the dozer. The man put his hands on Mr. Sarbaum's shoulders, identified himself as an MSHA inspector, and told him that he should not be walking on the feeder when the crusher is in motion. Mr. Sarbaum became upset when the inspector put his hands on his shoulders.

2. Discussion and Analysis

For the reasons set forth below, I find that the Secretary established a violation of section 56.11001. First, I find that the standard applies to the feeder because Mr. Sarbaum walked up the feeder to look into the crusher. The standard provides that a safe means of access shall be

provided and maintained to all working places. Working place is defined as Any place in or about a mine where work is being performed.@ 30 C.F.R. ' 56.2. Although the area near the discharge end of the feeder is not a working place in the traditional sense, Mr. Sarbaum walked up the feeder for a specific purpose: to see what was in the crusher. He was not directed to look into the crusher by his supervisor, but this was his general practice and his supervisor was aware of this practice. The feeder conveyor was the normal travelway that was used by Mr. Sarbaum. Accordingly, I find that the end of the feeder was a working place.

The parties dispute the amount of rock that was on the feeder at the time. Inspector Capps testified that the feeder was about half full of rock. Mr. Sarbaum testified that it was mostly empty. For reasons that are not clear to me, Inspector Capps did not inspect the feeder after he talked to Mr. Sarbaum near his dozer. The inspector observed the condition from a distance of 150 feet, walked to the dozer, and talked to Mr. Sarbaum, but he did not examine the feeder from the dozer. The inspector stated that he did not need to look at the feeder from the dozer because he saw everything he needed to see from 150 feet away. (Tr. 37). The feeder is at an angle and it would be difficult to see the conditions inside the feeder from a distance of 150 feet because of the aprons. He had a clear view of the discharge end of the conveyor, however.

Given the fact that Mr. Sarbaum was actually on the feeder and the inspector only saw the feeder from a considerable distance, I generally accept Mr. Sarbaum's account of the conditions inside the feeder. I find that the feeder was mostly empty but that there was rock on the feeder. Mr. Sarbaum testified that he saw a large rock in the crusher; he did not say that he saw a lot of smaller rock and dirt on top of or around the large rock. It is likely that at least some rock remained on the feeder when it was shut down. Thus, I find that rocks of various sizes were on the feeder but that it was not half full, as the inspector believed. I find that the discharge end of the feeder contained a considerable amount of rock, as observed by the inspector.

The testimony also conflicts as to whether Mr. Sarbaum traveled past the spreader bar when he looked into the jaw. On one hand, Mr. Sarbaum testified at the hearing that he did not go beyond the spreader bar and that he would never do so because it would be dangerous. He also made this statement to Inspector Palmer during the special investigation. (Tr. 53). Inspector Capps testified that he saw Mr. Sarbaum walk up the feeder, get on the other side of the spreader bar and look down into the jaw crusher. (Tr. 17). He testified that he is positive that Mr. Sarbaum crossed under the spreader bar because he had a clear view of the discharge end of the feeder from his observation point. (Tr. 18).

I find that it would have been difficult to see much of the crusher if one were to stand behind the spreader bar. Mr. Sarbaum is over six feet tall and the spreader bar was about six feet above the surface of the feeder. It is possible that he could have observed a small part of the crusher without crossing under the spreader bar. I find that the testimony of Inspector Capps is more credible on this issue, however. I rely, in part, on the photographs introduced by Western Construction. (Ex. R-1, R-2). Given the angle of the feeder and the distance between the spreader bar and the end of the feeder, it is unlikely that anyone could see a significant part of the

crusher from that location. He would have had to travel past the spreader bar or leaned forward under the bar to examine the crusher.

I agree with counsel for the Secretary that even if Mr. Sarbaum did not travel beyond the spreader bar, he was still in danger of falling. (Tr. 127-28). He walked up the feeder to the spreader bar and rocks on the feeder presented a stumbling hazard. He could have stumbled and sprained an ankle or hit his head on one of the aprons. Other cases present similar situations. In one case, an administrative law judge affirmed an S&S violation of section 56.11001 because an employee, who was walking on an empty elevated conveyor belt, could have been knocked over by a gust of wind. *Walker Stone Co.*, 14 FMSHRC 603, 606 (April 1992). In *USS*, 13 FMSHRC 145, 154 (January 1991), an administrative law judge affirmed a citation issued under this standard because of an accumulation of rock on a walkway that was up to eight inches deep. It is not necessary to find that Mr. Sarbaum would have fallen off the feeder or fallen into the crusher in order to sustain a violation. As stated above, Mr. Sarbaum could have injured himself without falling from the feeder.

Mr. Sarbaum testified that he believed that it was safe for him travel up the feeder to observe the crusher and pointed to the fact that no employee of Western Construction has ever been injured while walking on a feeder. I credit Mr. Sarbaum's testimony in this regard, but the fact that an employee has never been injured does not mean that an injury would never have occurred if this practice continued at Western Construction. I find that the Secretary established that Western Construction did not provide Mr. Sarbaum with safe access to the discharge end of the feeder. I find that it was reasonably likely that Mr. Sarbaum or another employee would be injured if this practice continued at the mine. Accordingly, I affirm the violation.

B. Significant and Substantial Nature of the Violation

An S&S 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 ... mine safety or health hazard. A violation is properly designated S&S if based upon 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. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

In order to establish that a violation is S&S, the Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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.

I find that the Secretary established the first two elements of this test. There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation will result in an injury. I find that the Secretary established that an injury was reasonably likely in this instance and that such an injury would be of a reasonably serious nature.

As stated above, the surface of the feeder was uneven, there were rocks of various sizes along the feeder, and it was reasonably likely that Mr. Sarbaum would trip and fall, if the practice of walking up the feeder continued unabated at the plant. There was no handrail or other device that one could hold to steady oneself. It was also reasonably likely that a fall would result in an injury of a reasonably serious nature. An employee could twist his ankle, break a bone, or hit his head on the apron. If the feeder contained a significant amount of rock, someone could fall off the side of the feeder because the apron would no longer act as a barrier to such a fall. It was also reasonably likely that Mr. Sarbaum or another dozer operator would fall off the feeder into the crusher if this practice continued. Western Construction argues that the stumbling hazard presented in the feeder is no greater than the stumbling hazard presented while walking on the ground at the plant. I disagree. Anyone walking up the feeder is restricted to a confined area and he cannot walk around obstructions as he could on the ground.

C. Other Issues

At the hearing, the Secretary presented evidence of a violation of section 56.15005. The petition for assessment of penalty does not mention a violation of that section. Exhibit A, attached to the petition, lists only a violation of section 56.11001. The citation itself, including the modification, refers to section 56.15005. I hold that the only issue before me is the allegation concerning section 56.11001. In civil penalty cases, the Secretary proposes civil penalties for alleged violations of her safety and health standards. A separate penalty is proposed for each alleged violation. In this case only one penalty has been proposed. I reject the Secretary's argument that the proposed penalty in this case covers both alleged violations. Although it is clear that Mr. Sarbaum was not wearing a safety belt or line, a penalty was not proposed for that alleged violation and any issues concerning that safety standard are not before me.

Western Construction presented evidence that it operates the plant in a safe manner. It argues that it is not a renegade company and that its policy emphasizes safety first. (Tr. 70). It introduced two safety awards it received from MSHA's Holmes Safety Association. Western Construction received one award for working 100,392 hours from January 1986 through March 1995 without any fatal accidents or permanent total disability accidents. (Ex. R-3). It received another award for working 50,392 hours between April 1991 through March 1995 without incurring a lost time injury. (Ex. R-4). Western Construction's achievements in this regard are commendable. It must be stated, however, that safe mine operators are issued citations from MSHA. The fact that Western Construction was issued the subject citation does not mean that it is a renegade company or that it does not emphasize safety. The citation simply indicates that the conditions described in this citation presented a safety hazard to employees.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The parties stipulated to many of the criteria. I find that seven citations were issued at the plant in the 24 months preceding June 23, 1997. The plant worked about 20,692 man-hours per year at that time. Western Construction worked about 41,293 man-hours per year at that time. The violation was rapidly abated. The penalty assessed in this decision will not have an adverse effect on Western Construction's ability to continue in business. The violation was S&S and it created a serious safety hazard.

Inspector Capps determined that Western Construction's negligence was high because it was a normal practice at the mine for dozer operators to walk up the feeder to find out what was in the jaw crusher. (Tr. 21-22). The employees at the plant did not consider this practice to create a significant hazard. Although I disagree with this assessment, management at the plant was not indifferent to safety issues. I credit the testimony of Eldon Heath, the crusher superintendent, that safety is a primary concern at the plant. (Tr. 88). Nevertheless, I find that there was a lack of reasonable care in allowing employees to walk along the feeder. I hold that Western Construction's negligence was moderate to high. Based on the penalty criteria, I find that a penalty of \$1,000 is appropriate for this violation.

III. ORDER

Accordingly, Citation No. 7959086 is **AFFIRMED** and Western Construction, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,000.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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