

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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April 6, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE AND SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 94-4 17-M  
Petitioner : A.C. No. 09-00265-05518  
:  
v. : Junction City Mine  
:  
BROWN BROTHERS SAND COMPANY, :  
Respondent :

## DECISION

Appearances: John A. Black, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;  
Steve Brown, Partner, Brown Brothers Sand Company, Howard, Georgia, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 801 et seq., (the Act). The Secretary's petition seeks to impose a total civil penalty of \$336 for five alleged violations of mandatory safety standards, four of which were designated as nonsignificant and substantial.

This matter was called for hearing on January 31, 1995, in Butler, Georgia, at which time the respondent stipulated that it is a mine operator subject to the jurisdiction of the Act. The Secretary called Mine Safety and Health Administration (MSHA) Inspectors Kenneth Pruitt and Donald L. Collier. The respondent relied upon the testimony of Greg Brown, a partner in the respondent company. The parties' posthearing briefs are of record.

This proceeding involves two citations issued by inspector Pruitt for alleged guarding violations and three citations issued by inspector Collier for alleged electrical violations during their March 22, 1994, inspection of the respondent's Junction City Mine site. The respondent extracts sand at its mine site by spraying a high pressure stream of water against the bark of an open pit causing the sand on the bark to slough off into a sink hole. A pump station transports the sand by pipeline from the sink hole pit onto shaker screens where the sand is separated from waste material such as roots and clay balls. The waste material is removed by the chalk conveyor belt. The sand falls through the screens into a horizontal tank and is transported through another pipeline to the classifier. The classifier separates the sand

according to granule size. The finer sand is used for mortar and the coarser sand is used for concrete. The sand leaves the classifier through a chute and is transported by grade to either of two conveyor stockpile belts. These belts stockpile the mortar and concrete sand.

Citation No. 430 1221

During the March 22, 1994, inspection, Pruitt observed that the guard for the head pulley on the concrete sand stacker conveyor belt was not secured in place. The guard had been removed and tied to the V-belt guard. The concrete sand stacker conveyor belt is approximately 134 feet long pitched at a steep angle above the ground. The head pulley is accessed by a walkway the full length of the belt. The head pulley (end of the conveyor belt) has a vertical height of 43 feet above the ground. The walkway is adjacent to the belt rollers the full length of the belt as well as the head pulley at the top of the belt. (See Resp. Ex. 1).

As a result of the unguarded head pulley, Pruitt issued Citation No. 430 1221 for an alleged nonsignificant and substantial violation of the mandatory safety standard in section 56.14 112(b), 30 C.F.R. ' 56.14 112(b), which provides:

Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard. (Emphasis added).

Guarding is intended to prevent the inadvertent contact of fingers or extremities from the pinch points of moving machinery. Guarding is not intended to prevent the intentional contact with moving parts or to protect maintenance personnel that must access the equipment. In this regard the Commission has stated:

[T]he most logical construction of [a guarding] standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. . . . Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis. (Emphasis added). Thompson Brothers Coal Company, Inc., 6 FM SHRC 2094, 2097 (September 1984).

Consistent with the Commission's reasonable possibility of inadvertent contact test in Thompson, the cited mandatory standard in section 56.14 112(b) exempts guarding requirements during maintenance. Section 56.14 107(b), 30 C.F.R. ' 56.14 107(b), also exempts guarding "where the exposed moving parts are at least seven feet from walking or working surfaces" as there is no exposure to moving parts.

Here, the Secretary asserts there is a violation of the guarding standard because there are no barriers or signs prohibiting employees from walking up the steep 134 foot long walkway to the head pulley at a vertical height of 43 feet above ground. However, it is obvious that the walkway on the subject stacker conveyor depicted in Respondent's Exhibit 1 is used exclusively by personnel maintaining the head pulley and rollers and that other employees would not ordinarily traverse the walkway. This conclusion is based upon the testimony of Greg Brown that the walkway is used by maintenance personnel for periodic greasing of roller bearings and the head pulley and that such maintenance activities can only be performed when the belt is deenergized as such activities require climbing on the belt. (Tr. 47-48). I also credit Brown's testimony that most employees are afraid "to go up there." (Tr.48).

The Secretary asserts that the provision in section 56.14107(b) exempting guarding at locations at least seven feet from walking or working surfaces is inapplicable to the head pulley because the head pulley is within seven feet of the walkway. However, as noted above, the walkway is used by maintenance personnel who must first deenergize the conveyor. Pruitt conceded that if this 43 foot elevation was accessed by ladder, the head pulley would not have to be guarded. (Tr. 35-36). It follows that the guarding exemption should also apply if the operator provides a safe walkway exclusively for maintenance purposes in lieu of the instability of a ladder. Consequently, in view of the Thompson decision, as well as the maintenance and remoteness from working area exceptions to guarding in Part 56, I conclude that the Secretary has failed to establish a violation of the cited mandatory standard. Accordingly, Citation No. 4301221 shall be vacated.

Citation No. 4301222

The Junction City facility has two shaker screens that were placed in operation approximately two weeks prior to Pruitt's inspection. (Tr. 19, 49; Resp. Ex. 2). The screens are accessed by climbing steps to a platform that is approximately four to six feet wide. The total length of the platform around the perimeter of the screens is approximately 25 feet. (Tr. 52). Brown testified that it is conceivable that someone could traverse the walkway when the screens were operational as the walkway could be used to view the screens' operation. There was an unlocked cable 35 inches above the ground in front of the platform steps. However, this cable could not prevent someone from entering the platform. (Tr. 20, 33, 41, 52).

A V-belt runs between the pulleys on a motor and pulleys to the screens, causing the screens to shake to separate debris from sand. (Tr. 18-20, 55). The shaker screen platform is located next to the V-belt drive. (Tr. 52-54). Pruitt observed that the V-belt drive of the No. 1 shaker screen was not guarded. Consequently, Pruitt cited the respondent for a guarding violation of section 56.14107(a) that, in pertinent part, requires guarding "to protect persons . . . from contacting moving parts that can cause injury." Pruitt concluded that this unguarded belt drive could cause permanently disabling injuries such as amputation of fingers or a hand. (Tr. 21). Such injuries could occur to anyone on the platform who inadvertently contacted the belt drive while observing the operation of the shaker. (Tr. 40, 54-55). However, Pruitt felt injury was unlikely and characterized the violation as nonsignificant and substantial

because the platform was routinely accessed by personnel who performed maintenance on a daily basis while the screens were deenergized. (Tr. 49-50).

At the outset, I note that none of the circumstances warranting an exemption of the guarding requirements of the conveyor stacker head pulley in Citation No. 430 1221 are present in Citation No. 430 1222. Unlike the conveyor walkway constructed for the sole purpose of maintenance and located high above the ground, the shaker platform is easily accessible by climbing a few steps. Moreover, it is constructed around the perimeter of the shaker screens and serves as an observation deck. The unguarded V-belt's proximity to this platform creates the precise hazard, *i.e.*, inadvertent contact with the V-belt drive by non-maintenance persons traversing the platform, that the guarding standard seeks to prevent. Thus, the absence of guarding violates the cited mandatory standard.

Having concluded that guarding was required, I am unconvinced by the respondent's assertion that the cable in front of the steps satisfied the guarding requirement. Even if the cable was an effective method of preventing access to the platform, which it was not, perimeter guarding is not an acceptable alternative to site specific guarding of moving parts. See, e.g., Moline Consumers Company, 15 FM SHRC 1954 (September 1993) (A LJ); Moline Consumers Company, 12 FM SHRC 1953 (October 1990) (A LJ); Yaple Creek Sand & Gravel, 11 FM SHRC 1471 (August 1989) (A LJ).

I am similarly unpersuaded by the respondent's contention that similar cables barring access to shaker screens at other locations at its facility were not cited during previous MSHA inspections. The Commission has held that prior inconsistent enforcement of a safety standard does not constitute a defense to a violation. See U.S. Steel Mining Company, Inc., 15 FM SHRC 1541, 1543 (August 1993) and cases cited therein. Any other interpretation would provide an operator with immunity from the enforcement and abatement requirements of the Act for any hazardous condition that was overlooked during a previous inspection.

Therefore, the cable does not satisfy the guarding requirements of section 56.14 107(a) and the respondent has presented no justifiable defense to the cited violation. Accordingly, consistent with the penalty criteria in section 110(i) of the Act, 30 U.S.C.

' 820(i), the \$50 civil penalty proposed by the Secretary for non-significant and substantial Citation No. 430 1222 shall be affirmed.

Citation No. 3606005

Electrical inspector Donald Collier accompanied Pruitt on the March 22, 1994, inspection. During his inspection, Collier determined the metal frames on the disconnect boxes for the chalk conveyor and for each of the two shaker screens were not grounded. Collier's conclusion was based on his observation of the plant side screen disconnect box that was open and deenergized. Collier observed a missing bonding screw inside the box. A bonding screw connects a terminal mounted in the disconnect box to the frame providing a ground for the box itself. (Tr. 62). Collier used an ohm meter to determine that the metal frames of the

two other energized disconnect boxes were also not grounded. (Tr. 61-62, 99-100; Resp. Ex. 3). In addition, Collier found the light switch boxes for the shaker screen tower were not grounded. (Tr. 69-70). As a result of his findings, Collier issued Citation No. 3606005 for violation of section 56.12025, 30 C.F.R. ' 56.12025, which requires the grounding of all metal enclosures encasing electrical circuits.

The cited disconnect boxes and light switches are located outdoors, mounted on a plywood panel approximately four and one-half feet off the ground. (Tr. 65; Resp. Ex. 3). The disconnect boxes are used to deenergize and lock out circuits when work is done on the screens or chalk conveyor. (Tr. 63). Collier characterized the violation as significant and substantial because the absence of grounding exposed employees, who disconnected equipment on a daily basis, to electrocution.

Collier's uncontroverted testimony establishes the occurrence of the cited violation. The question of whether this violation is significant and substantial must be resolved based on the particular facts surrounding the violation. Texasulf, Inc., 10 FM SHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FM SHRC 2007 (December 1987). In this instance, the facts support the citation was properly designated as significant and substantial for it was reasonably likely, if mining operations continued despite the defective grounding conditions, that the electric shock hazard contributed to by the violation would result in an injury of a reasonably serious nature. See Halfway, Inc., 8 FM SHRC 8, 12 (January 1986); U.S. Steel Mining Co., Inc., 6 FM SHRC 1573, 1574 (July 1984); Mathies Coal Co., 6 FM SHRC 1 (January 1984); Cement Division, National Gypsum, 3 FM SHRC 822, 825 (April 1981). This conclusion is based on the disconnect boxes' 220 volt three phase circuitry, the outdoor location that subjected the boxes and switches to water and dampness, and, the frequency of use of the defectively grounded boxes and switches.

The Secretary initially proposed a civil penalty of \$136 for Citation No. 3606005 based on the respondent's moderate degree of negligence. The Secretary now seeks to increase the civil penalty to \$500 asserting that the respondent's failure to use a licensed electrician to install the switches and boxes constitutes high negligence. However, the Secretary has cited no authority for the proposition that such installations are required to be performed by a licensed electrician. Moreover, the ground wires for the power cables coming into the boxes and the ground wires out to the starter motors were properly installed. (Tr. 98-99). The failure to place a bonding screw in each disconnect box and the failure to connect the grounding wire to the switches are attributable to ordinary negligence, moderate in degree, rather than the high degree of negligence belatedly asserted by the Secretary. Thus, the initial \$136 civil penalty for Citation No. 3606005 shall be affirmed.

Citation Nos. 3606006 and 3606007

Collier inspected the respondent's transformer building. The building is constructed with metal walls and a wood floor. It is approximately 10 feet wide by 16 feet long. The building is located approximately 30 feet from the main barge below ground level in the pit. (Tr. 105-108). The building houses two 2300 volt cylindrical transformers approximately

three to four feet tall and two and one-half feet in diameter with a metal casing similar to a water heater. (Tr. 76-77, 80; Resp. Ex. 5). There is a power disconnect switch outside the building. There is also a danger sign posted on the building.

Collier observed that the transformer building door was secured by a chain tied in a knot that was not locked. Collier opened the door and determined that, although the power cables into the transformers were grounded, the metal frames housing the transformers were not grounded. Consequently, Collier issued Citation No. 3606006 for a non-significant and substantial violation of section 56.12068, 30 C.F.R. ' 56.12068, that requires transformer enclosures to be locked to prevent unauthorized entry. Collier also issued Citation No. 3606007 for violation of section 56.12025 that specifies that metal enclosures containing electrical circuits must be grounded. Collier designated these violations as non-significant and substantial because he believed it was unlikely that an employee would enter the transformer building while the circuits were energized, and, because a short was unlikely since the transformers were sheltered from the weather. (Tr. 77-78, 83-84, 113).

With respect to the fact of occurrence, section 56.12068 prohibits unauthorized entry. Therefore, it is reasonable to conclude that this standard requires locked transformer buildings. Thus, the respondent's chain, which secured the door in a closed unlocked position, could not prevent the entry of an unauthorized individual. Consequently, this condition was properly cited as a violation of section 56.12068. The uncontroverted testimony of Collier establishes that the transformer frames were not grounded as required by section 56.12025. Consequently, the record establishes a violation of the cited standard in section 56.12025.

However, the likelihood of injury as a result of these violations is remote given the remote location of the transformer building, the danger sign posted on the building, the shut-off switch outside the building, the properly grounded incoming cables, and, the sheltered transformers making a short unlikely. Accordingly, the low gravity of these citations warrants a civil penalty of \$25 for each citation.

#### ORDER

In view of the above, Citation No. 430 1221 IS VACATED. Citation Nos. 430 1222, 3606005, 3606006 and 3606007 ARE AFFIRMED. Consequently, IT IS ORDERED that the respondent pay a total civil penalty of \$236 in satisfaction of the four affirmed citations in this matter. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of the \$236 payment,  
Docket No. SE 94-4 17-M IS DISMISSED.

Jerold Feldman  
Administrative Law Judge

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