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SOL (MSHA) V. SERVTEX MATERIALS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. CENT 82-31-M
A.C. No. 41-00059-05013

v.

Ogden Quarry & Plant Mine

SERVTEX MATERIALS COMPANY,
RESPONDENT

DECISION

Appearances: James J. Manzanares, Esq., Office of the Solicitor,
U. S. Department, Dallas, Texas, for Petitioner
Ed S. Chapline, III, Esq., Dallas, Texas,
for Respondent

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent, Servtex Materials Company, (Servtex), with violating five safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (the "Act").

After notice to the parties, a hearing on the merits was held in San Antonio, Texas on November 30, 1982.

The parties filed post trial briefs.

Issues

- 1) Is the Secretary estopped from issuing citations for safety violations when no citations for the same conditions were issued during previous inspections?
- 2) If not, did respondent violate the regulations?
- 3) If a violation occurred, what penalties are appropriate?

Synopsis of the Case

During an inspection in June 1981 of respondent's New Braunfels facility (engaged in crushing limestone), MSHA Inspector Pascual Herrera issued five citations under the authority of section 104(a) of the Act.(FOOTNOTE 1) The citations charge violations of the Act's safety regulations due to an unguarded coupling, insufficiently guarded pulleys, as well as an inadequate transformer fence.

Approximately fifty-three previous inspections of the facility by Herrera and other MSHA inspectors had not resulted in the issuance of citations for the violations charged in this case (Tr. 71). Petitioner seeks an order affirming four citations and proposed civil penalties. Petitioner also moved to vacate one of his citations.

Discussion

Failure of MSHA to issue citations at previous inspections.

As a threshold matter Servtex contends the citations are invalid. This defense arises from the fact that on 53 prior inspections no citations were issued on these conditions. Servtex suggests that Herrera's issuance of citations for newly noticed safety violations demonstrates an incorrect use of subjective standards and a minimal understanding of the operation and function of the machinery involved. Servtex further contends that an operator must rely, in part, on the results of previous inspections to determine the efficiency of its compliance with safety regulations.

Servtex's arguments lack merit. The evidence of record does not support Servtex. Further, the case law is contrary to that view. Generally, an operator's reliance on prior inspections does not estop the Secretary from bringing an action on newly discovered safety violations. *Midwest Minerals, Inc.*, 3 FMSHRC 251 (January 1981)(ALJ); *Missouri Gravel Co.*, 3 FMSHRC 1465 (June 1981)(ALJ). Furthermore, Inspector's Herrera's 27 years of mine safety experience, and an additional seven and a half years as a MSHA inspector hardly suggest lack of knowledge and experience in dealing with mine machinery and related safety issues (Tr. 10, 11).

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The failure of previous inspections to result in the issuance of citations for the safety violations charged in this case does not indicate that the Servtex facility is in automatic compliance with the appropriate safety regulations. It is necessary, then, to examine each of the citations issued to determine if any violations occurred.

Citation 174561

Inspector Herrera issued this citation for an unguarded coupling on a drill at Servtex's plant. It alleges a violation of Title 30, C.F.R., Section 56.14-1(FOOTNOTE 2) (Tr. 17, P2, P6).

Herrera testified that a six inch coupling connects and lies between the V-belt drive shaft and the transmission. While the coupling on the drill is only 18 inches from a walkway, it is separated from the walkway by a guard for the V-belt drive; the guard is 14 to 15 inches high. The area is further enclosed by a hand rail (Tr. 52).

Petitioner claims that a serious or fatal accident could occur if a miner were to become entangled in the coupling due to a fall or in the performance of maintenance duties (Tr. 21).

In conflict with such testimony, Servtex claims that the coupling was enclosed in a box-type guard, and was effectively separated from the walkway by the 24 inch V-belt drive guard (Tr. 33). In addition, witness John Faust (assistant plant manager) testified that an injury due to the coupling is unlikely. The coupling moves only when the transmission is engaged by the drill operator in the cab. In addition, the coupling is not serviced or repaired while the drill is in operation (Tr. 87, 88).

I accept MSHA's evidence but a fair reading of the record and a study of the drawing (P6) establishes that this coupling was guarded by location. Section 30 C.F.R. 56.14-1 only requires guarding when the moving parts "may be contacted by persons %y(3)4B" It follows that when the Secretary charges a violation of Section 56.14-1 he must show that the unguarded part may be "contacted by persons." Kincheloe & Sons, Inc., 2 FMSHRC 1570 (June 1980)(ALJ).

In Applegate Aggregates 2 FMSHRC 2403 (August 1980) I vacated a citation charging a violation of Section 56.14-1. In that case the unguarded machine part was in a location where it was unlikely that a worker would come in contact with it; further, a guard rail prevented ready access to the part; in addition, the equipment was shut down when maintenance was performed.

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Similar facts exist in this case. The coupling cited as a safety violation is separated from the walkway by both a V-belt drive guard and a hand rail, and it is not serviced while the drill is in operation. The mandatory regulation was therefore improperly applied. Citation 174561 should be vacated.

Citation 174568

At the commencement of the hearing the Secretary moved to vacate this citation (Tr. 7). The motion was granted and the order is formalized in this decision (Tr. 8).

Citation 174569

This citation alleges a violation of Title 30, C.F.R., Section 56.14-3.(FOOTNOTE 3)

The citation was issued for an insufficient guard at the head and tail pulley on a reversible conveyor at Servtex's plant. Herrera testified that the guard extended eight inches above the pulley's top pinch point. But the bottom pinch point was exposed as the pinch point was 3 1/2 feet beneath the bottom of the guard. The exposed pinch point was adjacent to a walkway (Tr. 72, Exhibit P7).

Herrera stated that both pinch points subjected miners to potential dangers. The guard extending above the pulley was felt to be inadequate because the conveyor belt was smaller than the pulley, thereby creating an exposed pinch point. A person performing service duties or removing debris from the top of the conveyor could therefore be caught (Tr. 30). The unguarded pinch point on the bottom of the pulley (and adjacent to the walkway) exposed miners to potentially serious injuries should they fall or reach into the area (Tr. 29).

Servtex offered evidence that the space between the shaft of the pulley and the walkway was a distance of 20 to 24 inches and that the radius of the pulley was approximately nine inches (Tr. 89, 100). I find additional

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conflicting testimony offered by Servtex to be unconvincing. (FOOTNOTE 4) A photograph of the pulley, offered by Servtex, does not shed light on the dispute: the angle of the photograph and a person's foot effectively obstruct the view of both the pulley and the alleged gap in the guard (Exhibit R8).

I find from MSHA's evidence that: the bottom pinch point was approximately 27 inches below the guard, and 15 inches above the walkway. (FOOTNOTE 5) I therefore accept MSHA's evidence that the bottom pinch point on the pulley was unguarded. The unguarded pinch point, adjacent to a walkway, posed a foreseeable hazard to a miner's safety. It was readily accessible to miners in the normal course of their duties, and was not indirectly guarded by location. A previous case has upheld a citation issued for a similar condition. Central Pre-Mix Concrete Co., 1 FMSHRC 1424 (September (1979) (ALJ). Citation 174569 should be affirmed.

Citation 174575

This citation also alleges a violation of a mandatory safety standard, 30 C.F.R. Section 56.14-3. (FOOTNOTE 6) Servtex is charged with failing to provide an adequate head pulley guard.

Inspector Herrera testified that the 4 1/2 foot pulley guard extended ten inches above the pinch point created by the pulley and conveyor belt (Tr. 58, 65). The width of the conveyor belt was smaller than that of the pulley, creating an exposed area on each end of the pulley of about four inches (Tr. 34, 35). Such a situation created two pinch points and made the guard less effective than it would have been if the conveyor belt and guard were directly adjacent to one another (Tr. 29, 34). The pulley was surrounded on three sides by a walkway (Tr. 35). Serious injuries could be suffered should a miner fall against the exposed part of the pulley, or reach in and be caught in the pinch point (Tr. 35).

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On the other hand, Servtex claims that its pulley guard was adequate. It asserts that MSHA Management Letter No. 80-39 requires guards to extend only "a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley." Servtex also argues in its reply brief (page 2) that accidental contact with the pinch points is "extremely unlikely" and that deliberate acts of reaching over the guard cannot be prevented.

I disagree with Servtex's construction of the evidence. It is true that it is unlikely that a miner would reach behind the guard and be caught in the pinch point. But in the unguarded area contact could readily be made. Exhibit P8 illustrates this point. A photograph of a pulley guard offered by Servtex (Exhibit R11) does not alter my conclusion, since statements made during the hearing suggest that the pulley guard depicted in the photograph was not the one cited by Herrera (Tr. 68).

The Commission case law establishes that where a miner can become entangled in pinch points during the ordinary course of duties then the citation should be affirmed. Belcher Mine, Inc., 5 FMSHRC 584 (March 1983) (ALJ); Central Pre-Mix Cement Co., 1 FMSHRC 1424 (September 1979) (ALJ).

Therefore, I accept Herrera's assessment of the hazard involved with the head pulley guard. The potential of entanglement in the pinch point, even though "extremely unlikely," does exist. Accordingly, Citation 174575 should be affirmed.

This is an appropriate place to discuss the factual differences between Citation 174561 and the remaining guarding citations. In citation 174561: Exhibit P6 shows the coupling in this citation to be guarded by location. It would virtually be impossible for a miner to be exposed to the hazard of the unguarded coupling. On the other hand, exposed pinch points in the other citations are not so guarded. In sum, the later violative conditions expose a miner in the ordinary course of his work to the hazard of entanglement.

Citation 174573.

This citation charges respondent with a violation of Title 30, C.F.R., Section 56.12-67, (FOOTNOTE 7) due to an allegedly inadequate transformer fence.

The uncontroverted evidence establishes the following facts:

The fence around the transformer was 6 to 6 1/2 feet high (Tr. 39, 91).

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A "muck pile" had been allowed to accumulate outside the fence, with one foot to 18 inches of debris settling against the fence over a distance of 6 to 8 feet (Tr. 91, 121, P9).

The foregoing facts establish a violation of Section 56.12-67. The pile of debris that had accumulated against the transformer fence effectively reduced the fence's height to less than 6 feet. Therefore, Citation 174573 was properly issued, and it should be affirmed.

Civil Penalties

Petitioner proposes the following civil penalties for the three citations that are to be affirmed:

Citation 174569	\$98
174573	60
174575	44
Total	\$202

Section 110(i) [now 30 U.S.C. 820(i)] of the Act sets forth six criteria to be considered in determining civil penalties:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Concerning prior history: The MSHA computer printout indicates that Servtex was assessed 22 violations from June 1979 to the beginning of June 1981 (Exhibit P1). Fifteen citations were issued during June 1981, four of which are at issue in this case (Tr. 15).

Concerning size: Servtex is a medium-sized operator. The evidence indicates that 105 people are employed at Servtex's Ogden Quarry and Plant. The number of man-hours worked was approximately 54,605 hours for the first quarter of 1981 (Tr. 42, 43).

Concerning negligence: The violative conditions should have been obvious to the operator.

Concerning the effect on operator's ability to continue in business: This is essentially an affirmative issue to be established by the operator. Buffalo Mining Co., 2 IBMA 226 (1973). Since no argument was advanced by Servtex that payment of the proposed penalties would impair its ability to continue in business, I assume that no such adverse affect will be suffered through payment of assessed penalties.

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Concerning gravity: The gravity of each violation is moderate. Protective devices had been provided in each instance, but such devices were insufficient.

Concerning good faith: The record establishes that Servtex promptly abated the violative conditions.

After considering all the statutory criteria, I conclude that the penalties proposed by petitioner for Citations 174569, 174575, and 174573 are appropriate.

The Solicitor and Servtex's counsel filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Based on the findings of fact and conclusions of law herein, I enter the the following:

ORDER

1. Citations 174561 and all penalties therefor are vacated.
2. Citation 174568 and all penalties therefor are vacated.
3. Citation 174569 and the proposed penalty of \$98 are affirmed.
4. Citation 174573 and the proposed penalty of \$60 are affirmed.
5. Citation 174575 and the proposed penalty of \$44 are affirmed.
6. Respondent is ordered to pay the sum of \$202 within forty (40) days of the date of this order.

John J. Morris
Administrative Law Judge

FOOTNOTES START HERE-

1 Section 104(a) provides in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

2 The cited section, 30 C.F.R. 56.14-1, provides as follows:

Mandatory. Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shaft; 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.

3 The cited section 30 C.F.R. 56.14-3 provides as follows:

Mandatory. Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

4 Respondent also claims that the bottom of the pulley and the lower pinch point extend below the walk way, and that both pinch points were covered by a guard (Tr. 89).

5 Figures are derived from the following measurements:

(a) Distance from guard to walkway = 42"

(b) Distance from shaft of pulley to walkway = 24"

(c) Radius of pulley = 9"

(d) Distance between walkway and bottom of pulley (and pinch point) = (b)-(c) = 15"

(e) Distance from bottom of guard and pinch point = (a)-(d) = 27" .

(Transcript at 72, 89, 100, P7).

6 The standard is cited in footnote 3.

7 The section provides as follows:

Mandatory. Transformers shall be totally enclosed, or shall be placed at least 8 feet above the ground, or installed in a transformer house, or surrounded by a substantial fence at least 6 feet high and at least 3 feet from any energized parts, casings, or wirings.