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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. WEST 84-87-M A.C. No. 05-03007-05509
v.	Ralston Quarry
ASPHALT PAVING COMPANY, RESPONDENT	

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Shane Rogers, Safety Director, Asphalt Paving Company, Golden, Colorado, for Respondent.

DECISION

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977 (the Act), arose out of the investigation of a conveyor accident which occurred at respondent's rock quarrying and crushing operation on November 10, 1983. Respondent, Asphalt Paving Company (Asphalt), concedes the two violations cited by the investigating inspectors, but contests the appropriateness of the penalties proposed by the Secretary of Labor (the Secretary). For Citation No. 2099795, the Secretary proposes a civil penalty of $1,500.00. For Citation No. 2099796 he proposes $500.00. At the evidentiary hearing held in Denver, Colorado on March 20, 1985, the Secretary was represented by counsel; Asphalt was represented by its safety officer. Both parties waived the filing of post-hearing briefs.

REVIEW OF THE FACTS

The facts giving rise to the two citations in this case are essentially undisputed. Respondent conducts a stone quarrying and crushing operation in connection with its paving business. At the time of the accident which produced the citations, it employed approximately 200 persons. Of these, 8 to 12 were employed in the quarrying and crushing operation which was subject to the regulatory provisions of the Act.

The morning of November 10, 1983 was cold and wet. Snow had fallen the night before. Under such conditions, the head roller on the large belt conveyor at the crusher site tends to become clogged, necessitating cleaning. The conveyor is electrically powered; the controls (on-off switches) are located in a small building some 80 feet from the conveyor.

One mine employee, the crusher operator, had been working with another employee, a laborer, cleaning frozen mud from the conveyor rollers. The latter worker became cold and walked to the conveyor-control building to warm up. While he was there, the crusher operator came to the building, switched on the power, returned to the conveyor, crawled inside its frame, and proceeded to knock mud from the return roller with a claw hammer. The man was caught up between the moving belt and roller. He suffered severe, non-fatal injuries before he could be freed.

The laborer, who claimed to have specifically warned the victim against working on the machine with the power on, had quickly turned off the power when he saw that his co-worker was in difficulty.

Asphalt had a general policy that electrical power was to be locked out during maintenance and repair procedures. The company did not enforce that policy, however, for cleaning mud from the return pulleys. Instead, Asphalt expected its employees to work as a team with one at the controls in the control building, and the other at the roller. Upon a signal from the person at the roller, the employee at the control would "bump" the belt forward a short distance, thus exposing a fresh segment of the roller. The team would repeat this procedure several times to clean the entire surface of the roller (Tr. 58-60, 64-65). In addition, the employee at the roller was expected to keep his distance from the roller by using a shovel to scrape off the accumulated mud (Tr. 65).

Upon the completion of their investigation, the federal inspectors issued two citations. In the first, Citation No. 2099795, they charged Asphalt with a violation of 30 C.F.R. 56.14-33, which provides:

> Pulleys of conveyors shall not be cleaned manually while the conveyor is in motion.

The Secretary proposes a penalty of $1,500.00 for this violation.

The second citation, No. 2099796, charges a violation of 30 C.F.R. 56.12-16, which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The Secretary asks for a $500.00 penalty for this violation.

DISCUSSION

Since Asphalt admits the violations charged, the only issue to be decided here is what penalties are appropriate under the Act. Asphalt complains that the proposed penalties of $1,500.00 and $500.00 are excessive. For the reasons which follow, I must agree.

Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The evidence discloses that the overall size of Asphalt's business was moderate, whereas the mining portion of the business was quite small. Records introduced by the Secretary show that in the two years immediately prior to the violations in this case, the company had 36 paid violations. The penalties were mostly small, totaling $1,111.00. For an operator of Asphalt's size, this history of prior violations is moderate. The evidence indicates that Asphalt's ability to continue in business would not be adversely affected by payment of the penalties proposed by the Secretary. The evidence also indicates that Asphalt abated both violations swiftly. The violations were of a high order of gravity. The severe injuries received by the crusher operator are ample proof of that.

We now consider the most important penalty criteria under the facts of this case: negligence. Asphalt maintains that the

violations would not have occurred had the accident victim observed the well-known company policies concerning cleaning of the conveyor rollers. Plainly, this plea enjoys some validity. Such evidence as there is shows that the crusher operator, for reasons we shall never know, decided to start the conveyor himself and to clean it himself. Worse, he climbed several feet into the framework of the machine to work on the roller at close range. I am inclined to give credence to the evidence which shows that Asphalt had instructed its workers to use a two-man team to clean the rollers--one starting and stopping the belt on signal, the other knocking the mud off with a shovel.(Footnote.1)

Had the victim followed those precepts there presumably would have been no violations of 30 C.F.R. 56.14-33. The conveyor would not have been "in motion" while the cleaning took place.(Footnote.2)

The question about "lockouts" under 30 C.F.R. 56.12-16 is more complex. Arguably, the two-man procedure used by Asphalt is a measure, other than lockout, "which shall prevent the equipment from being energized without the knowledge of the individuals working on it." I decline to decide that question because it is not truly in issue. It was not briefed, and, indeed, was never directly raised or discussed at the hearing.(Footnote.3) What is clear is this: when the crusher operator proceeded to energize the conveyor with the intent of working on it himself, he violated that part of the standard which requires that "[e]lectrically powered equipment shall be deenergized before mechanical work is done. . . ."

If a miner deliberately disregards a company safety policy, does it follow that the mine operator is free of negligence for penalty purposes? I hold that it does not. Even if the offending miner is shown to have known of the policy, there must be more. There must also be evidence that the policy was vigorously enforced. Put another way, the miner must know that he will be subject to some sanction, some form of meaningful discipline, if he violates safety practices. Without such an expectation, company safety rules may merely be seen by workers as non-compulsory company preferences.

In the present case I am convinced that the accident victim had to know that he was ignoring safety rules. Lacking evidence that he could reasonably expect the imposition of substantive disciplinary measures by management, however, I must find that some degree of fault still resides with Asphalt.

Having carefully considered all the evidence bearing upon the statutory criteria for penalty assessments, with particular emphasis on the negligence factor, I conclude that the appropriate assessments are as follows:

For Citation No. 2099795, $800.00
For Citation No. 2099796, 200.00

CONCLUSIONS OF LAW

Consistent with the findings contained in the narrative portion of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this case.

(2) Asphalt, the respondent, admits violation of 30 C.F.R. 56.14-33 as charged in Citation No. 2099795 and violation of 30 C.F.R. 56.12-16 as charged in Citation No. 2099796.

(3) A civil penalty of $800.00 is appropriate for the violation of 30 C.F.R. 56.14-33.

(4) A civil penalty of $200.00 is appropriate for the violation of 30 C.F.R. 56.12-16.

ORDER

Accordingly, it is ORDERED that Asphalt pay a total civil penalty of $1,000.00 within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 As to whether cleaning with a shovel is a "manual" cleaning under the standard need not be decided in this case. Cleaning with a short claw hammer clearly is "manual" since common sense dictates that it is not appreciably safer than use of the hands alone.

~Footnote_two

2 One of the federal inspectors testified that the laborer who had been working with the accident victim earlier in the morning admitted that it was "common practice" to clean the conveyor belt while it was in motion. The matter was apparently pursued no further. The declarant may well have been referring, in an unsophisticated way, to the two-man "bumping" procedure for cleaning. It is clear that the declarant himself understood that it was wrong to try to clean a roller in the way the crusher operator was doing at the time of his accident. I accord the admission little weight.

~Footnote_three

3 At one point counsel for the Secretary did assert, in response to a question from the judge, that she was not able to say if the government had a position on whether or not the two-man procedure was violative of 30 C.F.R. 56.12-16 (Tr. 62).