

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th ST. SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

February 7, 2022

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

v.

P.W. GILLIBRAND OF TEXAS, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2021-0104
A.C. No. 41-03618-529109

Mine: Voca West

DECISION

Appearances: Maria C. Rich-DoByns, CLR, U.S. Department of Labor, MSHA, 1100
Commerce Street, Room 462, Dallas, TX 75242

Meghan Neal, P.W. Gillibrand Co., Inc., 1000 Oglebay Norton Drive,
Brady, TX 76825

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against P.W. Gillibrand of Texas, Inc. (“PWG” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.¹ This case involves two Section 104(a) citations with a total proposed penalty of \$250.00. Respondent has withdrawn its contest of Citation No. 9516972, so only Citation No. 9516971 remains in dispute. Jt. Stip. 9.

The parties presented testimony and documentary evidence regarding the citation at issue at a virtual hearing held on September 23, 2021. MSHA mine safety and health specialist Ty Fisher testified for the Secretary. PWG environmental health and safety manager Jimmy Palacio

¹ In this decision, the joint stipulations, transcript, Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively.

testified for Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation No. 9516971, as modified herein.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. P.W. Gillibrand, at all times relevant to these proceedings, engaged in mining activities and operations at the Voca West (Mine I.D. 41-03618) (the "Voca West Mine") in McCulloch County, Texas.
2. P.W. Gillibrand is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").
3. P.W. Gillibrand's mining operations affect interstate commerce within the meaning and scope of § 4 of the Mine Act, 30 U.S.C. § 803.
4. Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mine where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.
6. The individual whose signature appears in Block 22 of the contested citations at issue in this proceeding is an authorized representative of the United States of America's Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citations at issue in these proceedings.
7. The citations at issue in this proceeding were properly served upon P.W. Gillibrand, as required by the Mine Act.
8. The penalties associated with the violations in this docket if imposed, will not affect the Mine's ability to remain in business.
9. The Respondent agrees to withdraw contest of Citation No. 9516972 and agrees to pay the assessed penalty of \$125.00.

Tr. 7-8, 12.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

PWG operates the Voca West mine, a sand plant located in McCulloch County, Texas. Tr. 22, 82; Jt. Stip. 1. On October 7, 2020, MSHA mine safety and health specialist Ty Fisher² arrived at the mine to conduct a regular EO-1 inspection. Tr. 23. While inspecting the site, he

²Ty Fisher has worked for MSHA for two years and 10 months. Tr. 19. He has worked in the mining industry for many years, including as a safety director and as a firefighter. Tr. 20-21.

was accompanied by three members of mine management: shift supervisor Mike Weeks, environmental health and safety manager Jimmy Palacio, and manager Tony Vargas. Tr. 26-27. Fisher traveled throughout the mine and inspected the pit, tire plant, fuel island, shop, and offices. Tr. 28.

While inspecting the shop area, Fisher issued a citation when he discovered there were no readily visible warning signs prohibiting smoking or open flames at the grease station used to service equipment. Tr. 28-29, 76; Ex. S-1-1. Fisher explained at hearing that there were three barrels present at the grease station. Tr. 29. One 55-gallon barrel contained a red grease and was hooked up to a grease gun. Tr. 30, 38, 79, 111; Exs. S-1-2, S-2-1A, S-2-9. That barrel also had grease on the outside of it and was connected to an air pump located on top of the barrel. Tr. 38; Ex. S-2-9. A second 55-gallon barrel was mostly empty except for green grease residue along the inside of it. Tr. 30, 39, 79; Exs. S-1-2, S-2-1A, S-2-11. A third, 33-gallon barrel was located below the grease gun to catch drips, but also contained four inches of combustible trash inside. Tr. 30-31, 34-35, 79; Exs. S-1-2, S-2-1A, S-2-8A.

Fisher testified that he believed the grease barrels posed a fire hazard because the combustible materials stored in the open barrel could be easily ignited by a spark and potentially cause the grease to burn. Tr. 35, 40. Fisher noted that grease fires emit toxic fumes and are harder to extinguish than other types of fires. Tr. 40. To terminate the violation, the mine installed a warning sign at the grease station. Tr. 52, 85; Ex. S-2-12.

PWG's environmental health and safety manager, Jimmy Palacio,³ testified for Respondent. Examining the safety data sheet for the green grease, he explained that he did not believe the green grease posed a fire hazard. Tr. 94; Ex. R-E-4. Palacio did not believe a warning sign cautioning against smoking and open flame would be a reasonable precaution to implement for this material. Tr. 105-06.

IV. DISPOSITION

During his inspection on October 7, 2020, Fisher issued 104(a) Citation No. 9516971, which alleged:

The grease station area at the shop had no warning signs prohibiting no smoking or open flames readily visible. The combustible grease barrels (3) that are used to grease equipment if ignited are a fire hazard to miners working near them, exposing them to burn injuries and smoke inhalation. There was no ignition source observed in the immediate are. The maintenance shop has an available fully functional fire extinguisher nearby.

Ex. S-1-1; Tr. 28.

³ Jimmy Palacio has worked for PWG for 18 months, oversees three mines, and has over seven years of experience working in mine safety and health. Tr. 81.

Fisher designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.4101 that was unlikely to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” would affect one miner, and was caused by PWG’s moderate negligence. Ex. S-1-1.

A. Fact of Violation

The Commission has long held that “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary’s burden as:

The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). For the reasons that follow, I find that the Secretary has presented sufficient evidence to show that PWG violated 30 C.F.R. § 56.4101.

30 C.F.R. § 56.4101 provides that “[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.” The Secretary asserts that the mine’s grease station posed a fire hazard. Sec’y Br. at 5-6. At the grease station, there were three barrels: one closed barrel containing a red grease, one closed barrel with residue of a green grease coating the inside, and one open barrel catching drips of the red grease with about four inches of trash inside it. Respondent presented testimony and documentary evidence regarding the flammability of the green grease but failed to meaningfully address the relevant properties of the red grease. The safety data sheet for the green grease conveys that that the grease is “not considered flammable or combustible, but this product will burn if involved in a fire.” Ex. R-E-1. The grease will also emit toxic fumes when burned. *Id.* Fisher testified that the grease at the grease station was a combustible liquid, and, while it did not pose an explosion hazard, it did present a fire hazard even though the grease was not flammable. Tr. 57-58.

As Fisher testified at hearing, the green grease at issue here “is not the only fire hazard.” Tr. 76. There were two greases present alongside paper and other trash. While the flammability of the red grease was not established, it is clear that the paper and rags present in the open barrel posed a fire hazard because they are undoubtedly flammable. Given the presence of that trash, and its proximity to grease that emits toxic fumes when burned, I find that the condition of the grease station at Voca West posed a fire hazard. 30 C.F.R. § 56.4101 requires signage to be posted where a fire or explosion hazard exists, and by failing to post signage at the grease station, PWG violated the standard.

B. Gravity

Fisher designated the citation as unlikely to cause an injury that could be reasonably expected to result in lost workdays or restricted duty. Ex. S-1-1. At hearing, Fisher explained that there was no potential ignition source at the grease station, and that the area is only used to

service equipment at certain times, so there was low exposure to the hazard. Tr. 41, 45. He marked “lost workdays or restricted duty” because, if a fire were to occur in the area, the most likely injuries would be smoke inhalation or burns. Tr. 46. There were clear and open escape routes on three sides of the grease station, so someone affected by the hazard would be able to get away from it. Tr. 46. Because the citation is marked “unlikely,” it is not considered a significant and substantial violation. Tr. 46. Respondent did not contest the gravity designations for this violation, and I find the designations made by the inspector to be appropriate.

C. Negligence

Under the Mine Act, operators are held to a high standard of care, and “must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d). MSHA’s regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Fisher determined that the violation was a result of PWG’s moderate negligence, explaining at the hearing that “the operator should have known to put up warning signs prohibiting smoking and no open flames,” but there were mitigating circumstances. Tr. 47. The grease station had been put in only one or two months before the inspection, and supervisors were unaware that there was no signage posted. Tr. 47. Fisher also stated that there were numerous other signs prohibiting smoking and open flames throughout the mine site, which “showed that they do their due diligence and it was just an oversight.” Tr. 47.

PWG should have known to put up a warning sign at the grease station. However, given the considerable mitigating circumstances, I reduce PWG’s negligence from moderate to low for this citation.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

- (1) the operator’s history of previous violations,
- (2) the appropriateness of such penalty to the size of the business of the operator charged,
- (3) whether the operator was negligent,
- (4) the effect on the operator’s ability to continue in business,
- (5) the gravity of the violation, and
- (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

For Citation No. 9516971, the Secretary proposed a regularly assessed penalty of \$125.00. PWG has a minimal violation history and is a relatively small operator. Tr. 24-25, Ex. S-5. The parties stipulated that the penalty will not affect PWG's ability to continue in business. Jt. Stip. 8. As discussed above, I find that this non-S&S violation was unlikely to result in an injury causing lost workdays or restricted duty and was the result of PWG's low negligence. Finally, PWG demonstrated good faith in quickly installing a sign to achieve compliance with the cited standard. In light of these considerations, I find that the proposed penalty of \$125.00 is appropriate.

For Citation No. 9516972, the Secretary has proposed a regularly assessed penalty of \$125.00. PWG has withdrawn its contest of this violation and agreed to pay the proposed penalty. Jt. Stip 9. As required by the Mine Act, I have considered the representations and documentation submitted and conclude that the proposed penalty is appropriate under the criteria set forth in Section 110(i) of the Act.

VI. ORDER

It is hereby **ORDERED** to pay the Secretary the total sum of **\$250.00** within 40 days of this order.⁴



David P. Simonton
Administrative Law Judge

⁴ Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

Distribution: (Email⁵)

Maria C. Rich-DoByns, CLR, U.S. Department of Labor, MSHA, 1100 Commerce Street, Room 462, Dallas, TX 75242 (dobyms.maria@dol.gov)

Jimmy Palacio, P.W. Gillibrand of Texas, Inc., 1000 Oglebay Norton Drive, Brady, TX 76825 (jimmy.palacio@pwgtx.com)

Meghan Neal, P.W. Gillibrand Co., Inc., 1000 Oglebay Norton Drive, Brady, TX 76825 (meghan.neal@pwgcoinc.com)

⁵ For the foreseeable future, Federal Mine Safety and Health Review Commission (FMSHRC) notices, decisions, and orders will be sent only through electronic mail. Because FMSHRC will not be monitoring incoming physical mail or faxes, parties are encouraged to submit all filings through the agency's electronic filing system. If you are not able to file through our electronic filing system, please send an email copy and we will file it for you.