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SOL (MSHA) V. GALLAGHER & BURK INC.
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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. DENV 79-517-PM
A/O No. 04-00113-05001

v.

GALLAGHER AND BURK, INCORPORATED,
RESPONDENT

Mine: Leona Quarry and Mill

DECISION

APPEARANCES:

Linda Bytof Esq.
United States Department of Labor
11071 Federal Building
450 Golden Gate Avenue, P O Box 36017
San Francisco, California 94102,
for the Petitioner

Joseph D. Ryan Esq.
Gallagher & Burk, Incorporated
344 High Street
Oakland, California 94601,
for the Respondent

Carlson, Judge:

This cause was heard under the Federal Mine Safety and Health Act of 1977, 30 USC 801 et seq. ("the Act"), upon the Mine Safety and Health Administration's petition for assessment of civil penalties for three violations of mandatory safety standards. Two of the alleged violations involved grounding of explosive magazines; the other a defective horn on a front-end loader.

Neither party elected to file a post-hearing brief, but both made oral arguments at the close of the hearing.

DISCUSSION OF VIOLATIONS
AND PENALTIES

Citations 374685 and 374686 - Grounding of Explosive Magazines.

The undisputed evidence shows that respondent maintained two explosives storage magazines near the access road to its quarry. These steel structures, about 6 feet high and 6 feet square, rested on steel skids. In one, respondent stored 450 pounds of dynamite; in the other it stored 250 detonating caps.

Inspector George Costanich examined the magazines on January 2, 1979, and concluded neither was grounded as required by 30 CFR 56.6-20(e), which provides:

56.6-20 Mandatory. Magazines shall be: (e) Electrically bonded and grounded if constructed of metal.

Inspector Costanich cited respondent based upon his belief that grounding required that the magazines be connected directly to the earth by a heavy wire attached to a metal rod driven into the earth.(FOOTNOTE 1) He testified that grounding is necessary to dissipate stray discharges of static electricity, particularly lightning.

It was undisputed that such discharges could ignite the explosives in the magazines, and that the resulting concussion and flying debris could inflict serious injury to employees on the nearby roadway or coming and going from the magazines themselves.

Respondent did not concede that the magazines were ungrounded. Rather, counsel sought to establish through cross-examination and argument that it was enough that the skids were in contact with the ground. Respondent succeeded in showing that the Secretary's inspector lacked any profound expertise in the theory of electrical phenomena. On the other hand, Inspector Costanich did demonstrate extensive practical experience with static grounding practice in storage of explosives. He indicated that wire-and-rod grounding technique was universal in other magazines he had inspected for MSHA, and those he had known while handling explosives as a miner. He supported his view by reference to Bulletin No. 256, "Static Electricity", a safety publication of the United States Department of Labor (ultimately admitted as respondent's exhibit 2) (Tr. 116). At page 7 that publication defines "grounding" as "... the connecting of a conductive body to earth by means of a conductive wire." (Emphasis added.) Costanich also relied upon a booklet entitled "Hazard of Electricity", published by

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the American Oil Company (respondent's exhibit 3) which defines bonding and grounding thusly at page 37:

Bonding means connecting two objects together with metal, usually a piece of copper wire. Grounding consists of connecting an object to earth with metal, and again a piece of copper wire is used. The connection to earth is usually made to a ground rod or underground water piping.

Respondent does not challenge the authoritative quality of either source.

I conclude that petitioner's understanding of this standard is correct: that a metal magazine merely resting on the earth is not "grounded." In doing so, I specifically reject respondent's suggestion that the standard is too vague for enforcement. The term "grounded" has a commonly accepted meaning when applied to electrical safety.

In this connection, one further matter deserves mention. Respondent points to this statement in the American Oil booklet at pages 28 and 29 relating to storage structures for flammable liquids:

Special grounding of steel tanks is not needed for lightning protection. Tanks resting on the earth, or even on concrete rings with piping disconnected, have such low electrical resistance to ground that special grounding is not necessary.

Respondent contends its steel magazines are likewise adequately protected without a wire-and-rod arrangement. The argument is unpersuasive. The language on which respondent relies clearly sets out an exception to ordinary grounding practice. The standard for explosive magazines, by contrast, expressly mandates grounding; and we must assume that that means adherence to common grounding practice. Had the drafters of the standard believed that metal magazines needed no grounding beyond simply resting on the earth, they would not have mentioned grounding at all.

Petitioner initially proposed a penalty of \$40.00 in connection with each of these citations. The record shows that respondent is a small operator and has no prior history of violations (Tr. 6; respondent's answers to requests for admissions numbers 15 and 16).(FOOTNOTE 2) The violations were abated promptly (Tr. 41). The possibility of an accident was relatively remote. Nevertheless, a penalty of \$40.00, as proposed in each case, is warranted. Lightning or stray electrical currents could have caused an explosion in either magazine resulting in serious injury or death to several employees (Tr. 35-38). Potential exposure to the hazard was significant because employees were required to inspect the magazines regularly and often travelled along the mine access road which runs nearby (Tr. 39). Respondent's ability to continue in business would not be affected by

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imposition of this penalty (Tr. 6; respondent's answer to request for admission number 17).

Citation 374687 - - Inoperable Horn

The undisputed evidence shows that on the afternoon of the inspection, respondent was using a front-end loader which had an inoperable horn. The 90,000 pound machine was loading crushed rock at the time. Inspector Costanich cited respondent with a violation of the mandatory standard at 30 CFR 56.9-87, which provides:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The inspector testified that he asked the operator of the loader to sound the horn, which is activated by a floor mounted button, and that it did not function. The operator told him that he did not know when the horn ceased to work, as he had had no occasion to use it that day.

According to the inspector, the horn was intended to warn pedestrians or other vehicles in the path of the machine. The loader had a functioning reverse alarm which he explained would not serve as a warning while the machine was moving forward.

None of these assertions were challenged by respondent. Its counsel suggested, however, that the Secretary did not prove any element of neglect. Under well established principles, however, negligence is not an element necessary for proof of violation of a mandatory standard; it bears only upon penalty. United States Steel Corp., 1 FMSHRC 1306, 1307 (September 17, 1979).

Because of language in the standard relating to reverse alarms, respondent further suggested that the standard does not clearly indicate that a manually operated alarm for forward motion -- an ordinary vehicle horn -- is necessary. I disagree. The words of the standard plainly require an automatic reverse alarm as an additional precaution for equipment with an obstructed view to the rear.

Respondent, through interrogation of the inspector, also seemed to question the utility of the horn. Would an operator, busy with gear changes and brakes, for example, be able to spare a foot for a horn button? This argument goes to the wisdom of the standard, a matter committed by law to the discretion of the Secretary.

Finally, respondent argued that its loading operation was beyond the jurisdiction of the Act. In this regard it relied on an interagency agreement between the Mine Safety and Health

Administration and the Occupational Safety and Health Administration (respondent's exhibit 1). The inspector did acknowledge that the loader in question was loading stockpiled rock into commercial trucks. Respondent points to nothing in the Act or the

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agreement, however, suggesting that the loading activity is not covered by MSHA authority. The Act in Section 3(h)(2)(C) defines "coal or other mine" to include "lands ... used in ... the work of preparing coal or other minerals." "Preparing" is nowhere defined except in Section 3(i) which defines "work of preparing ... coal" to include storage and loading. What is true for coal must be likewise true for other minerals. I find nothing in the facts of this case or the interagency agreement indicating that respondent's loading activity falls outside MSHA jurisdiction. The violation occurred and a penalty is warranted.

Petitioner initially proposed a penalty of \$18.00 in connection with this citation. The hazard created was potentially serious. If the driver were for some reason unable to stop the truck, he could not have warned other vehicles or people in its path. Injuries resulting from a collision could, of course, be serious. The inspector also testified that he observed many vehicles in the area (Tr. 51). Although the inspector admitted that he did not know why or how long the horn had been inoperative (Tr. 73), the relatively low proposal, in my opinion, suggests that that factor was considered in determining the initial assessment. A penalty of \$18.00 will therefore be assessed.

ORDER

Pursuant to the foregoing, it is ORDERED that the penalty proposals for Citations 374685, 374686, and 374687 are affirmed, and that the following penalties shall be paid: for Citation 374685, \$40.00; for Citation 374686, \$40.00; and for Citation 374687, \$ 18.00. It is further ORDERED that respondent shall pay the penalties within 30 days of this order.

John A. Carlson
Administrative Law Judge

~FOOTNOTE_ONE

1 Costanich conceded that the magazines were bonded, i.e. that all metal components were connected to each other by conductive materials.

~FOOTNOTE_TWO

2 These factors have also been considered in determining an appropriate penalty in connection with Citation 374687.