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SOL (MSHA) v. BROWN SAND
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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 Proceedings

Docket No. BARB 79-312-PM
A/O No. 09-00265-05001

v.

BROWN BROTHERS SAND COMPANY,
RESPONDENT

Docket No. SE 79-90-M
A/O No. 09-00265-05002

Docket No. SE 80-58-M
A/O No. 09-00265-05003

Junction City Mine

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for
Petitioner;
Frank J. Jordan, Jr., Esq., Talbotton, Georgia, for
Respondent;

Before: Judge Cook

I. Procedural Background

Petitions for assessment of civil penalty were filed by the Mine Safety and Health Administration (Petitioner) in the above-captioned cases pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act). The three cases allege a total of three violations of various provisions of the Code of Federal Regulations. Answers were filed by Brown Brothers Sand Company (Respondent).

On November 3, 1980, a notice of hearing was issued scheduling the above-captioned cases for hearing on the merits beginning at 9:30 a.m., on December 16, 1980, in Columbus, Georgia. The hearing was held as scheduled with representatives of both parties present and participating. After the presentation of the evidence, both parties were accorded the opportunity to file posthearing briefs and proposed findings of fact and conclusions of law. Counsel for Respondent specifically reserved the right to file a posthearing brief. Accordingly, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law.

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On February 9, 1981, counsel for Respondent filed a written communication indicating that neither party wished to file posthearing briefs because the issues involved in these cases are factual rather than legal. No briefs were filed by either party.

II. Violations Charged

A. Docket No. BARB 79-312-PM

Citation/Order No. 97094, November 20, 1978, 30 C.F.R. 56.12-16.

B. Docket No. SE 79-90-M

Citation No. 98528, May 1, 1979, 30 C.F.R. 56.4-2.

C. Docket No. SE 80-58-M

Citation No. 98541, November 27, 1979, 30 C.F.R. 56.12-32.

III. Witnesses and Exhibits

A. Witnesses

Petitioner called as its witnesses Federal mine inspectors Gartsel G. Hanrick, and Ronald J. Grabner.

Respondent called as its witnesses Steve Brown, a partner and manager; Jerry Mathis, the sand pump operator; and Carl Brown, a partner and manager.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-1 is a computer printout compiled by the Directorate of Assessments setting forth Respondent's history of previous violations for which assessments have been paid, beginning June 28, 1977, and ending June 27, 1979.

M-2 is a computer printout compiled by the Directorate of Assessments setting forth Respondent's history of previous violations for which assessments have been paid, beginning January 19, 1978, and ending January 18, 1980.

M-3 contains three photographs pertaining to Citation/Order No. 97094, November 20, 1978, 30 C.F.R. 56.12-16.

M-4 is the sworn statement of Mr. Steve Brown, dated February 5, 1979, pertaining to Citation/Order No. 97094, November 20, 1978, 30 C.F.R. 56.12-16.

M-5 is a two-page document containing a copy of Citation No. 98528, May 1, 1979, 30 C.F.R. 56.4-2, and a copy of the inspector's statement pertaining thereto.

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M-6 is a two-page document containing a copy of Citation No. 98541, November 27, 1979, 30 C.F.R. 56.12-32, and a copy of the inspector's statement pertaining thereto.

M-7 is a drawing prepared by Federal mine inspector Ronald J. Grabner pertaining to Citation No. 98541, November 27, 1979, 30 C.F.R. 56.12-32.

2. Respondent introduced the following exhibits in evidence:

O-1 is a two-page document containing a copy of Citation/Order No. 97094, November 20, 1978, 30 C.F.R. 56.12-16, and a copy of the inspector's statement pertaining thereto.

O-2 and O-3 are photographs pertaining to Citation No. 98528, May 1, 1979, 30 C.F.R. 56.4-2.

O-4 is a drawing.

O-5 is a drawing.

IV. Issues

Two basic issues are involved in these civil penalty proceedings: (1) did a violation of a mandatory safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Respondent's activities affect commerce within the meaning of the 1977 Mine Act (Tr. 3, 5-6).

2. Respondent employs nine employees for one 8- to 10-hour shift, 5 days a week (Tr. 3, 5-6).

3. The Junction City Mine is the only mine owned by Respondent. Respondent is not a subsidiary of any other corporation (Tr. 3, 5-6).

4. Respondent has no history of previous violations cognizable in Docket No. BARB 79-312-PM (Tr. 3, 5-6).

1. Occurrence of Violation

Federal mine inspector Gartsel G. Hanrick conducted an inspection of Respondent's Junction City Mine on November 20, 1978. At approximately 2 p.m., he issued Citation/Order No. 97094, a combination 104(a) citation/107(a) withdrawal order, citing Respondent for a violation of mandatory safety standard 30 C.F.R. 56.12-16. The citation/order alleges, in pertinent part, that "men were working on the main dredge sand pump replacing the packing without the electric power being locked out" (Exh. O-1). The cited mandatory safety standard provides, in part, that "[p]ower switches shall be locked out or other measures taken which shall prevent the [electrically powered] equipment from being energized without the knowledge of the individuals working on it."

The evidence presented during the hearing establishes that at least one employee was actively engaged in replacing the packing on the main dredge sand pump, a piece of electrically powered equipment, when the citation/order was issued. The power switch, a knife switch, was located approximately 5 to 18 feet from the area where the work was being performed. The equipment had been deenergized by opening the knife switch, thereby breaking the electrical circuit. However, the switch was not locked out and no other measures had been taken to prevent the equipment from being energized without the knowledge of the individual or individuals working on it. If the knife switch had been thrown upward into the "on" position, the pump would have started. The switch was located approximately 36 inches above the floor of the dredge (Exh. O-1, see also Exh. M-4).

Accordingly it is found that a violation of mandatory safety standard 30 C.F.R. 56.12-16 has been established by a preponderance of the evidence.

2. Negligence of the Operator

It appears that the repacking operation had to be performed on a weekly or monthly basis. However, no lock-out procedure existed at the mine. Pulling three fuse jacks was the only means available for complying with the requirements of the mandatory safety standard. The fuse jacks were located on a telephone pole located approximately 20 to 30 feet from the dredge. The fuse jacks were approximately 15 feet above the ground. Pulling the fuse jacks removed all electrical power from the dredge. It can therefore be inferred that Respondent had not established procedure for complying with the requirements of 30 C.F.R. 56.12-16. Accordingly, it is found that Respondent demonstrated a high degree of ordinary negligence.

3. Gravity of the Violation

The packing gland is a retaining ring that holds the packing in place. The four bolts holding the gland in place had been

removed, and the packing gland had been moved back on the shaft a short distance to a point between

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the pump housing and the pillar support bearing. Two employees were present in the work area when the inspection party arrived. One employee was actively involved in the repacking job. His left hand was resting on the shaft and was holding the packing. A tool, such as a screwdriver or punch, was being used to insert the packing material into the opening. The other employee was either observing the repacking operation or rendering assistance. The latter possibility is considered the more probable. There were no other employees on the dredge.

Had the shaft started to rotate, the packing gland would have rotated at a slower rate than the shaft. By holding the packing gland, an employee could have prevented the gland from rotating.

The shaft rotates at a maximum speed of 540 RPMs. In order to reach this speed, two switches must be engaged. Engaging the knife switch causes the shaft to reach a 300-RPM rate of rotation in 5 seconds. Then, a second switch must be engaged to increase rotation to 540 RPMs (Exh. M-4). Injuries could have been sustained as a result of hands, clothing or tools contacting rotating machine parts.

The knife switch had been pulled down to the "off" position and was parallel to the floor of the dredge. In this position, it projected into the walkway which could be used by persons walking on the dredge. Accordingly, it can be inferred that it could have been moved upward accidentally into an "on" position by a passing employee, provided sufficient force was applied.

All factors considered, I find that the occurrence of the event against which the cited standard is directed was improbable. If the event had occurred, one employee would have been exposed to a potentially disabling injury. Accordingly, I conclude that the violation was moderately serious.

4. Good Faith in Attempting Rapid Abatement

The violation was abated immediately by pulling the three power jacks on the nearby telephone pole. Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

C. Citation No. 98528, May 1, 1979, 30 C.F.R. 56.4-2

1. Occurrence of Violation

Federal mine inspector Ronald J. Grabner conducted an inspection at Respondent's Junction City Mine on May 1, 1979. At approximately 11:45 a.m., Inspector Grabner issued Citation No. 98528 citing Respondent for a violation of mandatory safety standard 30 C.F.R. 56.4-2 in that "[t]he no smoking sign for the gasoline storage area could not be readily seen as the post it was on had been [knocked] down" (Exh. M-5). The mandatory safety standard requires that "[s]igns warning against smoking and open flames shall be posted so they can be readily seen in

areas or places where fire or explosion hazards exist."

The gasoline storage area referred to in the citation was a refueling area located outdoors, and consisted of a 1,000-gallon underground fuel tank surmounted by an electrically powered gasoline pump. The post to which the "No smoking" sign was attached was laying on the ground with the sign face down. The sign could not be seen in this position and was therefore not readily visible.

Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. 56.4-2 has been established by a preponderance of the evidence.

2. Negligence of the Operator

When the inspection party reached the fuel storage area and discovered the violation, Mr. Jack Spanks, a foreman employed by Respondent, informed Inspector Grabner that the sign had been knocked down by a truck on April 30, 1979.

Mr. Steve Brown stated that to the best of his knowledge the pole with the no smoking sign was up on the day prior to the citation. He stated that he had no knowledge of the violation until after the citation was issued and that he and Mr. Spanks looked at the site and found big truck tracks near the downed pole. They believed that it had been knocked down on the evening of April 30, 1979, or in the morning of May 1, 1979, the date of the citation. The gas pump was not used every day but could be seen from a road passing through the property on the way to the pit. In view of the short time during which the operators or some of their employees could have seen the violation, the negligence is of a minor nature.

3. Gravity of the Violation

The outdoor fuel storage area was used by a small number of people to refuel vehicles with gasoline. Respondent's customers did not use the refueling facility. No one was using the facility when the inspection was conducted.

It is important to bear in mind that the sign was in place and readily visible until it was knocked down by a truck on April 30 or May 1, 1979. It can therefore be inferred that the men who used the refueling area knew that smoking in such area was prohibited, especially considering the small number of people employed at the mine. Additionally, there is no indication that open flames would have been carried into, or used in, the area. Accordingly, I conclude that an occurrence of the event against which the cited standard is directed was improbable. However, in the event of an occurrence, an explosion resulting in fatal injuries could have occurred.

Accordingly, it is found that the violation was accompanied by moderate gravity.

4. Good Faith in Attempting Rapid Abatement

The violation was abated within the time allotted for abatement (Exh. M-5). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

D. Citation No. 98541, November 27, 1979, 30 C.F.R. 56.12-32

1. Occurrence of Violation

Federal mine inspector Ronald J. Grabner conducted an inspection at Respondent's Junction City Mine on November 27, 1979. At approximately 1:30 p.m., he issued Citation No. 98541 charging Respondent with a violation of mandatory safety standard 30 C.F.R. 56.12-32 in that "[t]he junction box cover for the 220 volt electrical motor for the shaker screen was missing" (Exh. M-6). The cited mandatory safety standard requires that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs."

The evidence presented during the hearing is in accord with the statements contained in the citation. Additionally, the evidence establishes that no testing or repair work was being performed.

Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. 56.12-32 has been established by a preponderance of the evidence.

2. Negligence of the Operator

The record contains no evidence as to precisely how long the violation had been in existence. However, the missing junction box cover was not in the area. It can therefore be inferred that the condition had existed for a sufficient period of time for Respondent to have discovered it. Accordingly, it is found that Respondent demonstrated ordinary negligence.

3. Gravity of the Violation

The leads from the motor and the power leads were exposed. It appears that the opening was somewhat less than 6 inches long by 4 inches wide. However, due to the location of the junction box, it would have been improbable for anyone to achieve contact with the electrical leads (Exh. M-6). The occurrence of the event against which the cited standard is directed was improbable (Exh. M-6). However, if an individual had achieved contact with the exposed 220-volt electrical leads while such leads were energized, a fatal injury could have been sustained (Exh. M-6). No employees were in the area.

Accordingly, it is found that the violation was accompanied by moderate gravity.

4. Good Faith in Attempting Rapid Abatement

The violation was abated within the time period allotted for abatement (Exh. M-6). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

E. Size of the Operator's Business

The parties stipulated that the Junction City Mine is the only mine owned by Respondent, and that Respondent is not a subsidiary of any other corporation. The parties also stipulated that Respondent employs nine employees for one shift of 8 to 10 hours, 5 days a week (Tr. 3, 5-6).

Accordingly, it is found that Respondent is a small operator.

F. History of Previous Violations

The parties stipulated that Respondent has no history of previous violations cognizable in Docket No. BARB 79-312-M (Tr. 3, 5-6).

As relates to Docket No. SE 79-90-M, Respondent had five violations for which assessments have been paid prior to May 1, 1979. None were violations of 30 C.F.R. 56.4-2 (Exh. M-1).

As relates to Docket No. SE 80-58-M, Respondent had seven violations for which assessments have been paid prior to November 27, 1979. Four were for violations of 30 C.F.R. 56.12-32 (Exh. M-2).

G. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of civil penalties in these cases will adversely affect Respondent's ability to remain in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. I find, therefore, that penalties otherwise properly assessed in these proceedings will not impair Respondent's ability to continue in business.

VI. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

2. Brown Brothers Sand Company and its Junction City Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

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3. Federal mine inspectors Gartsel G. Hanrick and Ronald J. Grabner were duly authorized representatives of the Secretary of Labor at all times relevant to the issuance of the citations at issue in these proceedings.

4. The three violations charged are found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Penalties Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

A. Docket No. BARB 79-312-PM

Citation/Order No.	Date	30 C.F.R. Standard	Penalty
97094	11/20/78	56.12-16	\$60.00

B. Docket No. SE 79-90-M

Citation No.	Date	30 C.F.R. Standard	Penalty
98528	05/01/79	56.4-2	\$35.00

C. Docket No. SE 80-58-M

Citation No.	Date	30 C.F.R. Standard	Penalty
98541	11/27/79	56.12-32	\$45.00

ORDER

Respondent is ORDERED to pay civil penalties totaling \$140.00 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge