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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. SE 81-24-M A.O. No. 09-00265-05005
v.	
BROWN BROTHERS SAND COMPANY, RESPONDENT	Junction City Mine

DECISION

Appearances: Ken Welsch, Trial Attorney, U.S. Department of Labor, Atlanta, Georgia, for the petitioner; Carl W. Brown and Steven Brown, pro se, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for one alleged violation of the mandatory safety standard 30 CFR 56.12-23. Respondent filed a timely answer and notice of contest, and a hearing was convened in Columbus, Georgia, on August 31, 1981. The parties appeared and participated fully therein, and they waived the filing of posthearing proposed findings and conclusions. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

Citation No. 090842, November 5, 1980, cites a violation of 30 CFR 56.12-23, and states as follows:

> The connections to the slip rings of the dredge pump drive motor were not guarded. The guard had been left off and the energized components were readily accessable (sic) to the dredge operator.

Testimony and Evidence Adduced by the Petitioner

The citation in question in this case was issued by MSHA Inspector Thomas W. Hubbard, after inspection of the subject mine on November 5, 1980. Mr. Hubbard has since been permanently transferred to California, and to preclude the expense and logistical costs incurred in bringing him to the hearing, petitioner's counsel file a motion pursuant to the Commissions Rules, and the appropriate provisions of the Federal Rules of Civil Procedure, to permit the telephone deposition of Mr. Hubbard and for leave to introduce the deposition at the hearing in lieu of his "live" testimony. The motion was granted, and by Order issued by me on August 6, 1981, petitioner was permitted to take the inspector's deposition. Respondent was afforded a full opportunity to participate in the taking of the deposition, including the right to question and cross-examine the inspector. As a matter of fact, petitioner's counsel arranged for a conference call which would have permitted the respondent to participate in the taking of the deposition without the necessity of his leaving his own mine office and at no travel or other expense to him. However, respondent refused to participate or otherwise cooperate in the taking of the deposition and insisted that MSHA produce the inspector.

Mr. Hubbard's sworn deposition was produced and offered in evidence by the petitioner at the hearing and it was received in evidence and is a part of the record (Tr. 13). Respondent refused to make any comments regarding the deposition, and although given a copy and a full opportunity to refute the testimony, he refused to do so.

In addition to the deposition of Mr. Hubbard, petitioner presented testimony by Supervisory Inspector Reino Mattson and Electrical Inspector Russell Morris. Although Mr. Mattson was not with Inspector Hubbard when he inspected the mine site on November 5, 1980, he has inspected the mine on previous occasions and is familiar with the respondent's operations, and has some knowledge of the cited dredge pump motor. Although Mr. Morris is from another MSHA subdistrict office, he is a qualified electrical inspector and testified as to motors which are similar to the one which was cited.

Corrections to Deposition

At page 7 of Inspector Hubbard's deposition, the respondent Carl Brown is identified as Paul Brown. This is an obvious typographical

error made at the time the deposition was transcribed and the parties obviously recognized it as such.

Respondent's Testimony and Evidence

Although given a full opportunity to present testimony and evidence in his defense, respondent refused to testify or to cross-examine Mr. Mattson or Mr. Morris. He also refused to offer any statements to refute the matters testified to by Inspector Hubbard in his sworn deposition. However, respondent did offer four photographs of the cited dredge pump motor (exhibits R-1 through R-4).

Respondent conceded that the motor in question was unguarded on November 5, 1980, when the citation was issued by Inspector Hubbard. However, he contended that since the motor had been operated for some 30 years with no one being injured, the fact that the protective screen guard had been removed on November 5th did not render it hazardous. Respondent did concede that the motor was initially guarded with a heavy wire mesh guard which had been fabricated at the mine and installed sometime prior to the inspection of November 5th. The guard had been installed at the insistence of another MSHA inspector who advised him that it was required. Since the respondent complied no guarding citation was issued during this previous inspection.

Findings and Conclusions

Fact of Violation

Respondent does not dispute the fact that the cited dredge motor was in fact unguarded on November 5, 1980. Nor does he dispute the fact that the wire mesh screen which served to guard the motor in question had been removed from the motor and not replaced at the time Inspector Hubbard observed the condition cited (Tr. 61-62). Aside from the fact that respondent does not believe that the unguarded motor posed any hazard, his sole defense to the citation is his belief that the inspector was "nit picking", and unwarranted and ill-advised personal attacks as to the inspector's motives. As far as I am concerned, respondent Carl Brown has been treated more than fairly and objectively by the inspectors. He obviously is not too enchanted with any attempts to regulate his mining activity and this fact is attested to by the voluminous letters he has written over the past year or so expressing his views concerning mine safety and health enforcement.

Mandatory safety standard 56.12-23, provides as follows:

> Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location.

On the facts and evidence presented in this case, I conclude and find that the exposed motor area cited by Inspector Hubbard was required to be guarded. The question as to the degree of hazard involved when it is not guarded is a matter which goes to the gravity of the violation and may not serve as an absolute defense to the citation, unless the respondent can show that the motor was "protected by location". On the facts presented in this case, I cannot conclude that the respondent has established that the motor was guarded by location. The evidence adduced reflects that the motor was in an area where at least one workman was present on the dredge, and that it was in close proximity to several walkways. Further, since the respondent previously fabricated a guard and installed it on the motor, an inference may be drawn that he agreed that the motor required some protective device such as a wire mesh guard. Only after respondent was cited by Inspector Hubbard, which exposed him to an assessment of a civil monetary fine, did respondent assert that the requirements for a guard was "nit-picking".

I conclude and find that petitioner has established the fact of violation by a preponderance of the evidence adduced in this case, and the citation issued by Inspector Hubbard is AFFIRMED.

Negligence

I conclude that the conditions cited in the citation issued in this case resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Gravity

I find that the citation in question is serious. Although the possibility of someone coming into contact with the unprotected electrical motor parts was somewhat remote, the proximity of the unguarded motor to an area where a person could readily pass by and come in contact with the motor posed a potential hazard.

Good faith compliance

Compliance was achieved by fabricating another guard and installing it on the exposed motor the same day the citation issued (pg. 10, Hubbard deposition). I find that respondent exercised rapid compliance in achieving abatement of the cited condition, and this is reflected in the penalty assessment.

History of prior violations

Petitioner's counsel offered a computer print-out listing two prior citations of section 30 CFR 56.12-8; issued on May 1, 1979, for which civil penalties in the amount of $168 were paid. However, the computer print-out is obviously erroneous since it shows Engelhard Minerals and Chemicals Corporation at the mine "controller", and the "Junction City Mine"

as the mine for which the citations are charged. Under the circumstances, I rejected the offered computer print-out as evidence of the respondent's history of prior violations (Tr. 5-6). However, I will take official notice of my prior decision in MSHA v. Brown Brothers Sand Co., Docket SE 80-124-M, May 1, 1980, where I assessed a civil penalty for a previous violation issued on June 26, 1980, as well as decisions rendered by Judge Cook where he assessed civil penalties against this same respondent for three citations issued November 20, 1978, May 1, 1979, and November 27, 1979, (Dockets BARB 79-312-M, SE 79-90-M, and SE 80-58-M, March 30, 1981).

Respondent's history of prior citations, as reflected in the aforemention prior decisions, is not such as to warrant any additional increases in the civil penalty assessed by for the citation which I have affirmed in this case.

Size of Business and Effect of the Penalty Assessment on Respondent's Ability to Continue in Business.

Petitioner concedes that the respondent is a small family owned mining operation and I conclude and find that this is the case. With regard to the effect of the civil penalty assessed in this case on the respondent's ability to continue in business, there is no evidence that respondent is adversely affected by the payment of the penalty in question. I conclude that payment of the penalty will not cause the respondent to cease his mining business.

ORDER

In view of the foregoing findings and conclusions, including consideration of the requirements of section 110(i) of the Act, I conclude that a civil penalty in the amount of fifty-dollars ($50) is reasonable for the citation issued in this case, No. 090842, November 5, 1980 30 CFR 56.12-23, and Respondent IS ORDERED to pay the penalty assessed within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge