

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: CENT 84-15-M
Petitioner : A.C. No. 41-01007-05503
v. : Corpus Christi Mill
N.L. BAROID-DIV/NL :
INDUSTRIES, INC., :
Respondent :

DECISION

Appearances: Jack F. Ostrander, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
J.D. Fontenot, Safety and Health Manager,
N.L. Baroid Division, NL Industries, Inc.,
Houston, Texas, 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 civil penalty assessments in the amount of \$80 for four alleged violations of certain mandatory safety standards found in Part 55, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, and pursuant to notice, a hearing was held in Corpus Christi, Texas, on July 12, 1984. The parties waived the filing of post-hearing briefs. However, I have considered their oral arguments made on the record during the course of the hearing.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the

Discussion

All of the citations issued by Inspector White were section 104(a), non "S&S" violations, and they are as follows:

Citation No. 2232152, issued August 16, 1983, citing a violation of 30 CFR, 55.9-87, and the condition or practice cited states:

The hyster forklift was provided with a backup alarm. The alarm was not in working order.

Citation No. 2232254, issued August 16, 1983, citing a violation of 30 CFR 55.9-1, and the condition or practice states:

Records were not made available when requested as to the preshift inspection on the mobile equipment.

Citation No. 2232153, issued August 17, 1983, citing a violation of 30 CFR 55.14-1, and the condition or practice cited states:

The pinch point on the head pulley of the short belt conveyor (recirculating) was not guarded. The head pulley was located next to the catwalk. No one was observed in the area.

Citation No. 2232155, issued on August 17, 1983, citing a violation of 30 CFR 55.12-8, and the condition or practice states:

The power conductors for the overhead hoist in the machine shop had pulled out of the metal housing and was secured by a small wire, thus not properly housed. No one was observed using the hoist.

MSHA Inspector Robert W. White, testified as to his background and experience which includes past employments as a mine superintendent, and service as a Federal mine inspector since 1976. He described the respondent's Corpus Christi mill as a free-standing mill which processes raw barite through a process which includes grinding, milling, and screening of the raw material which is trucked to the facility. The processed barite is stored in silos and then is sold in bulk or as a bagged product (Tr, 10-12).

Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision. Included among these issues is the question as to whether the cited violations were "significant and **substantial.**"

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (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 operator in attempting to achieve rapid compliance after notification of the violations.

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(1)**.
3. Commission Rules, 29 C.F.R. **§2700.1 et seq.**

The parties stipulated that the respondent's Corpus **Christi** mining operation is small in **scope** and that it consists of a milling and grinding operation processing approximately 150,000 tons of barite annually, utilizing 40,000 man hours. The parties also agree that as a corporate operation, the respondent operates an additional 10 mining operations, and employs approximately 300 workers in all of its operations (**Tr. 7-8**).

The parties stipulated further that the respondent's mining operations at the Corpus **Christi** facility affects interstate commerce and that the respondent is subject to **MSHA's** enforcement jurisdiction.

The parties stipulated to the authenticity and admissibility of their respective exhibits (**P-1** through P-5, and R-1 through R-4.).

Inspector White confirmed that he conducted inspections at the mine on August 16 and 17, 1983, and that he issued the citations in question and served them on respondent's safety representative Bob Spradling (Tr. 12).

With respect to citation No. 2232152, which he issued because of an inoperative back-up alarm on a forklift, Mr. White confirmed that the machine was equipped with an alarm but when he had the operator put the machine in reverse, the alarm did not sound. The machine was not tagged out, and Mr. White did not observe it in actual use. The machine was parked outside of the machine shop, and he believed the machine was used periodically as needed to transport machinery and equipment in and out of the shop, and when it backed out of the shop the rear view at the corner of the shop would be obstructed. The machine was equipped with a canopy, with corner support posts, and Mr. White described it as a forklift which is larger than others which are in use at the facility (Tr. 13-14).

Mr. White did not know how long the backup alarm had been inoperative, and he stated that when he asked for the inspection report record to ascertain how long it had been inoperative, Mr. Spradling couldn't produce it (Tr. 14-16).

With regard to citation 2232154, Inspector White confirmed that he issued it after the respondent's representative failed to produce any record concerning the fact that the hyster forklift had been preshifted and found to have had an inoperative backup alarm. He confirmed that no records have to be kept if no equipment defects are noted, and he indicated that different people use the equipment, but that one equipment operator told him that he did not check the forklift (Tr. 18-19). The citation was abated after the operator's representative noted his records that the backup alarm was inoperative (Tr. 19).

With respect to citation 223215, concerning the hoist power conductors, Mr. White stated that bushings on the box where the wires entered had been pulled out, and while the three or four small wires entering the box through the metal housing were insulated, he believed they were subject to possible breakdown of the insulation, thereby presenting an electrical or short hazard (Tr.22). The condition was corrected by installing a housing grommet, which kept the wires from pulling out. The grommet also served as added protection for the wires (Tr. 23).

Mr. White confirmed that the hoist was not being used, but that the power was on, and a mechanic advised him that while the hoist is not used for long periods of time, there are days when it is used quite a bit (Tr. 23). Mr. White could not state how long the condition had existed, and he **confirmed** that the small wires were secured by another piece of wire (Tr. 24).

On cross-examination, Inspector White conceded that when he arrived at the plant on August 16, it was not in normal operation and no materials were being processed. He confirmed that the facility was on a hurricane alert and was in the process of carrying out several phases of shutting down because of the hurricane alert (Tr. 26).

Mr. White confirmed that the cited forklift was in-the yard and not in the shop when he inspected it, and he conceded that he did not consider that any hazards were presented by the forklift violation (Tr. 27). He conceded that while the forklift in question has a vertical rollover bar which does not obstruct the operator's view, the operator's view to the rear while backing out of the shop would be obstructed because he could not observe anyone around the shop corner (Tr. 34). Mr. White also confirmed that the machine was not being operated when he observed it, and while the respondent got someone to operate it, the operator was not backing out of the shop, and he did not have an obstructed view at the time he issued the citation (Tr. 34-35). Mr. White conceded that the only time the cited standard requires a backup alarm is when the operator has an obstructed view to the rear (Tr. 36). He also conceded that the machine itself would not obstruct the operator's view in any way, and that he could turn in all directions and see behind the machine (Tr. 38).

With regard to the inspection report citation, Inspector White indicated that after he cited the forklift violation, he asked to see a copy of the inspection reports concerning the mobile equipment inspections, and when asked whether he requested the particular report on the forklift, or all reports, he replied "I don't recall for how long a period I asked for. It could have been that day or that week. I just asked to see the records on the mobile equipment checks" (Tr. 39).

Inspector White stated that he was provided with an "operator's report" concerning "crushing and stuff like that" (Tr. 39). He conceded that "it's left to the operator

as to what type of forms he uses", and he further conceded that no particular prescribed forms are required to be maintained for **equipment** defects. When shown a copy of respondent's exhibit -3, Mr. White confirmed that he saw such forms, but he indicated that such forms are proper "production reports" under section 55.18-1, and that he advised the respondent's representative that "it looked like a production report rather than a mobile equipment checklist" (Tr.41). However, Mr. White also indicated that had the "bad forklift alarm" been noted on the face of the exhibit in question, he would have accepted it as compliance with the cited standard **(Tr. 42)**.

With regard to the wire conductor citation, Inspector White stated that the hoist was approximately **8-1/2** feet off the ground, and that he observed no rubber outer covering on the wires which went through the hoist housing, but just the wire holding the other small wires together. He could not state whether there was any stress on the wires, and confirmed that he issued the citation because of the lack of a proper bushing to secure the wires as they entered the housing **(Tr. 44-46)**.

In response to certain bench questions, Inspector White indicated that he assumed the cited forklift would be used to transport and protect equipment from the hurricane, and that it is normally used to move motors and parts around, and that he did not believe that it is normally used to store or move the bagged materials which are processed at the plant. He indicated that other forklifts are used for that purpose **(Tr. 49)**. When asked to explain why he issued the citation, he summed it up as follows **(Tr. 50)**:

* * * * *

Now, let's assume you've got this forklift parked, and the operator decides not to use it that day at all, then you come on the scene and decide to inspect it, and you crank it up and find that the backup **alarm is** inaudible. That's essentially what happened here, isn't it?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE: Would that be a violation?

THE WITNESS: The equipment was ready to be operated. In other words, I had asked them what equipment was subject to be ran and what equipment was being operated during the course of a day, and the only thing they told me was that they had one front-end loader that was out of service, that they knew it needed, I think it was brakes, and they weren't going to let anybody operate it. To me that was fine and . . .

ADMINISTRATIVE LAW JUDGE: So based on what you determined, they had some that was tagged out and some that wasn't, and this wasn't?

THE WITNESS: Yes, sir, that's right, from what they told me.

Tom Roe, respondent's plant manager, confirmed that at the time of the inspection the plant was under phase three of a hurricane preparation, and that the plant was in the process of being secured., He described the preparations that were being conducted, and confirmed that the plant was not in production (Tr. 59-61). He confirmed that Hurricane Alicia made landfall in the Galveston area on August 17th. He also confirmed that he knew the cited forklift-had an alarm which was out, but it still was used to secure plant equipment (Tr. 63). At the time the citation was issued, a micro-switch required to repair the alarm had already been ordered, but not delivered by the supplier (Tr. 63). Rather than wait, a completely different alarm was purchased and installed that same evening, and it was in operation the next day (Tr. 64). He confirmed that all forklifts at the plant are equipped with alarms, and this is done for the safety of all employees (Tr. 64). Mr. Roe stated that the forklift in question had been tagged out, but that it was put back in service because it was absolutely necessary to secure plant equipment (Tr. 65).

With regard to the reporting citation, Mr. Roe stated that previous MSHA inspectors had accepted the daily reports, such as exhibit R-3, and any defects in equipment are noted on these reports (Tr. 65). He explained how the reports are prepared (Tr.66).

With regard to the wire conductor citation, Mr. Roe explained as follows (Tr. 67):

Q. Okay, did you have personal knowledge that the grommet had come out of the housing?

A. I had no personal knowledge myself, but my maintenance people did.

Q. Had they attempted to correct?

A. Right. They told me that the rubber grommet that holds the wires into the housing, the least little pull will pull the rubber grommet loose. Our electrician had been notified, and he had checked it, and said he had to change types of grommet because that grommet just would not hold, so a wire was attached to that cable to hold it up to keep anybody from pulling the cord to keep the insulation from being broken on existing wires.

Q. And who installed that wire?

A. It was factory.

Q. No, the extra wire to keep from...

A. Oh, maintenance **personnel** at the Corpus **Christi** plant.

Q. Was this under the direction of the electrician?

A. No, huh-uh.

Q. Okay, the electrician evidently didn't feel like there was a hazard because he didn't do anything, is that right?

A. No, he didn't do anything. He said he would have to order a different type of grommet for it.

Q. Okay, was that grommet ordered?

A. It was.

Q. Was it installed?

A. It was installed.

On cross-examination, Mr. Roe confirmed that the cited forklift has a rated lifting capacity of 6,000 pounds, and

would be classified as a large forklift (Tr. 69). He identified exhibit R-4 as an equipment checklist prepared to abate the reporting citation, and indicated that such a form was not previously used (Tr. 70). He conceded that the operational report, exhibit R-3, shown to the inspector, did not note that the forklift alarm was inoperative, but he insisted that it would have been recorded on previous operational reports which he did not have with him at the hearing (Tr. 71). Mr. Roe stated that while he gave Inspector White only the daily record for the day he was there, exhibit R-3, all of his records were available in the office (Tr. 82). He later indicated that he gave the inspector all of the file, and not just the one report (Tr. 90). Mr. Roe explained further as follows (Tr. 74-77):

ADMINISTRATIVE LAW JUDGE: Well, now, did you ask Mr. White what he had in mind when he issued you the citation for not providing these records?

THE WITNESS: When we provided the records he looked them over and first stated, he said, "Well, I can accept these."

ADMINISTRATIVE LAW JUDGE: Which records?

THE WITNESS: The ones you have in your hand.

ADMINISTRATIVE LAW JUDGE: Just this one, R-3?

THE WITNESS: Right.

ADMINISTRATIVE LAW JUDGE: But you provided no other ones prior to this time?

THE WITNESS: No, sir.

* * * * *

ADMINISTRATIVE LAW JUDGE: All right, with that I assume that had he found on this one a defect noted on the forklift, he would have accepted that?

THE WITNESS: He didn't state that. He said he would accept these records at first,

and then during the conversation he kept going through there and he said, "No, I don't believe I can accept these records because I don't think any other inspector would accept them," and therefore he wrote the citations.

ADMINISTRATIVE LAW JUDGE: Well, what was his reason for not accepting them, do you remember?

THE WITNESS: His reason that he gave us was that any other inspector would not accept them.

ADMINISTRATIVE LAW JUDGE: For what reason would any other inspector not accept them?

THE WITNESS: He didn't say. He did not say, "Because the forklift is not listed on here I cannot accept these." He said, "I cannot accept these because I don't think any other inspector would accept them."

ADMINISTRATIVE LAW JUDGE: What did you provide to the Inspector, to Mr. White, to have this citation terminated or abated?

THE WITNESS: The additional, number three.

ADMINISTRATIVE LAW JUDGE: Which is what you have in your hand?

THE WITNESS: Yes, sir, R-4.

ADMINISTRATIVE LAW JUDGE: R-4. When was that provided to him?

THE WITNESS: We started this one on the twenty-second, and he was supposed to be back that same week, I believe, but he got tied up and couldn't make it back. He came back the next morning, to abate what we've got on, and he was supposed to come back the following week, and it was several days before he got back.

ADMINISTRATIVE LAW JUDGE: When he came back the next day, he abated the forklift citation because you had put an alarm on it, is that correct?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE: How did he abate this one?

THE WITNESS: I don't know. I don't know of an abatement made on that.

ADMINISTRATIVE LAW JUDGE: It says September twenty-second.

THE WITNESS: That's when he came back.

ADMINISTRATIVE LAW JUDGE: But this form that you're holding in your hand, which is Exhibit R-4, was that a form that was used prior or at the same time he inspected?

THE WITNESS: No, sir, this is a form that we started using by his request.

ADMINISTRATIVE LAW JUDGE: Who designed that form?

THE WITNESS: He told us what we should have on there, and we designed it ourselves.

Mr. Roe pointed out that equipment defects are noted on the daily reports, and he pointed to the fact that exhibit R-3, contains a notation with respect to a Caterpillar machine (Tr. 78). He insisted that he provided Mr. White with his records, and that he gave him his reports for mobile equipment, but that Mr. White would not accept them as compliance records (Tr. 79).

Bob Spradling, respondent's safety supervisor, confirmed that he accompanied Inspector White on his inspection rounds, and he conceded that the cited forklift had been out of service the day before, but that it was put back in service because of the hurricane emergency. He stated that the respondent had not been previously cited for mobile equipment violations (Tr. 93). He testified that he conducts regular safety meetings, and that equipment which is found to be defective is always taken out of service (Tr. 94).

Mr. Spradling stated that he gave Mr. White the daily operating report, as well as the file for the month, and he indicated that Mr. White did not ask for the specific report for the forklift, but only generally wanted to see mobile equipment reports (Tr. 95). He confirmed that approximately 16 to 20 employees normally work at the plant in question (Tr. 96).

Mr. Spradling stated that he had not previously noticed the grommet pulled out of the hoist connector. However, he indicated that maintenance personnel were aware of it and ordered a replacement part. In his opinion, the wires did not present any hazard because they were individually insulated and no bare wires were present. The wire which held the insulated wires together was there to keep tension off the hoist cable, and this was done to eliminate any safety hazard (Tr. 98).

Mr. Spradling stated that the remainder of the week of August 16, 1983, was spent undoing what was done to secure the plant from the hurricane, and that the plant "was gradually built back up to full capacity by Thursday and Friday", but was shut down over the weekend (Tr. 104).

Inspector White was called in rebuttal, and he testified as follows (Tr. 108-110):

Q. What specifically did you discuss with him then?

A. I asked Mr. Spradling if he could show me the records where the defective backup alarm was not working on this mobile equipment checklist.

Q. What, if anything, did he tell you at that time?

A. He didn't make them available. He didn't know. He just went and got the production sheets.

Q. Now what type of production sheet did he show you?

A. The ones over in the control booth.

Q. Are these the same ones he testified to previously?

A. Yes.

Q. Did he show you a whole month of reports?

A. A whole month?

Q. Yes. He testified he had a whole month of production reports.

A. No, he wouldn't have had a whole month. **I don't** recall how many reports that he did **show me**. I looked at some reports. I've never **seen** the defect list.

Q. Did you bring up the defect with him again?

A. Yes, that was the purpose, yes. That's what I told him, "I'd like to see where this has been reported."

Q. Did he make any effort **at all** to find the defect in the production reports?

A. Well, he didn't bring it to me. I don't know if he looked back through them and found them or what.

Q. What happened after you were there with the records and you told him that you wanted to see a report of the defects?

A. That he couldn't make it available, and I told him that was the reason I issued the citation, and then we went ahead and did the inspection on the other pieces of equipment, and I showed him what I looked for, and as a recommendation how other people were, told him how other people were complying with that standard.

* * * * *

ADMINISTRATIVE LAW JUDGE: No, I mean did you issue a citation here because there

wasn't a record produced that they had known about the defect, or did you issue the citation because the operator was being a little recalcitrant and uncooperative, and just didn't make his files available to you?

THE WITNESS: No, sir, that wasn't it. I issued the deal because there was a defect that I couldn't, that they didn't make available, that it was recorded, that's all (Tr. 114).

* * * * *

ADMINISTRATIVE LAW JUDGE: Well, your intent, Mr. White, in issuing this citation in here, the failure of the operator to make it available, was not, or was it, to look at all of his records on mobile equipment, or just. on this particular forklift?

THE WITNESS: Just -- I wanted to see his records. When I find a violation on that particular deal, I want to see that they were in fact recording the defects on mobile equipment.

ADMINISTRATIVE LAW JUDGE: Now, as you were perusing through the file that he gave you, did you feel or did you make any judgments then as to the utility of using such a form like this, or did you feel that they probably should have had something over and above this particular form?

THE WITNESS: I gave them some suggestions of what I seen. Maybe that was more of a production report, and it didn't leave much for the operator.

Findings and Conclusions

Fact of Violations

Citation 2232155. Petitioner has established that the power conductors for the overhead hoist were not properly housed or secured and that they were pulled out of the metal housing and secured with a wire. Section 55.12-8, requires

that such wires entering through electrical compartments either have proper fittings or are bushed with insulated bushings. In this case, they were held together with a piece of wire which had been installed by respondent's maintenance personnel. The citation is AFFIRMED.

Citation 2232154. Section 55.9-87, requires that heavy duty mobile equipment be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment is required to 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.

In defense of the forklift citation, respondent asserted that since the forklift is not used to load, dump or haul materials which are processed at the mill, it does not qualify as "heavy duty mobile equipment" under the cited standard (**Tr. 32**). The fact that the cited standard is listed under the general section 55.9 regulatory heading of "Loading, hauling, dumping", does not mean that equipment not used for these tasks are excluded from the requirements of section 55.9-87. Accordingly, respondent's defense is rejected. I conclude that the record here supports a finding that the forklift in question is a heavy duty mobile piece of equipment.

The forklift in question was provided with a backup alarm, but it was inoperative. Respondent conceded that the cited forklift was not put out of service at the time of the inspection, and that it was to be used to store and secure material from the hurricane (**Tr. 57**). Mr. Roe confirmed that the forklift had been taken out of service a week before the inspection after the backup alarm went out, but that he had been checking on the switch part which had been ordered because the forklift was needed (**Tr. 90**).

Respondent's representative indicated that the respondent equipped all of its forklifts with backup alarms, not for compliance with any MSHA requirements, but for the protection of its employees. The representative agreed that backup alarms are sensible items, but that in this case where the backup alarm wasn't working, the parts had been ordered, and the equipment was being used in an emergency situation, he was of the view that the backup alarm was of small consequence (**Tr. 119-120**).

Inspector White conceded that there was no hazard presented by the forklift violation, and he admitted that

the machine was parked on the parking lot and that he never observed it backing out of the shop. He agreed that the configuration of the machine is such as to not obstruct the operator's view to the rear, and he admitted that the operator could turn in all directions and see behind the machine. Mr. White's **only concern** was that the operator would not be able to see anyone coming around the corner of the shop if he were to back out of the shop.

Mr. White indicated that the forklift in question is not used to move or store the bagged materials which are processed at the plant, and that other types of forklifts are used for that purpose. He assumed that the cited forklift would be used to help secure equipment from the hurricane, and he indicated that it was normally used to move motors and parts around the plant.

Although it is true that at the precise time that the inspector viewed the forklift, it was not backing up, the fact is that when it is in normal use in and around the plant transporting equipment and parts, one can logically assume that it will back in and out of areas after depositing its load. Mr. Spradling confirmed that the machine might be used during the day to load out trucks with pallets and material or during an overhaul which takes place every two or three months (**Tr. 98**). Since the machine is equipped with a backup alarm, it makes good sense to insure that it is operational, and the respondent candidly admits that this is true. While the respondent has established that the forklift was not backing out of the shop at the time the inspector observed it, respondent has not rebutted the inspector's assertion that when it does back out of a shop area, the operator can not see around the corner.

After careful consideration of all of the testimony with regard to this citation, I conclude and find that petitioner has established a violation of section 55.9-87, and the citation is AFFIRMED.

Citation 2232154. The inspector here charges that the respondent violated section 55.9-1, for purportedly failing to make available certain records as to the pre-shift inspection on the mobile equipment. The requirements of **section 55.9-1**, are as follows:

55.9-1. Mandatory. Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before being placed

in operation. Equipment defects affecting safety shall be reported to, and recorded by the mine operator. The records shall be maintained at the mine or nearest mine office for at least 6 months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

Respondent's representative indicated that he was under the impression that the citation was issued because the inspector would not accept the company's daily production reports as preshift inspection reports for mobile equipment. The representative stated that the backup alarm defect had been reported a week prior to the inspection of August 16, 1983, and that he only brought to the hearing the daily report for that date because he believed that this was the issue presented **(Tr. 71-72)**. He also maintained that the respondent's records were made available to Inspector White, but that he would not accept them as preshift inspection checklists, and that preshift inspection records are not required unless a defect is noted **(Tr. 84)**.

I believe there is a ring of **truth** to the respondent's assertion in this case that Inspector White would not accept the daily production form as a suitable form for noting equipment defects. Mr. White admitted that he made some "suggestions" as to what equipment operators may use as a "checklist", and he expressed some reservations that the production report being used at the time of his inspection "didn't leave much for the operator" **(Tr. 117)**. The respondent here obviously followed the inspector's "suggestions" and devised a new form which satisfied him. Further, **Mr. White** testified that when he asked Mr. Spradling to show him "the records where the defective backup alarm was not working on his mobile equipment checklist", Mr. Spradling produced the production sheets kept in the control booth **(Tr. 108-109)**. **Mr. White** couldn't recall how many reports he was shown, but confirmed that he looked at "some reports", and he also confirmed that he explained to Mr. Spradling how other mine operators were complying with the standard which he cited **(Tr. 110)**.

The citation does not charge the respondent with a failure to note any defects in equipment. It simply charges that the respondent failed to make preshift inspection records available to the inspector when requested to do so.

Mr. White indicated that had the forklift been tagged out and not used on August 16, he would not have issued the citation (Tr. 126). He confirmed that once the respondent intended to use the machine, it had to be inspected and reported (Tr. 126). This leads me to conclude that Mr. White expected to find the defective backup alarm noted on some "checklist", and when Mr. Spradling failed to produce such a form, and only produced the daily inspection records, Mr. White rejected them and issued the citation.

I find Mr. Roe and Mr. Spradling to be credible witnesses, and I believe their version as to the events surrounding the records in question. I also believe that there was a lack of communication between the respondent's representatives and the inspector, particularly with respect to precisely what was being charged as a violation. The inspector's one sentence description of the charge is lacking in clarity and precision and leaves much to the imagination,

After careful review of all of the testimony and evidence adduced with regard to the citation, I conclude and find that the petitioner has failed to establish the fact of violation by a preponderance of the evidence. I find that the respondent has established that it made its appropriate records available to the inspector at the time of his inspection. The citation is VACATED.

Petitioner's counsel moved to dismiss citation No. 2232153, on the ground that MSHA could not establish the fact of violation by a preponderance of any credible evidence. The motion was granted from the bench, and I hereby re-affirm this action and VACATE the citation (Tr. 8).

While there is merit to the respondent's argument that the plant was preparing to shut down in the face of a hurricane threat and that the inspector should have left the employees alone, this fact does not excuse the violations. However, since the plant was not in production at the time of the inspection, and in view of the emergency situation which was presented, I have considered these factors in mitigating the penalties assessed for the violations which I have affirmed.

Size of Business and Effect of Civil-Penalties on the Respondent's Ability to Continue in Business.

The parties are in agreement that the respondent operates ten barite mining operations, some of which are dormant, and some of which are in active production. They also agreed that the Corpus **Christi** Mill is a small grinding mill operation, operating 40,000 man hours a year, processing an average of 150,000 tons a year, and that the overall company personnel consists of approximately 300 employees (**Tr. 7-8**).

I conclude that the respondent is a small mine operator and that the civil penalties which I have assessed will not adversely affect its ability to continue in business.

Good Faith Compliance

The record supports a finding that the violations in question were timely abated by the respondent, and **that** the cited violations were corrected in good faith.

History of Prior Violations

Exhibit P-1, is a computer print-out summarizing the respondent's compliance record for the period August 1, 1981 through July 31, 1983. That record reflects that the respondent received a total of seven citations during this time period, none of which were **for violations** of the mandatory standards cited in this case. Under the circumstances, I conclude that the respondent has a good compliance record, and this fact is reflected in the penalties which I have assessed for the violations which have been affirmed.

Negligence

I conclude and find that the violations in question here resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence. While it is true that the respondent placed the forklift in service knowing that it had been tagged out for a defective backup alarm, I have considered the emergency situation facing the respondent at the time this was done.

Gravity

Mr. Roe indicated that in his 29 years at the respondent's plant, there have never been any injuries due to forklift operations, and the last time the plant experienced a lost-time accident was in **1982**, when a man injured his knee playing basketball during lunch (**Tr. 91**).

Inspector White conceded that he considered no hazards presented by the use of the forklift in question (Tr. 27). Under the circumstances, I find that this violation is nonserious.

With regard to the hoist conductor citation, I note that Inspector White considered it to be **non-"S&S"**. Given the fact that the wires were insulated, somewhat isolated from anyone's reach and secured with another wire as support, with no evidence of any breaks or wear in the insulation, I agree with his finding and find that the citation is nonserious.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section **110(i)** of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2232152	8/16/83	55.9-87	\$20
2232155	8/17/83	55.12-a	\$20

Citations 2232154 and 2232153 are VACATED, and the proposal for assessment of civil penalties as to those citations is DISMISSED.

ORDER

Respondent is ORDERED to pay the civil penalties assessed by me for the two citations which have been affirmed, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is DISMISSED.


George A. Koutras
Administrative Law Judge

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