FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 21 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 86-12-M
	:	A. C. No. 09-00265-05505
v.	:	
	:	Junction City Mine
BROWN BROTHERS SAND COMPANY, Respondent	:	

DECISION.

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, for the Petitioner
Messrs Carl Brown, Steve Brown, and Greg Brown, Howard, Georgia, for the Respondent

Before: Judge Kennedy

This matter came on for a hearing in Columbus, Georgia in June 1986. The parties' stipulations as to jurisdiction, size, prior violations, ability to pay, and abatement are a part of the record. Four of the seven violations charged were cited for insignificant and insubstantial conditions. At the conclusion of the presentation of evidence as to each violation the trial judge entered a tentative bench decision. As a result five of the seven violations were dismissed, including one S&S violation. Of the two remaining violations one was reduced from S&S to non-S&S and the other was affirmed.

After receipt of the transcript the parties were afforded an opportunity to file post-hearing briefs challenging the tentative bench decisions.

Based on a review of the evidence in the record considered as a whole, I find each of the tentative decisions should be, and hereby is, CONFIRMED for the reasons set forth in the transcript and as supplemented below.

Citation No. 2007655

On July 19, 1985, the windshield on a John Deere 644-B front-end loader was cited for a non-S&S violation of 30 CFR

56.9-11 at respondent's sand mine in Junction City, Georgia. This mandatory standard requires the safety glass in cab windows be in "good condition." Inspector Mattson's 104(a) citation alleged the windshield was "broken and spider-webbed cracked right through the windshield from top to botton." Elaborating in response to questions from the bench, the inspector testified that the windshield measured 34 by about 36 inches; that the "entire windshield," some 1,224 square inches, was spider-webbed cracked on both sides starting from the upper left corner, which had a hole in it, and spreading throughout the windshield down to the "weather seal" at the bottom. The inspector said the condition of the windshield made "vision--visibility bad for the operator, especially when he got glare from the sun."

The inspector testified he understood the requirement that the safety glass be in "good condition" to mean that it "be free of cracks and broken glass . . . and kept clean." As far as the hole was concerned he felt that was not a "problem" but that the spider-web cracks were because they obstructed the operator's vision. Despite this, the inspector did not consider the condition hazardous because it was a "small operation, and there's very little foot traffic around, and what he's doing is doing clean-up work and loading trucks." The inspector said that in his judgment, the likelihood of injury to an employee was "minor" and "remote."

In response to further questions from the bench, the inspector said that he considers a windshield to be in "good condition" if "you have little cracks in the corner and so forth that doesn't obstruct the vision" and in "excellent" condition if it has "no cracks at all and it be kept clean and no cracks or no cloudiness from the sun from age." The inspector said he felt this windshield was below par for "good" because the spider-web cracks throughout the glass obstructed vision and created "eyestrain" and "glare" from the reflection of light through the cracked glass.

The inspector's description was at almost totally variance with the facts. At the time the inspector testified neither he nor his lawyer knew the operator had a picture of the windshield in question taken shortly after the citation was written and before it was replaced. He was shown this picture on cross examination but said he could not identify it because it did not show a "hole" in the "upper left corner." In its rebuttal case, the operator conclusively established that the picture of the windshield in the 644-B loader (OX-6) had no "hole" in the "upper left corner," in fact it had no hole at all. The picture also shows that the windshield was not cracked with spider-webs from top to bottom. There were only two large cracks that extended from the point of impact at about the center line of the glass

through the operator's line of vision and to the side or bottom of the glass. In addition, there were eight to ten hairline cracks radiating from the point of impact but no broken glass.

Mr. Gregg Brown, the foreman, who took the photograph testified he was very familiar with the 644-B loader; that the crack on that glass was "right in the middle of the windshield" but that there was no "hole" in the windshield; that the windshield was not cracked through and that when seated in the vehicle the large crack "in the middle" was above the operator's line of vision. He further testified that if the crack had obstructed the operator's line of vision he would have replaced it. Mr. Lucas, a loader operator, testified the cracks in the glass did not interfere with his operation of the machine.

Despite the fact that all the witnesses agreed that whatever impairment of vision existed did not make operation of the loader unsafe, the Solicitor argued and continues to argue that the "slightest impairment of vision" means the glass is not in "good condition" and constitutes per se a non-S&S violation. In his post-hearing brief, the Solicitor also asserts that "good condition" clearly implies an unbroken window. Since the undisputed evidence from the photograph (OX-6) and the testimony of the operator's witnesses conclusively show that the windshield in the 644-B loader, while cracked, was not "broken," the Solicitor's argument is obviously fatally flawed.

I find that as properly interpreted the standard was intended to promote safety not the sale of safety glass. Since the hazard against which the standard was directed, likelihood of injury to the loader operator or foot traffic, did not exist, I conclude the condition of this windshield was "good" and that the violation charged did not, therefore, occur.

Citation No. 2521743

On the same date as the previous citation a John Deere 644-C front-end loader was also cited for a non-S&S violation of 30 CFR 56.9-11. Inspector Grabner's 104(a) citation charged the windshield was "broken 'spider-web crack.'" In his testimony he described the windshield as "spider-webbed cracked the entire length of the windshield, from side to side, and from height to width." He further testified that the loader was being used to "push material into the surge pile" and to "clean up and load trucks." He said it was his observation that the "visibility of the operator to see through was obstructed by the number of cracks that ran the

length and width of the windshield." He said the citation was for a violation considered insignificant and insubstantial because "I didn't feel that . . . the operator's vision was impaired as far as being able to see out the windshield clearly . . . In other words it was not much exposure to foot traffic in the area of people around it." When shown the two photos of the windshields (OX-5 and OX-6) on cross examination, the inspector could not identify the windshield he was testifying about.

In response to questions from the bench, the inspector contradicted his earlier testimony and said that while the condition of the windshield did not make it unsafe to operate the loader, "the condition of the windshield made it difficult for the operator to have good, clear vision out the front of the machine." Nevertheless, the inspector affirmed that "even with the amount of spider-webbing we had here," he did not consider it unsafe to operate the loader.

Once again it was difficult to credit the inspector's description of the condition because the contemporaneous photograph of the windshield, made within a month after the citation was written, shows the only cracking or spider-webbing was in the upper left quadrant and that there was no cracking or spider-webbing in the lower half of the windshield (OX-5). Mr. Gregg Brown, who took the photo, testified the picture showed essentially the same condition that existed on July 19 and that "it didn't continue to shoot spider cracks every which-a-way, no sir. It reached certain--say side to side, and then it stopped." He further testified that after impact the glass did not shatter, that there was no broken glass, and that there was no "hole in either one of the windshields."

Mr. Gregg Brown, the operator's foreman and a part owner of the business, said it was the operator's policy to replace any windshield that had been hit and cracked in the middle so as to obstruct the operator's line of vision. Mr. Brown said he did not consider the 644-C windshield needed replacing because "There's still fifty percent or more of that windshield that is not obstructed, and I did not feel that his line of vision was impaired." On cross examination, Mr. Brown pointed out that while the vision of an operator who had to look through the upper left quadrant to load a truck might have some impairment there was a side window through which he could also look to align his vehicle. He also said the loaders were seldom used to load the trucks as they usually loaded off the conveyor belt.

Counsel for the Secretary argued that the test he applied to determine whether there was a violation was whether there was "even the slightest impairment" and not whether the condition created a hazard to the operator or miners working on

foot around the area. Later he argued that "'good condition' means the windshield should not have any cracks in it whatsoever; otherwise . . . you could purchase and install cracked windshields in any vehicle." In his post-hearing brief, counsel argues that "Visibility should not be considered relevant in establishing a violation." Needless to say, this extreme contention was contradicted by the testimony of both inspectors as well as the operator's witnesses.

Since I cannot agree that the standard "good," a comparative term, can properly be interpreted as "perfect" or that a de minimis likelihood of injury mandates the compulsory replacement of windshields with insignificant cracks I must once again reject the solicitor's interpretation and find the violation charged did not, in fact, occur.

Citation Nos. 2521413 and 2521414

On September 4, 1985, two inspectors returned to the operator's plant to check on the abatement of the windshield violations and to continue the regular inspection begun in July. At that time Inspector Manis wrote two 104(a) citations, the first being non-S&S and the second S&S.

The citations charged a violation of the guarding standard, 30 CFR 56.12-23. More specifically, they charged that at the No. 2 and 3 pumps there were four unguarded openings that exposed uninsulated inter electrical parts carrying 220 volts to possible contact. (Exhibits 1A, B, C, and D; 3A, B, C, and D; PX-6 and 8). It was further alleged that these openings were not guarded by location and that at the No. 2 pump the area was wet and an operator was in the area. These charges collapsed when the operator produced a vido tape, witnesses and expert testimony which showed that there was no electrical voltage in the connections cited within six to eight seconds after the motors were started. (Tr. 112-113, 167).

Since there was no recognizable electrical shock hazard, I found the violations did not, in fact, occur. In his post-hearing brief, counsel appears to concede this but claims the issue now to be decided is "whether the openings were protected by location." Since I find there was no hazard to be guarded against, I also find the question of whether the openings were guarded by location is moot.

Citation No. 2521467

During the inspection of September 4, 1985, Inspector Grabner observed that a grounding wire for the control panel for the pole mounted 220 volt electrical disconnect switch for the shaker had been pulled lose from the earth grounding rod. In the absence of a ground, the condition created a

potential shock hazard to the shaker operator. For this condition, the inspector wrote a section 104(a), S&S citation charging a violation of 30 CFR 56.12-25. The violation was considered S&S because the operator had to turn the switch off and on several times a day.

Respondent did not deny that the condition alleged existed but attempted to show there was another power ground that went back to the substation through an underground cable. The only photograph of the location, however, clearly showed only three, not four, wires coming from the substation (PX-10). In the absence of a showing that a power ground wire was connected to the disconnect switch, I found this violation did, in fact, occur and that it was significant and substantial. The gravity was, of course, serious but negligence was only modest. After considering the other criteria, I found, and affirm, that the amount of the penalty warranted is that proposed, namely, $126.

Citation No. 2521468

On September 4, 1985, Inspector Grabner also observed a single unguarded 110 volt incandescent light bulb in the surge tunnel. Usually, the tunnel was lit by florescent lighting located above the conveyor belt. The light bulb was temporary until the florescent lighting in the area could be repaired. The tunnel was about 5 feet, 6 inches high and the light bulb was suspended approximately 5 feet, 3 inches above the walkway. Miners passing through the tunnel would have to bend forward to walk through the tunnel and under or around the light bulb. The inspector wrote a 104(a), S&S citation charging a violation of 30 CFR 56.12-34 for failure to guard the light bulb. The inspector considered the violation S&S because he belived that the bulb could easily be struck by miners traveling the area and that such contact could possibly have caused "burns, shock or cuts from broken glass." A penalty of $126 was proposed.

There was no dispute about the existence of the condition charged. Respondent offered a video tape of the area which lent support to its argument that the bulb was located to the side of the walkway, not directly above it. I found a preponderance of the evidence showed the bulb was in sufficiently close proximity to the walkway that it could be struck by an individual passing through but that the likelihood of a burn, shock or cut from broken glass was so remote, speculative, and unlikely that the S&S finding must be vacated. This was predicated on the fact that miners passing through the area would be wearing hard hats and sufficient

clothing including protective clothing such as glasses and gloves to protect them from burns or cuts and that it would be most unlikely for anyone to grab the exposed filament of a broken light bulb, assuming, without deciding, that such a contact might result in an electrical shock.

Accordingly, I affirm my finding that the violation charged did, in fact, occur, that it was not serious, that the negligence was slight and that, after considering the other criteria, the amount of the penalty warranted should be reduced from $126 to $10.

Citation No. 2521469

While Inspector Manis was writing his citation for the alleged failure to guard the electrical connections on the No. 3 pump motor, Inspector Grabner wrote his third citation of the day. This stemmed from his observation of an alleged unguarded keyway on a 10 1/2 inch long shaft that protruded from the No. 3 motor some 43 inches off the motor platform. It was not claimed that the shaft itself was a hazard but that the keyway which was cut into the shaft to some unspecified depth might, because it was rusted and rough, catch or entangle someone's clothing and possibly strangle them (PX-13). Because this was unlikely Inspector Grabner wrote only a 104(a), non-S&S citation for which a $20 penalty was proposed.

The evidence showed that because of its location the likelihood of anyone coming into contact with the keyway while the motor was running was extremely remote, if not entirely speculative. Only a maintenance man regularly went near the shaft and then only when the motor was turned off. Anyone else wishing to approach the shaft would have to climb an 8 to 10 foot high stairway, step over a large discharge pipe, and other obstacles and make several sharp turns to even get near it. Even so there was no pinch point and the likelihood of a piece of clothing from a man's waist or neck becoming so entangled in the open keyway in such a way as to inflict an injury, let alone strangulation, was so inexplicable as to defy description or belief. In fact, the inspector admitted he found the violation to be non-S&S because it was unlikely to cause injury to anyone (Tr. 239). For these reasons, I found the violation charged did not, in fact, occur. I see no reason to change that determination.

The premises considered, therefore, it is ORDERED:

1. That for the two violations found the operator pay a penalty of $136 on or before Friday, September 19, 1986.

2. That as to the other five violations the petition for assessment of civil penalties be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Ken Welsch, Esq., Office of the Solicitor, U. S. Department of Labor, 1371 Peachtree Street, N.E., Room 339, Atlanta, GA 30367 (Certified Mail)

Mr. Carl Brown, Brown Brothers Sand Company, P. O. Box 32, Howard, GA 31039 (Certified Mail)

dcp