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SOL (MSHA) v. ALAMO TRANSIT MIX

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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. CENT 84-18-M  
A.C. No. 29-00417-05501

v.

Ortega Pit

ALAMO TRANSIT MIX CONCRETE  
COMPANY,  
RESPONDENT

DECISION

Apperances: Jack F. Ostrander, Esq., Office of the Solicitor,  
U.S. Department of Labor, Dallas, Texas,  
for Petitioner;  
Mr. James Rogers, President, Alamo Transit Mix  
Corporation, Alamogordo, New Mexico,  
pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with ten separate instances of violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

After notice to the parties, a hearing on the merits was held on December 11, 1984 in El Paso, Texas.

The parties waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Citations

The contested citations involve ten separate instances wherein respondent allegedly violated 30 C.F.R. 56.12-25 which provides as follows:

56.12-25 Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

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#### Stipulation

At the hearing the parties stipulated that the Commission has jurisdiction and they agreed that respondent's sand and gravel operation is covered by the Act. But they further stipulated that respondent's cement mixing plant is not covered by the Act. Respondent averages a total of seven to eight employees with four of them in the sand and gravel portion of the business. The parties further stated that respondent's annual income is \$150,000 to \$200,000. In addition, the proposed penalty will not affect respondent's ability to continue in business (Tr. 3, 4).

#### Summary of the Evidence

MSHA inspector Ernest Scott, a person experienced in electrical hazards, inspected respondent's sand and gravel Ortega Pit on August 30-31, 1983 (Tr. 9-12).

Test equipment used by the inspector caused him to believe that the metal casings of ten motor starters were ungrounded (Tr. 14, 15). When a probe was used the reading went "off of the scale." The equipment showed over 50 amps of resistance (Tr. 15, 16). If there had been a ground fault on the frames of the motors, the workers would not have been protected (Tr. 16).

In connection with Citation 2235255 the inspector opened the junction box and discovered that the ground wire had not been connected to the frame of the motor (Tr. 17). The same condition existed on the other pieces of equipment (Tr. 17).

The purpose of an equipment ground conductor is to provide a low resistance path back to the transformer.

Severe shock or possible electrocution could result from these defective conditions (Tr. 18-20). Phase conductors are subject to weather conditions and equipment vibrations (Tr. 19, 20).

At the worksite two men were observed to be cleaning around the crusher and conveyor. All of the equipment was accessible to the workers (Tr. 21).

This was not battery operated equipment. Each metal enclosed motor was considered to be an electrical circuit within the meaning of the standard (Tr. 21).

Two or three of the motors had a peg ground. A peg ground is when a copper or a steel rod is driven into the earth. This ground, or electrode, is then tied to the motor frames. Such a ground can supplement a ground conductor (Tr. 22, 23). In the inspector's opinion the peg ground did not satisfy the requirements of the standard. While a peg ground can augment a ground

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they can not be used solely as an equipment ground conductor (Tr. 23). A peg, such as a grounding electrode, is not an equipment grounding device (Tr. 23).

The inspector was familiar with the definition of a ground as contained in 56.2. That definition does not apply to the standard because a peg is not a permanent nor a continuous ground (Tr. 24). The purpose of an equipment ground is to hold the electrical phases at earth potential. It is not equivalent to an equipment ground (Tr. 24). In addition, a peg ground would not have prevented the hazard here (Tr. 24, 25). A peg ground only furnishes protection if lightning strikes. It is not a ground but, on the contrary, it is an electrode (Tr. 25). Specifically, no protection is furnished as far as opening an overcurrent device (Tr. 27, 28).

Devices can be purchased to test electrical equipment. The National Electrical Code (NEC), 1948 Edition, under supplementary grounding, provides that a supplementary ground, such an electrode, shall only be used to augment the equipment conductors specified in another section of the NEC. Further, the intent of the section in the NEC is that the grounding electrodes connected to the equipment are not to be used in lieu of equipment grounding conductors (Tr. 31, 32).

James Rogers, president of respondent, testified that the citation should have been issued against the company's employee (Tr. 35).

Witness Rogers further testified that it was unconstitutional for MSHA to cite the company for violations. He hadn't known about the violations and he should have been given an opportunity to repair them (Tr. 37-39). Further, the company assumed the peg ground was sufficient (Tr. 41).

#### Discussion

The Secretary's regulation, 30 C.F.R. 52.2, states that electrical grounding means to connect with the ground to make the earth part of the circuit.

The pivotal issue is whether the systems ground, that is, a peg ground, is sufficient within the terms of the regulation. Section 56.12-25 simply requires that "all metal enclosing circuits shall be grounded." I accept as credible the inspector's testimony that a peg ground is essentially different from a metal equipment ground. The difference lies in the fact that a peg ground will not protect workers from hazards due to ungrounded metal enclosed circuits. Since a peg ground does not protect against the hazards involved then it necessarily follows that respondent failed to comply with the regulation.

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In McCormick Sand Corporation, 2 FMSHRC 21 (1980), Commission Judge Franklin P. Michels vacated a citation involving 56.12-25. Judge Michels ruled that the circuit was grounded because it was attached to three ground electrodes, 2 FMSHRC at 22.

I decline to follow McCormick Sand. To do so would be the equivalent of stating that a peg ground, totally ineffective for metal enclosing an electrical circuit, complies with the regulations. This case illustrates the error in such a view. Here the system was grounded by peg electrodes but 10 separate electrical motors in the system were not grounded.

Respondent also argues that it was unconstitutional to give the company a citation because it had no knowledge of the violative conditions. Further, the company should have been given an opportunity to repair such conditions.

The above arguments lack merit. The lack of knowledge on the part of an operator is not a defense since the Act imposes liability without regard to fault. El Paso Quarries, Inc., 3 FMSHRC 35 (1981); United States Steel Corporation, 1 FMSHRC 1306 (1979).

Respondent's argument that the citations should have been issued against the responsible employee overlooks the fact that such a citation would require an employee to abate the violative condition when he lacks the authority to do so. Further, the Act specifically requires the operator to comply with a safety regulation of this type. Beckley Coal Company, 1 FMSHRC 1794 (1979).

All of the citations should be affirmed.

#### Civil Penalties

The Commission's mandate to assess civil penalties is contained in Section 110(i) of the Act, now 30 U.S.C. 820(i). It provides:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

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In considering the above criteria I find that respondent does not have an adverse prior history. The stipulation establishes that the penalty is appropriate in relation to the size of the company. The operator was negligent in that it could have discovered these violative conditions. The gravity is high in view of the possibility of serious injuries or fatalities. The operator's good faith is established by the company's rapid abatement of the violations.

The Secretary has proposed \$30 for each violation. In view of the statutory criteria, I am unwilling to disturb his proposed penalties.

#### Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. 56.12-25 and all citations should be affirmed together with the proposed penalties.

#### ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

1. The following citations and proposed penalties are affirmed:

Citation No.	Penalty
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2235255	\$30
2235256	30
2235257	30
2235258	30
2235259	30
2235260	30
2235401	30
2235402	30
2235403	30
2235404	30

2. Respondent is ordered to pay to the Secretary the sum of \$300 within 40 days of the date of this decision.

John J. Morris  
Administrative Law Judge