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SOL (MSHA) V. FIFE ROCK PRODUCTS
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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. WEST 85-141-M A.C. No. 42-00377-05502
v.	Fife Brigham Pit
FIFE ROCK PRODUCTS COMPANY, INC., RESPONDENT	

DECISION AFTER REMAND

Appearances: Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Clifford P. Woodland, Fife Rock Products Company, Inc., Brigham City, Utah, pro se.

Before: Judge Morris

On October 14, 1986, the Commission remanded the above case and directed that respondent be granted the opportunity to present its position seeking a hearing after the entry of a default order in the case. Respondent reasserted its position and the judge concluded that a hearing should be granted, (Order, November 20, 1986).

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah on January 6, 1987. The parties waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the regulation, if so, what penalty is appropriate.

Citation 2360673

This citation charges respondent with violating 30 C.F.R. 56.15007, which provides as follows

> Protective clothing or equipment and face shields, or goggles shall be worn when welding, cutting or working with molten metal.

Summary of the Evidence

Tyrone Goodspeed, an experienced MSHA inspector, conducted an investigation at respondent's sand and gravel operation on April 16, 1985 (Tr. 6, 7).

This was an average sized plant with three employees (Tr. 8). The plant area consists of a set of screens, conveyor belts, a control room and a dump point (Tr. 9).

The inspector located plant manager Harper who was then cutting holes in a screen with an oxygen acetylene torch (Tr. 10). He was lying on his side and not wearing glasses or any protective equipment (Tr. 10, 12, 13). Harper explained that he had forgotten about wearing the glasses (Tr. 11). He had been in a three foot space with the torch approximately 18 inches from his face (Tr. 11, 12).

In the inspector's experience Harper could have been blinded or incur a serious eye injury from molten material (Tr. 12). The inspector believed that it was reasonably likely that an injury could occur in these circumstances (Tr. 13, 15).

The inspector believed this was a condition involving imminent danger (Tr. 13, 14). Further, he believed that the negligence was high (Tr. 14).

The inspector further indicated the citation was incorrectly dated (Tr. 16 Ä29, 33). The inspector's notes and the form indicating the operator had been advised of his rights to a conference were received in evidence (Tr. 24).

Respondent offered in evidence its written narrative filed with the Commission (Tr. 35, 36; Ex. R3, R4). Respondent does not deny the violation but it condemns the action of its employee (Tr. 37).

Earl Harper, testifying for the operator, indicated he has been employed by Fife Rock for 30 Years (Tr. 38). He is now designated as the plant manager (Tr. 38, 46).

He normally uses glasses but on the day of the inspection he was at the Eljay screen installing J-bolts by first punching holes in the screen deck with a torch (Tr. 39, 40, 67). It was his neglect in failing to take his glasses with him (Tr. 41). The company, as well as the citation, stresses the use of glasses (Tr. 41). Harper realized that a potential for injury existed here and he should have used safety equipment (Tr. 43, 45, 50). Harper, who has been using a torch for 35 years, has no supervisory authority at the plant. There were two other operators at the site (Tr. 47).

Notwithstanding the company rule to the contrary, Harper admitted he had previously used a welding torch without wearing glasses. But he had not done so since the citation was issued (Tr. 51).

Don Perry runs the front-end loader. He also assisted with installing screens when necessary (Tr. 52Ä54). Perry didn't think Harper was wearing any protective equipment that day (Tr. 55). The company stresses safety (Tr. 56).

Ray Hardy feeds the crusher with a rubber tire dozer (Tr. 57). Hardy also assisted in installing the new screens (Tr. 57). When he was called Harper replied that he'd be through in a minute (Tr. 58, 59). Later, when they discussed the citation, the inspector seemed upset with Harper (Tr. 61, 64).

The company always instructed the employees to cooperate with MSHA (Tr. 61). Signs in the shop stress safety and accidents (Tr. 62).

Discussion

The evidence establishes that the violation occurred. Harper was seen by the inspector to be using a torch without protective gear. Respondent's evidence confirms the violation. The citation should be affirmed.

The principal issue concerns the assessment of a civil penalty. The statutory penalty to assess a civil penalty is contained in Section 110(i) of the Act which provides as follows:

> (i) 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.

In considering the statutory criteria I find that the computer printout received in evidence establishes that the operator had three assessed violations in the two year period ending April 15, 1985. This is a considerable improvement over the 11 violations assessed in the period before April 16, 1983. Three violations indicate respondent's prior adverse history of violations is below average. The operator with three employees should be considered as small and the penalty hereafter assessed appears appropriate in relation to the size of the business. The operator was negligent since it failed to offer any persuasive

evidence that it enforced its safety rules relating to the use of protective eyeglasses. There is no evidence relating to the effect of the penalty on the ability of the operator to continue in business. But the obligation rests with the operator to produce such evidence. Buffalo Mining Company, 2 IBMA 226, (1973); Associated Drilling, Inc., 3 IBMA 164 (1974). The gravity of the violation should be considered as high. The employee could have been blinded by molten lead. It is to the operator's credit that it rapidly abated the violative condition.

On balance, I consider that a civil penalty of $250 is appropriate.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion 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. 56.15007 and Citation 2360673 should be affirmed.

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

ORDER

1. Citation 2360673 is affirmed.

2. A civil penalty of $250 is assessed.

3. Respondent is ordered to pay to the Secretary the sum of $250 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge