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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 86-128-M A.C. No. 54-00271-05501 J7Y
v.	Cantera Metro
DRILLEX, INCORPORATED, RESPONDENT	

DECISION

Appearances: Jane Brunner, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner;
Antonio Garcia-Soto, Esq., Santurce, Puerto Rico, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed 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 of $68 for an alleged violation of mandatory safety standard 30 C.F.R. 56.6047, as stated in a section 104(a) "S & S" Citation No. 2655924, served on the respondent by an MSHA inspector on May 28, 1986.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty to be assessed for the violation based on the criteria found in section 110(i) of the Act.

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2. Whether the inspector's "significant and substantial" (S & S) finding concerning the violation is supportable.

3. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 3-6):

1. The respondent is a contractor engaged in a business performing blasting and drilling services for mine operators engaged in the business of mining aggregates.

2. The respondent is subject to the jurisdiction of the Mine Act.

3. For purposes of the Mine Act, the respondent is a small operator, employing four to five people in its operations covered by the Act, and its annual blasting and drilling activities consists of 557 man-hours.

4. Respondent's history of prior violations consists of one order issued in May 1985, for which the respondent paid an uncontested civil penalty assessment of $180. Two citations issued in February 1987, have not been assessed as yet by MSHA, and the respondent confirmed that it will not contest the citations and will pay the civil penalty assessments.

5. Payment of the proposed civil penalty assessment for the alleged violation in this case will not adversely affect the respondent's ability to continue in business.

Discussion

Section 104(a) "S & S" Citation No. 2655924, issued on May 28, 1986, cites a violation of mandatory safety standard 30 C.F.R. 56.6047, and the condition or practice is described as follows: "Company, Drillex, Inc., transported 565 electrical blasting caps from the dealer to Cantera Metro (54-00271), inside the pick-up cab, mark Isuzu, tag no. 299879, where blasting caps were exposed to sparking metal. A person was driving the pick-up."

MSHA Inspector Juan Antonio Perez, testified that he has been employed as an inspector since 1975, and that he is a professional licensed engineer with a background in chemical and metallurgical engineering. He confirmed that his duties include compliance inspections of sand and gravel quarries and cement plants, and that he has conducted approximately 2,000 inspections during his tenure with MSHA.

Mr. Perez confirmed that he issued the contested citation during the course of an inspection he was conducting at the Cantera Metro quarry operated by Metro Industry, Inc. During the course of that inspection, he observed a pickup truck arriving at the mine site, and upon observation of the truck he determined that it was carrying a load of blasting caps in the driver's compartment or cab. Upon questioning the driver of the truck, Mr. Perez learned that the truck was owned by the respondent and that the driver was one of the respondent's employees.

Mr. Perez stated that he determined the number of electrical blasting caps present in the cab of the truck by reviewing the delivery documents produced by the driver. Mr. Perez believed that the blasting caps presented a hazard in that they were exposed to the "sparking metal" of the cab of the truck, including the doors, and that is why he cited section 56.6047 of the regulations. He confirmed that he observed ammonium nitrate in the cargo bed of the truck.

Mr. Perez believed that the respondent was negligent in that the detonator caps in question were readily observable in the cab of the truck. He also believed that the caps presented a hazard in that they are considered to be explosive. He believed that an accident was reasonably likely to occur because all of the ingredients for such an event were present, namely, explosive caps, sparking metal, and the driver in the cab of the truck.

Mr. Perez confirmed that the electrical blasting caps in question are considered to be explosives under MSHA's regulations, and were not "blasting agent's" within the exception found in section 56.6047.

On cross-examination, Mr. Perez stated that ammonium nitrate, in its natural state, is a fertilizer and not an explosive. In order to be considered an explosive, it must be combined with a fuel oil. He conceded that his citation makes no reference to any such explosive material being transported in the back cargo area of the truck.

Mr. Perez confirmed that abatement was achieved by transferring the remaining cited detonator caps to another truck after the initial delivery, and that the citation was terminated approximately an hour after it was issued. Mr. Perez further confirmed that his enforcement jurisdiction over the respondent is limited to any trucks actually found on quarry or mine properties, and that in the instant case, he inspected the truck after it was driven onto the mine site in question.

Mr. Perez confirmed that he has no particular expertise or knowledge with respect to the use of explosives or blasting materials, and that his general knowledge of explosives is from his "on the job" work experience as an inspector and from his attendance at MSHA training sessions and seminars. He agreed that the manner in which the cited detonator caps were being transported did not violate any local explosive laws or regulations or other Federal laws or regulations.

The parties agreed that at the time the citation was issued, the driver of the pickup truck, who was an employee of the respondent, was delivering electrical detonator caps to a mine quarry operated by Metro Industries Inc. The pickup used to deliver the detonators was owned by the respondent, and the driver was making the first of two deliveries scheduled for that day. The first delivery consisted of 245 detonators, and the scheduled second delivery to another site consisted of 320 detonators, thus accounting for the total of 565 detonators cited by the inspector.

Respondent produced copies of a form issued by the local police department dated May 28, 1986, granting permission to one Jose Collazo Bonilla, the driver of the truck in question, to transport two loads of electrical detonators along a designated route specified on the face of the forms. The forms reflect that they were issued at 6:58 and 7:06 a.m., and the information describing the pickup truck in question, including

the tag number, is identical to that stated by the inspector on the face of the citation (exhibit R-1).

Although the police permit in question is in Spanish, respondent's counsel translated it for the benefit of the Court and petitioner's counsel, and upon review of the form by Inspector Perez, he confirmed that the permits are in fact as represented by the respondent.

Mr. Perez explained the general procedures normally followed in the transportation of explosives, and he conceded that he made no determination as to whether those procedures were in fact followed in this case. He explained that it was his understanding that local police regulations required separate trips when multiple deliveries of detonators are made to local mine sites. He confirmed that his principal concern in issuing the citation was his belief that the detonators were exposed to the truck "sparking material," namely, the interior metal cab framing.

Mr. Perez stated that the detonators in question were packed inside their original manufacturer's cardboard containers and that the boxes were stacked in the cab of the truck from the floor to halfway up the front cab window. He could not state how many containers he observed, and denied that the boxes were stored inside another container. However, he later stated that they were inside another non-conductive container as required by section 56.6057, but that it had no top. Petitioner's counsel asserted that the detonator containers were inside the type of container required by section 56.6057, and if they were not, the inspector would have cited a violation of that standard. Mr. Perez conceded that this was true.

Mr. Perez admitted that he did not inspect the interior of the truck cab to determine the actual composition of the metal interior framework and did not determine whether it was aluminum or painted with a "non-sparking" paint. He also admitted that he had no knowledge as to whether or not the truck ignition key was aluminum and did not inspector or look at the key. He admitted that aluminum material is "non-sparking."

Mr. Perez stated that the electrical detonators were classified as a "class C explosive," but he conceded that they could not explode while packed inside the manufacturer's original boxed containers.

At the close of MSHA's case, respondent's counsel made a motion for summary dismissal of the citation on the ground that MSHA had failed to produce any evidence, or to otherwise establish, that the interior of the truck cab where the electrical detonators were located and observed by the inspector was composed of sparking metal, or that the detonators were otherwise exposed to any sparking metal (Tr. 65-66). The motion was initially taken under advisement, subject to any re-dirct or rebuttal testimony by MSHA (Tr. 66). Respondent's motion was again renewed (Tr. 83, 99), and it was tentatively granted from the bench, subject to the filing of a posthearing brief by MSHA, and the receipt of the final hearing transcript (Tr. 99-102, 107). Respondent was also afforded an opportunity to file a brief (Tr. 107).

MSHA's Arguments

In its posthearing brief, MSHA views the single issue in this case to be whether or not its mandatory standards permits the carrying of explosives in the passenger cab of a truck. MSHA submits that such a practice is prohibited by 30 C.F.R. 56.6047 and by its overall regulatory scheme pertaining to the transportation of explosives. MSHA points out that section 56.6047 plainly requires that there be no sparking metal exposed "in the cargo space," that the cargo space be equipped with "suitable sides and tail gates," and that the explosives "shall not be piled higher than the side or end enclosures." MSHA asserts that if the standard is construed to permit the transportation of explosives in the cab of a vehicle, or in any area other than the acknowledged cargo space, the quoted provisions of the standard would be rendered meaningless. MSHA maintains that the standard obviously contemplates that the "cargo space" of the vehicle is only that area which is enclosed by the sides and tailgate of the vehicle, and not the area within the passenger cab. MSHA concludes that the standard only addresses the presence of exposed sparking metal in the cargo space because that is the only area of the vehicle where it is permissible to place explosive materials, and to hold otherwise would authorize the placement of explosives in the passenger cab, which is not a cargo space, where the explosives could indeed be exposed to sparking metal. Consequently, MSHA believes that the placement of explosives in the cab of a pickup truck constitutes a clear violation of the cited standard.

With regard to its overall regulatory scheme concerning the transportation of explosives, MSHA cites section 56.6050, which provides as follows: "Other materials or supplies shall

not be placed on or in the cargo space of a conveyance containing explosives, detonating cord or detonators, except for safety fuse and except for properly secured, nonsparking equipment used expressly in the handling of such explosives, detonating cord or detonators." (Emphasis added).

MSHA argues that the presumptive placement of explosives in the cargo space of a vehicle forms the only conceivable basis for excluding other materials or supplies "on or in the cargo space." Similarly, the standard's exception for "nonsparking" equipment would serve little purpose if there was no requirement to transport explosives in the same cargo space. MSHA concludes that a contrary interpretation of the standard would curiously subject covered employers to possible citations in circumstances where sparking equipment was present in the cargo space of a vehicle while explosives were present in the passenger cab, and submits that the standard has no such intent.

MSHA also cites section 56.6040, which provides as follows: "Explosives and detonators shall be transported in separate vehicles unless separated by 4 inches of hardwood or equivalent."

MSHA argues that section 56.6040 contemplates that all explosives and detonators are to be transported in the cargo space where they are to be separated as specified. MSHA points out that the standard does not mention, or imply, that these materials may be separated merely by placing the explosives or detonators in the passenger cab of a vehicle, and that absent the required separation inside of the cargo space, employers are required to utilize separate vehicles. Since this standard sets forth the only alternative available to employers engaged in the transportation of explosives and detonators, MSHA concludes that the standard would indeed reference the use of the passenger cab if such a practice was deemed appropriate. MSHA maintains that the respondent in this case was engaged in transporting explosives and detonators in the same vehicle. Since the cargo space was full, MSHA suggests that the respondent was attempting to avoid having to make two trips or the use of two vehicles.

At the hearing, MSHA's counsel took the position that while the cited standard section 56.6047, makes reference to sparking metal exposed in the cargo space of vehicles used to transport explosives, since the detonators in question were in the passenger cab of the truck, rather than the normal rear truck cargo bed, the cab of the truck would be considered the cargo space for purposes of the standard. At the close of the

hearing, counsel conceded that the essence of the alleged violation is whether or not the truck cab contained sparking metal, and whether the blasting caps were exposed to any such sparking metal (Tr. 103).

Findings and Conclusions

Fact of Violation

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. 56.6047, which provides as follows:

> 56.6047 Vehicle construction
>
> Vehicles used to transport explosives, other than blasting agents, shall have substantially constructed bodies, no sparking metal exposed in the cargo space, and shall be equipped with suitable sides and tail gates; explosives shall not be piled higher than the side or end enclosures.

Respondent produced copies of two permits issued by the local police department on the day the citation was issued, attesting to the fact that the transportation of the electrical blasting caps in question satisfied local police regulatory requirements, and MSHA did not dispute this fact (exhibit R-1, Tr. 52).

MSHA's conclusion that the respondent was transporting explosives in the rear of the truck in question is unsupported by any credible or probative evidence, and it is rejected. The record reflects that Inspector Perez was not sure what he observed in the rear of the truck. Although he alluded to "other explosives" in the back of the truck, he obviously made no effort to identify them. Although he further alluded to ANFO, an explosive brand name, he stated that "I cannot testify as to anfo" (Tr. 22, 26).

The only specific "explosive" material referred to by Mr. Perez were bags of ammonium nitrate (Tr. 22). However, he conceded that this material was not an explosive (Tr. 23). He also conceded that the citation he issued makes no mention of any explosives being carried in the rear of the truck (Tr. 23). Mr. Perez explained that ammonium nitrate, in its natural state, was a fertilizer and not an explosive, and in order to

make it an explosive, one must add diesel fuel oil. He reiterated that the ammonium nitrate he may have observed was not an explosive (Tr. 26).

Mr. Perez confirmed that ammonium nitrate is considered a "blasting agent," under MSHA's regulations. However, he conceded that section 56.6047 provides for an exception for blasting agents, and that the transportation of such materials in the truck in question was not prohibited by that standard (Tr. 25, 28). He also confirmed that the transportation of the blasting caps in question in the cab of the truck did not violate any local laws or any regulations of the Federal Treasury Department, Alcohol, Tobacco and Firearms (ATF) Agency (Tr. 37-38). Mr. Perez suggested that the reason the blasting caps were carried in the cab of the truck was that there was no room in the back of the truck (Tr. 28).

Mr. Perez confirmed that the detonators in question were not exposed, but were packed in their original manufacturer's cartons. The cartons were in turn located in non-conductive containers as required by section 56.6057, and both Mr. Perez and MSHA's counsel conceded that the manner in which they were stored was in compliance with that mandatory standard (Tr. 76, 77).

Although one may conclude that it may have been imprudent for the respondent to transport electrical detonator caps in the cab of the truck, I find no regulatory or evidentiary basis for finding a violation in this case. Aside from the fact that MSHA produced no evidence to establish that the cab of the truck was constructed of non-sparking metal, MSHA's posthearing arguments, which I find to be rather strained, and which I reject, would require the respondent to consider two or three mandatory standards together before reaching any rational conclusion that transporting blasting caps in a cab of a truck was or was not prohibited.

In my view, the regulatory intent of section 56.6047 is to establish minimum construction standards for vehicles used to transport explosives. Contrary to MSHA's arguments, I cannot conclude that the standard is intended to prohibit the transportation of explosives in the cab of a truck. As a matter of fact, as pointed out earlier, MSHA's position during the hearing was that the cab of the truck was in fact the cargo space since the explosives were located there, and since the interior of the cab was of metal construction, which MSHA assumes was exposed sparking metal, a violation was established. MSHA's counsel stated that "once you put the cargo in the cab of the truck, then you've by definition made the cab

of the truck the cargo space" (Tr. 61). When asked to define the term "sparking metal," Inspector Perez replied "I don't know, its zinc, iron, . . . whatever the truck is made of" (Tr. 60). When asked whether or not the inspector had in mind the phrase "no sparking metal" as stated in section 56.6047, when he issued the citation, MSHA's counsel replied in the affirmative (Tr. 62).

Although Mr. Perez indicated that he was a licensed metallurgical engineer, his experience in explosives was limited to several seminars, and his experience and training in applying MSHA's mandatory standards (Tr. 30-31). MSHA's counsel conceded that Mr. Perez failed to inspect the interior of the truck cab to determine whether it was in fact constructed of sparking metal. Counsel further conceded that Mr. Perez simply assumed that the interior of the truck was constructed of sparking metal, and took the position that this was common knowledge. Counsel acknowledged that aluminum metal, and metal which is treated or painted with non-sparking paint, would be considered non-sparking and in compliance with the standard. However, counsel took the position that the burden was on the respondent to establish this (Tr. 81-82). I disagree. In my view, the burden of proof here lies with MSHA and not the respondent. MSHA must establish all elements of the cited standard, particularly the fact that the interior of the truck was constructed of sparking metal.

On the facts of this case, MSHA's evidentiary proof is totally lacking to support any conclusion that the interior of the truck was constructed of sparking metal. Mr. Perez considered "sparking metal" to be any metal that can heat and produce a spark. As an example, he explained that if a truck driving down a road hit a stone, and the stone hit the truck body and produces a spark, then he would consider the metal to be sparking metal (Tr. 78-79). Yet, he simply looked at the metal door, and in a less than cursory way, determined that it was constructed of sparking metal. He made no inspection of the cab interior to determine whether it was constructed of aluminum, or whether it was coated or painted with non-sparking paint. As for the door, he candidly admitted that "I didn't prove that it can produce a sparking material on that" (Tr. 81). He also made no determination as to whether or not the truck ignition key was made of aluminum, and acknowledged that he has heard of such keys (Tr. 98). Given his asserted metallurgical background, I would think that it would have been a simple matter for Mr. Perez to make a determination as to the composition of the interior of the truck to determine whether it was constructed of sparking metal. The fact is that he did not do so.

Under all of the aforesaid circumstances, I conclude and find that MSHA has failed to establish a violation of section 56.6047. Accordingly, the respondent's motion to dismiss, made at the hearing, IS GRANTED, my previous tentative bench ruling in this regard IS AFFIRMED, and the citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, section 104(a) Citation No. 2655924, issued May 28, 1986, citing an alleged violation of 30 C.F.R. 56.6047, IS VACATED, and MSHA's proposal for assessment of civil penalty IS DISMISSED.

George A. Koutras
Administrative Law Judge