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SOL (MSHA) V. MATIN MAIETTA AGGREGATES
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. SE 87-84-M A.C. No. 31-00065-05508
v.	
MARTIN MARIETTA AGGREGATES, RESPONDENT	Fountain Mine

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner; William E. Sharp, Jr., Esq., Martin Marietta Corporation, Bethesda, Maryland, 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 $20 for an alleged violation of mandatory safety standard 30 C.F.R. 56.16006. The respondent filed an answer denying the violation, and a hearing was held in Raleigh, North Carolina. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issue

The issue presented is 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.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 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. 5Ä6):

1. The respondent is in a business affecting commerce within the meaning of the Act.

2. The respondent is a large granite mine operator with a reported total work hours for 1986 in excess of three million man hours.

3. The payment of the proposed civil penalty by the respondent will not adversely affect its ability to continue in business.

4. A computer print-out of the respondent's history of past paid violations for the 2Äyears prior to the issuance of the violation in this case consist of four section 104(a) "single penalty" citations (Joint ExhibitÄ1; Tr. 11).

Discussion

The section 104(a) non-"S & S" Citation No. 2658034, issued by MSHA Inspector Floyd Patterson on December 9, 1986, cites a violation of 30 C.F.R. 56.16006, and states as follows: "The compressed gas cylinders (Oxygen and Acetylene) on the welding truck were not protected by covers while they were being transported on the premises with the gauges and hoses attached."

Mandatory safety standard 30 C.F.R. 56.16006 provides that "Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use."

MSHA's Testimony and Evidence

MSHA Supervisory Inspector Robert M. Friend, confirmed that he participated in the inspection conducted at the

respondent's mining operation by Inspector Floyd Patterson on December 9, 1986. He stated that he was with Mr. Patterson to evaluate him, and that Mr. Patterson has since retired. Mr. Friend identified a copy of the citation issued by Mr. Patterson, and he confirmed that he was present when it was issued (Tr. 14Ä16).

Mr. Friend confirmed that he observed the truck carrying at least three cylinders at various times during the course of the inspection, and he stated that the truck was used "for transportation throughout the plant." Mr. Friend stated that the cylinders were standing upright and were secured on the left side of the truck behind the driver, and he determined that they contained oxygen and compressed acetylene. He described the truck as a maintenance truck, with a utility type bed, and he estimated that he observed it at least three times, and when it was cited it was pulling into the shop. At no time did he observe the cylinders being used for welding (Tr. 16Ä18).

Mr. Friend confirmed that the cited cylinders had the regulators attached, and they were attached to the cylinders at the valve assembly in a vertical position in the same manner as most of the cylinders in use at the plant are attached. He confirmed that the valves were on, and that none of them were protected or guarded. He stated that one of the regulators extended beyond the side of the cab of the truck. He further stated that trucks of this kind are used throughout the plant and are sometimes driven under conveyors and bins, and that there is a possibility of rocks falling and striking the unprotected valves, which would result in a sudden release of acetylene, thereby presenting a fire hazard. There was nothing to protect the valves from being accidently struck (Tr. 19).

Mr. Friend was of the opinion that the unprotected cylinder valves posed a potential for an accident, but that Inspector Patterson, who issued the citation, was of the opinion that not many accidents occur as a result of unprotected valve covers. Since he believed that an accident was unlikely, he did not consider the violation to be "significant and substantial" (Tr. 20).

In response to further questions, Mr. Friend confirmed that the function of the cylinder valve is to reduce the cylinder gas pressure in the acetylene tank to a workable pressure, and that the valve is screwed to the cylinder by means of a wrench. He also confirmed that the cylinder gauge is a part of the regulator, that the hoses are used to connect the

acetylene torch, and that all of the valve assemblies, including the gauges and hoses, were unprotected. He stated that the terms "welding truck" and "maintenance truck" are used synonymously, and that the trucks are basically used for the same welding and maintenance purposes. The cited truck also carried other supplies and tools, and it was a general purpose truck (Tr. 23Ä25). However, when used for welding purposes, the cylinders are not removed from the truck, and anyone doing any welding work uses the cylinders while they are in place on the truck (Tr. 26).

Mr. Friend confirmed that additional gas cylinders were present in the plant shop, and that a citation was issued that same day because some valves were not turned off while the cylinders were left unattended. He confirmed that the respondent maintains a separate storage area for empty acetylene cylinders, refilling, etc., but he did not know where this area was located (Tr. 29).

Mr. Friend stated that the fact that the truck moves about the mine site with the cylinders aboard leads him to conclude that they are being "transported" within the meaning of the standard, even though they may not be used after the truck moves from one location to another. His opinion would not change even if the cylinders on the truck are used on a regular and routine basis every day (Tr. 30). He estimated that it would take 5 minutes to detach and reattach the cylinder regulators (Tr. 31).

Mr. Friend confirmed that the violation was abated after the respondent was instructed to remove the gauges and replace the cylinder caps before transporting the cylinders, and until such time as other guarding was provided. He did not know whether other cylinder guarding has been provided at the plant in question, but that respondent has provided such guarding at its other locations where similar citations have been issued under similar circumstances. These citations were abated after cylinder covers were manufactured on-site to protect the valves, and they are protected at all times while stored, transported, or in use in other than a safe location. Cylinder covers were required for the cited cylinders, and they were installed to achieve abatement (Tr. 31Ä34).

Mr. Friend stated that the type of cylinder covers he would accept as compliance with the standard in question would be a cover that is a part of the cylinder when it comes from the manufacturer, or one that is substantial and protects the entire valve assembly on all sides and the top, and he alluded

to a law that requires caps or covers on such cylinders while they are transported on the highways (Tr. 35).

MSHA's counsel explained that the law referred to by Mr. Friend requires that the cylinders themselves be capped when they are being transported. However, in this case, since the attached valves, gauges, and hoses, which constitute the valve assembly, were not protected and added to the potential hazard, the standard still requires that at least the valves be covered and protected. Although MSHA would accept a cap as a protection for the cylinder itself, once the cap is removed, and the valve is attached, it must be covered and protected on all sides and the top (Tr. 38Ä39).

Mr. Friend confirmed that the standard only requires protection for the cylinder valve, and that once the cap is removed and the valve, along with the gauges and hoses, are attached to the cylinder as one assembly or unit, the valve must be protected. In the instant case, the exposed and unprotected valves were attached to the cylinders as a unit, and the valves were not protected. Had the respondent provided some protection for the valves, which formed part of the units attached to the cylinders, it would have been in compliance with the standard (Tr. 40Ä42).

Mr. Friend identified 10 photographs of protected and covered compressed gas cylinders which he confirmed would be acceptable to MSHA as compliance with the standard, and he explained how they would afford protection for the valves (Tr. 43Ä46).

When asked to identify the other locations where the respondent has been cited for failure to provide protection for cylinder caps, Mr. Friend responded that the only one he could think of was the respondent's site at "Lemon Springs." He explained that he sent the photographs to the plant manager as examples of suggested methods for protecting the valves, and that the manager later informed him that the citation had been abated and asked him to visit the site to see what had been done. Mr. Friend confirmed that he did not visit the site, and had no knowledge as to whether or not the inspector who issued the citation has had time to visit the site and abate the violation, but he assumed that this was done (Tr. 47).

When reminded of the fact that Inspector Floyd's abated citation was terminated after the truck in question was parked, and the employees were instructed to remove the gauges

and replace the cylinder caps before transporting the cylinders, and until such time as other guarding is provided, MSHA's counsel asserted that MSHA would accept a cap as a suitable cover as long as it provided substantial protection for the valve on all sides and the top. Counsel conceded that the replacement of the cylinder cap to protect the cylinder, coupled with the removal of the valve assembly, still left open the question as to how to provide suitable protection for the valve with the gauges and hoses intact (Tr. 51). Respondent's counsel concurred, and stated "you've captured our dilemma exactly, your honor. Multiply this problem times a hundred and you see what we're faced with" (Tr. 53).

MSHA's counsel confirmed that the Lemon Springs site referred to by Inspector Friend is under the same sub-district enforcement jurisdiction as the subject Fountain site where the contested citation in this case was issued, and he suggested that the same photographs furnished to the Lemon Springs location should have been available to the Fountain plant manager. MSHA did not have available copies of any of the other citations referred to by Mr. Friend, and no additional information was forthcoming as to what may have been done at these other sites to provide any standard means of covering valves "across-the-board" (Tr. 53Ä55). Mr. Friend confirmed that the citation at the Lemon Springs location came "much after" the citation issued in this case, and he could not confirm whether that citation has been abated (Tr. 56).

The respondent's counsel expressed surprise with Mr. Friend's assertion concerning the Lemon Springs citation, and he stated as follows (Tr. 56):

> MR. SHARP: See, the reason I'm surprised, your honor, because it's my interpretation that Mr. Lennon's direction to all the plant managers through all Martin Marietta was, "wait until we find out what kind of fix we can make so everybody can make the same fix." Our welding tanks have the same basic configuration and the same basic protection configuration, so the fix we will have to make will be for everybody. That's what we were after. Mr. Lennon will give some testimony on that.

Respondent's Testimony and Evidence

Arthur P. Lennon, respondent's Personnel and Safety Manager, confirmed that after the citation was served on the

respondent, he contacted MSHA's Subdistrict Manager Fred Dupree in Knoxville, Tennessee, in order to obtain some guidance or guidelines as to precisely how the valves on the cylinders should be guarded. Mr. Dupree assured him that he would obtain some information for him and would contact him again. After the passage of 2 months, Mr. Lennon again contacted Mr. Dupree, and Mr. Dupree again advised him that he would send him some information. After the passage of two more months, Mr. Lennon received the photographs from Mr. Friend, but he has not received anything in writing from MSHA as to the exact cylinder regulator guarding criteria MSHA would accept for compliance with the standard in question (Tr. 58Ä59).

Mr. Lennon explained the scope of the respondent's operations Nationwide, and he confirmed that the trucks on which the cylinders are located are commonly referred to as "welding trucks." Although they are used for other purposes as well, the driver is usually a welder and his helper is usually an assistant (Tr. 60). Mr. Lennon further explained that the trucks are used for day-to-day maintenance in and around the quarry, which is the "plant," and the pit. He estimated that in the course of a day, the welding truck would be used on an average seven to ten times to perform welding work as required, and in that process, the cylinder regulators would have to be capped and re-capped each of those times (Tr. 61Ä63).

Mr. Lennon identified the photographs in question, and he explained how the cylinders at the Fountain operation are located in the trucks and secured by chains across a small compartment where the cylinders are located (Tr. 63Ä64). He confirmed that he informed Mr. Dupree that he was seeking a standard MSHA approved method of protecting the valves, or regulators, so that it may be applied at all of the respondent's operations, and he expressed disappointment that nothing has been forthcoming from MSHA in this regard (Tr. 65). Mr. Lennon confirmed that he was unaware of the citation issued at the respondent's Lemon Springs operation, and that he informed his field engineers that he was attempting to work out a solution and to do nothing further until he found a positive solution to the problem of protecting the valves (Tr. 67).

Mr. Lennon conceded that the cylinder valves are not covered, and that they have never been covered as the truck is driven about the plant. He explained that the valve is covered by the regulator, and that it is part of the same

assembly, and that he simply refers to it as a regulator (Tr. 68). He confirmed that the closet in which the cylinders are stored does not go all the way to the top of the valve, and that the valve is exposed from the top and all three sides. He confirmed that the valves do not extend higher than the cab of the truck, and do not normally extend beyond the side of the body of the truck (Tr. 69).

On cross-examination, Mr. Lennon confirmed that the welding truck in question is used for welding most of the time, and that the cylinders remain uncapped at all times, and the valves and regulators remain uncovered, at all times, even while the truck is idle or parked overnight, and this has been the case for the 27 years that he has been in the business (Tr. 77Ä78). Mr. Lennon stated that he offered no suggestions to Mr. Dupree as to the type of valve cover that might be used at the Fountain operation, but that he has discussed the problem with Mr. Roy Benard, at MSHA's headquarters in Virginia, with a view to arriving at some solution for use by the respondent Nationwide, but has not heard from him further on the matter (Tr. 79).

With regard to the photographs furnished by Mr. Friend, Mr. Lennon stated that while they do give him some ideas as to the methods for covering the valves at the Fountain operation, there is no assurance that other MSHA inspectors in other areas will accept this as compliance at the respondent's other plants (Tr. 79). He confirmed that the respondent has not decided on any particular valve cover concept for submission to MSHA for its concurrence or acceptability, nor has he sought out Mr. Dupree or Mr. Friend further to determine whether they would accept any particular covering device, and the reason he has not done so is that it has not been the practice in the industry to cover cylinder valves and regulators at all times while they remain on welding trucks (Tr. 80).

MSHA's counsel expressed concern that Mr. Lennon's instructions to his field engineers not to do anything, may result in non-compliance with the standard at all of the respondent's operations (Tr. 75). However, Mr. Lennon confirmed that it was his hope that the hearing afforded the respondent with respect to the citation would provide some guidance for a solution to its problem, and that his instructions to his engineers were made with that in mind, rather than any notion of flaunting or not complying with the standard, and MSHA's counsel stated that he did not doubt that this was the case (Tr. 92).

Mr. Lennon pointed out that in the 9 years the plant has been in operation since 1977, and inspected twice a year, MSHA has not previously cited any violations for any unprotected cylinder valves on a welding truck. In response to Mr. Friend's assertions concerning the hazards connected with unprotected valves, respondent's counsel pointed out that MSHA's "accident and incident" reports from 1985 to the present, concerning welding-related accidents, reflect not one single incident industry-wide involving an unprotected valve (Tr. 96Ä98).

Arguments Presented by the Parties

The respondent's counsel asserted that the basis for contesting the citation is the respondent's desire for guidance concerning the interpretation and application of the cited standard. Counsel took the position that the cited cylinders were not being "transported" within the common understanding of that term, but were an integral part of the welding truck which was used in the regular course of welding in and around the plant as the need arose, and that it would be extremely inconvenient to cover and uncover the truck-mounted cylinders as the truck moved about from job-to-job at the site. Counsel took the position that the truck and the cylinders "are in use" as the truck goes from one work location to another, and that in this posture, the cylinders are not being transported (Tr. 7). Counsel also indicated that Mr. Lennon apparently misunderstood and believed that the Commission could afford the respondent some appropriate relief from the requirements of the standard as part of its contest in this matter by establishing some standard criteria for compliance to be used at all of the respondent's facilities (Tr. 108Ä109).

Respondent's counsel stated that the respondent has approximately 100 similar operations in 13 states, and that some 20Ä25 MSHA inspectors would be inspecting these sites over the course of a year. Counsel further asserted that the respondent is wiling to do whatever is reasonable to take corrective action at all of its facilities, but given the costs of compliance, and the need for compliance consistency at all of its operations, it needs to know what MSHA might accept as an acceptable cylinder valve cover to insure future compliance (Tr. 11).

Except for the protection provided by the configuration of the truck, the respondent concedes that at the time the citation was issued the cited cylinder valves were not capped or otherwise protected by some type of configuration built around them (Tr. 85). Respondent's position is that once the

work shift starts and the welding truck moves from location to another about the plant, the cylinders are "in use" rather than being "transported." However, in the event the truck left the site with the cylinders aboard to visit another site, and used the public highways, the clinders would be "in transportation," and would probably be required to be capped. Assuming the welding truck, with the cylinders aboard, simply drove about the plant for a day or two, without being used for welding, respondent's counsel and Mr. Lennon conceded that one could argue that the cylinders were being transported (Tr. 85Ä87).

The respondent asserted that it is inconvenient and impractical to require that all cylinders be covered or capped while the truck is moving about the quarry and pit on a rather continuous basis everyday, and that a standardized method of protecting the valves, short of dismantling the valve assemblies and capping the cylinders from job-to-job, must be found.

MSHA's response is that the respondent should be able to come up with a solution to provide the required valve protection at all of its operations, and that the burden is on the respondent to demonstrate its intentions to at least attempt to come up with a suitable valve cover for its use Nationwide. In the instant case, MSHA's counsel suggested that if the respondent had fabricated an acceptable valve cover to abate the violation, and MSHA accepted it, unless there were some factual differences, MSHA would probably accept it as compliance at all of the respondent's operations (Tr. 83). Counsel pointed out that in this case, the respondent took the easy way out by parking the truck and capping the cylinder to achieve abatement, and that no cover was fabricated. Counsel assumes that subsequent to the termination of the citation, the respondent is capping the cylinders and dismantling the valve assembly when they are not in actual use and being driven around in the truck (Tr. 83Ä84).

MSHA's counsel takes the position that on the facts of this case, the standard should be interpreted to include any movement of the cylinders while on the truck within the confines of the plant and quarry. Counsel asserted that the term "in use" applies while the cylinders are actually being used for welding at any particular time, and that otherwise, they would be "transported" while the truck is moving from location to location in and around the mine site (Tr. 8).

In response to the respondent's concern with regard to some standard guideline for determining an acceptable cylinder

cover, MSHA's counsel asserted that in the instant case, MSHA's district manager has informed the respondent as to what MSHA will accept for compliance in the enforcement district responsible for the respondent's mining operation, but that the district manager cannot speak for the other districts. Counsel suggested that the respondent seek a formal interpretation from MSHA's National headquarters in order to ascertain any acceptable guidelines for use throughout its operations (Tr. 13).

MSHA's counsel suggested that the respondent design a valve cover that it believes may have universal application at all of its operations, and submit it to MSHA for a review and evaluation, with a request for an official written opinion as to whether or not it may be acceptable for future compliance (Tr. 100). With regard to the Fountain plant operation, counsel confirmed that Mr. Friend advised him that he had discussed the alternative methods of covering the valves, as shown in the photographs previously discussed, with the plant manager, and respondent's counsel acknowledged that the photographs were in fact supplied to the respondent by MSHA (Tr. 102Ä103).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.16006, for failing to provide protection for the valves on the gas cylinders which were being transported on a welding truck used regularly at the respondent's plant. Although Inspector Floyd did not specifically refer to valves on the face of the citation, he referred to the uncovered cylinders, as well as the attached gauges and hoses, which the evidence shows included valves. The fact is that all of these devices constituted one identifiable unit which is readily attached and removed from the cylinder with a wrench. The credible testimony of Inspector Friend, who accompanied Mr. Floyd, and who also observed that the valves were exposed and unprotected, coupled with the respondent's admissions that the valves were not protected or covered, clearly establishes that this was the case. Further, the respondent has not suggested that it was in anyway confused or prejudiced by the failure of Mr. Floyd to specifically include the term "valve" in the citation.

Respondent's suggestions and arguments that the gas cylinders were "in use" rather than being "transported" on the welding truck in question, are rejected. Section 56.16006

requires that valves on gas cylinders be protected by covers when they are stored or being transported. If they are in use, they are required to be protected by a safe location. Although one may argue that gas cylinders which are on a truck while they are being used for welding are in a "safe location," this would depend on a particular factual situation, and I find no basis for concluding that at the time the welding truck was observed by the inspectors, the cylinders were being used for any welding work. It seems clear to me that the citation was issued after the inspectors concluded that the cylinders were being transported about the plant area in the welding truck as the driver went about his necessary maintenance duties. As a matter of fact, based on the respondent's admissions that such cylinders are routinely unprotected at all times, even when the truck may be idle or parked for days when not used for welding, one could conclude that during this time period, the unprotected cylinders were also stored within the meaning of the standard. See: Secretary v. Turner Brothers, Inc., 6 FMSHRC 1219 (May 1984).

It seems clear to me that the intent of the standard is to preclude the exposure of unprotected gas cylinder valves to the possibility of being struck, thereby unexpectedly releasing gas under great pressure, which may under certain conditions pose a fire or explosion hazard. Given the rather brief and general nature of section 56.16006, and balancing it against the hazards which it is intended to cover, I believe that any reasonable interpretation and application of the standard would lead one to conclude that the cited cylinders in this case were in fact being transported on the welding truck within the common understanding and meaning of that term.

Black's Law Dictionary, Revised Fourth Edition, and Webster's New Collegiate Dictionary defines the term "transport" to mean "to carry or convey from one place to another." The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, defines the term as "a mining term used to cover vehicular transport."

On the facts of this case, it seems clear to me that the cylinders in question were being transported on the welding truck within the meaning of the standard when the truck was being driven from location to location in and around the plant site in question. Inspector Friend observed the truck being driven about at least three times when he was at the site at the time of the inspection, and during all of this period of time the unprotected cylinder valves were aboard and were being transported. Accordingly, I conclude and find that MSHA has established a violation, and the citation IS AFFIRMED.

History of Prior Violations

MSHA's computer print-out for the 2Äyears prior to the issuance of the citation which was issued in this case reflects four "single penalty" section 104(a) Citations which have been paid. I conclude and find that the respondent has an excellent compliance record.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The parties have stipulated that the respondent is a large granite mine operator and that the payment of a civil penalty will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Good Faith Compliance

Abatement was accomplished within one-half hour of the issuance of the citation after the cited truck was parked, and the employees given instructions for future compliance. Under the circumstances, I conclude and find that the respondent exercised rapid good faith compliance in abating the violation.

Negligence

The inspector who issued the citation found that the violation was the result of a low degree of negligence on the part of the respondent. I agree, and adopt this finding as my conclusion on this issue.

Gravity

The inspector who issued the citation found that the violation was not significant and substantial, and that any injury as a result of the violation would be unlikely. Although Inspector Friend expressed an opinion that the violation may have been serious due to the fact that one of the valves was protruding from the side of the truck, I find no credible evidence to establish that the truck travelled in any area where there was a likelihood that the unprotected valve would be struck. Under the circumstances, I find no basis for changing Inspector Floyd's gravity finding, and I conclude and find that the violation was non-serious, and accept his finding in this regard.

Civil Penalty Assessment

MSHA's proposed civil penalty assessment of $20 for the violation in question IS AFFIRMED, and the respondent IS ORDERED to pay that amount to MSHA within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge