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SOL (MSHA) V. RIVER CEMENT
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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 PROCEEDINGS Docket No. CENT 88-4-M A.C. No. 23-00188-05524
v.	
RIVER CEMENT COMPANY, RESPONDENT	Docket No. CENT 88-5-M A.C. No. 23-00188-05525 Docket No. CENT 88-6-M A.C. No. 23-00188-05526
	Selma Plant Quarry and Mill

DECISION

Appearances: Tobias B. Fritz, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri, for the Petitioner;
Bradley S. Hiles, Esq., and, JoAnne Levy Saboeiro, Esq., Peper, Martin, Jensen, Maichel and Hetlage, St. Louis, Missouri, for the Respondent

Before: Judge Maurer

STATEMENT OF THE CASE

These civil penalty proceedings concern proposals for assessment of civil penalties 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). The petitioner initially sought civil penalty assessments for five alleged violations of certain mandatory safety standards found in Part 56 of Title 30, Code of Federal Regulations.

Pursuant to notice, the cases were heard in St. Louis Missouri on March 29, 1988. At the beginning of that hearing, I approved the vacation by the petitioner of Citation No. 2870962 and the settlement without reduction in penalty of Citation No. 2870467. That left one 104(a) citation remaining in each of the three above-styled cases to be heard and decided. The parties filed post-hearing arguments and proposed findings which I have considered in the course of making and writing this decision.

STIPULATIONS

The parties stipulated to the following:

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977.

2. Respondent operates the Selma Plant Quarry and Mill, where 347,550 hours were worked during calendar year 1986.

3. Respondent has paid 14 violations in 99 inspection days in the 24Ämonth period preceeding February 1987.

4. Respondent would not be adversely affected by the payment of the proposed civil penalties.

ISSUES

The primary issues presented are: (1) whether the conditions or practices cited constitute violations of the cited mandatory standards, and (2) the appropriate civil penalties to be assessed for the violations, should any be found, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

DISCUSSION WITH FINDINGS

I. DOCKET NO. CENT 88Ä4ÄM

Section 104(a) Citation No. 2870494, which is the subject of this proceeding, was issued by an MSHA inspector on February 26, 1987. The citation alleges a violation of the mandatory safety standard found at 30 C.F.R. 56.9087 and the condition or practice alleged by the inspector to be a violation of that standard states as follows:

> The Bobcat FEL #1187 was not equipped with a reverse signal alarm. This loader has restricted view to the rear and operates in the entire mill area. The vehicle was not being used on this shift.

30 C.F.R. 56.9087 provides in its entirety as follows:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Respondent admitted that the front end loader, number 1187, was not equipped with an operational automatic reverse signal alarm on February 26, 1987, and that the equipment was available for use by its employees on that date.

At the conclusion of the Secretary's case, I granted respondent's motion to vacate the citation and dismiss the case based on the fact that the Secretary had not proffered any evidence that the Bobcat was operated in violation of the cited standard on February 26, 1987, or indeed any other prior date certain.

Since the citation did not specifically allege any other prior date, I found the relevant date to be February 26, 1987, as that was the date contained in Section IÄViolation Data on Petitioner's Exhibit No. 1, which is Citation No. 2870494. Therefore, I held that the Secretary must prove that the violations occurred on that date, which she could not do. In fact, at the close of the Secretary's case concerning this citation, it became evident that she could not prove that a violation of the cited standard occurred on any particular day, before, on or even after February 26, 1987.

The cited standard gives the operator the option to operate the equipment without an automatic reverse signal alarm if they utilize an observer to signal when it is safe to back up. When Inspector Ryan testified he was asked what the basis was for his belief that the operator had used this equipment without an observer. He replied "[a]t this time, sir, the best thing I can tell you would be instinct."

The Secretary's next witness, Mr. Wagner, who is a former employee of the respondent, did better than that, but he too was unable to identify any specific instance or date when he operated the Bobcat in violation of the cited standard although he testified that he had done so many times.

The Secretary argues that at unspecified occasions and times prior to the date of the citation, the respondent violated the cited standard because they had a general policy of not providing an observer while operating the Bobcat in reverse. This argument overlooks the fact that this particular standard does not speak to company policy, but rather requires evidence of discrete violations of its terms, including the alternative method of compliance.

I have again searched the record herein and am unable to locate any specific evidence of a date, time and place when the respondent was in noncompliance with the standard and I find that

in order to have made a prima facie case of a violation the Secretary must have produced some evidence that the respondent was operating this equipment without a reverse signal alarm or an observer at some definite time or at least some date certain. To hold otherwise would force the respondent to prove the negative, i.e., that it did not operate the equipment in violation of the standard on any day since it was first acquired, which was years before the citation was written. Therefore, I conclude that Citation No. 2870494 was properly vacated at the close of the petitioner's evidence pursuant to the Federal Rules of Civil Procedure (F.R.C.P. 41(b)).

II. DOCKET NO. CENT 88Ä5ÄM

Section 104(a) Citation No. 2870470, which is the subject of this proceeding, was issued on February 25, 1987. The citation alleges a violation of the mandatory standard found at 30 C.F.R. 56.16003 and the condition or practice alleged by the inspecto to be a violation of that standard states as follows:

> A 55 gallon barrel of tannergas was stored alongside the maintenance shop.

30 C.F.R. 56.16003 provides in its entirety as follows:

> Materials that can create hazards if accidentally liberated from their containers shall be stored in a manner that minimizes the dangers.

Inspector Wilson issued the subject citation because he observed a barrel of tannergas (Footnote 1) stored outside the respondent's maintenance shop and was concerned that there could be an explosion if fumes got into the shop should there be any accidental liberation of the substance and ignition from welding or grinding sparks occurred. He testified that the substance could be accidentally liberated by a vehicle running into it and rupturing the drum, or if it was knocked off the rack, its valve could rupture. He further testified that employees periodically filling other containers with the tannergas could have incidental spillage occur.

During cross-examination, however, the inspector was obviously not very conversant with the particulars of why this particular storage was hazardous, if it was. He readily admitted that at the time of his inspection, he did not know what tannergas was, did not physically inspect it, did not know its

evaporation rate or indeed even if it existed in vaporous form. Furthermore, he opined that of all the ways he could possibly think of for the tannergas to have been accidentally liberated in its original location all were probably unlikely to occur.

To rebut what nominally could be considered a prima facie case for a violation of the cited standard, the respondent called Mr. John Jurgiel, a certified industrial hygienist, as an expert witness. Mr. Jurgiel agreed with the inspector that based on his observations of the area where the tannergas was stored at the time the citation was written, accidental liberation of the tannergas was unlikely. He further testified that in his opinion even if a spill occurred outside the shop it was almost impossible for the tannergas vapors to enter the maintenance shop, travel the 75 feet to the welding area, and concentrate at the lower explosive limit of six percent, meaning that the tannergas vapor must comprise six percent by volume of the air to be explosive. Mr. Jurgiel therefore concluded that the storage of the tannergas drum outside the maintenance shop was a "no hazard" situation, presenting no likelihood of danger to the health or safety of the employees.

Interestingly, the inspector required and approved an abatement site for the storage of the tannergas which is contrary to the instructions on the material safety data sheet (MSDS) for tannergas. The data sheet specifically states "do not store in open sunlight." For this reason, Mr. Jurgiel believes that the original, cited location was better than the abatement site where the tannergas is now located in the sun, notwithstanding the contrary warning on the MSDS.

I conclude that the preponderance of reliable, probative evidence in the record does not establish that the tannergas was stored in an unsafe manner and to the contrary I find that it was stored in a manner that minimized the danger of explosion, at least in comparison to its present, approved location. Therefore, it follows that I find no violation of the cited mandatory standard.

III. DOCKET NO. CENT 88Ä6ÄM

Section 104(a) Citation No. 2870466, which is the subject of this proceeding, was issued on February 24, 1987. The citation alleges a violation of the mandatory standard found at 30 C.F.R. 56.14045 and the condition or practice alleged by the inspecto to be a violation of that standard states as follows:

> Welding operations in the shop were not ventilated.

30 C.F.R. 56.14045 provides in its entirety as follows:

> Welding operations shall be shielded and well ventilated.

Inspector Wilson personally observed a welding operation in the respondent's shop on February 24, 1987. He testified he observed a welder "hard surfacing" a piece of equipment and the smoke coming off that welding rod was spreading throughout the shop area. To the best of his recollection, there was no air movement in the shop at the time this "hard surface" welding was taking place. This condition most likely existed at that time because all the doors in the maintenance shop were closed and the ventilation fans were not operating. Subsequent testimony established that it was company policy on cold days to operate the ventilation system only intermittently. If someone noticed welding fumes building up, they would turn on the fans and open the doors, which was apparently sufficient to dissipate the smoke and fumes.

This violation, however, is not about the sufficiency of the ventilation system, which everyone agrees was not even in use at the time. Rather, the violation was completed if the inspector observed even a single discrete welding operation which was not well ventilated. The uncontradicted evidence is that he in fact did personally observe such an operation and I find that evidence to be credible, and entirely consistent with the fact that the ventilation fans were not in operation and all the doors were closed. Not an unlikely configuration in February in Missouri, but nonetheless one that caused a violative accumulation of smoke and fumes. Therefore, I find that a violation of 30 C.F.R. 56.14045 has been established, as alleged.

A "significant and substantial" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of

> Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

The hazard involved in this particular violation is the accumulation of unhealthful concentrations of fumes and/or smoke. The inspector did not have any specific information concerning actual exposure levels in the shop since he did not collect any air samples from the respondent's shop. The Secretary also put on evidence from a health specialist with some knowledge of welding that chromium, manganese and iron oxide fumes are almost always present when you have hard surface welding going on. He further testified that beyond some ceiling value (the TLV), these materials can be harmful. However, he had not analyzed any air samples pertaining to welding fume concentrations in the respondent's shop, but rather was testifying in a general manner about hard surface welding and overexposure to hazardous materials.

Once again, Mr. Jurgiel, an industrial hygienist hired by the respondent, went the extra mile. He collected several air samples in the shop under conditions simulating the welding observed by Inspector Wilson. More specifically, he arranged to have an employee hard surface weld continuously for one hour with the maintenance shop doors closed and the ventilation fans off. These air samples were than turned over to an accredited industrial laboratory where chemical analysis showed the exposure to the potentially hazardous components of the welding rods to be substantially below the threshold limit values (the TLVs) for those elements. Mr. Jurgiel therefore concluded, with some

scientific basis, that there was no health hazard posed for the welder or other persons in the shop, at the concentrations of smoke and fumes observed by Inspector Wilson.

I find the results of Mr. Jurgiel's air sampling tests and the subsequent chemical analysis of the air filters by an atomic absorption spectrophotometer to be credible and therefore conclude that the violation was not "significant and substantial" and will affirm the citation on that basis.

CIVIL PENALTY ASSESSMENT

In assessing a civil penalty herein, I find and conclude that this violation resulted from moderate negligence as marked on Petitioner's Exhibit No. 8 and that any injury or illness resulting from this violation was unlikely. I have also considered all the foregoing findings and conclusions made in the course of this decision and the requirements of section 110(i) of the Act. Under these circumstances, I find that a civil penalty of $50 is appropriate in this case.

ORDER

1. Citation No. 2870962 is vacated.

2. Citation No. 2870467 is affirmed and a penalty of $20 is assessed.

3. Citation No. 2870494 is vacated.

4. Citation No. 2870470 is vacated.

5. Citation No. 2870466 is affirmed as a "non-S & S" citation and a penalty of $50 is assessed.

6. Respondent is ordered to pay to the Secretary the sum of $70 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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Footnote starts here:-

~Footnote_one

1 Tannergas is a flammable liquid antifreeze used in compressed air lines.