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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. WEST 87-206-M
A.C. No. 05-03998-05506 NYO

v.

Summitville Mine

INDUSTRIAL CONSTRUCTORS
CORPORATION,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. James A. Brouelette, Industrial Constructors
Corporation, Missoula, Montana,
pro se.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., (Mine Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charges the respondent, Industrial Constructors Corporation (ICC), the operator of the Summitville Mine with the violation of 30 C.F.R. 56.4402 a mandatory safety standard promulgated by the Secretary of Labor.

The proceeding was initiated by the Secretary with the filing of a proposal for assessment of civil penalty. The operator filed a timely appeal contesting the existence of the alleged violation and the amount of the proposed civil penalty. An evidentiary hearing was held on these issues at Denver, Colorado. Oral and documentary evidence was presented and the matter submitted for decision. The parties waived filing of briefs.

REVIEW OF EVIDENCE AND FINDINGS

This Summitville Mine is an open pit, heap leach gold mining operation located in Summitville, Rio Grande County, Colorado. The mine was owned by Summitville Consolidated Mining Company

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Inc. Industrial Constructors Corporation (ICC) was under contract to complete the mining phase.

Approximately 325 employees worked two-eleven hour shifts, seven days a week performing the mining tasks and three eight hour shifts, seven days a week milling.

During the early morning hours of September 5, 1986, at approximately 2 a.m. an accident, involving an explosion and fire, occurred at the bulk fuel storage tank area of the mine. The accident resulted in serious injury to the driver of ICC's fuel tank truck and injury to another miner who came to the truck driver's assistance.

At the time of the accident the driver was replenishing the supply of diesel in the large supply tank of his fuel tanker truck. He was using a Honda draft pump, driven by a 5 h.p. internal combustion gasoline engine, to pump the diesel fuel from one of the large storage tanks into the 3,000 gallon capacity tank of the fuel truck. Suddenly there was an explosive fire which engulfed the driver causing serious injuries.

MSHA investigated the accident. The preliminary investigation started September 5, 1986. It commenced its on-site investigation about noon Monday September 8, 1986 and completed it on September 10, 1986. Its primary concern was to determine the ignition source of the fire. MSHA concluded in its investigation report that the ignition source of the fire could not be determined.

At the hearing MSHA Inspector Simpson testified that even though they could not determine the ignition source of the fire they did establish that the fire started around the gasoline powered Honda pump while it was being used to pump diesel from the storage tank into the supply tank of the fuel truck.

When the MSHA investigators first saw the Honda pump on September 8, 1986 it was in a wheelbarrow used to move it from tank to tank and it was located underneath a box-like protective cover approximately 20 feet from where the pump was in use when the fire broke out. The pump had been taken out of service, "tagged" and placed underneath the cover to protect it from the elements. Respondent had "tagged it out", shortly after the accident.

When MSHA commenced its on-site inspection on September 8th it took a photograph of the pump. This photograph, Exhibit PÅ4, shows the engine of the pump as it appeared when first observed by the MSHA investigators. They noticed that the pump's engine did not have the manufacturer's control switch. There was just an open box-like area where the manufacturer's control switch would normally be located. MSHA investigators looked but were

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unable to find any other "on/off" switch. MSHA Inspector Simpson stated this lack of switch was unusual. He testified that where there was no "on/off" switch on an engine such as this the normal procedure for shutting off the engine would be to either pull a spark plug wire or possibly "flood out" the engine. It was later determined that the engine had been turned on and off by the use of a toggle switch. It is undisputed that sometime after the Friday morning September 5th accident and before the commencement of the on site investigation on Monday September 8th, that some unknown person had removed this toggle switch from the engine of the Honda pump.

This alteration of the accident scene was determined through the use of a photograph taken and provided by ICC's management. The photograph was taken by ICC's project superintendent on September 6th the day after the accident. The negative was given to MSHA by ICC's safety director on September 22nd but was not developed by MSHA until the first part of October. A comparison of that photograph, Exhibit PÄ3, with the photograph taken by MSHA when it commenced its on-site inspection (Exhibit PÄ4) plainly shows a toggle switch that was not present at the time the on-site inspection commenced.

On November 12, 1986 MSHA issued its Section 104(a) Citation No. 2638787 charging ICC with a violation of 30 C.F.R. 50.12. The citation reads as follows:

On September 5, 1986 an accident occurred at the Summitville Mine. The accident scene was altered, by removing a toggle switch on the Honda Engine involved in the accident. Photographs taken by the company after the accident show this switch. The switch was missing from the Honda engine prior to an on-site investigation by MSHA. This action by the company is in direct violation of 103(j) of the Act. The switch in question could possibly have direct bearing on the possible cause of this accident.

30 C.F.R. 50.12 provides as follows:

Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

Stipulations

1. Industrial Constructors Corp., respondent, is the operator of the Summitville Mine located at Rio Grande County, Colorado.

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2. The operations and products of the mine affect commerce, its products enter commerce and accordingly, the mine and its operators are subject to the provisions of the Act.

3. The undersigned ALJ has jurisdiction to hear and decide this case.

4. Respondent is a large operator that employed approximately 200 people at this mine site at the time of the alleged violation and overall employed approximately 700 people.

5. This is the first citation issued to this operator for allegedly altering an accident site.

Respondent presented evidence that its management fully cooperated in MSHA's investigation of the accident. In addition, the operator had outside professionals (Rampart Investigators Inc.) conducted a "cause and origin investigation" regarding the September fire and explosion. Rampart's investigators reported that a cigarette butt was found in the immediate area and that this butt was the same brand of cigarettes the victim (truck driver) had on his person at the time of the accident. Rampart Investigation Inc. concluded that the probable source of ignition was the discarding of the cigarette butt into the gasoline fumes or spilled gasoline on the ground next to the tanker truck.

Discussion and Further Findings

Irrespective of the cause of the accident the evidence establishes that the accident scene was altered by the removal of a toggle switch from the Honda gasoline engine that powered the pump involved in the accident. In addition, the undisputed testimony of the MSHA mine inspector established the fact that this alteration of the accident scene hampered the investigation.

No evidence was presented as to who removed the toggle switch from the Honda engine. A comparison of the two photographs Exhibit PÄ3 and Exhibit PÄ4 clearly shows that the toggle switch was removed from the Honda engine between the time of the accident occurred on September 5th and the time MSHA commenced its on-site inspection on September 8th. During that time the Honda engine was under the control of ICC in a secured area of the mine site approximately 200 yards south of the main guard house. Approximately 200 employees had access to the Honda engine at that site.

Evidence was presented that before the accident the original design of the Honda engine had been modified by wiring in the

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toggle switch. The MSHA inspector testified that that this was a very unsafe modification. From the evidence presented and the facts established and the reasonable inferences that can be drawn from them, it is found that the accident scene was altered by an employee or someone under the control of the respondent. Respondent was responsible for taking the measures needed to prevent this deliberate alteration of the accident scene. I find that respondent was negligent in its failure to prevent the alteration before MSHA commenced its on-site investigation.

Respondent argued that it had in effect preserved the evidence by taking the photograph of the Honda engine that shows the toggle switch. It points to the fact that its project superintendent took the photograph of the Honda engine the day after the accident and (22 days later) it gave the negative to MSHA. The photograph clearly shows the toggle switch dangling along side the engine with open contacts where the terminal wires were attached. This contention that the photograph preserved the evidence must be rejected in view of the undisputed testimony of MSHA's investigator that the removal of the toggle switch hampered the investigation. It is found that the accident scene was altered before MSHA could complete its investigation and that this was a violation of 30 C.F.R. 50.12.

PENALTY

With respect to the penalty for Citation No. 2638787 the Mine Safety and Health Administration under 30 C.F.R. 100.5 elected to waive the regular assessment formula and decided to make a special assessment in accordance with 30 C.F.R. 100.5. In its narrative findings for a special assessment MSHA found that the gravity of the violation was "non-serious", that the violation resulted from the operator's negligence, and that the violation was abated within a reasonable period of time. The special assessment report concluded with a statement that "based on the six criteria set forth in 30 C.F.R. 100.3(a) and the information available to the Office of Assessments, it is proposed that the Industrial Constructors Corporation be assessed a civil penalty of \$250.00."

I agree with the finding in the narrative report of MSHA's Office of Assessments that the gravity of the violation was non serious. I also find the violation resulted from the operator's negligence which I evaluate as low under the facts and circumstances of this case. Arguably it is only with hindsight that respondent would have reason to suspect that someone would alter the accident scene.

At the hearing Petitioner argued that the alteration was a "purposeful" alteration and that the penalty for the violation should be \$5,000. I have determined that the penalty should be

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more than the \$250 initially proposed by MSHA. The violation could contribute to another fire or explosion. Complete accident investigations are necessary to determine the cause of an accident so corrective action can be taken to prevent another occurrence. However, in view of my findings on gravity and negligence and on the undisputed testimony that Respondent's top management fully cooperated in the investigation to determine the cause of the accident, a \$5,000 penalty would be excessive. Based on careful consideration of the entire record and the six criteria set forth in 30 C.F.R. 100.3(a), I find that the appropriate civil penalty in this case for the violation of 30 C.F.R. 50.12 as alleged in Citation No. 2638787 is \$500.00. Citation No. 2638556

Respondent moved to withdraw its contest of Citation No. 2638556 which alleges a violation of 30 C.F.R. 56.4402 and agreed to pay the \$46.00 proposed penalty. The motion is granted and the \$46.00 proposed penalty is approved.

Conclusions of Law

Based upon the entire record and the 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. The respondent violated the provisions of 30 C.F.R. 56.4402, a mandatory safety standard.
3. The appropriate penalty for this violation is \$500.00.
4. The appropriate penalty for the violation of 30 C.F.R. 56.4402, alleged in Citation No. 2638556, is \$46.00.

ORDER

Citation Nos. 2638556 and 2638787 are affirmed and Industrial Constructors Corporation is ordered to pay civil penalties totaling \$546.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge