

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 1, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 88-43-M
Petitioner : A. C. No. 19-00798-05503
: :
v. : Richardson Pit Mine
: :
WARREN E. MANTER COMPANY, :
INC., :
Respondent :

DECISION

Appearances: David L. **Baskin**, Esq., Office of the Solicitor
U. S. Department of Labor, Boston, Massachusetts,
for Petitioner.
Warren E. Manter, Pro Se, for the Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties for four alleged violations filed by the Secretary of Labor against Warren E. Manter Company, Inc., under section 110 of the Federal Mine Safety and Health Act of 1977, **30 U. S. C. § 820**. An evidentiary hearing was held on March 24, 1989, and the parties have waived the filing of post-hearing briefs.

When a violation is established, section **110(i)** of the Act, **30 U. S. C. § 820(i)**, directs that in assessing the amount of civil penalty, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, 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 operator in attempting to achieve rapid compliance after notification of a violation.

Gravity and negligence will be considered individually with respect to each citation. Based upon the record, I make the following findings for the remaining criteria as applicable to all the citations. The alleged violations were rapidly abated in good faith. In absence of any evidence to the contrary, I conclude that the imposition of civil penalties herein will not affect the operator's ability to continue in business. Also in the absence of any evidence to the contrary from the Solicitor, the operator prior history is held noncontributory. The operator's size is small (**Tr.87**).

Citation No. 2853589 sets forth the subject condition as follows:

"The fire extinguisher in the generator trailer had been discharged and not replaced with a fully charged and sealed extinguisher. There is oil and other flammable material in the trailer."

The citation charges a violation of **30 C.F.R. § 56.4203** which provides:

"Fire extinguishers shall be recharged or replaced with a fully charged extinguisher promptly after any discharge."

A conflict exists in the testimony regarding this citation. The inspector testified that the seal on the extinguisher had been broken (**Tr. 15**). He said an employee of the operator told him the extinguisher had been used previously in a fire (**Tr. 16**). The inspector admitted he did not look at the extinguisher's gauge (**Tr. 26**). The operator testified that although the seal was broken, the gauge showed the extinguisher was full and that the extinguisher had in fact not been used and was charged (**Tr. 29, 991**). I find that the operator was a credible witness and that his first-hand testimony is persuasive. As appears hereinafter, where a violation did exist, the operator freely admitted it. The employee upon whom the inspector relied with respect to the supposed prior use of the extinguisher, was described by the operator as disgruntled and that description is uncontradicted. The hearsay statements attributed to this employee are not as convincing as the operator's live testimony. Accordingly, I find the extinguisher was not discharged and I conclude that no violation existed. Therefore, this citation is vacated and no penalty is assessed.

Citation No. 2853590 sets forth the subject condition as follows:

"**The** walkway and floor in the trailer for the generator is covered with oil [sic] it is a slipping and fire hazard. This area is used as a walkway to gain **access** to some areas of the plant."

The citation charges a violation of **30 C.F.R. § 56.20003(a)** which provides that at all mining operations:

"**(a)** Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly."

The inspector testified that the walkways were covered with dust and oil (Tr. 31). The operator admitted the trailer was messy (Tr. 101). On this basis I conclude a violation existed. I also find the operator was negligent, relying upon the inspector's estimate that the condition occurred over a period of time (Tr. 33). The violation was however, of only modest gravity. The inspector testified that the oil was a mixture of diesel and motor oil and that most of it was motor oil which is not as flammable as diesel (Tr. 36). In addition, the inspector stated that except for oil under the generator, stone dust covered the oil and made it less flammable (Tr. 36-37). The operator asserted that stone dust covered the oil everywhere, rendering all of it less flammable (Tr. 101). To the extent that there is a conflict in the descriptions, I find that of the operator more persuasive. I also accept the operator's testimony that the cited area was not the main access to the plant (Tr. 101, 102). Finally, although the generator was on, the plant was not operating. The foregoing circumstances indicate only moderate gravity and show as well that there was no reasonable likelihood of injury. Therefore, the significant and substantial designation on the citation was improper: Cement Division, National Gypsum Co., 3 FMSRRC 822, 825 (1981), Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). The penalty was originally assessed at \$276, but in view of the circumstances set forth herein regarding gravity and the other statutory criteria, I determine a penalty of \$75 is appropriate.

Citation No. 2853591 sets forth the subject condition as follows:

"The electrical junction box on the scalping screen is broken loose and hanging on live wires. Everyone on the plant is exposed to potential electrical shock..?"

The citation charges a violation of 30 C.F.R. § 56.12032 which provides:

"Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

The inspector's testimony that the junction box was disengaged from the plant structure and was hanging supported by wires that supply electricity to the plant is uncontradicted (Tr. 50). On this basis I find a violation existed. The inspector did not know exactly how long the condition had existed, but he estimated it would have been more than a day, something in the nature of days (Tr. 64, 72). The condition was visibly obvious (Tr. 64). The operator could not state when the condition occurred, but I accept his testimony that the rust the inspector saw was not on the screws which had been holding the box before they broke off and that therefore, the rust is not an indication

of the duration **of** the violation (**Tr. 77**). Clearly, the operator should have found and corrected this condition and accordingly must be found negligent. With respect to gravity, I accept the operator's statement that the voltage was 220 and that if fuses failed to work, the plant structure could become energized, creating a shock hazard (**Tr. 79**). However, gravity is greatly mitigated, because the plant was not operating. The inspector also mentioned the possibility of a shock hazard if wires were chafed through, but he did not see any evidence of insulation wearing away because he did not look. Based upon the foregoing, I conclude the violation was of only moderate gravity. Because the plant was not operating, there was no reasonable likelihood of injury and therefore, the significant and substantial designation on the citation was improper. The penalty was originally assessed at \$413, but in view of the circumstances set forth herein regarding gravity and the other statutory criteria, I determine that a penalty of \$100 is appropriate.

Citation No. 2853592 sets forth the subject condition as follows:

"The guards had been removed from the self-cleaning tail pulley of the small conveyor and not replaced after repairs."

The citation charges a violation of 30 C.F.R. § 56.14006 which provides:

"Except when testing the machinery, guards shall be securely in place while machinery is being operated."

The inspector testified that the location of the missing guard was at the tail pulley of the stacking conveyor (**Tr. 88-89**). The operator admitted the guard was broken off because he had seen it himself the day before (**Tr. 96**). On this basis I find a violation existed. The operator was negligent because the missing guard should have been replaced. With respect to gravity, I accept the operator's testimony that the tail pulley did not extend beyond the belt (**Tr. 96-97**). Nevertheless, as the operator admitted and as the inspector testified, there was a danger that an individual's arm or clothing could become caught (**Tr. 88-89, 97**). However, the inspector testified that only the individual performing maintenance tasks would be subject to such a danger. Finally, any risk of harm was greatly reduced because the plant was not operating. The foregoing circumstances indicate only moderate gravity. Because the plant was not operating, there was no reasonable likelihood of injury and therefore, the significant and substantial designation on the citation was improper. The penalty was originally assessed at \$168, but in view of the circumstances set forth herein regarding gravity and the other statutory criteria, I determine that a penalty of \$75 is appropriate.

ORDER

Accordingly, it is ORDERED that Citation No. 2853589 be **VACATED**, and that Citation Nos. 2853590, 2853591 and 2853592 be **AFFIRMED**.

It is further ORDERED that the designation of significant and substantial in Citation Nos. 2853590, 2853591, and 2853592 be **DELETED**.

It is further ORDERED that the following civil penalties are assessed.

<u>Citation No.</u>	<u>Penalty</u>
2853590	\$75
2853591	\$100
2853592	\$75

It is ORDERED that the operator pay \$250 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

David L. **Baskin**, Esq., Office of the Solicitor, U. S. Department of Labor, John F. Kennedy Federal Building, Government Center, Boston, MA 02203 (Certified Mail)

Mr. Warren E. Manter, Warren E. Manter Company, Inc., 20 **Popes** Lane, Danvers, MA 01923 (Certified Mail)

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