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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. YORK 89-2-M  
A.C. No. 30-00006-05525

v.

Blue Circle Atlantic, Inc.

BLUE CIRCLE ATLANTIC,  
INCORPORATED,  
RESPONDENT

DECISION

Appearances: Jane Snell Brunner, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
New York, New York for Petitioner;  
Paul Gardner, Labor Relations/Safety Manager,  
Blue Circle Atlantic, Inc., Ravena, New York, and  
Mark A. Lies, II, Esq., Seyfarth, Shaw,  
Fairweather & Geraldson, Chicago, Illinois for  
Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging Blue Circle Atlantic, Incorporated (Blue Circle) with one violation of the regulatory standard at 30 C.F.R. 56.14006. The general issue before me is whether Blue Circle violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation at bar, No. 2630320, issued pursuant to section 104(a) of the Act, alleges a "significant and substantial" violation and, as amended, charges as follows:

An employee was required to apply speedi-dry to a take-up pulley drive on the No. 1 main conveyor to prevent the pulley from slipping. The guard was open and the conveyor was running during the

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application process which occurred at 4:05 pm, 6-30-88 on the second shift.

The cited standard requires that "[e]xcept when testing the machinery, guards shall be securely in place while the machinery is being operated."

At hearing Blue Circle conceded that a violation occurred but maintained that it was caused by the unauthorized actions of a non-supervisory employee, Michael Carrano and, presumably, that it was accordingly without negligence.

Former Blue Circle employee Michael Carrano testified that before his retirement on March 31, 1989, he had worked more than 23 years for Blue Circle. At the time of the alleged violation he was working as a utility man, cleaning, aligning and maintaining the No. 1 belt. Carrano described the belt, which transports rock and stone, as 3 to 4 feet wide and running about 3,000 feet in each direction.

Carrano testified that on June 30, 1988, a "spin-out" occurred on the No. 1 belt caused by wet conditions. A "spin-out" results from slippage between the drive pulley and the belt causing the belt to slow down or stop. Spin-outs are corrected by feeding scoops of a substance known as "speedi-dry" onto the pulley as it rotates thereby providing friction between the pulley and the belt.

According to Carrano it had been the established procedure for as long as 20 years to correct a spin-out by first removing the guard surrounding the belt pulley and then calling the crusher operator by mine telephone to stop the belt. An initial quantity of speedy-dry would then be scooped onto the pulley and the belt started. Additional speedy-dry would then thrown onto the rollers as the pulley is rotated. Since the wire mesh on the guard was too fine to enable any significant application of speedy-dry to the rollers it was found to be necessary to remove the guard before application. Carrano testified that he had been taught this procedure by his foreman Ray Shove. Other Blue Circle employees including union committeeman Richard Boice, crusher operator Arnold Schieren, Jr., Martin Powell, and crusher operator Edward Smith, confirmed that these procedures had been followed at the plant for years. The testimony of Boice is also undisputed that he warned Lloyd Shove within six months before the incident at issue and also the current superintendent about the inability to apply speedy-dry through the existing mesh guard. He informed both that it was therefore necessary for the employees to open the

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guard and apply the speedi-dry onto the moving belt. It is further undisputed that these officials admitted to Boice they knew they had a problem and were planning on correcting it in September 1988.

According to Carrano, several months before June 30, 1988, the Blue Circle employees were warned by company officials to no longer remove the guard. On June 30, 1988, another spin-out occurred because of rain. Carrano's foreman, John Zubris, told Carrano by telephone to get the belt running. What happened next was described at hearing by Carrano in the following colloquoy:

Q [By Government Counsel] Now, on June 30th, 1988 after the belt spun out, tell us precisely what happened.

A [By Carrano] Well, at this time the belt spun out -- this happend after we had orders not to open that guard, and not to open that guard under no circumstances, you'll be fired. So, the belt spun out and I realized I couldn't get speedi-dry in there. So I called my foreman, John Zubris, told him I can't \*\*\*

And I told him I can't feed speedi-dry in cause I can't take the guard off. He said, "Well, I want the belt running." I said, "I can't." He said, "Mikey, get that belt running." I said "John, I can't." I said, "I can't take the guard off because I'll be fired."

So, he says, "Mike, get your wrench, take that nut off there." He said, "Don't let me come up those "f-ing" stairs and have to do it. Get that belt running."

So meanwhile I got my wrench -- well, I did ask him, I said, "If I take this guard off, would you back me up on this?" He said, "yep." I took the guard off. He come up while I was taking the guard off, and before I fed speedi-dry on the belt he left.

Then I proceeded to throw speedi-dry on there, and I had the crusher operator on the phone and I told him to start it, and as he started I Kept feeding it, and we got the belt running. So, I didn't think this was a very good idea, so I told Dick

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Boice [the union representative] about it.  
(Tr. 16-18).

Boice recalled that on June 30, 1988, Carrano indeed called him on the mine telephone. Carrano had been confronted by Zubris and was agitated. Boice overheard Zubris "screaming at the top of his lungs" on the phone ordering Carrano "you'll do what I tell you, when I tell you, and I don't care if you like it or not".

Inspector William Prehoda of the Federal Mine Safety and Health Administration (MSHA), issued the citation at bar based upon Carrano's statements that Zubris directed him to perform the cited procedure. Prehoda described the hazard as follows:

by putting speedi-dry on with the scoop -- and this is what Mike Carrano stated he had the guard open and he was putting speedi-dry on with a scoop, and. . . the conveyor was running, and this by being the pinch points it could have caught his arm and probably pulled his arm off, or even himself got thrown into the pulleys so, in other words, it was an unsafe act . . .

This unchallenged testimony is minimally sufficient to support an inferential finding that the violation was "significant and substantial" and serious. See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

Prehoda also opined that the operator was highly negligent because "it was done quite frequently and it should have been corrected". In this regard Prehoda credited Carrano's statement that he had been directed to perform the violative act by his foreman John Zubris. Prehoda therefore necessarily discredited Zubris' statement to him that while he had directed Carrano to throw the material onto the pulley he also told Carrano to close the guard before running the belt. However upon close examination of the testimony of Carrano and Zubris and of those additional persons present at the meeting on July 1, 1988, i.e. Boice and Schucker, I am satisfied that Zubris did not in fact instruct Carrano specifically to throw speedi-dry onto the belt with the guard open while the belt was moving. Zubris' instructions were of course admittedly in violation of the company's March safety directive against opening the guard without the belt being locked-out. Carrano may have accordingly been seriously concerned by Zubris' order but I do not find that Zubris directly ordered Carrano to violate the cited standard.

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Blue Circle is not however without negligence. The evidence shows the existence of a long standing practice of many years during which speedi-dry was applied to a moving pulley with its guard open. In spite of the company memo issued in March 1988 ostensibly prohibiting the practice, management knew that the only effective application of speedi-dry was with the guard open. It is undisputed that Boice so informed several company officials and was told only that the problem would not be corrected until September 1988. Thus while Carrano may not have been directly ordered to perform the cited violative act, he was nevertheless placed in a position by Zubris' orders (to get the belt running) of being compelled to commit the violative act because it was within the knowledge of management that the only way to get the belt running under the circumstances was to apply the speedi-dry onto the moving belt with the guard open. This compulsion under the circumstances constitutes high negligence.

Considering the criteria under section 110(i) of the Act I find that a civil penalty of \$400 is appropriate.

ORDER

Blue Circle Atlantic, Inc. is hereby directed to pay a civil penalty of \$400 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge  
(703) 756-6261