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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. CENT 88-140-M
A.C. No. 41-02522-05513

v.

Damon Quarry

V H W INCORPORATED

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for the
Petitioner;
Russell E. Mackert, Esq., Mackert & Garrett,
Houston, Texas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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 civil assessments for 17 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed an answer denying the alleged violations, and a hearing was held in Houston, Texas.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

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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 in relevant part to the following (Exhibit ALJ-1):

1. The respondent is subject to the jurisdiction of the Act, and the alleged violations took place in or involves a mine that has products which affect commerce.
2. The name of the mine is Damon Quarry, and it is located near Damon, Texas in Brazoria County. The size of the company is 21,166 production tons or hours worked per year and the size of the mine is 21,166 production tons or hours worked per year.
3. The imposition of any penalty in this case will not affect the operator's ability to continue in business.
4. The total number of inspection days in the preceding twenty-four months is seventeen.
5. The total number of assessed violations (including single penalties timely paid) in the preceding twenty-four months is twenty two.
6. On March 10 through April 26, 1988, an inspection was conducted by MSHA Inspectors James S. Smiser and Robert J. Kinterknecht, and they issued 17 section 104(a) citations. All of the citations were abated by the respondent.

Findings and Conclusions

Inspector Smiser testified that the respondent is a crushed stone operator who operates a small surface quarry producing abrasive black limestone from different areas of one pit. He stated that the respondent employs 12 to 14 miners, has a very good compliance record, and has always attempted to address any safety problems in a timely manner. He characterized the respondent as a small-to-medium sized operator, and stated that the quarry pit is a small operation. Respondent's mine supervisor John Duke agreed that the respondent's normal employment consists of 12 to 14 miners (Tr. 30-31).

Contested section 104(a) non-"S&S" Citation Nos. 3273935, 3273939, 3273894, and 3273898, are all "single penalty" citations which were issued during regular mine inspections on March 10, and April 21, and 26, 1988. MSHA seeks civil penalty assessments in the amount of \$20 for each of the citations. The respondent

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agreed to pay the proposed civil penalties for these citations, and to withdraw its contests (Stipulation #3 (exhibit ALJ-1; Tr. 6). I considered the respondent's request as a motion to approve a settlement pursuant to Commission Rule 30, 29 C.F.R. 2700.30, and after review of the citations and the pleadings, the motion was approved from the bench, and my decision in this regard is herein reaffirmed.

With regard to section 104(a) "S&S" Citation Nos. 3273897 and 3273899, issued on April 26, 1988, citing violations of mandatory safety standards 30 C.F.R. 56.9002 and 56.5003, the respondent agreed to pay the full amounts of the proposed civil penalty assessments of \$85 and \$98, and to withdraw its contests and request for a hearing (Tr. 8-9). I considered this request as a motion for approval of a settlement, and approved it from the bench. My decision in this regard is herein reaffirmed.

Section 104(a) "S&S" Citation No. 3273893, was issued by MSHA Inspector Robert J. Kinterknecht on April 20, 1988, and he cited a violation of mandatory safety standard 30 C.F.R. 56.12019. The cited condition or practice states as follows:

The access to the electrical switch gear in the N. West wall of the shop was not being maintained in that misc. diesel motor parts and (1) electrical Toshiba 40 H.P. 4-pole Nema design, serial No. 80905691 was in the walkway to the switch gear.

Mandatory safety standard 30 C.F.R. 56.12019, provides as follows: "Where access is necessary, suitable clearance shall be provided at stationary electrical equipment or switchgear."

The evidence establishes that MSHA Inspector James S. Smiser accompanied Inspector Kinterknecht during the inspection on April 20, 1989, and that the citation was served on respondent's mine supervisor, John Duke. Mr. Smiser and Mr. Duke were present at the hearing, and they testified in this proceeding. Both Mr. Smiser and Mr. Duke viewed the cited conditions in question, and petitioner's counsel asserted that the citation should be reduced to a non-"S&S" citation because the likelihood of an injury was unlikely, and that the materials which were present in the area were from an engine which was being dismantled and that it was a temporary, rather than a continuing condition. The violation was immediately abated by simply moving the engine parts to one side.

Petitioner's counsel confirmed that the intent of the standard is to provide clearance so that someone could have ready access to the electrical switch controls, and that the presence of the engine parts did not provide "straight-line" access. Although the only conceivable hazard was a tripping hazard if someone stumbled over the engine parts, counsel confirmed that

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there was enough room to go around the parts to access the switch, and that someone would likely go around the parts to do this.

Counsel proposed to reduce the proposed civil penalty assessment of \$74 to \$20 as a non-"S&S" single penalty citation, and Inspector Smiser agreed (Tr. 14-16). I considered the argument presented by petitioner's counsel as a motion for approval of a proposed settlement pursuant to Commission Rule 30, 29 C.F.R. 2700.30, and it was approved from the bench (Tr. 16). My bench decision in this regard is herein reaffirmed, and the section 104(a) "S&S" citation is modified to a single penalty non-"S&S" citation. The respondent agreed to pay the modified civil penalty assessment of \$20 for the violation in question, and to withdraw its contest.

Section 104(a) "S&S" Citation No. 3273896, was issued by Inspector Kinterknecht on April 26, 1988, and he cited a violation of mandatory safety standard 30 C.F.R. 56.12032. The cited condition or practice states as follows:

The Dieplex box on the side of the crusher frame located just under a transformer was not provided with a cover plate. There was an orange colored extension cord plugged into it. This is a 120 VAC.

Mandatory safety standard 30 C.F.R. 56.12032, provides as follows:

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

Petitioner's counsel stated that the parties proposed to settle this violation by a slight reduction in the original civil penalty assessment, from \$74 to \$60, and that the respondent has agreed to pay the settlement amount in satisfaction of the violation. In support of this proposal, counsel stated that after consulting with the inspectors, they agreed that the box in question was located out of sight under a transformer, and that the respondent's negligence was "low" rather than "moderate." The inspectors also agreed that cover plates were in place on other equipment, and that the plate in question had been removed for some unexplained reason, and simply not replaced (Tr. 17). Abatement was achieved immediately by the replacement of the cover plate. The proposed settlement was approved from the bench, and my decision in this regard is herein reaffirmed (Tr. 17).

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Section 104(a) "S&S" Citation No. 3273937, was issued by Inspector Kinterknecht on March 10, 1988, and he cited a violation of mandatory safety standard 30 C.F.R. 56.14001. The cited condition or practice states as follows:

The head pulley on the shaker belt was not guarded, thus exposing a pinch point to persons that would have to work around this area cleaning up and maybe grease (sic) and maintenance work (sic).

Mandatory safety standard 30 C.F.R. 56.14001, requires that pulleys and similar exposed moving machine parts which may be contested by persons, and which may cause injury to persons, be guarded.

Respondent's Mine Supervisor John Duke testified that the unguarded pulley belt in question was located out of reach and approximately 10 feet above a platform on which the shaker was located. He confirmed that while one could stand on the shaker and reach the belt, no one is permitted to stand on a vibrating shaker at any time, and that any maintenance work which would place someone in close proximity to the belt while standing on the shaker would only be done while the equipment was deenergized and inoperative (Tr. 18-20).

Inspector Smiser, who accompanied Inspector Kinterknecht when he issued the citation, agreed with Mr. Duke's testimony and agreed that it would be unlikely that anyone would come in contact with the unguarded belt during the normal operation of the shaker (Tr. 20-21).

Petitioner's counsel stated that in view of the fact that it was unlikely that anyone would contact the unguarded belt and sustain an injury, he proposed to modify the citation to a non-"S&S" citation, and to reduce the civil penalty assessment from \$136 to \$20. Respondent's counsel joined in the motion, and agreed that the respondent would pay the modified civil penalty. Upon further consideration of the proposed settlement disposition for this citation, it was approved from the bench (Tr. 21). My bench decision in this regard is herein reaffirmed.

Section 104(a) "S&S" Citation Nos. 3062190, 3062191, and 3062192, were issued sequentially by Inspector Smiser on March 17, 1988, after he found that three motors on a shaker conveyor were not being protected against excessive overloads by fuses of the correct type and capacity. Two of the motors were 7.5 horsepower, and the third one was a 5 horsepower motor, and they were all protected by one 100 amp. fused disconnect. Inspector Smiser cited violations of mandatory safety standard 30 C.F.R. 56.12001, which requires that all circuits be protected against excessive overloads by fuses or circuit breakers of the correct type and capacity.

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Petitioner's counsel stated that the parties proposed to settle these violations by joining the three citations into one citation which would be assessed at \$136, and that the inspector's "S&S" finding would stand (Tr. 21-22). Counsel proposed to vacate Citation Nos. 3062191 and 3062192, and to modify Citation No. 3062190, to include all three of the cited motors, and that this citation will be affirmed as an "S&S" citation, and assessed a civil penalty in the amount of \$136 (Tr. 29).

Inspector Smiser confirmed that he issued the citations after finding that the three motors were being protected by one 100 amp. disconnect fuse system rather than three individual fuses, and that this was contrary to the National Electrical Code which requires individual fuse protection for each motor. He stated that protecting each of the motors by one large 100 amp fuse disconnect would not afford adequate short circuit protection for each of the motors, and that section 75.12001 requires circuits to be protected against excessive overload by fuses of the correct type and capacity.

Mr. Smiser stated that the hazard presented involved inadequate short circuit protection which could result in an electrical shock should anyone touch any energized equipment frames. He agreed that such a hazard would only be present in the event of a fault condition, which may cause a short circuit in the motors.

Mr. Smiser confirmed that the violations were timely abated by the respondent by providing adequate fuse protection for each of the individual motors. Although he extended the abatement times because of the difficulty encountered by the respondent in obtaining the necessary parts to correct the conditions, he confirmed that the respondent exercised good faith in correcting the conditions.

Mr. Smiser confirmed that all of the conditions cited in the three individual citations were all the result of one violation, namely, the failure to provide fuses of the correct capacity to protect the motors from short circuits. He also confirmed that he issued three separate violations because of office policy, but agreed that the issuance of one citation incorporating the same violative conditions with respect to each of the motors would effectively take care of the problem.

With regard to the proposed settlement by vacating Citation Nos. 3062191 and 3062192, and incorporating the conditions as part of Citation No. 3062190, Mr. Smiser expressed agreement with this proposal and confirmed that it was a reasonable resolution since all of the citations essentially stemmed from one common violative condition. Mr. Smiser also agreed that payment of the full amount of \$136 for "S&S" Citation No. 3062190, as amended, to incorporate the two other motors was reasonable and that he

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would have no objection to the proposed settlement disposition for the three citations which he issued (Tr. 22-29).

The proposed settlement was approved from the bench (Tr. 29), and my bench decision in this regard is herein reaffirmed.

With regard to section 104(a) Citation Nos. 3273934, 3273936, 3273938, 3273887, and 3273895, the parties agreed to settle these violations. The respondent agreed to pay the full amount of the proposed civil penalty assessment of \$74, for Citation No. 3273895. With respect to the remaining citations, the parties proposed to settle these citations by reducing the proposed civil penalty assessment of \$85 to \$75 for Citation No. 3273938; \$112 to \$100 for Citation No. 3273887; \$112 to \$100 for Citation No. 3273934; and \$136 to \$68 for Citation No. 3273936.

In support of the proposed settlements, Inspector Kinterknecht testified as to the facts and circumstances surrounding the issuance of the violations, and he confirmed that all of the violations were timely abated by the respondent, and that they all resulted from moderate negligence on the part of the respondent. He also testified as to certain mitigating factors in support of the proposed settlement reductions, and confirmed that he was in agreement with the proposed settlement dispositions for all of these violations (Tr. 7-25). The proposed settlements were approved from the bench, and my decision in this regard is herein reaffirmed (Tr. 33).

ORDER

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty criteria found in section 110(i) of the Act, I conclude and find that the approved settlement dispositions for the violations in question are reasonable and in the public interest. The respondent IS ORDERED to pay to MSHA the following civil penalty assessments for the violations which have settled and affirmed, and payment is to be made within thirty (30) days of the date of this decision.

Citation No.	Date	30 C.F.R. Section	Assessment
3273934	03/10/88	56.14001	\$100
3273935	03/10/88	56.12032	\$ 20
3273936	03/10/88	56.14007	\$ 68
3273937	03/10/88	56.14001	\$ 20
3273938	03/10/88	56.14003	\$ 75
3273939	03/10/88	56.12013	\$ 20
3062190	03/17/88	56.12001	\$136
3273887	04/07/88	56.14003	\$100
3273893	04/20/88	56.12019	\$ 20
3273894	04/21/88	109)a) Act)	\$ 20

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3273895	04/20/88	56.12008	\$ 74
3273896	04/26/88	56.12032	\$ 60
3273897	04/26/88	56.9002	\$ 85
3273898	04/26/88	56.15002	\$ 20
3273899	04/26/88	56.5003	\$ 98

Citation Nos. 3062191 and 3062192, ARE VACATED.

George A. Koutras
Administrative Law Judge