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SOL (MSHA) V. APPALACHIAN BUILDERS  
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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. WEVA 89-112  
A.C. No. 46-05368-03501 A2L

v.

Prep Plant

APPALACHIAN BUILDERS  
CORPORATION,  
RESPONDENT

DECISION

Appearances: Glenn M. Loos, Esq., U.S. Department of Labor,  
Office of the Solicitor, Arlington, VA, for the  
Petitioner;  
Charles S. Wickline, Appalachian Builders, Inc.,  
Huntington, West Virginia, for the Respondent.

Before: Judge Maurer

The Secretary of Labor filed a petition for the assessment of civil penalties for four alleged violations of the mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977 (the "Act").

Pursuant to notice, this case was heard on July 27, 1989, at Morgantown, West Virginia. Inspector Miller testified for the government and Mr. Charles Wickline for the respondent.

At the hearing, prior to the taking of any testimony, the Secretary moved for the approval of an agreed upon settlement with respect to two citations, for the full amount of the proposed penalties, which is \$50 per each. I thereafter approved the settlement concerning Citation No. 3132750 and 3135815. The remaining two citations to be considered, Citation Nos. 3135814 and 3135816 were tried before me and having considered the entire record herein and the contentions of the parties, I make the following decision.

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Citation No. 3135814

This citation alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 77.208(d) and alleges as follows:

The acetylene and oxygen bottles, on the ground floor of the Bird Dryer Building were not stored and secured in a safe manner, in that one oxygen bottle, and three acetylene bottles were not tied off and secured.

The inspector found and the respondent essentially admits that the gas bottles were standing unsecured at the time the inspector happened along and found them. The respondent goes on to state that these cylinders were empty and were being collected for moving to the storage area. They had been standing unsecured where the inspector found them for 10-30 minutes at that time and most likely would have been transported to the storage area and properly secured within the next half hour, according to the respondent's witness.

This is a violation of the cited standard. The next question is what reasonably could have been the consequences of this violative condition. The inspector feels it was an "S & S" violation in that the tanks could have been pushed over, ruptured by penetration and exploded. I find this to be an absolutely incredible allegation. To begin with, these are very substantial metal cylinders standing on a dirt-packed floor. They were spent, having little or no internal gas pressure and they were already capped. The worst case scenario that I can imagine is that one of these tanks would tip over and fall on someone's foot. This is not inconsequential, but I do not believe it will support an "S & S" finding. See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Accordingly, I find that Citation No. 3135814 was erroneously designated as an "S & S" violation.

Considering the criteria for a civil penalty in Section 110(i) of the Act, I find that a penalty of \$20 is appropriate for this violation.

Citation No. 3135816

This citation alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 77.1104 and alleges as follows:

Combustible materials such as oil and grease were present on the frame, motor and electrical components on the Le-Roi Air Compressor, located beside the prep plant.

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The inspector testified that there was a fire hazard because of the accumulation of oil, grease and grime on the motor and electrical components of the cited air compressor. The inspector further opined that this "mess" was both combustible and flammable, and there was an ignition source present. The inspector believed this was an "S & S" violation because a fire, resulting in burns to somebody, or resulting in an explosion of the air compressor itself was reasonably likely to occur. If this fire and/or explosion did in fact occur, the inspector believed a serious injury was "possible".

Respondent's testimony regarding this citation concerned the type of grease and grime that was present. Mr. Wickline testified that this compressor uses both motor oil and pneumatic oil. He points out that motor oil is not highly flammable, but is combustible. Pneumatic oil, in his opinion, is either inflammable or "almost nonflammable", and a lot of the leaking on this air compressor is done by this pneumatic oil rather than the motor oil. Respondent also disagreed with the amount of "grease and grime" present. Mr. Wickline stated: "What I saw on the compressor was no more than you would if I opened the hood of my Blazer out there now, which was on a mine site yesterday" (Tr. 61).

Reduced to its essentials, respondent's argument is that there was not enough grease, oil, dirt and grime covering the compressor to create a hazard and secondly that the "mess" that was there was not proven to be combustible.

30 C.F.R. 77.1104 states:

Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

Based on this record, I believe the inspector can identify grease and lubricants when he sees them and I accept his opinion that these had accumulated on the cited air compressor to the point where they could create a fire hazard, and thus a violation is proven. However, in order to find that a violation is "significant and substantial" the Secretary also has the burden of proving a discrete safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. See Mathies Coal Co., supra.

From the description the inspector gave of the violative condition, I believe it is somewhat of a stretch to find that this could create a fire hazard. To also find that a fire was a

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reasonably likely outcome of the violative condition is an improbability in my opinion. Accordingly, I find that Citation No. 3135816 was erroneously designated as an "S & S" violation.

Considering the criteria for a civil penalty in Section 110(i) of the Act, I find that a penalty of \$20 is appropriate for this violation as well.

ORDER

1. The designations of Citation Nos. 3135814 and 3135816 as significant and substantial violations are hereby stricken.

2. Citation Nos. 3135814 and 3135816 are affirmed as amended.

3. Citation Nos. 3132750 and 3135815 are affirmed as issued.

4. Respondent is ordered to pay the sum of \$140 within 30 days of the date of this decision and order.

Roy J. Maurer  
Administrative Law Judge