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SOL (MSHA) V. BROWN BROTHERS SAND
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-246-M
Petitioner : A.C. No. 09-00265-05515
 :
v. : Junction City Mine
 :
BROWN BROTHERS SAND COMPANY, :
Respondent :

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia,
for Petitioner;
Carl Brown, Brown Brothers Sand Company,
Talbotton, Georgia, for Respondent.

Before: Judge Barbour

This civil penalty proceeding was initiated by the Secretary of Labor ("Secretary") against Brown Brothers Sand Company ("Brown Brothers") pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The issues are whether Brown Brothers violated three mandatory safety standards for surface metal and non-metal mines and, if so, the amount of the civil penalty to be assessed for each violation. A hearing was held in Talbotton, Georgia.

At the commencement of the hearing the parties stipulated to the following:

1. Brown Brothers is subject to the Mine Act and the Commission's jurisdiction;
2. Brown Brothers is a small sand mine operator employing nine to ten persons;
3. The Secretary's hearing exhibit P-1 is a computer printout reflecting Brown Brothers' history of prior violations, which shows five prior citations during the period from August 12, 1989 to August 11, 1991;
4. Each of the citations was timely abated by Brown Brothers in good faith.

See Tr. 3-4.

DISCUSSION

On February 12, 1992, MSHA Inspector Earl Goldsberry issued three citations to Brown Brothers. On March 13, 1992, the Secretary proposed civil penalties of \$50 for each alleged violation. Brown Brothers contested the citations. On April 10, 1992, the Secretary amended the proposed civil penalties from \$50 to \$20. Exhibit R-1; Tr. 48-50.

Mine Act Section	Citation Number	Date	30 C.F.R. Section
104(a)	3601852	02/12/92	56.12001

Citation 3601852 alleges that Brown Brothers used an incorrect type and capacity of fuse in a circuit transmitting power from a power cable to an air compressor. The citation states: "The 10/4 AWG power cable suppl[y]ing 220 volts to the air compressor located beside the employee house was fuse[d] with 200 amp fuses." Exhibit P-2. The citation alleges a violation of section 56.12001 which states:

Circuits shall be protected
against excessive overload by fuses
or circuit breakers of the correct
type and capacity.

Inspector Goldsberry testified that he followed the National Electric Code to determine the correct type and capacity of fuses or circuit breakers, and that under the code a 30 amp fuse was required in this instance. Tr. 15, 21. He testified that the circuit was "over-fused . . . [I]f a fault would occur on that wire[, the fault] . . . would burn the wire in two, and possibly energize . . . a piece of metal equipment or create a fire hazard." Tr. 14-15. He further testified that the correct type and capacity of fuse would prevent such an occurrence because "a 30 amp fuse would have opened up and not damaged the circuit." Tr. 15.

Goldsberry considered the risk of injury unlikely, based on the nature of the condition and the amount of limited exposure of employees to the condition, but if injury had occurred, he believed a fatality through electrocution, reasonably could have been expected. Id. He did not find the violation constituted a significant and substantial contribution to a mine safety hazard (an "S&S" violation). He regarded the degree of Brown Brothers' negligence as moderate, based on the electrical background of Brown Brothers' employees. Tr. 21-22. Goldsberry stated that if Brown Brothers employed an electrician, he would have held the operator to a higher standard. Tr. 22.

Carl Brown, the owner and operator of Brown Brothers, testifying on behalf of the company, stated that Goldsberry

failed to notice other violations that Brown indicated were in existence when Goldsberry conducted the inspection. In so doing, Brown appeared to be attempting to impeach Goldsberry's competence as an inspector. Tr. 45-46.

There is no dispute, however, about the existence of the alleged violation, and I therefore find Brown's attack on Goldsberry's credibility (if that is what it was) to have been irrelevant. I further find that use of the incorrect fuse created a potential safety hazard, but I conclude that the violation was not serious. I agree with Inspector Goldsberry that an injury was unlikely to occur because of the lack of employee exposure. I also conclude that Brown Brothers was negligent in failing to use the correct type and capacity of fuse.

I find the Secretary's amended proposed assessment of \$20 appropriate, based on the non-serious nature of the violation, Brown Brothers' negligence, Brown Brothers' stipulated small history of previous violations, its small size, its good faith abatement of the violation, and the lack of effect of the penalty on Brown Brothers' ability to continue in business.

Mine Act Section	Citation Number	Date	30 C.F.R. Section
104(a)	3601854	02/12/92	56.12008

Citation 3601854 alleges that Brown Brothers used an improper fitting around a power cable where the cable entered an air compressor. The citation states: "The 220 volt power cable to the air compressor located near the employee house did not enter the metal frame of the switch box through a proper fitting." Exhibit P-3. The citation alleges a violation of section 56.12008 which states:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector Goldsberry testified that the standard protects against strain on electrical connections and prevents mechanical damage that could occur if the cable moved on sharp edges. Tr. 26. The fitting causes the cable to be tight through the hole with no maneuvering room. Id. Goldsberry testified that here the cable had no fitting whatsoever. He was of the opinion that regardless of the fact that the cable was not damaged and

was fully protected by insulation, it still should have been protected by a fitting where it entered the compartment to comply with the standard. Tr. 30-31.

Goldsberry testified that the air compressor was located in an open area and there was no evidence of any frequency of personnel coming in contact with it during the course of a workday. Tr. 29, 31. Goldsberry was told that the air compressor was only used occasionally, when a trucker needed air in a tire. Tr. 31-32. The area surrounding the compressor was dry. Tr. 31.

Goldsberry determined that injury was unlikely to occur as a result of the condition because of the limited exposure of personnel to the condition and because of the dry nature of the surrounding area. However, if an injury had occurred, he believed that death by electrocution reasonably could have been expected. Tr. 27. The violation was not designated as S&S. Brown Brothers' negligence was rated as moderate, for the same reason as Citation No. 3601852. Id. The condition was promptly abated by disconnecting the air compressor from the power cable. Tr. 27-28.

Again, there is no dispute about the existence of the violation and I find that it occurred as alleged. I further find that use of the improper fitting created a potential safety hazard, but I agree with Goldsberry that the violation was not serious. As Goldsberry noted, the air compressor was located in a dry area and there was no evidence of any frequency of personnel coming in contact with it during the course of a workday. I also conclude that Brown Brothers was negligent in failing to use the proper fitting.

I find the Secretary's amended proposed assessment of \$20 appropriate for the same reasons as previously set forth for Citation No. 3601852.

Mine Act Section	Citation Number	Date	30 C.F.R. Section
104(a)	3601853	02/12/92	56.12013(b)

Citation 3601853 alleges that Brown Brothers used a power cable that had an inadequate splice. The citation states: "The power cable suppl[y]ing 220 volts to the AC Lincoln Welder had a splice that was not insulated to a degree at least to the original insulation and will not exclude moisture." Exhibit P-4. The citation alleges a violation of section 56.12013(b) which states, in part:

Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:

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* * *

(b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture;

Inspector Goldsberry testified that the splice in the welder's power cable "wasn't a very well made splice, just some tape put around it; and the outer jacket hadn't been replaced around the conductors." Tr. 34. He testified that the danger of a "sloppy splice" was that someone could possibly step on it and be electrocuted. Id. Goldsberry testified that MSHA and the regulation require a splice that will exclude moisture and is insulated. Tr. 38. In Goldsberry's opinion, the cited splice would not exclude moisture because the tape around the individual conductors was not tightly wrapped and the cable's three phase wires were not wrapped as a unit to simulate the cable's missing outer jacket.

Brown testified that Brown Brothers' personnel wear rubber boots. Tr. 47. Goldsberry testified that wearing rubber boots would reduce the risk of being electrocuted. Tr. 39-40. Goldsberry guessed that the welder would be used approximately once a day, and he noted that there was a house over the welder, but that anyone going inside the house would be subject to stepping on the splice. Tr. 41-42.

Carl Brown testified that Brown Brothers had done its own work for ninety years, and that the company could not hire electricians, except for special assignments. Tr. 47-48.

Goldsberry determined that injury was unlikely because of limited access to the equipment and the splice. Also, the area was kept dry. Tr. 34-35. Goldsberry did not find the violation was S&S, and he rated the degree of Brown Brothers' negligence as moderate. The condition was abated by remaking the splice. Tr. 35.

As with the previous violations, there is no dispute about the existence of the alleged conditions, and I find Brown Brothers violated the standard as charged. I further find that the inadequate splice created a potential safety hazard but that the violation was not serious. Access to the welder and splice was restricted, the welder and the splice were protected from the weather, and Brown Brothers' personnel wore rubber boots, all which decreased the risk of injury. I also conclude that Brown Brothers was negligent in allowing the violation to exist.

I find the Secretary's amended proposed assessment of \$20 appropriate for the same reasons as previously set forth for Citation Nos. 3601852 and 3601854.

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ORDER

Brown Brothers IS ORDERED to pay civil penalties of twenty dollars (\$20) each, totaling the sum of sixty dollars (\$60) for the violations cited in sections 56.12001, 56.12013(b), and 56.12008 respectively. Payment of the assessed amounts is to be made to MSHA within thirty (30) days of the date of this decision, and upon receipt of payment, this matter is DISMISSED.

David F. Barbour
Administrative Law Judge
(703)756-5232

Distribution:

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