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SOL (MSHA) V. W. J. BOKUS INDUSTRIES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. YORK 92-106-M
	:	A. C. No. 30-02790-05512
v.	:	
	:	Docket No. YORK 92-107-M
W. J. BOKUS INDUSTRIES, INC., Respondent	:	A. C. No. 30-02790-05513
	:	
	:	High Peaks Asphalt

DECISION ON REMAND

Before: Judge Weisberger

On April 21, 1994 the Commission issued a decision in this civil penalty proceeding remanding the matter to me to resolve the merits of the citations and orders issued concerning cylinders(Footnote 1), a grinder(Footnote 2), and a fan on a wood stove(Footnote 3). Also to be resolved are the special findings, and appropriate penalties for violations found.

I.

On October 22, 1991, MSHA Inspector Randall Gadway observed seven compressed gas cylinders which were standing unsecured. Four or five of the cylinders contain oxygen, and two or three of the cylinders contained acetylene. Gadway handled two of the oxygen cylinders, and determined that they were full. Gadway issued an order alleging a violation of 30 C.F.R. 16005 which provides as follows: "Compressed and liquid gas cylinders shall be secured in a safe manner." There is no evidence in the record to contradict or impeach Gadway's testimony. Accordingly, based upon his testimony, I conclude that Respondent did violate Section 56.16005, supra.

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1 A Section 104(d)(1) order was issued alleging a violation of 30 C.F.R. 16005, and another Section 104(d)(1) order was issued alleging violations of 30 C.F.R. 56.16006.

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2 A Section 104(d)(1) order was issued alleging a violation of 30 C.F.R. 56.14115.

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3 An imminent danger order was issued with an accompanying citation alleging a violation 30 C.F.R. 56.12030.

According to Gadway, the violation resulted from Respondent's unwarrantable failure. Petitioner must establish that there was aggregated conducted on the part of Respondent (See, Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987)). According to Gadway, when he informed Respondent's employee, James McGee, that the cylinders must be secured, McGee stated that "'I will tell Mr. Bokus about it'; but he doesn't do anything about it." (Tr. 21) (sic). McGee, who testified, did not specifically rebut or impeach this testimony. William J. Bokus, who represented Respondent at the hearing, did not testify to rebut or impeach this testimony. Hence, based upon the testimony of Gadway, I conclude that the violation herein resulted from Respondent's aggravated conduct. I thus find that the violation resulted from its unwarrantable failure. (See, Emery supra).

In essence, according to Gadway, should one of the oxygen cylinders fall or be knocked over, the valve on the cylinder could break, and cause the cylinder to become a "missile" which could strike an employee, and cause a serious or fatal injury. At the time of Gadway's observation, one of Respondent's employees and one employee of Pallette Stone Corporation were performing work in the garage where the cylinders were located. This garage was generally used by employees of Respondent and Pallette Stone for the repair of vehicles and equipment. Given these uncontested facts, I concluded that the violation herein was significant and substantial (See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984)).

Taking into account the factors set forth in Section 110(i) of the Act, I find that a penalty of $550.00 is appropriate for this violation.

II.

Gadway also observed that the two full oxygen cylinders were not provided with valve covers. He issued a citation alleging a violation of 30 C.F.R. 56.16006, which provides as follows: "Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use." The record does not contain any evidence from Respondent which impeaches or contradicts Gadway's testimony. Based upon his testimony, I conclude that since two of the oxygen cylinders lacked valve covers, Respondent did violate Section 56.16006 supra.

Since the lack of valve covers was observed by Gadway, it is likely that this condition was obvious. However, there is no specific evidence in the record to indicate how long this

condition existed until it was noted and cited by Gadway. I thus conclude that the violation herein did not result from any aggravated conduct on the part of Respondent. Hence, I find that the violation was not as a result of Respondent's unwarrantable failure. (See, Emery, supra).

According to Gadway, the unsecured oxygen cylinders could have been easily knocked over. He indicated that, since there were not any valve covers on the cylinders, the impact of hitting the floor could break the valves off. Gadway opined that in this event, the cylinders would become "missile[s]", and a fatal accident would be likely. Respondent did present any evidence to impeach or rebut Gadway's testimony in these regards. Accordingly, I conclude that the violation herein was significant and substantial (See U.S. Steel). I find that a penalty of $400.00 is appropriate for this violation.

III.

According to Gadway, when he made his inspection he observed a stationary grinder that lacked a peripheral hood. The hood enclosed the grinding wheel in order to capture any fragments in the event that the wheel bursts. Gadway indicated that the grinder also lacked an adjustable tool rest. He observed an opening of approximately an inch and a half between the wheel, and the frame of the grinder. Gadway issued an order alleging a violation of 30 C.F.R. 56.14115 which, as pertinent, provides as follows: "Stationary grinding machines . . . shall be equipped with -

(a) Peripheral hoods capable of withstanding the force of a bursting wheel...;

(b) Adjustable tool rests set so that the distance between the grinding surface of the wheel and the tool rest is not greater than 1/8 inch...."

Respondent did not specifically rebut or impeach Gadway's testimony. Based upon his testimony I find that Respondent did violate Section 56.14115 supra.

According to Gadway, McGee told him regarding the grinder, that ". . . he tells Mr. Bokus, but he does nothing about it." (sic) (Tr. 220). McGee who testified did not impeach or contradict this testimony. Bokus did not testify to impeach or rebut this statement. Hence, based upon the testimony of Gadway, I conclude that the violation of Section 56.14115, supra resulted from Respondent's unwarrantable failure. (See, Emery, supra.)

Gadway characterized the violation as significant and substantial. According to Gadway, fatalities have resulted ". . . where the stone burst and went through the employee's head." (sic) (Tr. 218) There is no evidence in the record containing any description of any physical conditions present which would have made it reasonably likely that an injury producing event i.e. bursting of the wheel, or an operators fingers being drawn into the wheel was reasonably likely to have occurred. (See Mathies, supra.) Accordingly, I conclude that it has not been established that the violation was significant and substantial. I find that a penalty of $500.00 is appropriate for this violation.

IV.

Gadway also observed a wood stove located in the garage. This stove was used to provide heat for employees. A 110 volt electric fan was located next to the stove to circulate warm air. According to Gadway, the cord supplying electricity to the fan had a 1-1/2 inch bare spot in the insulation which was located approximately 8 inches from the stove, and 4 feet above the floor. He opined that the energized conductors were exposed to physical contact by employees. He opined that in the event that an employee came into contact with the exposed conductors, he could be electrocuted. He issued an imminent danger order, and an accompanying citation alleging a violation of 30 C.F.R. 56.12030.

According to Gadway, he issued an imminent danger order because of the following factors: the existence of a bare energized wire; the lack of a fitting where the wire entered the fan which could cause the wire to rub against the metal frame and short out; and the lack of any ground wire which could result in the stove becoming energized. He concluded that if a person would have inadvertently touched the stove, he would have been electrocuted.

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the

> Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

The term "imminent danger" is defined in Section 3(j) of the Act to mean ". . . the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j).

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector abuses his discretion when he orders the immediate withdrawal of a mine under Section 107(a) in circumstances where there is not an imminent threat to miners. Utah Power & Light Co., 13 FMSHRC 1617 (1991).

Within the framework of the above summarized evidence, and based on Gadway's testimony that I accept, I conclude that he did not abuse his discretion, and that the imminent danger order was properly issued.

In addition, Gadway cited Respondent with a violation of 30 C.F.R. 56.12030 which provides as follows: "When a potentially dangerous condition is found, it shall be corrected before equipment or wiring is energized." As indicated above, there not any contradiction or impeachment of Gadway's testimony regarding the lack of insulation on the cord supplying electric to the fan being used to circulate warm air. I thus find that Respondent did violate Section 56.12030 as cited. Further, within the framework of the above summarized evidence, I conclude that the violation was significant and substantial. (See Mathies, supra.) I find that a penalty of $550 is appropriate for this violation.

ORDER

It is ordered as follows:

(1) Order No. 3593042 be amended to a Section 104(a) citation.

(2) Order No. 3599752 be amended to indicate a violation that is not significant and substantial.

(3) Respondent shall pay a civil penalty of $2,000 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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