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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 94-21-M
Petitioner : A. C. No. 09-00265-05517
v. :
 : Junction City Mine
BROWN BROTHERS SAND CO., :
Respondent :

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia for
Petitioner;
Mr. Steve Brown, Partner, Brown Brothers Sand
Co., Howard, Georgia, Pro Se, for Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor against Brown Brothers Sand Company pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The petition alleges nine violations of the Secretary's mandatory health and safety standards and seeks civil penalties in the amount of \$597.00. For the reasons set forth below, I vacate one citation, affirm the rest, while increasing the degree of negligence on two of them, and assess penalties in the amount of \$1,036.00.

A hearing was held in this case on May 26, 1994, in Butler, Georgia. Mine Safety and Health Administration (MSHA) inspectors Steve C. Manis and Harry L. Verdier testified for the petitioner. Messrs. Greg and Carl Brown testified on behalf of Brown Brothers. The parties were offered the opportunity to file briefs in this case; only the Secretary availed himself of the opportunity.(FOOTNOTE 1) I have considered the Secretary's Brief in my disposition of this case.

FOOTNOTE 1

By letter dated September 9, 1994, Mr. Steve Brown stated, on behalf of the Respondent: "We do not know what you want in this brief. We stated everything that we wanted to during the hearing that you presided at. We do not have anything new to add. Therefore we stand on our testimony at time of hearing."

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SUMMARY OF THE EVIDENCE

MSHA inspector Steve C. Manis conducted an inspection of Brown Brothers Sand Company on August 11, 1993. He was accompanied on the inspection by his supervisor, Harry L. Verdier.

Before going on the inspection, Inspector Manis had received a report from the MSHA Health and Safety Analysis Center that Brown Brothers had not filed its quarterly report, MSHA Form 7000-2, for the first quarter of 1993. Both he and Inspector Verdier had called "Denver" before August 11 to verify that the report had not been received. Therefore, when they arrived at the facility, Inspector Manis asked Greg Brown if a report had been filed and if the company had their copy of it. Mr. Brown indicated that he believed that one had been filed, but was unable to locate the company's copy of the form. As a result, Manis issued Citation No. 3604123 for a violation of Section 50.30(a) of the Secretary's Regulations, 30 C.F.R. 50.30(a). (Pet. Ex. 3.) The violation was abated that afternoon when Mr. Brown filled out another MSHA Form 7000-2 and gave it to the inspector.

The inspectors next went to the shop where they found two compressed and liquid gas cylinders standing with hoses, regulators and torches attached to them. They were not chained to the wall or by the wall, and they were not in a stand. When this was discovered, Greg Brown placed them on their sides on the ground. Inspector Manis issued Citation No. 3604124 for a violation of Section 56.16005 of the Regulations, 30 C.F.R.

56.16005. (Pet. Ex. 4.) The violation was abated later that day by placing the cylinders in a storage rack and chaining them.

On leaving the shop and walking through the plant, Inspector Manis observed that the cover for the electrical switch box for the tank conveyor belt was off and lying on the ground. He did not observe any repairs or testing being performed on the switch box or the conveyor belt, nor was he informed that such was the case. As a consequence, he issued Citation No. 3604125 alleging a violation of Section 56.12032, 30 C.F.R. 56.12032. (Pet. Ex. 5.) The breach was abated when Greg Brown picked up the cover, knocked the sand out of it, and replaced it on the switch box.

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The inspector believed that this situation was reasonably likely to result in a fatal injury to at least one person because "people do come in this area and they could contact the inner parts, electrical parts." (Tr. 32.) He stated there was "an electrocution hazard if a person did come into contact with the 480 volts." (Tr. 31.) Inspector Verdier added that "this particular box was mounted at about chest height on a piece of board directly in a line going from the shop to a tunnel." (Tr. 98.)

The inspection next proceeded to the concrete sand tunnel. Inspector Manis found that the conveyor belt, which was next to a walkway, did not have an emergency stop device and was not guarded by railings. The inspector considered this to be a violation of Section 56.14109, 30 C.F.R. 56.14109, and issued Citation No. 3604126.(FOOTNOTE 2) (Pet. Ex. 6.) Brown Brothers abated the violation by placing a wire rope along the walkway, the length of the conveyor belt.

Inspector Manis found the same deficiencies in the mortar sand tunnel. He issued Citation No. 3604127 for a violation of Section 56.14109.(FOOTNOTE 3) (Pet. Ex. 7.) The violation was abated in the same manner as the previous one.

At the mortar sand belt conveyor, Inspector Manis discovered that the back section of the tail pulley guard had deteriorated or "rotted out" to the point that it no longer guarded the pulley. Consequently, the inspector issued Citation No. 3604128 for a violation of Section 56.14112(a)(1), 30 C.F.R. 56.14112(a)(1). (Pet. Ex. 8.) The violation was abated by replacing the back section of the guard.

FOOTNOTE 2

The citation, as written by the inspector, charged a violation of Section 56.14109(a) and alleged that the violation was "significant and substantial." The citation was subsequently modified by the inspector to delete the "significant and substantial" designation. It was amended at hearing, without objection, to allege a violation of Section 56.14109. (Tr. 9-12.)

FOOTNOTE 3

This citation was also modified by the inspector and amended at hearing. See fn. 1, supra.

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On the barge on the primary side of the pit, the inspector detected that the belts on the multi-V-belt drive for the sand pump were not guarded. The unguarded belts were at the foot of a stairway and to the left of the walkway. The belts were moving rapidly at the time he observed them. As a result, Inspector Manis issued Citation No. 3604129 for a violation of Section 56.14107(a), 30 C.F.R. 56.14107(a). (Pet. Ex. 9.) The violation was later abated by placing a guard on the belts.

Inspector Manis considered that this violation was reasonably likely to result in a permanently disabling injury to at least one person. He came to this conclusion because:

[f]rom time to time this is a wet area. From time to time because of the drive and lubrication there are slippery conditions from grease and oil there. A person could accidentally, or he could back up into a belt or he could fall and accidentally stick his arm. If he fell, his whole body could go into that drive.

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A fatal [sic] would occur there if he fell into it. But if he just . . . it's more like an arm or fingers could be dismembered there very easily.

(Tr. 55.)

The next citation was issued when the inspector was in the concrete sand tunnel. Near the middle of the tunnel he noticed that several light bulbs were out. He concluded that there was not sufficient illumination in the tunnel. Accordingly, he issued Citation No. 3604130 for a violation of Section 56.17001, 30 C.F.R. 56.17001. (Pet. Ex. 10.) The citation was abated by replacing the light bulbs.

The final citation in this case was issued at the multi-V-belt drive. Inspector Manis determined that the front section of the belt drive motor had openings that were not guarded, exposing inside parts, armature, brushings and slip rings, to contact. He issued Citation No. 3604131 for a violation of Section 56.14107(a). (Pet. Ex. 11.) The violation was abated by placing a guard over the openings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 3604123

Section 50.30(a) requires that "[e]ach operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 . . . and submit the original to the MSHA Health and Safety Analysis Center . . . within 15 days after the end of each calendar quarter." It further requires that "[e]ach operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date."

It is undisputed that Brown Brothers MSHA Form 7000-2 for the first quarter of 1993 was not received by the MSHA Health and Safety Analysis Center within 15 days after the end of the calendar quarter. It is also undisputed that Greg Brown could not find the operator's copy of the report on the day of the inspection. Accordingly, I conclude that the Respondent did not file the form as required, and, thus, violated Section 50.30(a). (FOOTNOTE 4)

Citation No. 3604124

Section 56.16005 requires that "[c]ompressed and liquid gas cylinders shall be secured in a safe manner." In this case, the evidence indicates that two cylinders were standing in the mine shop and not secured in any manner. No one was present in the shop at the time. While the inspectors believed that the cylinders were full, that is not necessary to establish a violation of this regulation. Laurel County Sand and Gravel, Inc., 15 FMSHRC 2380, 2383 (Judge Weisberger, November 1993); Tide Creek Rock Products, 4 FMSHRC 2241 (Judge Koutras, December 1982). Consequently, I conclude that it has been established that Brown Brothers violated the regulation as alleged.

FOOTNOTE 4

I give no weight to Greg Brown's testimony that he found the operator's copy during an inspection "a couple of month's" prior to the hearing because the "found" copy was not offered at the hearing and there is no way of knowing whether the copy found was one mailed in a timely manner or, for instance, the one prepared by Mr. Brown to abate the citation.

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Citation No. 3604125

Section 56.12032 provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." It is unchallenged that at the time of the inspection, the cover for the switch box for the tank belt conveyor was lying on the ground. There was no evidence of testing or repairs being performed on it, nor does the Respondent claim that such was the case. Therefore, I conclude that Brown Brothers violated Section 56.12032 of the Regulations.

Inspector Manis also concluded that this violation was "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of mandatory safety standard; . . . (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g*, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (December 1987).

As is frequently the case, the question of whether or not this citation is S&S turns on the third element of the Mathies test. I have already concluded that a violation occurred and there can be little doubt that by leaving the cover off of the switchbox there was a measure of danger to safety, in this instance the possibility of electrocution. Nor can there be any question that electrocution is reasonably likely to result in an injury of a reasonably serious nature. However, it is not as readily apparent that the hazard contributed to is reasonably likely to result in an injury.

The evidence indicates that the switchbox was located on a post which was in a direct line from the shop to a tunnel; a natural walkway between the two. The box was positioned about chest high on the post so that it would be easily accessible, intentionally or by accident, by anyone walking past. The leads coming into the box were always charged, and not completely insulated or shielded. Based on these facts, I conclude that there was a reasonable likelihood leaving the cover off of the switchbox would result in an injury, i.e. electrocution. Accordingly, I conclude that this violation was "significant and substantial."

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Citation Nos. 3604126 and 3604127

Section 56.14109 provides that "[u]nguarded conveyors next to the travelways shall be equipped with" emergency stop devices or railings. It is uncontested that the unguarded belt conveyor next to the walkway in the concrete sand tunnel and the unguarded conveyor belt next to the walkway in the mortar sand tunnel had neither emergency stop devices nor railings. Hence, I conclude that these were violations of the regulation.

Citation No. 3604128

Section 56.14112(a)(1) states that: "(a) Guards shall be constructed and maintained to--(1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation." It is undisputed that at the time of the inspection the back section of the tail pulley guard for the mortar sand belt conveyor was not in place. It apparently had been allowed to decay to such an extent that most of it either fell off or disintegrated. Clearly, it was not maintained sufficiently to keep it from wearing out. Thus, I conclude that this was a violation of the regulation.

Citation No. 3604129

Section 56.14107(a) requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." Greg Brown admitted at the hearing that the multi-V-belt drive for the sand pump was not guarded at the time of the inspection. The belt was in operation at the time and was located at the foot of a stairway. Accordingly, I conclude that Brown Brothers violated this regulation.

Inspector Manis considered this violation to be "significant and substantial." Applying the Mathies criteria and taking into consideration that this was a large belt drive, located at the foot of a stairway and along an obvious walkway, in an area that could become slippery from water or lubrication, which operated at a high rate of speed, I agree with the inspector and conclude that the violation was "significant and substantial."

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Citation No. 3604130

Section 56.17001 states that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." The regulation does not provide any insight as to how one determines whether the illumination is sufficient to provide safe working conditions. However, in a case concerning a predecessor of this regulation, 30 C.F.R. 56.17-1, which was identically worded, the Commission said that "[r]esolution [of what constitutes sufficient illumination] requires a factual determination based on the working conditions in a cited area and the nature of the illumination provided." *Capital Aggregates, Inc.*, 3 FMSHRC 1388 (June 1981).

Inspector Manis testified that "near the middle of the tunnel there were several light bulbs that were failing, that were either burned out or they were shorted, they were not burning" and that he did not believe that there was sufficient illumination in the tunnel. (Tr. 58.) He also testified that it was "[n]ot totally dark; no, sir. There were lights burning in different areas, but in just one area near the middle of the tunnel, there were several lights that were out, and I couldn't see that well myself passing through there," although he "could see the belt." (Tr. 91.) Inspector Verdier stated only "[i]n my opinion there was not sufficient illumination." (Tr. 103.) On the other hand, Greg Brown testified that, in his opinion, there was sufficient illumination "for me to work in it." (Tr. 131.)

There is not enough information to make a factual determination as to whether the illumination was sufficient or not. Consequently, I conclude that the Secretary has not sustained his burden of establishing a violation of this regulation and will vacate the citation.

Citation No. 3604131

This citation alleges another violation of Section 56.14107(a), the requirements of which are set out under Citation No. 3604129 above. It is undisputed that the multi-V-belt drive motor for the sand pump was not guarded. The Respondent knew that it was supposed to be guarded, and, in fact, had guarded it prior to moving it to a new location. Therefore, I find a violation of the regulation.

CIVIL PENALTY ASSESSMENTS

Section 110(i) of the Act, 30 U.S.C. 820(i), sets out six criteria to be considered in determining an appropriate civil penalty. It is the judge's independent responsibility to ascertain an appropriate penalty, based on these criteria, and he is not bound by the proposal of the Secretary. *Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151-52 (7th Cir. 1984).

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In connection with these criteria, the parties have stipulated that Brown Brothers is a small sand mine operator with nine to ten employees; that payment of the proposed civil penalty assessment will not adversely affect the Respondent's ability to continue in business; that Brown Brothers had received two prior citations during the period of February 11, 1989 through February 10, 1991; and that the citations in this proceeding were timely abated by the Respondent in good faith. (Tr. 4.)

In his brief, the Secretary has recommended that I impose a penalty of \$250.00 for the violation in Citation No. 3604123 (failing to file MSHA Form 7000-2), rather than the \$50.00 originally proposed by the Secretary, because Brown Brothers has received five prior citations for the same violation. While this may be a germane reason for increasing the penalty in some instances, it is not in this case.

Although Brown Brothers does indeed have five prior violations of Section 50.30(a), the most recent one, previous to this case, was on January 9, 1986. (Pet. Ex. 2.) There is no evidence in this case that Brown Brothers has reverted to its past practice of frequently failing to file the form or that this failure was anything other than an oversight. Accordingly, I concur with the inspector that this resulted from moderate negligence and assess a penalty of \$50.00.

The Secretary has also recommended a penalty of \$250.00 for the Respondent's failure to secure its compressed and liquid gas cylinders because Carl Brown testified at the hearing that the state in which the inspector found the cylinders was the way they used them. To back up his point, he submitted photographs of some cylinders, one of which clearly showed that the cylinders were unsecured. (Resp. Exs. 2 and 3.)

This argument is appealing, particularly in view of the fact that Brown Brothers' main defense is that they have been in business for 53 years and have never had an accident, therefore, they do not need government regulation. (Resp. Ex. 1.) However, I note that if Brown Brothers does always keep its cylinders unsecured, as indicated, they have been very lucky because they have never before been cited for this violation. (Pet. Ex. 2.) Consequently, I will concur with the Secretary's original assessment and order a penalty of \$50.00 for this violation.

The Secretary suggests penalties of \$250.00 each for the failure to have an emergency stop device or railings on the

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conveyor belts in the sand tunnels. This proposal is based on the testimony of the inspector that he told Greg Brown on a previous inspection that such devices were required. Therefore, according to the Secretary, the failure to have installed them was at a minimum highly negligent. On the other hand, Greg Brown said that he had understood that installing an alarm which went off before the belt began moving took care of the problem.

There is nothing in the evidence to show that Mr. Brown deliberately misunderstood the inspector. Further, the fact that he did take some action, installing the alarm system, removes these violations from the high negligence category. Accordingly, I will impose a penalty of \$50.00 for each of these violations.

The Secretary urges a penalty of \$1110.00 for failing to guard the multi-V-belt drive on the barge because the drive had been guarded at its old location, the Respondent knew that it had to be guarded at its new location, and it had not been re-guarded because the Respondent thought that it was more important to meet customer demands. I agree with the Secretary's counsel that this indicates a greater degree of negligence than the moderate level assessed by the inspector.

However, I do not agree that this amounts to "reckless disregard" in view of the testimony that not only was the Respondent interested in providing sand for its customers, but it was also constantly having to change the pulleys and readjust the belts to get the pump operating properly in the new location. (Tr. 131, 149.) Therefore, I find the respondent to have been highly negligent, but not "reckless," in a situation that could reasonably have been expected to result in serious injury to an employee and assess a penalty of \$500.00.

The Secretary requests a penalty of \$500.00 for failing to guard the motor on the multi-V-belt drive on the grounds that the Respondent had guarded it in its old location and knew that it had to be guarded in its new location. The Secretary argues that this was the result of the Respondent's "reckless disregard." I do not concur. The evidence indicates that there was little likelihood of an injury occurring. Consequently, while I find that the Respondent was highly negligent in not guarding the motor, I do not find that the failure to immediately replace this guard amounted to "reckless disregard." I will assess a penalty of \$150.00 for this violation.

The Secretary has not made any new recommendations with respect to Citation Nos. 3604125 and 3604128. Having considered the penalty criteria, I conclude that the \$136.00 and \$50.00 penalties, respectively, originally proposed by the Secretary are appropriate.

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ORDER

Citation No. 3604130 is VACATED and DISMISSED. Citation Nos. 3604129 and 3604131 are MODIFIED by increasing the level of negligence from "moderate" to "high" and are AFFIRMED as modified. Citation Nos. 3604123, 3604124, 3604125, 3604126, 3604127 and 3604128 are AFFIRMED.

Brown Brothers Sand Company is ORDERED to pay, by single check or money order for the entire amount, civil penalties in the amount of \$1,036.00 for these violations within 30 days of the date of this decision.(FOOTNOTE 5) On receipt of payment as ordered, these proceedings are dismissed.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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FOOTNOTE 5

It appears that in a previous case heard by me [Brown Brothers Sand Company, 16 FMSHRC 452 (February 1994)], the Respondent paid the assessed penalty in loose coins. (Tr. 13-15.) If, by such actions, Brown Brothers intended to demonstrate its contempt for the Commission, as suggested by the Secretary, it is advised that continued gestures of this nature may well reflect adversely on any consideration of its good faith in future appearances before the Commission.