

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 5, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

AMES CONSTRUCTION, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-274
A.C. No. 26-02674-339615

Mine: Mill/Autoclave Operations

DECISION

Appearances: Ryan Pardue, U.S. Department of Labor, Office of the Solicitor
1244 Speer Blvd., Suite 216, Denver, CO 80204

Donna V. Pryor, Jackson Lewis P.C.
950 17th Street, Suite 2600, Denver, CO 80202

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against Ames Construction, Inc. (Respondent), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This case involves one 104(a) citation issued on November 4, 2013 at the Barrick Gold Mill Autoclave Operations site for alleged improper housekeeping within a mobile storage trailer. The parties presented testimony and documentary evidence at a hearing held in Salt Lake City, Utah beginning December 10, 2014 followed by submission of post hearing briefs.

At hearing, MSHA Inspector Jack Stull testified for the Secretary. Ames Site Foreman David Jackson and Carpenter Jose Rodriguez testified for the Respondent. For the reasons that follow, Citation No. 8701612 is **VACATED**.

II. MOTION IN LIMINE

Prior to hearing, the Respondent moved to exclude photos and training documents created after the alleged housekeeping violation had been abated to Inspector Stull's satisfaction. Resp. Mot., 1. The Respondent argued that post-abatement photos did not have any relevancy in proving the existence of a violation prior to mandatory abatement efforts. *Id.* at 3-5 citing FRE 407; *Sec'y of Labor v. B&S Trucking Co.*, 17 FMSHRC 411, 414 (ALJ Melick)(March 1995). The Secretary opposed the Respondent's motion, arguing that the photos and training documents would only be entered to detail abatement efforts and document what clutter was removed from the trailer. Sec'y Response, 4. At hearing the court allowed counsel to present brief oral arguments on this issue. Tr., 8-11. Upon questioning by the Court, both the Secretary and the Respondent confirmed that the operator had successfully and promptly abated the alleged violation. Tr. 9. The parties also confirmed that MSHA Inspector Stull had taken photos prior to issuing the citation that documented the condition of the trailer prior to the requested abatement. Tr. 8. Based on these representations, the undersigned excluded post abatement photos from consideration as the photos did not have any relevancy to the existence of a prior violation and were inadmissible per Federal Rule of Evidence 407.¹ Tr., 10.

III. FINDINGS OF FACT

A. Citation No. 8701612

MSHA Inspector Jack Stull issued Citation No. 8701612 for an alleged violation of 30 CFR §56.20003(a) on November 4, 2013. Stull alleged within the citation that:

At the T.C.M Leach Project, Elutions Area, Contractor Trailer #730804, housekeeping was an issue. Multiple tripping hazards were found in and around the travel area located inside the trailer. Two miners were observed accessing the trailer earlier in the shift to get tools. In the event of an accident involving a miner tripping and falling, lost workdays or restricted duty injuries would be expected to occur. The Foreman in the area was aware that the trailer was (in) need of cleaning, but failed to take action to ensure that the work was performed prior to miners accessing it.

GX 11, 1.

Stull designated Citation No. 8701612 as a high negligence violation that was reasonably likely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. Stull also determined that the housekeeping violation was significant and substantial. The Secretary has proposed a regularly assessed penalty of \$12,248.00 for Citation No. 8701612.

¹ The court has previously admitted post-abatement photos of a condition in a separate proceeding. *SCH Terminal, Inc.*, 2014 WL 6723959, *14 (November 2014)(ALJ Simonton). However, in that, case, the admitted post-abatement photos were the only photos depicting the relevant condition and the court relied on them for the limited purpose of corroborating the inspector's testimony regarding pre-abatement conditions.

1. Testimony

a. The Secretary

MSHA Inspector Jack Stull testified for the Secretary. Stull testified that when he approached a mobile trailer at approximately 8:30 AM on November 4, 2013 he observed two workers exiting the trailer with buckets. Tr. 34-35. Stull stated that when he looked into the trailer he observed a yellow box² with rounded feet at the entrance of the trailer sticking out, a folding chair with a water cooler on top, and several sheets of plywood lying at an angle. Tr., 27-28. Stull determined that these items presented a tripping hazard and measured the narrowest part of middle walkway in the trailer at 13 inches. Tr. 31. Stull testified that he considered walkways less than 24" wide unsafe but stated that this standard was "just (his) own opinion." *Id.*

Stull testified that the two workers he saw exiting the trailer appeared to head towards a concrete project approximately 15-20 feet away from the trailer. Tr. 33, 34-35. Stull stated that he attempted to ask the workers where their boss was but the workers appeared to be uncomfortable communicating in English and left. Tr. 35. Stull stated that an Ames supervisor arrived shortly thereafter. *Id.* Stull stated that the Ames supervisor told him that "he knew that the trailer needed cleaning but he was busy with this concrete project right now." *Id.* Stull determined that this comment indicated high negligence on the part of Respondent's management. Tr. 35-36, 44. Stull stated that lost workday injuries including broken bones and contusions were likely to occur from the alleged tripping hazards present in the trailer. Tr. 43. Stull indicated that he had reviewed accident reports where significant injuries had resulted from trips and falls. Tr. 44.

Stull stated that Ames management informed him that the trailer had just been moved that morning. Tr. 45. Stull did not consider that a credible mitigating factor because the trailer was not connected to a truck and a grounding wire was already connected to the trailer at 8:30 AM, one and a half hours after. *Id.* Stull did not believe that the trailer had just been moved. *Id.*

On cross-examination, Stull stated that prior to abatement, it was not necessary to step over anything to access any tool or material in the trailer. Tr. 51-52. Stull did maintain that a broom head was sticking out into the aisleway at head level and needed to be pushed back. *Id.*

Stull testified that after being notified of the alleged violation, Ames abated the violation by widening the walkway in the trailer and hanging tools up on nails or stacking them in the shelving. Tr. 47-48. Stull stated that the abatement was complete by 9:00 AM. Tr. 47.

² The "yellow box" described by Inspector Stull was readily identified in the inspection photo as a standard temporary power box as later confirmed by Ames Foreman Jackson. Tr. 100.

b. The Respondent

Ames's carpenter, Jose Rodriguez, testified for the Respondent.³ Tr. 78. Rodriguez stated that he worked on a small labor crew at the Barrick mine site directed by Foreman Dave Jackson. Tr. 80.

Rodriguez testified that Ames had recently moved the storage trailer in order to clear space for another company. Tr. 81. Rodriguez stated that he opened the trailer after the company had its morning meeting on Monday. Tr. 82. Rodriguez testified that Foreman Jackson had told them when they first moved in and on Monday morning to clean the trailer. Tr. 83. Rodriguez stated that he removed several buckets from the trailer to get them out of the way before Inspector Stull spoke with him. Tr. 85. Rodriguez stated that he did not have any trouble moving around in the trailer. *Id.* Rodriguez stated that Inspector Stull only asked him where the foreman was and did not ask him any other questions. Tr. 87.

Concrete Foreman David Jackson testified regarding Citation No. 8701612 and the conditions of the cited trailer. Jackson stated that the cited trailer was a tool trailer that was approximately 20 feet wide by six feet wide inside to inside. Tr. 96, 98. Jackson testified that he and his crew relocated the trailer the Friday evening before the citation was issued to make way for a crane move. Tr. 101-02. Jackson testified that the temporary power box, water cooler, sheets of expansion material, and power (screed) pointed out by Inspector Stull were moved into the trailer for the crane move. *Id.*

Jackson stated that when his crew returned to the jobsite the next Monday he conducted a safety meeting with his crew that lasted about thirty minutes. Tr. 103. Jackson testified that he instructed Mr. Rodriguez and Mr. Sherez early on Monday morning to remove the material stored temporarily in the trailer. Tr. 103-04. Jackson stated that extension cords, spare harnesses, and other tools were stored in their normal position. Tr. 104-05.

Jackson testified that when Inspector Stull asked him if he knew there was a hazard he answered yes. However, Jackson became frustrated when Stull accused him of willfully exposing his workers to a hazard and did not inform Inspector Stull that he had assigned workers to clean up the trailer. Tr. 106. On cross-examination, Jackson stated that when he acknowledged that there was a hazard in the trailer he was simply agreeing that some material needed to be removed from the trailer. Tr. 117.

B. The Cited Standard

30 CFR 56.20003(a) mandates:

Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

30 CFR 56.20003(a).

³ Jose Rodriguez testified with the aid of a translator. Tr. 79. Mr. Rodriguez stated in English that he could understand and speak English but felt more comfortable using a translator to avoid possible confusion. *Id.*

The MSHA Program Policy Manual does not provide any guidance regarding what constitutes a violation of 30 CFR § 56.2003. A Commission Administrative Law Judge has upheld an alleged violation of 56.20003(a) even in the absence of a significant hazard when the Secretary has shown that deficient housekeeping conditions were extensive. *Baker Rock Crushing Company*, 2010 WL 3616493, *6 (August 2010)(ALJ Barbour)(affirming non S&S 56.20003(a) citation when Secretary demonstrated existence of an “accumulation of dirt, dust and hydraulic fluid spillage *throughout* the rock breaker area.”(emphasis added). However, an ALJ has vacated an alleged violation of 30 CFR 56.20003(a) when the judge has found that:

The photograph taken by the inspector shows a trailer that is relatively clean and orderly. (Ex. P-8). Spare hoses and belts are hung from hooks on the wall; other hoses are coiled along one side; various cans, including oil barrels, are located along that same side; and a pathway leads into the area. The only slightly cluttered area is at the back of the trailer, but even that area is rather clear of impediments to walking. There are long pieces of metal along one side, but the floor is clearly visible along the path...

Beco Construction Company, 23 FMSHRC 1182, 1194 (October 2001) (ALJ Manning).

An ALJ has also vacated an alleged violation of 30 CFR 56.20003(a) when the Respondent credibly demonstrated that workers had not been exposed to recently formed accumulations *and* the Respondent had already initiated clean-up efforts. *Stringtown Materials LP*, _4, Docket No. CENT 2004-229-M, (unpublished May 18, 2005)(ALJ Zielinski).

C. Analysis

As an initial matter, I find that 30 CFR § 56.20003(a) applied to the mobile trailer cited by Inspector Stull. Ames uses the trailer to store small tools and construction materials. Tr. 81, 98-99. Accordingly, the trailer fits the definition of a “storeroom” listed in 30 CFR 56.20003(a).

After reviewing all testimony and evidence presented, I find that the Secretary has not established by a preponderance of the evidence that the Respondent failed to maintain the mobile trailer in a “clean and orderly condition.” Although Inspector Stull objected to the positioning of a temporary power box, folding chair, and water cooler at the front of the trailer; it appears there were at least several feet of clear space to the side of these items through which the workers could enter the trailer. GX 3. The photo submitted by the Secretary also indicates that small tools, including shovels, brooms, and breaker bars were placed upright and out of the main walkway within secure shelving. *Id.* On the opposite side of the trailer it appears that rain gear, safety harnesses and extension cords were placed on racks and hung in an orderly fashion. *Id.* The point Inspector Stull marked on the inspection photo as measuring at 13 inches wide is a small isolated section of the center walkway that otherwise appears to be approximately three feet wide throughout trailer. *Id.* As such, I find that the evidence submitted indicates that the

trailer was, in fact maintained in a relatively clean and orderly fashion prior to the issuance of Citation No. 8701612. *Beco Construction Company*, 23 FMSHRC 1182, 1194.

The inspection photo does indicate that there were two sheets of expansion material toward the back of the trailer leaning at a low angle. GX 3. However, as these sheets were butted up against a large metal concrete finishing screed, I do not credit Inspector Stull's testimony that the plywood was likely to slide out into the walkway and cause an accident. GX 3; Tr. 29-30. I also note that Inspector Stull stated that it was not necessary to step over any item to walk in the trailer, and did not provide for any support for his individual belief that a continuous 24" wide walkway was necessary to comply with 30 CFR § 56.20003(a). Tr. 31, 51-52. Accordingly, I find that the Secretary has not demonstrated that conditions in the trailer presented a hazard.

I also credit the testimony of Rodriguez and Jackson that the items Inspector Stull objected to had been placed there temporarily for a recent trailer move. Tr. 81, 100. Foreman Jackson credibly testified that it was necessary to move the trailer the Friday before and store extra material in the trailer over the weekend while a large crane was moved on site. Tr. 100. Jackson and Rodriguez both testified that Jackson instructed his crew to remove those temporary materials after the Monday morning safety meeting. Tr. 83, 103-04. Rodriguez stated that after he opened up the storage trailer on Monday morning, he and his partner removed the buckets from the front of the trailer and intended to remove the expansion material, temporary power box, and concrete finishing screed before Inspector Stull contacted them. Tr. 83-86.

Inspector Stull testified that he thought the two Ames laborers were not cleaning the trailer on the basis that no other materials had been removed from the trailer and the laborers appeared to leave the trailer and head towards a concrete project with buckets. Tr. 34-35, 36-37, 46. However, according to Stull, the concrete project was only 15 to 20 feet away from the trailer. Tr. 33. Additionally, after observing the workers remove the buckets from the trailer, Stull quickly contacted the workers and asked them where their boss was. Tr. 35. Given that Stull first observed the Respondent's laborers only shortly after the conclusion of the morning safety meeting, it is unsurprising that Rodriguez and his partner had not yet made significant progress in reorganizing the trailer. Tr. 85, 104. As such, I find the record demonstrates that the Respondent's employees were actively engaged in cleaning the trailer prior to the time Inspector Stull issued Citation No. 8701612. *Stringtown Materials LP*, _4, Docket No. CENT 2004-229-M.

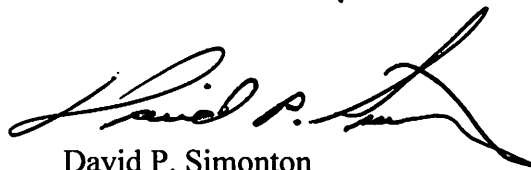
Inspector Stull emphasized that after he issued Citation No. 8701612, the Respondent's employees cleared out the materials he objected to and significantly widened the interior walkway. Tr. 48. However, I have already found above that the Secretary has failed to prove that the presence of these items violated 30 CFR 56.20003(a). Thus, evidence showing that Ames removed and rearranged additional items in the mobile trailer after Inspector Stull issued the citation is not sufficient to sustain the alleged violation.

Having found that the trailer was kept in a relatively clean and orderly condition free of safety hazards, and that the Respondent's employees were actively removing materials normally

stored elsewhere at the time of the citation in order to clean the trailer; I find that the Secretary has not established a violation of 30 CFR 56.20003(a).

IV. ORDER

Accordingly, Citation No. 8701612 is **VACATED** and this matter is **DISMISSED**.

A handwritten signature in black ink, appearing to read "David P. Simonton". The signature is fluid and cursive, with a large, sweeping flourish at the end.

David P. Simonton
Administrative Law Judge

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