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February 21, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RAIN FOR RENT, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-0730 A.C. No. 04-01891-418057 Mine: Eliot Plant

DECISION AND ORDER

Appearances: Andrew R. Tardiff, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner

Bryon J. Walker, Esq., Rose Law Firm, Little Rock, Arkansas, for the Respondent

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor ("the Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d).[1] At issue are two citations issued to Respondent Western Oilfields Supply Company, doing business as Rain for Rent ("RFR"), under Section 104(a) of the Mine Act.

A hearing was held in San Jose, California on November 26, 2019, at which time testimony was taken and documentary evidence was submitted. The parties filed post-hearing briefs on January 28, 2020. I have reviewed all of the evidence at length and have cited to the

[1] This case was previously before the Commission. *Rain for Rent*, 40 FMSHRC 976 (July 2018), *aff'g* 39 FMSHRC 1448 (ALJ 2017). The United States Court of Appeals for the District of Columbia Circuit remanded this case in light of the Supreme Court's decision in *Lucia v. SEC*, 138 U.S. 2044 (2018). *See W. Oilfields Supply Co. v. FMSHRC*, No. 18-1269 (D.C. Cir. Mar. 22, 2019). The Commission subsequently remanded this case to the undersigned for a hearing and decision on the merits. 41 FMSHRC 243 (May 2019).

testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. After consideration of the evidence and observation of the witnesses and assessment of their credibility, I uphold the Section 104(a) citations as written for the reasons set forth below.

B. Stipulations

The parties have stipulated to the following facts:

1. RFR provides temporary liquid handling solutions, including pumps, tanks, filtration, and spill containment to different industries, including mine operators in the United States, Canada, and the United Kingdom.

2. On the date of the subject citations, RFR provided services as an independent contractor to CEMEX Construction Materials Pacific LLC, which operates the Eliot Plant, Mine Safety and Health Administration ("MSHA") I.D. No. 04-01891, in Alameda County, California.

3. The case is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission ("FMSHRC") and the assigned Administrative Law Judge ("ALJ").

4. The MSHA inspector was acting in his official capacity when issuing the citations.

5. The citations were properly served by a duly authorized representative on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.

6. RFR had no history of MSHA violations as of the date the citations were issued.

7. The air compressor referenced in Citation No. 8785486 was a Quincy model, with a 30 gallon air receiver tank, which was mounted on the Ford F-550 company service truck (company # 2102).

8. During the subject inspection, RFR did not produce to the MSHA inspector, in response to the MSHA inspector's request, any documents showing that the air compressor referenced in Citation No. 8785486 had been inspected by an inspector holding a valid National Board of Boiler and Pressure Vessel Inspectors ("National Board" or "Board") Commission and in accordance with the applicable chapters of the National Board Inspection Code ("NBIC").

9. 30 C.F.R. § 56.4402 does not require any specific labeling on a safety can, other than that the labeling "indicate the contents."

10. MSHA has neither published any guidance, nor promulgated any rules or regulations that defined "labeled" or "indicate," as those terms are used in 30 C.F.R. § 56.4402.

11. There is no requirement under the Mine Act that labeling of a safety can be in a specific location on the can, in a specific size or color, or be in a specific language.

12. The safety can which is the basis for Citation No. 8785487 was red in color at the time of the subject inspection.

13. RFR and its representatives have at all times cooperated with the investigation.

14. RFR demonstrated good faith in addressing the conditions in the subject citations.

15. The alleged violation in Citation No. 8785487 was terminated immediately.

16. The alleged violation in Citation No. 8785486 has been terminated.

Jt. Ex. 1.[2]

II. BACKGROUND

Rain for Rent is a global contractor supplying liquid handling solutions to various industries. It was providing services on the Eliot Mine sand and gravel mine property on July 6, 2016 when MSHA inspector Nicholas R. Basich[3] conducted a regular inspection. He issued the two citations herein. Tr. 15; Ex. S-3; Jt. Ex. 1.

During the inspection of RFR's Ford F-550 truck, Inspector Basich observed a Quincy air compressor and 30-gallon air receiver tank in the bed of the truck. Tr. 15-16; Ex. S-3, S-5 at 3; Jt. Ex. 1. Basich looked for evidence that the receiver tank was inspected, and noted that it displayed no evidence that an inspector commissioned by the National Board performed an inspection. Tr. 15-16, 26. Basich then asked the driver of the RFR truck to produce evidence that the tank had been inspected by a National Board-commissioned inspector. Tr. 15, 17, 18, 43. After searching the truck, the RFR driver informed Basich that he did not have a permit or other proof of a conforming inspection. The RFR driver also telephoned the RFR office but was still unable to produce the documentation at which time Basich issued Citation No. 8785486. Tr. 18.

Next, Inspector Basich observed two Eagle Manufacturing Company 5-gallon safety cans in the cargo bed of the truck. Tr. 29, 30. The safety cans were identical in design, with each being red in color and having a yellow stripe running horizontally around the upper portion of the cans. Tr. 31, 60; Ex. S-7; Jt. Ex. 1. However, the exterior of one safety can was labeled with

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[2] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered Ex. S-2 to S-7. The Respondent's exhibits are numbered Ex. R-1 to R-12. The stipulations are the only joint exhibit, Jt. Ex. 1. References to the Secretary's Post-Hearing Brief are designated "SB," and references to the Respondent's Post-Hearing Brief are designated "RB."

[3] Basich has served as a mine safety and health inspector with MSHA for seven years. Tr. 9, 10. Prior to becoming a mine inspector, Basich was employed in the construction industry, where he held supervisory positions. Tr. 10, 11. Basich attended the Mine Safety and Health Academy, and has specifically received training on pressure vessels and fire prevention. Tr. 12.

the word "diesel," whereas the other safety can did not have any similar writing. Tr. 29, 59. After the RFR driver stated that the safety can without writing held gasoline, Basich issued Citation No. 8785487. Tr. 29; Ex. S-6, S-7. Shortly thereafter, the RFR driver wrote the word "gasoline" on the safety can and terminated the citation. Tr. 31, 32; Jt. Ex. 1.

III. LEGAL PRINCIPLES

A. Gravity

Gravity is the degree of seriousness of the violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000) (citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996)). The Commission has indicated that the focus of the gravity inquiry "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the [significant and substantial] inquiry, but rather on the effect of the hazard if it occurs." *Consolidation*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation demonstrating recidivism, or a violation that could compound the effects of other conditions).

B. Negligence

Negligence is conduct that falls below the high standard of care established by the Mine Act. 30 C.F.R. § 100.3(d). Operators must avoid conditions and practices that could cause injuries. *Id.* Negligence considers what actions a reasonably prudent person—familiar with the mining industry, the facts, and the protective purpose of the cited regulation—would have taken. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016) (citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). An ALJ may "evaluate negligence from the starting point of a traditional negligence analysis" rather than consulting the Secretary's definitions. *Brody Mining, LLC*, 37 FMSHRC at 1702.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8785486 in violation of 30 C.F.R. §56.13015

1. Fact of Violation

The condition or practice cited by Basich was that the 30-gallon pressure air receiver tank located in the bed of the mechanic's Ford F-550 truck did not have a current record of inspection. Ex. S-2. The Secretary assessed the violation as unlikely to cause injury, but of a fatal nature to one miner and the result of moderate negligence. The proposed penalty is $114.00.

The mandatory standard requires that compressed air receivers and other pressure vessels shall be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code ("NBIC"). Records of the inspections shall be kept in accordance with the NBIC and shall be made available to the Secretary or his authorized representative. 30 C.F.R. §56.13015 (a) and (b).

The applicable Chapter II of the NBIC requires that "inspections of ... pressure vessels as provided for in jurisdictional regulations, will be made at the time of installation and at regular intervals thereafter." R-10 at 5. The purpose of the NBIC is "to maintain the integrity of such ... vessels after they have been placed into service...by providing rules and guidelines for inspection after installation....thereby helping to ensure that these objects may continue to be safe." Ex. R-10 at 5.

2. Findings of Fact and Analysis

Basich testified that regular inspections of a pressurized tank once it has left the manufacturer is critical. Tanks are handled multiple times thereafter in shipment, installation and pressurization. Such handling can cause fractures in the tank that are invisible to the naked eye yet serious enough to turn the tank into a "bomb" when pressurized during normal use. Shrapnel from the tank could easily cause fatal injuries should a miner be exposed to such an event. National Board inspectors perform tests that measure the thickness of the tank wall and inspect for any cracks, scars or other signs of damage using specialized equipment to ensure their continued safety. Once the tank is inspected, it is documented on paper with the name of the certified inspector, name of their company and the date on which the inspection was performed. The record indicates that the RFR tank was installed on the F-550 truck on December 17, 2014, one year and seven months prior to Basich's inspection. It was then placed into operation at the mine on February 25, 2015, one year and five months prior to the inspection. Kelly George, Vice President of RFR testified that the RFR trucks are driven to multiple work sites across state lines with frequency. Tr. 70. It is therefore evident that any one of these transportation circuits as well as more than one year's normal use and wear and tear on the tank could cause undetectable damage resulting in a catastrophic injury.

Rain for Rent contests that violation on several bases, essentially arguing that the manufacturer's plate issued by the American Society of Mechanical Engineers ("ASME") (which was on the tank) complied with the mandatory standard and that the Secretary's actions were arbitrary and capricious, and deprived the Respondent of fair notice and due process. None of these arguments are persuasive or relevant.

Respondent cites to Chapter IV of the NBIC in support of its argument that the ASME plate on the tank was in compliance with the cited standard. Chapter IV, however, expressly "limits its application to the inspection during construction of and assembly of new pressure vessels." Ex. R-10 at 4. Respondent further relies on *D&H Gravel*, 31 FMSHRC 272 (2009)(ALJ) in support of its position that the Secretary's interpretation of the standard is contrary to Commission precedent. Interestingly, Respondent failed to properly cite the case (or make mention of the fact) in its brief that *D&H Gravel* is an ALJ decision which holds no precedential value. I find, as a matter of law, the decision in that case was a misinterpretation of the mandatory standard and Chapter II of the NBIC.

Not only does RFR cite an inapplicable chapter of the NBIC and a decision of no precedential value, but its position flies directly in the face of the protective purpose of the Mine Act and could certainly not be so interpreted by a reasonable person familiar with the mining industry charged with being aware of the Secretary's rules and regulations.

Respondent also argues in its brief:

> The California permit, like the manufacturer's plate with an ASME certification, does not say "Nationally Board Certified" on its face. The arbitrariness of choosing to accept one and not the other is egregious in light of the fact the California permit does not even represent an inspection by an individual holding a National Board Certification. See Cal. Code Regs. tit. 8,§ 779. Issuing a citation without considering the manufacturer's inspection plate with the ASME stamp, which FMSHRC precedent expressly finds is sufficient, shows that the action was arbitrary and capricious. See D&H Gravel, 31 FMSHRC at 280.

RFR brief at 12. While difficult to make out the logic of the argument, it is clear that it misplaced. As found above, the SOL has not accepted the ASME stamp or the CA permit as evidence of compliance with the cited standard, nor have I. Again, reliance on D&H Gravel is misplaced. There is no "FMSHRC precedence" that finds the ASME stamp sufficient. RFR further contends that Inspector Basich issued his citation for the operator's failure to comply with California law depriving it of fair notice. This is not the case. Basich found a violation of the unambiguous cited mandatory standard when he found no Commission-certified inspection on the tank or documentary evidence of the same. He did not apply California Law. Rain for Rent's due process argument is based, again, on D&H Gravel and is therefore, again, misplaced and irrelevant.

I hold that the SOL has proven by a preponderance of the evidence that a person with a valid National Board Commission did not inspect the tank within the plain and unambiguous language of 30 C.F.R. §56.13015(a). The standard provided the operator with adequate notice that such an inspection was required. I also find RFR failed to provide the Secretary through its authorized MSHA inspector documentary proof the required inspection in violation of 30 C.F.R. §56.13015(b).

3. Negligence and Gravity

Basich testified that he assessed the negligence as moderate because it was an open and obvious condition that RFR should have been aware of. Vice President Kelly George, who holds degrees in occupational safety and health and jurisprudence, testified that he was aware that California air tank inspectors were not required to be commissioned by the National Board and he could not ensure that RFR tanks were inspected by commissioned inspectors. I find moderate negligence is appropriate, although only just. I find the violation is reasonably serious and could have resulted in a fatal injury to one person should the unlikely event of a tank explosion occur.

B. Citation No. 8785487 in violation of 30 C.F.R. §56.4402

1. Facts of Violation

The condition or practice Basich cited during his July inspection was that one of two 5 gallon safety cans located in the bed of the Ford F-550 truck was not labeled to indicate its contents. It was full of gasoline according to the truck driver. It is accessed as unlikely to cause

and accident or injury resulting in lost workdays or restricted duty affecting one miner and the result of moderate negligence. Ex. S-6. The Secretary has proposed a civil penalty of $114.00.

The cited mandatory standard requires "[s]mall cans of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents. 30 C.F.R. §56.4402.

Basich testified that he found the cited red can was not labeled to indicate its contents. "So you couldn't tell looking at the outside of the can what was inside the can." Tr. 29; Ex. S-7. The can is visibly old, dented and scratched. A similar red can was found as well which had a label on it indicating that it contained diesel fuel. Tr. 59. Basich was concerned with the failure to label the can as misuse of it could lead to a fire. Tr. 14. At the time he issued the violation, it was late in the day towards the end of the shift and the gas can was full. Tr. 64.

B. Findings of Fact and Analysis

The Secretary asserts that the meaning of "contents" in this context means the name of the actual substance within the can. The Respondent, to simplify its myriad of arguments, urges that the color of the can, the printed warnings such as "flammable, explosive, and dangerous" and the like satisfy the language of the standard.

I agree with the Secretary's interpretation of this clearly worded standard. The word "contents" as Inspector Basich indicted, answers the question, "What's inside?" The response is a thing -a noun, not an adjective describing the properties of what may be inside the can if it is filled with the intended contents – gasoline. That the red color of the can indicates the can should be filled with gasoline, in contrast to a yellow can which is suggested for diesel fuel, as RFR argues, is irrelevant. Nothing in the manufacturer's literature or the National Fire Protection Code provisions submitted by RFR in support of the assertion that the red can is a sufficient indication of the contents therein, rules out the use of a red can for other substances. RFR also points to MSHA Hazardous Communication ("HazCom") and OSHA standards as well as the MSHA Program Policy Letter ("PPL") No. P13-IV-01 as proof that the cited can satisfies the requirements of §56.4402. Aside from being under entirely different sections of C.F.R. from what was cited here, the hazcom provisions offer no support of RFR's position. The PPL requires a container to be labeled to include "the chemical identity" in addition to the appropriate warnings (flammable, toxic, explosive, etc.). Ex. R-4. Additionally, the PPL also states that OSHA requires labels to include the product identifier and chemical identity and have a Material Safety Data Sheets ("MSDS") on hand to cross-reference for each hazardous chemical used at the mine. The significance of this is, an MSDS cannot be cross-referenced to "flammable" or any other adjective describing the property of a particular chemical without the specific identification of the chemical in question.

Respondent once again misguidedly cites *Bellaire Corporation*, 12 FMSHRC 1726 (1990)(ALJ) as precedence for finding the red can was sufficiently labeled. Again, RFR fails to properly cite or refer to the case as an ALJ decision, not Commission precedent. Furthermore, the issue in Bellaire was entirely different from the instant case. In fact, the Administrative Law Judge stated, "[t]he issue is whether the cans containing gasoline were properly 'identified.' The

cited safety standard expressly requires only 'proper identification,' not 'proper labeling.'" *Bellaire* at 1730.

The language of the standard in question is unambiguous. Any reasonable person familiar with the mining industry would know that a "label indicating contents" means what the particular substance is inside the can. I find the Secretary has met his burden of proving this violation.

C. Negligence and Gravity

I find the violation to be reasonably serious. Should the can be improperly handled, it could lead to serious burns to the driver of the truck. I agree with Basich that it would be unlikely.

I find the negligence is properly assessed at moderate. The driver of the truck knew the can contained gasoline as opposed to the other red can containing diesel – a nonflammable fuel. However, the can was still full at the end of the shift and he was not the only miner with access to the can. Having both red cans containing different substances on hand could easily lead an inattentive miner to confuse the two and mishandle or misuse it resulting in injuries.

V. PENALTIES

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided for by the Act. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012) (citing 30 U.S.C. § 820(i)). In determining penalty amounts, Section 110(i) directs the Commission to consider:

> [T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although ALJ penalty assessments "must reflect proper consideration" of the Section 110(i) criteria. *Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016) (citations omitted). In addition to considering the Section 110(i) criteria, the judge must provide a factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 265-66 (May 2006) (citing *Sellersburg*, 5 FMSHRC 287, 292-93 (Mar. 1983)). My analysis of the Section 110(i) factors is set forth below.

The parties have stipulated that RFR had no history of violations at the time these citations were issued and that the violations were abated in good faith. There is no evidence of record of the operator's inability to pay the proposed assessments and find that it is a large, global company and therefore find the penalties will not affect the operator's ability to continue in business. The findings as to gravity and negligence involved in each citation are set forth above.

After considering the six statutory penalty criteria, I assess a penalty of $114.00 for Citation No. 8785486 and $114.00 for Citation No. 8785487.

ORDER

Rain for Rent is hereby **ORDERED** to pay a total penalty of $228.00 for the violations herein within thirty (30) days of the date of this Decision and Order.[4]

Priscilla M. Rae
Administrative Law Judge

Distribution:

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[4] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.