FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 26, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RAIN-FOR-RENT, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-730-M A.C. No. 04-01891-418057 VVG Eliot Plant

DECISION

Appearances: Jose Figueroa, Mine Safety and Health Administration, Vacaville, California, and Isabella Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; B.J. Walker, Esq., Rose Law Firm, Little Rock, Arkansas, for Respondent.

Before: Judge Manning

This case are before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Rain-For-Rent ("RFR") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing held in San Jose, California, and filed post-hearing briefs. Two section 104(a) citations were adjudicated at the hearing. RFR was an independent contractor performing work at the Eliot Plant, a sand and gravel operation in Alameda County, California. Although I have not included a detailed summary of all evidence or each argument raised by the parties, I have fully considered the entire record in rendering this decision.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agreed upon several general stipulations set forth in the bullet points below:

- Respondent Rain-For-Rent is a contractor that provides temporary liquid handling solutions, including pumps, tanks, filtration and spill containment to different industries, including mine operators in the United States, Canada and United Kingdom.
- Respondent provided services to the CEMEX Construction Materials Pacific LLC, which operates Eliot Plant, MSHA I.D. No. 04-01891, in Alameda County, CA.
- The case is subject to the jurisdiction of the Commission and the assigned judge.
- The MSHA inspector was acting in his official capacity when the citations were issued.

- The subject 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.
- Respondent demonstrated good faith in abating the conditions noted in the subject citations.
- Respondent had no history of MSHA violations as of the date that the subject citations were issued.
- Respondent and its representatives have at all times cooperated with the investigation.
- Respondent demonstrated good faith in addressing the conditions noted in the subject citations.

It is important to emphasise that the Commission and courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g., Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

A. Citation No. 8785486

Citation No. 8785486, issued under section 104(a) of the Mine Act on July 6, 2016, alleges a violation of section 56.13015 of the Secretary's safety standards and asserts that an air receiver tank[1] in the bed of a truck did not have a current record of inspection. Moreover, the citation asserts that the truck is used daily and that persons would suffer potentially fatal injuries in the event of a pressure vessel explosion. Section 56.13015 requires, in pertinent part, that "[c]ompressed-air receivers and other unfired 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, a Manual for Boiler and Pressure Vessel Inspectors, 1979."[2] 30 C.F.R. § 56.13015.

[1] The terms "tank" and "pressure vessel" are used interchangeably throughout the decision.

[2] For brevity's sake the National Board Inspection Code is referred to as the "NBIC" throughout the decision.

Inspector Nicholas Basich[3] determined that the condition was unlikely to cause an injury or illness but, if it did, the injury could reasonably be expected to be fatal. He further determined that one person was affected, the condition was not significant and substantial, and Respondent was moderately negligent. The Secretary proposed a penalty of $114.00 for this alleged violation.

The parties agreed upon the following stipulations with respect to this citation:

- The air compressor referenced in Citation [N]o. 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).
- During the subject inspection, Respondent 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 [N]o. 8785486 had been inspected by an inspector holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code.
- The alleged violation in Citation No. 8785486 has been terminated.

Summary of the evidence

Inspector Basich was at Cemex's Eliot Plant (the "mine") in July of 2016 to conduct a regular inspection. Tr. 10-11. RFR was a contractor at the mine. Tr. 11. During his inspection he observed a RFR service truck parked adjacent to the mine shop. Tr. 11-12. An air compressor and receiver tank were mounted on the bed of the truck. Tr. 12. Inspector Basich inspected the pressure vessel, relief valve and gauge. Tr. 45. As part of that inspection he looked for an identification number on the receiver tank but did not find one. Tr. 12.

Based on his observations, Inspector Basich issued Citation No. 8785486 for an alleged violation of section 56.13015 of the Secretary's safety standards. Tr. 14. He explained that the cited standard requires pressure vessels to be inspected by someone with a "valid National Board Commission and in accordance with the National Board Inspection Code [of] 1979". Tr. 14. According to Inspector Basich, an identification number can be used to determine if the tank has been inspected by someone holding a valid National Board Commission. Tr. 12. Here, Inspector Basich explained the tank did not have a stamp on it indicating that it had been inspected by someone with a valid National Board Commission and the driver could not produce documentation showing that a proper inspection had been conducted even after given the opportunity to call his office.[4] Tr. 12, 20, 29, 39-40, 60, 149.

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[3] Inspector Basich has worked for MSHA for over four years. Tr. 9. In addition to standard training at the Mine Academy, he has had journeyman training and special investigation training. Tr. 10. He is trained on pressure vessels, the NBIC, and fire prevention. Tr. 10.

[4] On cross-examination, Inspector Basich confirmed that the citation was issued for failure to inspect the pressure vessel and not for failing to provide record of an inspection, which would have been cited under a different subsection of the Secretary's standard. Tr. 47

Inspector Basich agreed that, while it can be presumed that a pressure vessel has been inspected by a manufacturer, the standard requires that the inspection be done by someone holding a "valid National Board Commission[,]" and the pressure vessel needs to be inspected when it changes ownership and at the time of installation before placing the pressure vessel into service. Tr. 20, 30. On cross-examination Inspector Basich explained that, while he did not see a "manufacturer's plate" on the tank, the presence of one would not change his opinion because the tank, valves, gauges and hoses can be damaged after the tank leaves the manufacturer. Tr. 49-51. As a result, he stated that RFR could not rely on any manufacturer's plate applied to the tank since that was only proof of an inspection by the manufacturer. Tr. 50-53.

Robert Kelly George[5], the vice president for health and safety for the company doing business as RFR, testified that he conducted an internal investigation surrounding the circumstances of both citations at issue in this case. Tr. 79. He explained that RFR had pumps at the mine and the service truck driver, a mechanic, was at the mine to work on the pumps. Tr. 83. George testified that after the subject citation was issued, he contacted someone at the RFR branch and had them take photographs of the pressure vessel. Tr. 93; RX-1. George explained that the photographs show that the pressure vessel was equipped with a manufacturer's plate and American Society for Testing and Materials ("ASTM") stamp indicating that the tank had been inspected to the ASTM standard.[6] Tr. 86-88, 93; RX-1. George acknowledged that the purpose of the NBIC is to maintain the integrity of the pressure vessels after they are put into service and that the Code "requires that the air compressor be inspected when it's first put into service." Tr. 88,118. Moreover, he averred that any follow-up inspection under the NBIC was not yet due, as the tank had been in service for less than a year. Tr. 88. However, on cross-examination he conceded that he was unaware how many hands the compressor and pressure vessel went through after it was manufactured and before it ultimately ended up on RFR's truck, was not sure who installed the compressor and pressure vessel on the service truck, and had no recollection as to whether anyone with a National Board Commission had inspected the compressor after RFR came into possession of it. Tr. 119. Moreover, he acknowledged that RFR purchased the truck from a dealership and that a third party was responsible for making sure that the air compressor and pressure vessel were correctly installed upon the truck. Tr. 123-124. Finally, he conceded that, while he knew the pressure vessel had been inspected after the manufacturer's plate was attached, he could not be sure if those inspections satisfied the NBIC. Tr. 134.

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[5] George currently oversees health and safety for Western Oil Fields Supply Company, doing business as RFR, and its 1600 employees. Tr. 75-76. Prior to working at RFR he worked as a fire fighter, paramedic, OSHA compliance officer, and a safety director of another private entity. Tr. 75-77. While he was trained as an OSHA compliance officer and wrote citations in that role, he is not trained on how to enforce MSHA safety standards. Tr. 77, 115. George has a master's degree in occupational safety and health, is familiar with various safety and health regulations, and is currently enrolled in law school. Tr. 78.

[6] ASTM is an international standards organization that develops and publishes voluntary consensus standards for a wide range of materials and products. The ASTM stamp presumably indicated that the tank met ASTM standards.

Fact of Violation

I find that the Secretary has established a violation. The requirements of the cited standard are twofold. First, it requires that pressure vessels be inspected by persons holding a valid National Board Commission. Second, it requires that the inspection be conducted in accordance with the applicable chapters of the NBIC.[7] Because RFR violated the first requirement, I find that consideration of the second requirement unnecessary.

Inspector Basich testified that RFR provided no record of an inspection conducted by an individual with a National Board Commission and the parties stipulated to that fact. RFR offered no evidence to the contrary. Accordingly, I find that a violation existed under the standard's first requirement.[8]

RFR cites *D&H Gravel*, 31 FMSHRC 272, 279-80 (Feb. 2009) (Judge Manning), for the proposition that a manufacture's tag on a new pressure vessel is evidence that a proper inspection was conducted. However, limited facts are available in that decision and it does not appear that the question of whether the pressure vessel was inspected by someone with a National Board Commission was raised by either party. Accordingly, I find that *D&H Gravel* is distinguishable and my ruling in that case should not be applied here.

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[7] Both parties offered testimony, introduced evidence, and presented arguments regarding California state regulations as they relate to the NBIC. The NBIC states that "where any provision herein presents a direct or implied conflict with any lawful regulation in any governmental jurisdiction, the lawful regulation shall govern and such compliance shall be made." PX-4 p.4. In its brief, RFR contends that MSHA cannot constitutionally base a citation on an alleged violation of California state regulations. RFR Br. 3-9. However, no evidence was presented to show that California regulations would have exempted the tank from inspection. Consequently, no conflict existed. For the reasons set forth herein, I find that this matter can be decided based solely on the safety standard cited by Inspector Basich. Accordingly, I do not address the issue of whether MSHA can enforce state regulations where they conflict with the NBIC.

[8] RFR, in its brief, asserts that the inspection conducted by the manufacturer of the pressure vessel, as evidenced by the manufacturer's plate and ASTM stamp, satisfied the standard. Although an inspection may have been conducted, nothing in the record establishes that it was conducted in accordance with the NBIC. The placement of the ASTM stamp on the tank does not meet the requirements of the Secretary's safety standard. The purpose of the NBIC is "to maintain the integrity of . . . pressure vessels *after* they have been placed into service." PX-4 p. 3 (emphasis added). The NBIC requires that inspections be conducted "at the time of installation." PX-4 p. 5. Here, at some point subsequent to the manufacturer's inspection, the compressor and pressure vessel were installed on the service truck prior to that truck being turned over to RFR and put into service.

Gravity

Inspector Basich determined that the condition was unlikely to cause an injury or illness because the tank, relief valve and gauge were in good condition with no defects. Tr. 20-21, 46, 62. However, he stated that in the event an injury were sustained it would be fatal since a defect affecting the performance of the compressor could cause the tank to become overcharged and explode, sending shrapnel in all directions and striking persons close by. Tr. 21, 61.

I find that the gravity was extremely low. The pressure vessel, while not inspected to NBIC standards, had been inspected to ASTM standards and no signs of damage or other problems were observed by Inspector Basich. The tank had been recently installed. There was little to no likelihood that an injury causing explosion due to overcharging would occur. Nevertheless, under the Act's strict liability structure the condition constituted a violation.

Negligence

Inspector Basich designated the citation as being the result of moderate negligence because RFR should have known that the safety standard required proper inspection of the tank, yet no inspection had taken place during the six months the truck had been in service. Tr. 21-22.

I find that RFR's negligence was low. The pressure vessel was new and RFR relied, albeit in error, on the manufacturer's inspection to the ASTM standard. RFR is a large contractor but does relatively little work in the mining industry. I find that the facts in this instance weigh in favor of a low negligence finding. Accordingly, I **MODIFY** the citation to low negligence and assess a penalty of $100.00.

B. Citation No. 8785487

Citation No. 8785487, issued under section 104(a) of the Mine Act on July 6, 2016, alleges a violation of section 56.4402 of the Secretary's safety standards and asserts that a safety can full of gasoline was not labeled to indicate its contents. Further, the citation asserts that the can was located in the back of a truck that was used daily and persons were exposed to hazards associated with misuse of the can's contents. Section 56.4402 requires that "[s]mall quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents." 30 C.F.R. § 56.4402.

Inspector Nicholas Basich determined that the condition was unlikely to cause an injury or illness but, if it did, the injury could reasonably be expected to result in lost workdays or restricted duty. He further determined that one person was affected, the condition was not significant and substantial, and Respondent was moderately negligent. The Secretary has proposed a penalty of $114.00 for this alleged violation.

The parties agreed upon the following stipulations with respect to this citation:

- 30 CFR § 56.4402 does not require any specific labeling on a safety can other than that the labeling "indicate the contents".

- There is no requirement under the Mine Safety and Health Act that labeling of a safety can be in specific location on the can.
- There is no requirement under the Mine Safety and Health Act that labeling of a safety can be in a specific size or color.
- There is no requirement under the Mine Safety and Health Act that labeling of a safety can be in specific language.
- The safety can which is the basis for Citation No. 8785487 was red in color at the time of the subject inspection.
- The safety can which is the basis for Citation No. 8785487 was marked with a yellow stripe at the time of the subject inspection.
- The alleged violation in Citation No. 8785487 was terminated immediately.

Summary of the evidence

While inspecting the same RFR service truck discussed above, Inspector Basich observed two red five gallon safety cans in the bed of the truck. Tr. 23, 64. While one can had the word "diesel" written on it, the other can did not have wording on it indicating the contents. Tr. 23-24. The unmarked five gallon safety can was full of gasoline. Tr. 23-24.

Based on his observations, Inspector Basich issued Citation No. 8785487 for an alleged violation of section 56.4402 of the Secretary's safety standards. Tr. 26. He explained that the cited standard requires that small quantities of flammable liquids must be kept in safety cans labeled to indicate their contents. Tr. 26. Although the gasoline was in a proper safety can, the can was not labeled to indicate its contents. Tr. 25-26, 67. The can had warning symbols, but not the words "gas" or "gasoline." Tr. 65.

George testified that he examined the subject safety can and reviewed the can manufacturer's website as part of his own investigation and believes that the can complied with the cited standard because the can was "labeled." Tr. 97-98. He explained that the subject safety can, which was red with the yellow stripe, was consistent with industry practice and met the requirements under multiple non-MSHA standards, e.g., Department of Transportation, Occupational Safety and Health Administration, National Fire Protection Association, Underwriters Laboratories. Tr. 99, 103. In particular, he noted that OSHA does not require that "gasoline" be written on the can and instead requires that a red safety can with a yellow stripe be used for "flammable liquids with a flash point below 80 degrees Fahrenheit." Tr. 100, 105. Moreover, he testified that warnings on the cited can that stated "danger, . . . extremely flammable, harmful or fatal if swallowed[,] . . . [were] additional evidence of [the can] being labeled." Tr. 102. Further, he stated that the RFR employee/driver knew exactly what was in the can and RFR's own policy says that "a red safety can will be used for gasoline . . .[, a] yellow safety can will be used for diesel . . . [and if] you vary from that, you must mark the can conspicuously with what it contains." Tr. 99-101. Finally, he stated that the benefit of color coding instead of wording is that the meaning is more universally understood. Tr. 107-109. On cross-examination he agreed that, although RFR's color policy is communicated to its employees, other workers at a mine site may not be privy to that policy. Tr. 129.

Fact of Violation

I find that the Secretary established a violation of the cited standard. The cited standard, as relevant to this matter, requires that flammable liquids shall be kept in safety cans labeled to indicate the contents. 30 C.F.R. § 56.4402. There is no dispute that gasoline, a flammable liquid, was kept in the can and that the can was a proper "safety can." Accordingly, the only question that remains is whether the can was "labeled to indicate its contents." I find that in order to comply with the standard, the can would have to be labeled to indicate that it contained gasoline. The words "gas" or "gasoline" did not appear on the can. Accordingly, I find that the can was not labeled to indicate its contents.

RFR argues that the color scheme of the can amounted to a proper label. It avers that the color scheme satisfies the labeling requirements of multiple non-MSHA regulations[9] and, as a result, it is an industry norm and should satisfy the MSHA standard. As an example, George testified that, under OSHA, the red and yellow color scheme signals that "flammable liquids with a flash point below 80 degrees Fahrenheit" are in the can. While I decline to address whether OSHA's regulation, as described by George, was satisfied, I find that MSHA's safety standard requires more. Specifically, it requires that the labeling *indicate the contents* of the safety can. It is not enough to simply provide information that indicates the characteristics of the contents of the can, i.e., the flash point and whether the material is flammable. Rather, the label must indicate the actual contents, i.e., gasoline.

The color scheme implemented by RFR, while it may have satisfied other non-MSHA regulations, did not provide the information necessary to satisfy the Secretary's standard. Although RFR asserts that the red color scheme is indicative that a safety can contains gasoline, RFR violated this rule in this instance, as evidenced by fact that RFR also used a red safety can on this very truck for diesel fuel. The other red can in the truck that day had the word "diesel" written on it. The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]" *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Having two red cans with different contents could cause confusion where one can is not labeled. Written labels[10] which indicate the contents of a safety can are intended to help avoid the guesswork of what might be in a can and help guard against the misuse of the can's contents as a result of a lapse in

[9] Although materials introduced into evidence from the manufacturer of the safety can state that the can meets multiple standards, MSHA standards are not listed. RX-3 p. 1.

[10] MSHA's HazCom standards include a definition of "label" at section 47.11. A label is defined as "[a]ny written, printed, or graphic material displayed on or affixed to a container to *identify its contents* and convey other relevant information." 30 C.F.R. § 47.11 (emphasis added). Although not directly applicable here, that definition provides that a label must indicate the contents of the container even if it conveys other relevant information such as the flashpoint. Although I agree with RFR that red cans are typically used in industry to store gasoline, I find that color alone, even with a yellow stripe, is not sufficient to meet the requirement of the cited safety standard.

attention, or fatigue. The lack of the word "gas" or "gasoline" in this instance could result in such misuse.

Gravity

Inspector Basich determined that the condition was unlikely to cause an injury or illness because the can was in good condition, and the driver was aware of the contents and was the only person accessing the bed of the truck that day. Tr. 27-28, 68. However, Inspector Basich stated that in the event an injury were sustained it would result in lost workdays or restricted duty because the misuse of a flammable liquid could lead to a fire or explosion which could result in shock or burn injuries. Tr. 28, 66.

George testified that RFR maintains a written policy and its employees are trained so that they would always know what was in the subject can. Tr. 104. The policy has never been confused in the past. Tr. 104-105. Had the policy been confused and diesel accidently been mistaken for gasoline, or vice versa, he would have known about it because it would have destroyed an engine. Tr. 104-105.

I find that the gravity was very low. There was little to no likelihood of an injury being sustained given that the container was a proper safety can, and the RFR employee was aware of the contents, trained to identify the contents based on RFR's policy, and was the only individual who would likely use the can. Nevertheless, the lack of a proper label created the potential for misusing the contents of the can. Although Inspector Basich testified that the misuse of the contents of the can could lead to a fire or explosion, I credit George's testimony and find that the far more likely outcome of the condition of the cans on the truck would be gasoline being mistakenly put into a diesel engine or diesel fuel being put in a gasoline engine, thereby ruining the engine. Accordingly, I find that, in this particular instance the condition is far less of a safety concern and more of an equipment protection issue. Nevertheless, as with the above citation, under the Act's strict liability structure the condition constituted a violation with low gravity.

Negligence

Inspector Basich designated the negligence as moderate because RFR was aware of the standard, as evidenced by one of the two cans being properly labeled. Tr. 28.

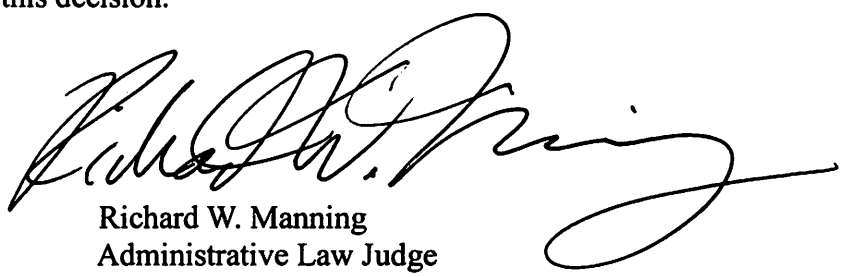
I find that RFR's negligence was low. RFR had a reasonable good faith belief that it was in compliance with the standard. While I find that RFR's color scheme does not satisfy the Secretary's safety standard, I find that its policy and training are mitigating factors. Moreover, although the Secretary argues that the word "diesel" written on the other safety can was an indication that RFR was aware of the standard, I find that RFR's policy, which required employees to "mark the can conspicuously with what it contains" only if the contents deviated from the understood color scheme, also explains why one can was marked but the other was not. Accordingly, I **MODIFY** the citation to low negligence and assess a penalty of $100.00.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). Neither MSHA's website nor Exhibit A to the Petition for Assessment of a Civil Penalty reflect any hours worked by RFR during the relevant time period. While George testified that RFR has approximately 1,600 employees, it does very little work in the mining industry. RFR did not assert that the penalties will affect its ability to remain in business. The parties have stipulated that RFR had no history of MSHA violations as of the date that the subject citations were issued. The citations were timely abated. The negligence and gravity are discussed above. Based on the penalty criteria I assess a total penalty of $200.00.

III. ORDER

For the reasons set forth above, Citation Nos. 8785486 and 8785487 are **MODIFIED** to low negligence. Rain-For-Rent is **ORDERED TO PAY** the Secretary of Labor the sum of $200.00 within 30 days of the date of this decision.[11]



Richard W. Manning
Administrative Law Judge

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