

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 12, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-25-M
Petitioner	:	A.C. No. 39-00670-05519
	:	
v.	:	Dakota Quartz Plant
	:	
MINERAL TECHNOLOGY CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor,
 Denver, Colorado, for Petitioner;
 Robert L. Cullum, Mineral Technology Corporation, Custer, South
 Dakota, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (AMSHA@), against Mineral Technology Corporation (AMinTec@), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' ' 815 and 820 (the AMine Act@). The petition alleges three violations of the Secretary's safety standards. A hearing was held in Rapid City, South Dakota.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Dakota Quartz Plant produces high purity quartz for the semiconductor industry. (Tr. 58-60). The plant receives raw material from two sources. Quartz ore is shipped from North Carolina, Wyoming, and the Black Hills. The plant also recycles quartz glass and fused quartz cullet.¹ This material is shipped to the plant from all over the world. About 60 percent of the raw

¹ The term Acullet@ is defined as broken or waste glass produced at a glassworks. A *Dictionary of Mining, Mineral, and Related Terms*, 289 (1968).

material processed at the plant is fused quartz cullet. MinTec grinds and purifies the raw material at the plant. The plant is very small and processes small quantities of material.

The company no longer mines quartz ore. (Tr. 59). MinTec uses a number of techniques to grind and purify the cullet, quartz glass, and quartz ore that is shipped to the plant. Part of the purification process involves screening material and passing the material through an electro-magnet to remove impurities.

Mr. Robert L. Cullum, President of MinTec, stated that he is not certain that the plant is subject to the jurisdiction of the Mine Act. (Tr. 4). He stated that he did not contest MSHA's jurisdiction in this proceeding. MinTec did not offer evidence on this issue except Mr. Cullum's description of the plant. The question whether the plant is subject to the jurisdiction of the Mine Act is always at issue in a proceeding before the Commission. As discussed below, I conclude that MSHA had jurisdiction to inspect the Dakota Quartz Plant at the time the citations were issued.

The starting point for an analysis of Mine Act jurisdiction is the definition of the term "coal or other mine" in section 3(h)(1). A coal or other mine is defined, in pertinent part, as "lands, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in ... the work of extracting minerals from their natural deposits, ... or used in ...the milling of such minerals...." 30 U.S.C. ' 802(h)(1). The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978); *see also* *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D. C. Cir. 1984).

The issue is whether MinTec's grinding, screening, and purifying of quartz-bearing material is the "milling" of "minerals." The term "milling" is not defined in the Mine Act. The MSHA-OSHA Interagency Agreement defines "milling" as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives." 44 *Fed. Reg.* 22827, 22829 (April 17, 1979). The Interagency Agreement goes on to provide, in pertinent part, that "milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying," *Id.* It is clear that at least some of these activities occur at the Dakota Quartz Plant. In addition, it is undisputed that some of the materials that are milled at the plant are minerals extracted from the "crude crust of the earth" from their natural deposits. Thus, I find that the plant is subject to Mine Act jurisdiction for purposes of this case. If the plant processed only cullet and quartz glass, it would not be subject to the jurisdiction of the Mine Act.

It is important to keep in mind that the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *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 Co., 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. 4644826

On August 7, 1997, MSHA Inspector John R. King issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.12008. In the citation, the inspector alleged that the energized 220-volt line entering the No. 1 magnet in the mill was not properly bushed or adequately insulated where it passed into the magnet. The citation states that the outer jacket and the bushing had worn away, subjecting the inner insulation to possible damage. It states that such damage could potentially cause a short in the system. Inspector King determined that the violation was of a significant and substantial (S&S) nature and that MinTec's negligence was moderate. The Secretary proposes a penalty of \$178 for the alleged violation. The safety standard requires that power wires and cables be adequately insulated where they pass into electrical compartments. It further requires that, where insulated wires pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector King testified that the outer jacket on the power line had pulled out of the metal frame of the electromagnetic separator and a bushing was not present in the opening. (Tr. 12; Ex. P-3). The opening in the metal frame was about an inch in diameter. He stated that the insulated wires could become damaged due to vibration. The purpose of a bushing is to keep the power wires locked into place so that they do not come loose or sustain mechanical damage. (Tr. 15). Inspector King further testified that the condition was readily visible. (Tr. 14). He believes that a bushing had been present in the past but that it had been pulled loose or had fallen out. (Tr. 17). He testified that the condition presented an electric shock hazard if bare wires became exposed as a result of the vibration. The inspector testified that the condition was adjacent to a walkway and that if an employee were to slip and fall, he could come in contact with any bare wires or nearby metal components and suffer an electric shock. (Tr. 18).

Inspector King determined that the violation was the result of MinTec's moderate negligence because he assumed that the condition had existed for quite some time. (Tr. 19). He believes that the violation was S&S because it was reasonably likely that a fatality could occur. (Tr. 20). He also relied on the fact that the continuity resistance testing of the grounding system

had not been conducted during the past year, that there was exposed metal in the area, and that the violation was near a walkway. *Id.* The condition was terminated immediately.

The magnetic separator is in an isolated room above storage tanks. (Tr. 22). This room has only one entrance. MinTec has a company policy that no employee is to enter the room containing the magnetic separator until the electromagnet is shut down. MinTec de-energized the electromagnet when Inspector King inspected the area but he was not aware that it was the policy of the company to shut it down whenever anyone enters the area. The inspector testified that he would have reconsidered the gravity of the violation had he known about the company's policy. (Tr. 31). Mr. Cullum testified that the company instituted this policy because the room often gets very dusty when the magnetic separator is operating and the company does not want to expose its employees to the dust. (Tr. 61). He stated that there are no exceptions to this policy. He further testified that employees rarely enter the room containing the magnetic separator. (Tr. 62). He stated that he did not know how long the cited condition existed.

MinTec does not contest the fact that a bushing was not present or that the outer jacket covering the wires had pulled back. I find that the Secretary established a violation of the safety standard. MinTec contests the inspector's S&S and negligence findings. I find that, given the particular conditions present in this case, the violation was not S&S. I reach this conclusion because the violation was in an isolated location and employees are not in the area when the electrical wires are energized. It was not reasonably likely that the hazard contributed to by this violation would result in an injury, assuming continued operations. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The vibration of the machinery had not exposed any bare wires. Even if an employee entered the area while the equipment was energized, in violation of company policy, the exposure to the hazard would not be great. It is unlikely that anyone would suffer an electrical shock, given the low level of exposure. I find that the violation was moderately serious.

I find that MinTec's negligence was moderate to low. Negligence is conduct that is inadvertent, thoughtless, or inattentive. *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). In this case, I credit the testimony of Inspector King that the condition had existed for some period of time. Section 56.18002 requires mine operators to examine each working place at least once a shift for conditions which may adversely affect safety or health. MinTec's examinations should have detected this violation. The fact that employees are required to shut down the magnetic separator before entering the area is a mitigating factor. Taking into consideration the civil penalty criteria, a penalty of \$50.00 is appropriate for this violation.

B. Citation No. 4644827

On August 7, 1997, Inspector King issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.12028. In the citation, the inspector alleged that the continuity and resistance of grounding systems had not been tested for a 12-month period. The citation states that the most recent test had been conducted on July 1, 1996. Inspector King determined that the violation was S&S and that MinTec's negligence was moderate. The Secretary proposes a penalty of \$220 for the alleged violation. As pertinent here, the safety standard requires that continuity and resistance of grounding systems shall be tested at least annually and that a record of such tests be kept.

Inspector King testified that he asked employees at the plant for a copy of the testing records and that they could only produce the record for July 1, 1996. (Tr. 34). These employees could not remember whether the test had been made and believed that it had not. Inspector King testified that if an operator fails to conduct this test, the integrity of the grounding system remains unknown. If there is an electrical short, the grounding system is designed to return the power to its source. Because the grounding test was not performed, it is possible that a ground fault would not trip the breakers and one or more employees could be injured. (Tr. 37-39).

Inspector King determined that MinTec's negligence was moderate because it had been cited for a violation of this standard in 1991 and 1995. He determined that the violation was S&S because it is highly likely that an employee will be seriously injured if a grounding system is faulty. He testified that there have been fatal accidents at mines under similar circumstances where these tests were not performed. (Tr. 35).

Mr. Cullum stated that it is possible that the testing was done but not recorded. (Tr. 63). Don Smith, the employee who did this testing, retired from the company. Cullum testified that he asked Mr. Smith about this test and Smith thinks that he did the test but did not record it. *Id.* Mr. Cullum further stated that in the previous instances when MinTec was cited for failing to conduct the test, the test had been completed but not recorded.

I find that the Secretary established a violation of the safety standard. I also find that it is likely that the test was never completed. Failure to complete the required test can contribute to a serious safety hazard. If a fault developed in the electrical system, employees would not be protected from shock hazards. The violation is S&S because it is reasonably likely that if the test is not completed an employee will be seriously injured, assuming continued operations. The violation was caused by MinTec's moderate negligence. I reach this conclusion based in part on the testimony of Inspector King that MinTec violated this same safety standard on two occasions in the recent past. A penalty of \$150 is appropriate for this violation.

C. Citation No. 7915033

On August 7, 1997, Inspector King issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.12030. In the citation, the inspector alleged that the energized 110-volt electrical outlet by the No. 2 magnet had the hot and ground wires reversed and the 110-volt electrical outlet in the field office by the coffee pot had the hot and neutral lines reversed. Inspector King determined that the violation was S&S and that MinTec's negligence was moderate. The Secretary proposes a penalty of \$220 for the alleged violation. The safety standard provides that when a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Inspector King testified that he used an outlet tester during his inspection to test the electrical outlets at the plant. (Tr. 47). The tester indicates whether any of the wires attached to an outlet are reversed. The violation presents a potential hazard because electricity may continue to run into the frame of any device that is plugged into the socket, even after it is turned off. A hazard is presented if there is a fault in the device being used. In such an event, an employee could suffer a serious injury. He believes that the violation is S&S. (Tr. 50). He determined that the violation was caused by MinTec's moderate negligence because the continuity and resistance test, described above, should have revealed this violation and the fact that testing for reverse polarity is easy to perform. (Tr. 51).

Mr. Cullum testified that these electrical outlets had been present in the same condition for at least 20 years. He also stated that no other MSHA inspector had tested these outlets during past inspections. (Tr. 52, 66-67). He contends that the violation is not very serious and that the company was not negligent.

I find that the Secretary established a violation. Whether the violation is S&S is a close question. On one hand, the inspector testified that this type of violation can cause a fatal injury. On the other hand, this condition had existed for 20 years in the case of the outlet by the magnet and 30 years in the case of the outlet in the field office. The coffee pot is used at the field office outlet and electric hand tools may be used in the outlet at the magnet. I find that the violation was not S&S. While it is possible that an employee could suffer an electric shock if the coffee pot or hand held tools malfunctioned, such an event was not reasonably likely in this case. The violation was moderately serious. I also find that MinTec's negligence was very low. The cited conditions had existed for a long time, had not been previously cited by MSHA, and had not caused an injury to an employee. The condition should have been revealed with a thorough continuity and resistance test. Nevertheless, MinTec was not aware of the violation and, given the length of time that the violation existed without detection by MSHA or the company, MinTec's failure to correct the cited conditions was not the result of its moderate negligence. A penalty of \$50 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that seven citations were issued at the Dakota Quartz Plant between August 1995 and August 1997. (Ex. P-8). The Dakota Quarts Plant is a small facility and MinTec is a small operator. All of the violations were rapidly abated. The penalties assessed in this decision will not have an adverse effect on MinTec's ability to continue in business. The gravity and negligence criteria are discussed separately for each violation. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. ' </u>	<u>Penalty</u>
4644826	56.12008	\$50.00
4644827	56.12028	150.00
7915033	56.12030	50.00

Accordingly, the citations listed above are hereby **AFFIRMED** as modified above, and Mineral Technology Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of \$250.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

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RWM