FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 26, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. LAKE 95-229-M
	:	A.C. No. 11-02963-05501
NORTHERN ILLINOIS SERVICE CO., Respondent	:	Northern Illinois Service

DECISION

Appearances: George F. Schorr, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Duluth, Minnesota, for the Petitioner; David A. North, Esq., Rockford, Illinois, for the Respondent.

Before: Judge Feldman

This matter is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, (the Mine Act). The petition seeks a $50.00 civil penalty for each of two alleged non-significant and substantial (non-S&S) violations[1] of the mandatory safety standards contained in 30 C.F.R. Part 56.

[1] A violation is not significant and substantial if it is not reasonably likely that the hazard contributed to by the violation will result in a serious injury. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981).

This case was heard in Rockford, Illinois, on March 19, 1996.[2] The parties stipulated the respondent is an operator subject to the jurisdiction of the Act, the cited violations were abated in a good faith and timely manner, and, the proposed civil penalties will not affect the respondent=s ability to continue in business. The parties= post-trial briefs are of record.

Preliminary Findings of Fact

Wayne Klinger is the sole owner of Northern Illinois Service Company. The company extracts limestone at the subject quarry located north of Rockford, Illinois, on Swanson Road. The quarry had been inactive for approximately five years before it was leased by Klinger in September 1993, for a five year term. Normally, there are three employees working at the quarry -- a Ascale girl,@ loader operator Steven Yancy, and the Foreman, Dan Kentner. (Tr. 99). The extraction process consists of drilling and dynamiting the limestone deposits. The extracted material is then transported to the primary crusher by a front-end loader where it is processed and transported by belt to stacker conveyors.

Blasting by an independent contractor began in October 1993. Klinger purchased new equipment including a Kamatsu loader, a Boehringer primary crusher that was assembled by Murawski Engineering in Rockford, Illinois, a screen and conveyors. The primary crusher was installed in May 1994. The first bucket of extracted limestone was loaded into the crusher on June 18, 1994.

In April and May 1994, prior to commencing operations, Klinger made several telephone calls to the Mine Safety and Health Administration=s (MSHA=s) field office in Peru, Illinois, to request a compliance assistance visit (CAV). A CAV is performed, at an operator=s request, in order to ensure compliance with mandatory safety standards by operators who are

[2] The March 19, 1996, hearing in this matter was initially scheduled for November 9, 1995. The hearing was continued until January 23, 1996, due to an interruption in government operations as a consequence of the budget impasse. The January 23, 1996, hearing date was once again continued because of the government shutdown.

opening new mines, or who are operating new mining equipment. Under this CAV program, an MSHA inspector visits the facility and informs the operator of potential violations. The operator is then given a reasonable period of time to correct the violative conditions without the imposition of civil penalties.

In response to Klinger=s request, MSHA Inspector Robert Flowers performed a CAV on June 9 and June 16, 1994. At that time, the primary crusher was out of service. Therefore, Flowers could not perform a CAV to determine if the quarry was operating in compliance with the mandatory standards pertaining to dust and noise. However, Flowers issued numerous CAV Nonpenalty Notices on MSHA FORM 4000-51. The CAV notices cited various conditions including several for apparent violations of the mandatory guarding requirements for conveyor belts and tail pulleys. These CAV Nonpenalty Notices did not specify a termination date before which the cited conditions had to be corrected. (See Ex. R-1). The conditions were corrected during the period June 15 through July 6, 1994. Foreman Dan Kentner testified Flowers did not state that he would return for a noise and dust inspection or that the CAV was otherwise incomplete. (Tr. 103).

In August 1994, MSHA Inspector William Hatfield reviewed MSHA=s files on the subject quarry. Hatfield talked to Flowers and his supervisor, Ralph Christiansen. They informed him the CAV visits were completed. Christiansen assigned Hatfield to perform a regular inspection. Ordinarily, Flowers would have conducted the inspection. However, Hatfield was assigned because Flowers was behind on his inspections due to illness.

Hatfield arrived at the Swanson Road quarry at approximately 8:00 a.m. on August 4, 1994. Hatfield went to the scale house, identified himself, and requested to speak to the foreman. According to Hatfield, Foreman Kentner arrived at the scale house, whereupon Hatfield, consistent with his normal procedure, advised Kentner he was there to conduct a regular inspection. Hatfield also testified he had no reason to represent that his visit was for a CAV, as his assignment was to conduct a routine inspection. Kentner testified Hatfield informed him that he wanted to do a noise and dust inspection, although Hatfield did not specify whether the purpose was a CAV or regular inspection. (Tr. 103).

Kentner informed Hatfield that the primary crusher had been out of service since August 1, 1994, due to a major breakdown involving the clutch. Hatfield had intended to inspect the entire operation including noise and dust compliance. (Tr. 48). Hatfield observed two different types of material beneath the stacking conveyor which led him to believe that extraction operations had commenced. (Tr. 20). Kentner conceded there were stockpiles of material, although he characterized the piles as insignificant. (Tr. 185). Since the crusher was not operational, Hatfield, accompanied by Kentner, inspected other areas of the facility.

Hatfield and Kentner were in the scale house at approximately 9:30 a.m. when Hatfield observed an energized, uncovered 110 volt duplex outlet box on the east wall. Hatfield testified that the purpose of an outlet cover is to prevent contact with inner wires that could result in electric shock injuries. Consequently, Hatfield informed Kentner that a cover was required and he issued Citation No. 4313030 citing a non-S&S violation of the mandatory safety standard in section 56.12030, 30 C.F.R. ' 56.12030. This standard requires electrical boxes to be covered at all times except during testing and repair. Hatfield returned to the facility the following morning to ensure that the violations had been abated. Hatfield terminated the citation at 8:00 a.m. on August 5, 1994, after he observed that a cover had been installed on the cited outlet.

At approximately 10:00 a.m. during the August 4, 1994, inspection, Hatfield and Kentner proceeded to the generator trailer which contained the generator that powered the crusher unit, screens and conveyors. Hatfield observed an acetylene tank and an oxygen tank without valve covers. Acetylene is used as fuel and the oxygen is used as an enhancer to power the cutting torch. When in use, the valve caps must be removed to install the regulator on the tanks. A regulator is attached to the tanks and a 100-foot hose is attached to the regulator with the cutting torch at the end of the hose. The long hose enables torch cutting operations to occur outside the generator trailer without removal of the tanks. The tanks remain stored in the generator trailer when not in use.

Hatfield concluded the tanks, also referred to as cylinders, were not in use because they were not attached to any regulator

gauges or torches. (Tr. 29, 58). Hatfield testified that these cylinders contained compressed gas under pressure of up to 2,000 pounds per square inch. Hatfield opined these cylinders could explode if an exposed valve was accidentally damaged by contact with a tool or other object. Hatfield informed Kentner that the valve caps were required. Hatfield issued Citation No. 4313031 for a non-S&S violation of section 56.16006, 30 C.F.R. 56.16006. This mandatory standard requires valves on compressed gas cylinders to be covered when the cylinders are transported or stored. Kentner had the valve caps reinstalled within 30 minutes.

Hatfield testified that he wrote Citation Nos. 4313030 and 4313031 during the evening of August 4, 1994, after returning to his motel room after completing the day=s inspection. Hatfield returned to the quarry the following morning where he conducted a close-out conference with the end-loader operator because Kentner was not available. Hatfield does not recall the name of the end-loader operator and he could not identify Yancy who was the respondent=s the end-loader operator at that time. Yancy could not recall ever meeting Hatfield. (Tr. 145). The meeting related by Hatfield reportedly occurred approximately 18 months before the trial in this proceeding. Hatfield explained it is difficult for him to recognize someone in a courtroom who had been wearing a hard hat and who was last seen 18 months earlier. (Tr. 197-98).

The respondent alleges it received the subject citations via certified mail on or about August 30, 1994, in an envelope postmarked August 28, 1994. Hatfield testified that citations are personally served on operators rather than mailed, with the exception of citations that require subsequent laboratory analysis such as respiratory dust samples. Therefore, Hatfield maintained he personally served the subject citations to an individual identified as the end-loader operator during a close-out conference in the scale house on August 5, 1994.

Ultimate Findings and Conclusions

As a threshold matter, the respondent asserts that Hatfield went to its mine site to complete the noise and dust CAV started by Fowler in June 1994. The respondent contends that Hatfield issued the subject wall outlet cover and tank valve cover

citations only after Hatfield learned he could not conduct a CAV for noise and dust compliance because the crusher was not operational. The respondent speculates that the subject citations were intended to be CAV warnings but were later written as formal citations and initially served by certified mail on or about August 30, 1994. Thus, the respondent argues the citations should be treated as nonpenalty CAV warnings.

The nature and extent of a CAV inspection is within the discretion of the Mine Safety and Health Administration (MSHA). Although the respondent characterized the stockpiles as insignificant when Hatfield conducted his August 1994 inspection, it is undisputed that mining activities began on June 18, 1994, when the first bucket of limestone was loaded into the crusher. The evidence also reflects Flowers had already conducted a CAV which noted a variety of non-crusher related violative conditions. (See Ex. R-1). Therefore, there is no basis for disturbing Hatfield=s decision to conduct a regular inspection on August 4, 1994.

Moreover, it is well settled that MSHA is not estopped from citing a violative condition simply because the violation was overlooked during a prior inspection. See King Knob Coal Co., Inc., 3 FMSHRC 1417, 1421-22 (June 1981). Judge Morris addressed this issue with respect to CAV reviews in Brighton Sand & Gravel, 3 FMSHRC 127 (ALJ, Jan. 1991). Judge Morris stated:

> When A CAV inspection takes place, MSHA cannot guarantee that all areas of a mine will be inspected, nor can it guarantee that all possible violations will be detected by the inspector. This is because the primary obligation for compliance with the regulations rests with the mine operator. Id. at 128.

Therefore, the Secretary is not precluded from enforcing these citations even if they existed but were not cited by Flowers during his June 1994 CAV visit.

The citations in this matter identified as Exs. P-1 and P-2 were issued pursuant to section 104(a) of the Mine Act, 30 U.S.C.' 814(a). They cite violations of mandatory safety standards that were observed by Inspector Hatfield on the morning of August 4, 1994, in the presence of Kentner, the quarry Foreman. In accordance with section 104(a), the citations describe with particularity the nature of each violation and the mandatory standard violated. The citations also provide a reasonable period of time for abatement of the cited violative conditions.

Section 104(a) provides:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard rule, regulation ,or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

I credit the testimony of Hatfield that he served the citations on the morning of August 5, 1994, when he returned to the quarry to determine the cited conditions were abated. (Tr. 55-56). In this regard, the citations reflect the last violation was terminated at 8:00 a.m. on August 5, 1994. (Ex P-4). However, even if the citations were first served by certified mail on or about August 30, 1994, as alleged, they were served with Areasonable promptness@ as required by section 104(a) of the Mine Act, and, the respondent has not shown any prejudice by its purported receipt by certified mail. Therefore, whether Hatfield personally served the citations, or mailed them, is not a relevant issue that impacts on the citations= validity.

With respect to the issue of Hatfield=s credibility, there is no evidence that Hatfield represented that he was performing a CAV inspection. Moreover, the respondent=s prompt abatement efforts reflect these violations were not viewed as informal CAV warnings. CAV warnings are advisory in nature and do not have a formal abatement date. Review of the subject citations reflects the violative conditions were abated within one day -- well in advance of the termination date specified in the citations. This prompt abatement evidences that Kentner was aware that these were formal violations that, unlike CAV violations, required immediate correction.

Having determined that the citations are valid, we turn to the question of the fact of occurrence of the cited violations. Citation No. 4313030 was issued for an uncovered, energized 110 volt duplex outlet box on the east wall of the respondent=s scale trailer. The uncovered condition of this outlet box is not in dispute. The respondent does not contend this outlet box was undergoing testing or repair at the time it was observed by Hatfield. Therefore, the Secretary has met his burden of establishing the cited violation of the mandatory safety standard in section 56.12030.

With respect to remaining Citation No. 4313031, section 56.16006 requires valves on compressed gas cylinders to be covered when not in use. The dispositive question is whether or not the cited cylinders were in use when they were observed by Hatfield without valve covers at approximately 10:00 a.m. The respondent asserts the tanks were in use because: (1)they were connected to a regulator and a hose; (2) they had been used by Yancy immediately prior to Hatfield=s inspection; and (3) Yancy used the cylinders for torch operations throughout the day, both before and after the inspection. As noted below, the evidence fails to support these assertions.

Contrary to the respondent=s claim that a regulator and torch were connected, Hatfield testified the regulator and torch were not connected and there was no one observed preparing to use the cylinders. (Tr. 29, 58). Similarly, Kentner testified that no one was Aphysically cutting@ at the time. (Tr. 122).

The respondent=s self-serving statements that the cylinders were being used were not expressed to Hatfield by Kentner at the

time of the inspection. (Tr. 137). Such exculpatory testimony, the substance of which was first presented at trial, is of little evidentiary value. Moreover, Citation No. 4313031 reveals the valve caps were installed at 10:30 a.m., shortly after the condition was cited. There is no evidence to support Kentner=s self-serving assertion that the regulator was removed prior to installation of these valve caps. (Tr. 123). For example, as noted above, Kentner admittedly did not question Hatfield about why he was required to remove the regulator if the cylinders were being used. (Tr. 137). Kentner=s testimony that the 100-foot hose was Awrapped inside@ next to the cylinders and not seen by Hatfield is inconsistent with the respondent=s assertion that the torch was being used outside the generator trailer. (Tr. 138). In short, the regulator, hose and torch were not observed by Hatfield because there is no objective evidence that they were connected to the cylinders and being used. (Tr. 58).

Significantly, although Yancy allegedly remembers using the tanks off and on all day on August 4, 1994, his testimony is inconsistent with his purported recollection. (Tr. 151-52). In this regard Yancy testified:

> Q. On that day [August 4, 1994], were you aware of the fact that there was some comment about the use of the oxygen and torch equipment?
>
> A. Yeah, later towards quitting time in the afternoon he had gone, Dan [Kentner] was telling me -- about some caps that he had put on. (Tr. 151).

Yancy testified Ait [doesn=t] make any sense@ to remove the regulator and replace the valve caps when the cylinders are used intermittently throughout the day. (Tr. 152). However, the substance of the above quoted testimony is that Yancy first learned that valve caps had been installed by Kentner at quitting time. If Yancy had used the cylinders throughout the day, as alleged, he would have known Kentner had installed the caps earlier that morning because Yancy would have had to remove the caps and reinstall the regulator and hose in order to resume his purported use of the torch.

Thus, on balance, I credit Hatfield=s testimony that there was no evidence that the cylinders had been in use on the morning of August 4, 1994. Accordingly Citation No. 4313031 is affirmed.

In considering the appropriate penalty to be assessed, I must consider the penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i). The minimal $50.00 civil penalties proposed by the Secretary for each of the two cited violations takes into account that the respondent is a small operator that has cooperated with MSHA during the CAV process. These small proposed penalties also reflect the low gravity of the violations, the low degree of negligence attributable to the respondent, and the respondent=s good faith efforts to achieve rapid compliance. Accordingly, there is no basis for disturbing the $50.00 penalties sought to be imposed.

In affirming the proposed civil penalties, I am cognizant of Hatfield=s testimony that the respondent is safety conscious and runs Aa very good operation.@ (Tr. 95). This mitigating factor is a consideration in the imposition of this small penalty. However, concerns for safety are not a defense to the cited violations.

ORDER

In view of the above, Citation Nos. 4313030 and 4313031 **ARE AFFIRMED.** The respondent shall pay a total civil penalty of $100.00 to the Mine safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, this case **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

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