

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 95-331-M
Petitioner : A.C. No. 09-00265-05521
v. :
 : Junction City Mine
BROWN BROTHERS SAND COMPANY, :
Respondent :

DECISION

Appearances: Terry E. Phillips, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner; Steve Brown, Partner, Brown Brothers Sand Company, Howard, Georgia, 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 Act). The petition seeks a civil penalty of \$50.00 for each of two alleged nonsignificant and substantial violations of mandatory safety standards in Part 56, 30 C.F.R. Part 56. This matter was heard in Macon, Georgia, on October 24, 1995. The parties stipulated that Brown Brothers Sand Company is a small operator subject to the jurisdiction of the Act. (Tr. 13-15; Joint Ex. 1). At the culmination of the hearing the parties waived the filing of post-hearing briefs. This decision formalizes the bench decision made at the conclusion of the hearing.

Citation No. 4302160

The essential facts are not in dispute. As of January 31, 1994, the Mine Safety and Health Administration changed its policy concerning the enforcement of the mandatory safety standard in section 56.12028, 30 C.F.R. ' 56.12028. This standard provides:

Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and

modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

On January 31, 1994, Program Policy Letter No. P94-IV-1 was distributed to all mine operators advising them of the requirements of section 56.12028. (Ex. P-4). The policy statement noted that conductors in fixed installations, such as rigid conduit, armored cable, raceways and cable trays, that are not subject to vibration, flexing or corrosive environments, may be examined annually by visual observation to check for damage in lieu of an annual resistance test. All other installations, including power cables that supply power to tools and portable equipment must be tested by a resistance meter. Records of all testing, whether by observation or meter, must be kept by the operator. Id.

In March 1994, Mine Safety and Health Administration (MSHA) Electrical Inspector Donald Collier and Metal/Nonmetal Mine Inspector Kenneth Pruitt reminded Greg Brown, a partner of Brown Brothers Sand Company, of the recent Policy Letter requiring annual continuity and resistance testing for all existing electrical installations. This testing will alert the operator if a problem exists in the grounding system which may not allow the circuit protective devices to quickly operate when faults occur. The inspectors advised Greg Brown to conduct such testing immediately.

Inspector Pruitt returned to the respondent's Junction City facility on September 13, 1994. Pruitt asked Greg Brown if he had conducted the requisite resistance testing of the mine site grounding systems. Greg Brown replied that he had not yet performed the testing because he was waiting for his cousin, who had been unavailable, to perform the tests. The testing requires a multi-tester ohms resistance meter that measures the resistance of the ground field at various intervals between the disconnect boxes, circuit breakers and motors. (Tr. 33).

As a result of Brown's failure to perform any visual or metered continuity and resistance testing, Pruitt issued 104(a) Citation No. 4302160 for a violation of section 56.12028. Pruitt characterized the violation as nonsignificant and substantial because he concluded that the failure to perform the testing alone, in the absence of an intervening ground fault, would not contribute to the likelihood of an injury. (Tr. 20). The citation was abated on February 27, 1995, after the required testing had been performed. (Tr. 63-66).

Citation No. 4300557

On March 14, 1995, MSHA Inspector Ronald Grabner observed that a ground wire about one-half to three quarters of an inch in length had broken off on the 110-volt pump for the portable diesel storage tank. (Tr. 74, 109-110). The ground wire was not readily visible in that it was very short in length and located at the rear of the pump. (Tr. 110). Grabner issued Citation No. 4300557 citing a violation of the mandatory standard in section 56.12025, 30 C.F.R. ' 56.12025. This safety standard requires all electrical circuits to be grounded, or, to be provided with equivalent protection. Grabner considered the violation to be nonsignificant and substantial because, with the exception of the ground wire, there was no evidence of frayed or broken wires indicative of a potential short. (Tr. 82).

At the conclusion of the hearing I issued the following bench decision which is edited with non-substantive changes:

This proceeding concerns two 104(a) citations issued for violations characterized as nonsignificant and substantial. The first citation, Citation No. 4302160, was issued for a failure to perform the required annual continuity and resistance testing as required by section 56.12028 of the regulations. The uncontroverted testimony is that Collier and Pruitt informed Greg Brown of the section 56.12028 testing requirements during an inspection on or about March 22, 1994.

Pruitt returned to the mine site on September 13, 1994, and determined that the requisite testing had not been performed. Consequently, Pruitt issued the subject citation. The only issues before me are the fact of occurrence of the violation and the appropriate penalty, if any, to be assessed. While there may be a legitimate difference of opinion concerning whether a particular electrical circuit requires visual or meter resistance testing, the respondent has admitted that it had performed neither procedure when Pruitt returned to the mine site on September 13, 1994. Consequently, the Secretary has established the fact of the occurrence of the cited violation.

With respect to the appropriate penalty to be assessed, I note that Pruitt has testified that MSHA had postponed the enforcement of section 56.12028 on several occasions prior to its January 31, 1994,

Policy Letter advising operators that this mandatory standard would now be enforced. In addition, Grabner testified that the continuity and resistance test results obtained during the course of abating the citation revealed all grounding systems in the electrical circuits were functioning properly. I view these two factors as mitigating circumstances. Accordingly, I am assessing a civil penalty of \$25.00 for Citation No. 4302160.

Remaining Citation No. 4300557 was issued for a broken ground wire on the diesel pump motor. Greg Brown, who accompanied Grabner on his March 14, 1995, inspection was not called to testify to confirm or deny the condition cited by Grabner. In the absence of any contradictory testimony, I have no reason to question Grabner's credibility. Consequently, the evidence reflects the cited portable pump did not have the ground protection required by section 56.12025.

However, I find the degree of negligence attributable to this nonsignificant and substantial violation to be minimal. The broken ground wire was less than one inch in length and it was not readily visible as it was located behind the pump motor. There is also no evidence that this condition had existed and gone undetected for any significant period of time. Consequently, I am assessing a civil penalty of \$15.00 for Citation No. 4300557.

As a final matter, a previous proceeding before me in Docket No. SE 94-417-M, concerned three separate citations issued to Brown Brothers on March 22, 1994, for three nonsignificant and substantial grounding violations of section 56.12025. See Brown Brothers Sand Company, 17 FMSHRC 578, 582-584 (April 1995). When there is a general grounding problem at a particular mine site, particularly at a mine of a small operator as in the current case, there comes a point when similar violations should be consolidated into the same citation rather than the issuance of cumulative citations. For example, as an extreme illustration, there comes a time when \$50.00 penalties for each of 1,000 pieces of ungrounded equipment, become disproportionate to the gravity of nonsignificant and substantial violative conditions. While I recognize that section 104(a) of the Act authorizes an inspector to issue a citation for each violation of a mandatory safety standard, and, the grounding citations issued to

Brown Brothers are not so numerous as to constitute an abuse of discretion, MSHA should consider the propriety of consolidating similar violations in the same citation in instances where such consolidation is consistent with the penalty criteria in section 110(i) of the Act. (Tr. 135-144).

ORDER

In view of the above, Citation Nos. 4302160 and 4300557 **ARE AFFIRMED**. Brown Brothers Sand Company **SHALL PAY** a total civil penalty of \$40.00 in satisfaction of these citations within 30 days of the date of this decision. Upon timely receipt of payment, Docket No. SE 95-331-M **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

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