

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 26, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-474-M
Petitioner	:	A.C. No. 26-01977-05528
	:	
v.	:	
	:	Royal Cement
ROYAL CEMENT COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
 Patricia D. Ceron, Esq., Logandale, Nevada, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Royal Cement Company, Inc., (“Royal”), 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”). A hearing was held in Las Vegas, Nevada.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Royal operates a quarry and cement plant (the “plant”) in Clark County, Nevada. An accident occurred at the plant on July 1, 1999, that killed Robert Dotts, an electrician. The plant was not operating at the time and had been shut down for about 17 months. The plant was being rebuilt and modernized at the time of the accident. Mr. Dotts was in the process of replacing a transformer when he was electrocuted.

At the conclusion of MSHA’s investigation of the accident, MSHA Inspector John Widows issued Citation No. 4394965 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14100(b). The condition or practice section of the citation states:

A fatal accident occurred at this mill on July 1, 1999, when a contractor electrician was electrocuted when he contacted an energized 4160 volt cable inside the crusher and finish grinding transformer. The flicker switches (knife blades) in the interrupter

switches for the transformer were defective in that they did not open when the switch was tripped due to an accumulation of dust and dirt. With the switches stuck in the closed position, power was inadvertently supplied to the 4160 volt transformer.

In the citation, Inspector Widows determined that the violation was of a significant and substantial nature (“S&S”), was serious, and that Royal’s negligence was moderate. The Secretary proposes a penalty of \$25,000 for this violation under her special assessment regulation at 30 C.F.R. § 100.5. The safety standard provides, as follows:

Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

Royal was started by Aldo DiNardo in the late 1980s. Mr. DiNardo bought a used cement plant, had it transported to Nevada, and set it up in the Logandale area, which is about 60 miles from Las Vegas. Mr. Dotts was associated with Royal for a considerable length of time. He was first hired in 1990 to work under another electrician. When that electrician was terminated, Dotts became the electrical supervisor at the plant. Because Mr. DiNardo had little knowledge of electrical systems, he relied on Mr. Dotts to perform all electrical services and to keep him informed of any electrical problems. (Tr. 64-65, 81-82, 88). Although Mr. Dotts performed some of the electrical work himself, he also supervised other Royal employees who performed electrical work under his direction.

At some point in time, Dotts asked DiNardo if his status could be changed from a Royal employee to an independent contractor. Dotts apparently made this request because of tax problems and because he wanted to be able to do electrical work for others. (Tr. 62-63). DiNardo testified that Dotts basically put this request in the form of an ultimatum that he would quit if he could not become an independent contractor for Royal. DiNardo granted Dotts’ request in spite of the fact that it cost Royal more money because he believed that Dotts was a good electrician who was familiar with the plant. As an independent contractor, Mr. Dotts worked under the name Dotts Electric. He lived in Las Vegas where DiNardo believes he did electrical work for others. The parties dispute when Mr. Dotts became an independent contractor. DiNardo testified that Dotts was an independent contractor by the mid 1990's, while the Secretary contends that this change occurred 12 to 18 months prior to the accident.

In March 1998, DiNardo shut down the plant because it was losing money and he owed about \$700,000 to creditors. (Tr. 69-70). He testified that Royal was too undercapitalized to be successful. DiNardo traveled to California to raise capital and also found three additional principals to invest in the plant. By the spring of 1999, DiNardo decided that he could reopen the plant with the objective of starting production in September 1999. Mr. Dotts was contacted to upgrade the electrical system at the plant. Other independent contractors provided services at the plant to get it back into production.

On July 1, 1999, Dotts was at the plant to install a new transformer for the crusher finish grinding circuits. He was working alone at the time of the accident but there were other people working at the plant. Based on the investigation conducted by MSHA, with the cooperation of Royal, it appears that the following events occurred, as set forth in MSHA's accident report. (Ex. P-3). Several weeks before the accident, Dotts opened (shut off) the circuit breaker for the transformer circuit and also opened the load interrupter switch for that same circuit. Dotts locked out the load interrupter switch with his own lock, but did not lock out the circuit breaker. He then disconnected the leads from the old transformer. As a result of a power outage at the plant some days later, all of the circuit breakers tripped open. Dotts flipped them back to the closed (on) position once power was restored to the plant, including the circuit breaker for the transformer at issue in this case.

Dotts was at the plant on July 1 to install the new transformer, which had arrived the day before. The transformer was rated at 4.16 KV - 480 V, 1000 KVA . Because the circuit breaker was closed, power was being supplied to the load interrupter switch for the transformer. This load interrupter switch, manufactured by Square D Electrical Company, is operated by pulling a large lever on the front of cabinet. When the lever is up, power is being supplied to the circuit. When the lever is down, power should be cut off. At the time of the accident, the lever was down and locked so that it could not be pulled up. This lever controls both the main electrical contacts and the arcing contacts inside the cabinet. Both the main and arcing contacts must be disengaged in order to shut off the power and both are controlled by the same lever. The arcing contacts are operated by a spring so that when the lever is pulled down a spring pulls the knife blades away from the contacts thereby disengaging the circuit. They are often called "flicker blades" because they flick out of the contacts when the lever is pulled. This feature is incorporated into the interrupter switch to prevent potentially hazardous arcing when opening and closing the circuit. One can look into the cabinet through a window on the front to see if these flicker blades have disengaged when the lever is pulled down. (Tr. 18-19, 26; Ex. P-15).

When representatives from Royal and MSHA looked into the window on the cabinet of the load interrupter switch during MSHA's investigation, they discovered that the flicker blades were still engaged. Royal relied upon John Zeller, an engineer with the firm of Grove Madsen Industries, to provide technical assistance during the investigation. (Ex. P-17). The cabinet was opened and Mr. Zeller cleaned the flicker blades and contacts with an aerosol cleaner. (Tr. 48). After the blades were cleaned, the spring-operated flicker blade mechanism functioned properly. Because the plant had been shut down for about 17 months, dirt and grime had accumulated around the flicker blades which prevented them from working properly. In his report, Mr. Zeller stated that "[l]ack of maintenance and accumulations of dust and dirt will cause this type of anomaly in load switches of this type." (Ex. P-17). He recommended regular preventive maintenance and inspection of the switch. It appears that when Mr. Dotts pulled down and locked out the lever to shut off the power, he did not look through the window to make sure that the blades had "flicked out" and he had not cleaned the blades prior to removing the old transformer. When he removed the old transformer, power had also been shut off at the circuit breaker so Dotts was not endangered. Because Dotts had flipped on all of the circuit breakers following the power outage, power was being supplied to the load interrupter switch on July 1.

As the flicker blades were stuck in the closed position, power was being supplied to the bare electrical leads Dotts was going to connect to the new transformer. He was found lying motionless on the ground in front of the open transformer box at 6:55 am. It is the Secretary's position that it was the responsibility of Royal to make sure that the flicker blades were in proper working condition. (Tr. 12, 26).

At the conclusion of the investigation, Inspector Widows issued the contested citation to Royal. He also issued a section 104(d)(1) citation to Dotts Electric charging a violation of section 56.12107 for Dotts' failure to lock out and tag out the circuit breaker.

Royal makes a number of arguments in its trial brief. First, it maintains that it fully complied with the provisions of section 56.14100(b) by selecting the most qualified licensed electrician to perform the specialized electrical tasks necessary to safely reopen the plant. Although Mr. Dotts had been a Royal employee in the past, Dotts Electric was an independent contractor at the time of the accident. Royal maintains that it acted reasonably in relying on Dotts' expertise. Dotts was in complete control over all the electrical work necessary to restart the plant in September 1999. Royal believes that it would have been foolhardy for Mr. DiNardo or any other representative of Royal to "go behind" Mr. Dotts and supervise his work because Dotts knew more about it than DiNardo or other Royal employees.

Royal states that MSHA violated its own enforcement guidelines for issuance of citations involving independent contractors. III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 45. The MSHA guideline provides that enforcement action "against a production-operator for a violation involving an independent contractor is normally appropriate in any of the following situations: (1) when the production-operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work; (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor; (3) when the production-operator's miners are exposed to the hazard; or (4) when the production-operator has control over the condition that needs abatement." *Id.* Royal contends that it does not fit into any of these categories because Dotts Electric was in control of the condition; Royal did not contribute to the violation; and Royal's employees were not exposed to the hazard. Royal maintains that Dotts Electric had the responsibility to inspect the flicker blades to ensure they were operating properly prior to doing electrical work on the circuit. As a consequence, it argues that Dotts Electric was solely responsible for the violation.

MSHA's guidelines relied upon by Royal are not binding on the Secretary. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-538 (D.C. Cir. 1986). Production operators are strictly liable for the violations of their independent contractors. *See Cyprus Indus. v. FMSHRC*, 664 F.2d 1116, 1119-20 (9th Cir. 1981). Consequently, Royal's argument that it is not liable for the violation of section 56.14100(b) is rejected.

I find that the Secretary established a violation of section 56.14100(b). A defect in the flicker blades was not corrected in a timely manner to prevent creation of a hazard to persons.

The defect was that dust and dirt had been allowed to accumulate on the blades. This accumulation affected safety because it prevented the flicker blade switch from functioning properly. The flicker blades must disengage in order to shut off the power. Under the Mine Act, a production operator such as Royal is strictly liable for violations that occur at its facility. “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989). Although Mr. Dotts should have inspected and cleaned the flicker blades before commencing work, Royal bears some responsibility as the production operator.

In the alternative, Royal argues that the Secretary should not have applied MSHA’s special assessment regulations at 30 C.F.R. 100.5 when proposing a penalty in this case. It contends that, in doing so, the Secretary failed to properly consider the civil penalty criteria. The Secretary’s penalty regulations are not binding on the Commission. Commission administrative law judges must assess an appropriate penalty *de novo* based on the six statutory criteria specified in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). *Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff’d* 376 F.2d 1147, 1150-51 (7th Cir. 1984). I base the penalty in this case on the evidence presented at the evidentiary hearing not on the Secretary’s Part 100 regulations.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The Secretary submitted information concerning the history of violations at the plant but it included four citations issued more than 24 months prior to the fatal accident. I find that 16 citations were issued at the plant during the 24 months prior to the date of the accident. The Secretary presented information that the plant worked over 66,000 man-hours during 1999. That figure includes work performed during the months following the accident when the plant was in operation. I find that Royal was a small- to medium-sized operator. The violation was rapidly abated in good faith. The penalty assessed in this decision will not have an adverse effect on Royal’s ability to continue in business.

I find that the violation was serious and I affirm Inspector Widow’s significant and substantial determination. I find that Royal’s negligence was very low. I considered the evidence and arguments presented by Royal with respect to its relationship with Mr. Dotts. Royal hired Dotts Electric based on its past experience with his work as a licensed electrician. It was reasonable for Royal to rely on Mr. Dotts’s electrical expertise. It was also reasonable for Royal to believe that he would follow safe procedures, especially since he was the one who was personally exposed to the hazards presented by his work. I reject the Secretary’s argument that Dotts was an independent contractor in name only. The fact that Dotts was once an employee and supervised Royal employees in performing electrical work prior to the March 1998 shutdown does not change the fact that on July 1, 1999, he was working as an independent contractor. The Secretary does not dispute his independent contractor status. (Tr. 21-22; Ex. P-3). MSHA’s reliance on Royal’s safety rules on lockout procedures is not well taken because the contested citation does allege such a violation. (Tr. 26-27; Ex. P-16 p. 16). As an electrician, Mr. Dotts

was in a position to know more about the operation of the flicker blades than Royal's employees. (See Tr. 17). Based on the penalty criteria, I find that a penalty of \$5,000 is appropriate. The reduction in the penalty is based primarily on my finding that Royal's negligence was quite low.

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 penalty:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4394965	56.14100(b)	\$5,000.00

Accordingly, Citation No. 4394965 is **AFFIRMED**, except that the degree of negligence is lowered from moderate to very low, and Royal Cement Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$5,000.00 within 30 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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