

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 29, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-453-M
Petitioner	:	A.C. No. 04-05509-05152
	:	
v.	:	Docket No. WEST 2004-4-M
	:	A.C. No. 04-05509-07088
GOCHENOUR’S MINERALS & MINING,	:	
Respondent	:	Cryo-Genie Mine

**DECISION**

Appearances: John D. Perez, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner; Robert J. Clanin, Gochenour’s Minerals & Mining, El Cajon, California, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Gochenour’s Minerals & Mining (“Gochenour”), 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 cases involve three citations issued by the Secretary under section 104(a) of the Mine Act. The Secretary seeks a total penalty of \$175 for the alleged violations. An evidentiary hearing was held in San Diego, California. The parties introduced testimony and documentary evidence and, at the close of the hearing, presented oral argument.

**I. BACKGROUND**

Gochenour operates an underground gemstone mine in San Diego County, California. The mine produces tourmaline, aquamarine, morganite, and other minerals. During an inspection of the mine on November 17, 2002, MSHA Inspector Chad Hilde issued Citation No. 6349417, alleging a violation of 30 C.F.R. § 57.6132(b). Inspector Hilde inspected the mine again on May 21, 2003 and issued two citations. Citation No. 6351424 alleges a violation of 30 C.F.R. § 57.12008. At the beginning of the hearing, the Secretary agreed to vacate Citation No. 6351425.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Citation No. 6349417

This citation alleges a violation of section 57.6132(b) as follows:

The booster and explosives magazines had not been equipped with electrical bonding straps between the door and the metal frame structure. Employees at the site were exposed to the possibility of personal injury from explosion by the door lacking equal conductivity to the structure.

Inspector Hilde determined that an injury was unlikely and that any injury would reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature (“S&S”) and that Gochenour’s negligence was low. The safety standard provides, in part:

Metal magazines shall be equipped with electrical bonding connections between all conductive portions so that the entire structure is at the same electrical potential. Suitable bonding methods include welding, riveting, or the use of securely tightened bolts where individual metal portions are joined.

The Secretary proposes a penalty of \$55 for this citation.

Inspector Hilde testified that he observed two metal explosives magazines at the mine. (Tr. 11). The doors were attached to the magazines with metal hinges. He testified that there was no bonding strap between the door of each magazine and structure of the magazine. Although Inspector Hilde determined that it was unlikely that anyone would be injured by this condition, he was concerned that, over time, the continuity between the door and the magazine would not be maintained. He testified the “body and the door of the magazine would not be at the same continuity if electricity doesn’t carry across the hinge.” (Tr. 14). If someone who had built up static electricity touched the door, a spark might be created as the electricity arcs across the hinges. (Tr. 15). The inspector testified that a bonding strap would prevent such arcing. He admitted that it was unlikely that such an arc would detonate explosives in the magazines.

The magazines were built by Robert J. Clanin, the operator of the mine. The hinges were welded to the metal body of the magazines. Clanin testified that he built these magazines to meet the specifications of San Diego County and the Bureau of Alcohol, Tobacco, and Firearms (“ATF”). (Tr. 49). He further testified that California OSHA, ATF, and MSHA had previously inspected the magazines and none of these agencies raised any questions about the lack of electrical bonding connections. Clanin stated that MSHA did not cite this condition until its third inspection of the magazine. (Tr. 50). He abated the condition by bolting automobile battery

cables between the door and body of each magazine. *Id.* Clanin used a multimeter to test the resistance between the door and the body of the magazines both before and after he abated the citation. In each case he measured zero ohms of resistance. (Tr. 50, 68; Ex. R-3). As a consequence, Clanin does not believe that there was a violation. The safety standard requires that the entire structure be at the same electrical potential. His measurements demonstrate that the magazines complied with the standard. The hinges were welded to the body and door of each magazine. He contends that there were electrical bonding connections between all conductive portions of the magazines. Because the magazines are in constant use, corrosion and rust would not develop to such an extent in the hinges as to create any electrical resistance. Clanin testified that there was almost no chance that static electricity would create a spark across the hinges and that the explosives were not so sensitive that such a spark would detonate the explosives.

As noted by Clanin, the safety standard does not specifically require bonding straps. The standard does, however, require “electrical bonding connections between all conductive portions.” I find that it defies logic to characterize hinges as “electrical bonding connections.” Hinges are devices attached to a door that allow the door to swing open. Hinges are not designed to conduct electricity or to provide electrical bonding between the door and the body of a structure. The safety standard provides that “electrical bonding connections” must be installed to ensure that “the entire structure is at the same electrical potential.” I find that the hinges were not electrical bonding connections.

Gochenour established that, at the time the citation was issued, the entire structure of each magazine, including each door, was at the same electrical potential. That fact does not establish that electrical bonding connections were present. The hinges were not presenting any electrical resistance on May 21, 2003, but that does not make them “electrical bonding connections.” As the magazines age there is a risk that resistance will develop across the hinges so that the doors will no longer be at the same electrical potential. A bonding strap greatly reduces that risk. I find that the Secretary established a violation of section 57.6132(b).

I find that the violation was not serious. The likelihood of a spark or arc developing from the buildup of static electricity was quite remote. It was also highly unlikely that if such a spark occurred it would trigger any sort of ignition of the explosives in the magazine. I also find that Gochenour was not negligent with respect to this violation. I credit the testimony of Clanin that the magazines had been previously inspected by ATF, the State of California, and MSHA. In addition, at the time of MSHA’s inspection, the entire structure of each magazine was at the same electrical potential, which is the objective of the safety standard.

#### **B. Citation No. 6351424**

This citation alleges a violation of section 57.12008 as follows:

There was approximately three inches of exposed conductors where the wires entered the main switch box on the portable generator. Power wires shall be insulated adequately where they

pass into or out of electrical compartments. The exposed insulation on the conductors will eventually weather or be damaged by the vibration of the generator, exposing persons to electric shock. The generator is used daily as needed to provide power both above and underground and is located between the portal and magazines.

Inspector Hilde determined that an injury was unlikely but, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that Gochenour's negligence was high. The safety standard provides:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The Secretary proposes a penalty of \$60 for this citation.

Inspector Hilde testified that the "electrical cord coming out of the generator had been strung through a metal opening" that was not bushed. (Tr. 17). This opening in the front of the electrical box appeared to be where a gauge had once been present. (Tr. 24, 34-35). The outer jacket of the cord was missing where it entered the box on the generator and the individual insulated wires were exposed. It looked like the outer jacket on the conductor had been "yanked and pulled out." (Tr. 24). The inspector testified that weathering and the vibration of the generator could cause the insulation to "wear out" allowing the bare wires to come into contact with the metal frame of the generator. *Id.* The generator was the only power supply for the mine. Inspector Hilde determined that it was unlikely that anyone would be injured by the condition because the insulation around the individual conductors was in good condition. If the wires became exposed to bare copper, a fatal accident could occur. He determined that Gochenour's negligence was high because the violation was obvious. (Tr. 20). When Inspector Hilde terminated the citation, he wrote that the "outer sheathing now enters the box, eliminating the hazard." Larry Larson, a supervisory MSHA inspector, accompanied Hilde on the inspection and he supported Hilde's testimony. He believes that the cited conductor entered the front of the electrical box on the generator through a gauge opening. (Tr. 39-40).

Mr. Clanin's description of the generator and the condition of the electric cord is quite different. He testified that the citation was issued on the power conductor entering the back of the box on the generator. (Tr. 60). Exhibit R-1 consists of two photographs of the generator that were taken a few weeks before the hearing. Clanin testified that the photograph on the right shows the front of the box with two conductors exiting the box at the bottom. Inspectors Hilde and Larson testified that, when they inspected the mine, a black conductor exited the box from the front through one of the black holes that can be seen on the right photo of Exhibit R-1. They

testified that there was no bushing present and the outer jacket on the conductor had been pulled back or was not present where the conductor entered the front of the box. Clanin testified that no conductors have ever exited the electrical box through the old gauge holes on the front. (Tr. 58, 71). Clanin testified that the cited condition is illustrated on the left photo of Exhibit R-1. He stated that he abated the condition by wrapping electrical tape around the conductor at the point where it entered the back of the box. (Tr. 53). Clanin testified that a grommet was present but it could not be easily seen because it had been painted over. Clanin does not dispute that there was no outer jacket on the conductor where it entered the box, but he contends that the conductor was not in that condition the day before. (Tr. 57). Clanin believes that one of the inspectors may have pulled the outer jacket back while they were at the mine before he arrived at the mine that day. Clanin testified that he has had a history of problems with MSHA's Redlands, California office, especially with Mr. Larson. (Tr. 63). Larson denies that he pulled on any power conductors. (Tr. 73).

Dana Gochenour, the owner of the mine, testified that he bought the generator in 2001. He stated that it was his understanding that the conductor coming out of the back of the electrical box was cited by MSHA. (Tr. 45). He testified that he cannot recall any conductors exiting the electrical box through the gauge holes on the front of the electrical box. *Id.* Gochenour stated that the only modification made to the electrical box on the generator after it was purchased was the addition of another conductor at the bottom of the box. (Tr. 47).

The testimony of the witnesses contrasts sharply with respect to the condition of the generator on at the time of the inspection. Both inspectors testified that the cited conductor exited the electrical box on the front through one of the unused gauge holes. Inspector Hilde reviewed his notes from the day of the inspection, but the notes did not provide any clarification as to the location of the cited condition. Clanin and Gochenour testified that conductors have never exited the generator through the front of the electrical box. Although the photographs are useful in trying to understand the disputed testimony, they are not helpful in the resolution of the dispute because they were taken a few weeks before the hearing. Gochenour and Clanin both believe that the cited condition was on the generator side of the electrical box where a conductor entered the box from the back.

Clanin and Gochenour are in a better position to know the details about the condition of the generator than the inspectors because they work in and around the generator on a daily basis. MSHA inspectors only visit the mine for brief periods and they see many portable generators during the course of their mine inspections. The exact location of the alleged violation was not well documented by the inspectors in the citation itself or in their notes. They did not take any photographs. For purposes of this decision, I credit the testimony of Gochenour and Clanin as to the configuration of the conductors on the generator on the day of the inspection. Nevertheless, I find that the Secretary established a violation because the operator did not dispute that the outer jacket on one of the conductors was not present where it entered the electrical box. The parties dispute the location of the cited conductor, but not the condition of the outer jacket. I note that there was a grommet at that location which reduced the danger created by the cited condition. This grommet was not a bushing because it did not act to keep the electrical conductor securely

in place. (See R-1, left photo). I do not credit Mr. Clanin's testimony and evidence that the inspectors created the condition by pulling on the conductor.

I find that the violation was not serious. The likelihood of an injury was not great because of the presence of the grommet. If, through weathering or vibration, bare conductors were exposed, a fatal accident would be possible. I find that the operator's negligence was moderate to low. The condition was not as obvious as Inspector Hilde believed and it is not clear how long the condition had existed.

### III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that Gochenour has no history of previous violations. Gochenour is a small mine operator. All of the violations were abated in good faith. As discussed above, the violations were not serious and Gochenour's negligence with respect to the violations was low in one citation and moderate in the other. The penalties assessed in this decision will not have an adverse effect on Gochenour's ability to continue in business. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

### IV. 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>
WEST 2003-453-M		
6349417	57.6132(b)	\$10.00
WEST 2004-004-M		
6351424	57.12008	50.00
6351425	57.4102	Vacated
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	TOTAL PENALTY	\$60.00

For the reasons set forth above, Citation Nos. 6349417 and 6351424 are **AFFIRMED** and Citation No. 6351425 is **VACATED**. Gochenour's Minerals and Mining is **ORDERED TO PAY** the Secretary of Labor the sum of \$60.00 within 30 days of the date of this decision.

Richard W. Manning  
Administrative Law Judge

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