

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

September 24, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-179-M
Petitioner	:	A.C. No. 04-00107-16715
	:	
v.	:	
	:	Felton Quarry
GRANITE CONSTRUCTION COMPANY,	:	
Respondent	:	

DECISION

Appearances: John D. Pereza, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner;*
 William R.E. Jackson, Director of Safety, Granite Construction, Inc.,
 Watsonville, California, 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 Granite Construction Company (“Granite Construction”), 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”). An evidentiary hearing was held.

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

Granite Construction operates a sand and gravel mine near Felton, California, in Santa Cruz County. On December 16, 2003, James Weisbeck, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) conducted an inspection of the quarry. During his inspection, Inspector Weisbeck issued Citation No. 6353461 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12030. The body of the citation states:

* Isabella M. Del Santo, Esq., of the Department of Labor’s Office of the Solicitor in San Francisco, also appeared for Petitioner.

A potentially dangerous condition exists in that the positive and negative welder lugs were not protected in the side compartment of the International maintenance truck #4-030 creating hazards of shocks and flash burns to the operator reaching into the area of energized parts. The OCV rating was rated at 80. The compartment is used to store tools and supplies along with control adjustments, giving exposure to persons reaching into the area. The truck is used around the mine site as needed for maintenance.

The inspector determined that it was unlikely that anyone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature and that Granite Construction's negligence was moderate. The cited safety standard provides that "[w]hen a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Weisbeck testified that as he was inspecting the maintenance truck he noticed that the lugs on the portable welder at the back of the truck were not protected from inadvertent contact. (Tr. 11). These lugs are the points where the welding cables are attached to the welder with metal nuts. These lugs are energized when the welder is in use. The parties stipulated that there were no insulating covers on these lugs at the time the citation was issued. (Ex. S-1 ¶ 4). Inspector Weisbeck estimated that the lugs were about waist high inside a compartment that was about six feet tall and three feet wide. Employees reach into this compartment to get tools and other equipment. (Tr. 11; Exs. G-3 & G-4). Controls for the welder are also located near the lugs. Inspector Weisbeck believes that the alleged violation would be obvious to anyone who worked around the welder. (Tr. 36; 55). He believes that the condition should have been observed during required workplace examinations. (Tr. 56). There was no evidence that the lugs had previously been protected.

The inspector believes that the condition he cited creates a potentially dangerous condition because if someone were to inadvertently come into contact with both lugs when the welder was on, he could be injured by the electric shock. The welder operates at about 80 volts and pulls about 300 amps. (Tr. 14-15; 37-38). Inspector Weisbeck stated that if a person came into contact with the lugs, he could sustain an electric shock or flash burns. He also testified that there was a plug on the welder near these lugs that was used to energize other electric equipment. He noted that oxygen and acetylene bottles were also stored in this compartment. The hose for the oxygen bottle was defective in that the outer jacket was separated from the hose inside the jacket. Inspector Weisberg believes that this condition created a slight risk of an explosion in the event of an arc flash. He also testified that equipment, including welding rods and a welding hood, were stored in the compartment. These factors increased the risk that someone might touch the lugs while reaching into the welding compartment.

Because a confluence of factors would have to occur for an accident to happen, the inspector determined that an injury was unlikely. (Tr. 18; 38-39). The welder would have to be turned on and there would have to be contact between the two lugs. If the conditions were right, a person might also suffer a shock if he were touching the truck and the positive lug. (Tr. 39).

The inspector determined that the violation was the result of Granite Construction's moderate negligence because, although the violation was obvious, the company had only recently brought the truck onto the mine property. (Tr. 19). Although he was not sure how the condition was abated, he testified that MSHA accepts the installation of a rubber flap over the lugs, the use of battery terminal covers, or the installation of lug terminal covers.

Inspector Weisbeck testified that the web site maintained by the welder manufacturer states that covers must be secured over terminals and other exposed electrical parts before operation of welders. (Tr. 21; Ex. G-8 p. 3). Inspector Weisbeck also made reference to fatalities and injuries caused by shocks received from welders, but none of these accidents were caused by someone coming into contact with unprotected welder lugs. (Tr. 24-29, 38; Exs. G-9 - G-11). In November 2002, Granite Construction received a similar citation involving welder lugs at its Bradshaw Pit. (Tr. 29-30; Ex. G-12). The penalty for the citation was paid by Granite Construction. (Ex. G-13).

The inspector further testified that it has been the policy of MSHA to require protection for welder lugs since before the time he started working for MSHA in 1999. (Tr. 43). He was not sure how much insulation would be required to provide protection, but he did not believe that much insulation would be necessary. (Tr. 44-46).

Although Granite Construction listed three witnesses in its response to my notice of hearing, it chose not to call any witnesses at the hearing. Instead, it made several arguments, as discussed below.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Granite Construction maintains that the cited safety standard is "too vague and ambiguous to specify what behaviors are required or prohibited." (Tr. 67). It argues that although the inspector testified that "there was a possibility of an injury," the Secretary did not present any evidence that any injuries have occurred as a result of unprotected welder lugs at any mine in the United States. *Id.* It contends that the Secretary's evidence is all based on speculation. The Secretary does not dispute that the welder was sold by the manufacturer without lug covers. In addition, the manufacturer's web page that the Secretary introduced at the hearing has a 2004 publication date, so its recommendation that welder terminals be protected should not be considered. (Ex. G-8, p. 3). As a consequence, the record does not establish that Granite Construction was "given adequate notice of what behavior was expected by the Agency" with respect to the welder lugs. (Tr. 67).

I find that the Secretary established a violation. First, the Secretary proved that a “potentially dangerous condition” existed. Having exposed terminal connectors (lugs) in a compartment where tools and supplies are kept creates a potentially dangerous condition. When the welder is running, the lugs are energized with low-voltage power that can cause an injury to anyone who comes in contact with them. Granite Construction did not present evidence to dispute the Secretary’s evidence on this issue at the hearing.

The safety standard at issue is “simple and brief in order to be broadly applicable to myriad circumstances.” *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). When faced with a challenge that a broadly written safety standard fails to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (August 1996). The appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). In order “to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be ‘so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.’ ” *Id.*, quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citations omitted).

Section 56.12030 must be construed in light of its underlying purpose: the protection of miners working around electrical circuits and electric equipment. Any overly narrow or restrictive reading of the scope of this safety standard cannot be reconciled with the purpose of the Secretary’s safety standards or with the protective ends of the Mine Act. A safety standard “must be interpreted so as to harmonize with and further . . . the objectives of” the Mine Act. *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).

I find that a reasonably prudent person would recognize the hazard presented by the cited condition. A potentially dangerous condition exists if there are exposed energized terminals in a compartment where employees reach in to retrieve tools and equipment and to adjust control knobs. Although this citation involves a welder, the hazard would be the same if exposed terminals of any other low-voltage electrical circuit were similarly situated. Unprotected eighty volt terminals that carry electric current at 300 amps present a potential hazard that cannot be denied. The lugs on other welders at the Felton Quarry were provided with appropriate protection. (Tr. 20-21). In addition, although no citations had been issued at the Felton Quarry for exposed welder lugs, Granite Construction had received at least one other citation for the same condition at another quarry. Thus, Granite Construction knew what the standard required with respect to welders.

During cross-examination of Inspector Weisbeck, Granite Construction raised issues regarding the adequacy of the protection required. The standard does not provide that any shield covering the lugs must furnish a particular level of insulation. Other safety standards provide

that splices in power conductors and electric cables must be insulated to a degree at least equal to that of the original. (*See* § 56.12013(b)). The standard at issue here does not include that degree of specificity. The inspector testified that any thick rubber shield, such as conveyor belting, would provide enough insulation. I find that Granite Construction's argument that the standard is too vague because it fails to specify the degree of insulation required is not well taken in this case. If Granite Construction had a guard over the lugs and MSHA issued a citation because the guard was inadequate, such a vagueness argument might have some merit. In this case, however, Granite Construction was cited because no protection was provided at all. The safety standard provides reasonable notice that an insulated guard was required.

Finally, Granite Construction argues that, because the cited condition was not "found" by the operator, the citation should be vacated. The evidence establishes that the violative condition was not hidden. I credit the testimony of Inspector Weisbeck that the bare welder lugs would be obvious to anyone working in the area. (Tr. 36, 55: Ex. G-3 & 4). Examinations required under section 56.18002(a) should have revealed the hazard. Under that standard, workplace examinations for "conditions which may adversely affect safety or health" must be conducted by the operator each shift and corrective action must be promptly initiated if such conditions are found. Records of such examinations are required to be kept. Thus, although the operator had not "found" the cited condition, it should have been aware of the condition. The fact that the exposed lugs had not been discovered is a result of Granite Construction's own negligence.

III. APPROPRIATE CIVIL PENALTIES

I find that the citation should be affirmed as written by Inspector Weisbeck. Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation. I affirm the inspector's determinations with respect to the gravity of the violation. Although there was a potential hazard presented by the violation, I credit the inspector's testimony that an injury was not reasonably likely. Granite Construction did not present any evidence or convincing argument to rebut Inspector Weisbeck's determination that its negligence was moderate. The record supports the inspector's negligence determination.

Granite Construction Company is a rather large operator, but the Felton Quarry is a small mine. MSHA has issued about six citations at the Felton Quarry in the two years preceding December 2003. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect on Granite Construction's ability to continue in business. Based on the penalty criteria, I find that the penalty proposed by the Secretary is appropriate.

IV. ORDER

As set forth above, Citation No. 6353461 is **AFFIRMED** without modification. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$60.00 for the violation. Granite Construction Company 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

Distribution:

John D. Perez, Conference & Litigation Representative, Mine Safety & Health Administration,
2060 Peabody Road, Suite 610, Vacaville, CA 95687-6696 (Certified Mail)

William R.E. Jackson, Director of Safety, Granite Construction, Inc., Box 50085, Watsonville,
CA 95077-5085 (Certified Mail)

RWM