

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

July 31, 2018

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

RAIN FOR RENT

:
:
:
:
:
:
:
:
:
:
:
:

Docket No. WEST 2016-730-M

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and concerns two citations issued by the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”) to Rain For Rent.¹ One citation alleges a failure to procure an inspection of an air tank. The second citation alleges a failure to label a safety can.

After a hearing on the merits of the citations, a Commission Administrative Law Judge found that the Secretary had demonstrated violations of both standards. The Judge assessed civil penalties of \$100 per citation. 39 FMSHRC 1448 (Jul. 2017) (ALJ). Rain For Rent filed a petition for discretionary review with the Commission, which we granted. After review of the issues raised in the petition, we affirm the Judge’s decision.

I.

Factual and Procedural Background – Citation No. 8785486

In July 2016, MSHA Inspector Nicholas Basich was conducting an inspection at a sand and gravel mine in California. A Rain For Rent service truck was parked near the mine shop. A mechanic had arrived to work on the mine’s water pumps. A compressed-air receiving tank and an air compressor were mounted on the bed of the truck. The mandatory safety standard at 30

¹ Rain For Rent is a contractor that provides temporary liquid handling solutions, including pumps, tanks, filtration and spill containment. Joint Stip. 1.

C.F.R. § 56.13015² requires compressed-air receiving tanks to be inspected by an inspector with a valid National Board Commission³ in accordance with the applicable chapters of the National Board Inspection Code (“NBIC”).

Basich searched the tank for an indication that it had been inspected, but found no sign that the requirements of the safety standard had been satisfied. After calling Rain For Rent’s office, the mechanic was still unable to provide any record demonstrating compliance. As a result, Basich issued Citation No. 8785486, alleging a violation of section 56.13015.

Thereafter, a Rain For Rent employee removed the tank and discovered a metal plate affixed to it, bearing the name of the tank’s manufacturer (Manchester Tank) and the year 2014. At the hearing, a photo of the metal plate was admitted into the record. Robert Kelly George, the vice president of environmental health and safety for Rain For Rent, testified that he believed the metal plate demonstrated that the tank had been inspected by the manufacturer in accordance with the requirements of the safety standard.⁴ Tr. 93-94, 96. Inspector Basich did not observe the metal manufacturer’s plate at the time of inspection, but testified nevertheless that its existence did not demonstrate compliance with the mandatory safety standard. Tr. 49-50.

The Judge found that the record did not demonstrate that a person with a valid National Board Commission had performed an inspection. The Judge relied on the inspector’s testimony that there was no evidence that the tank had been inspected since its manufacture by an individual with a National Board Commission.⁵ 39 FMSHRC at 1452; Tr. 22, 29, 51-52.

² Section 56.13015, 30 C.F.R. § 56.13015, states that:

- (a) Compressed-air receivers and other unfired pressure vessels shall be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code
- (b) Records of inspections shall be kept in accordance with requirements of the National Board of Inspection Code

³ The National Board is an organization “comprised of Chief Inspectors of States and Cities of the United States, and Provinces of Canada and is organized for the purpose of promoting greater safety to life and property by securing concerted action and maintaining uniformity in the construction, installation, inspection and repair of boilers and other pressure vessels and their appurtenances” Sec’y Ex. 4 at 3 (NBIC Manual).

⁴ In California, a state serial number is stamped on a tank by a qualified inspector after an inspection. Tr. 29-30; Cal. Code Regs. tit. 8, § 462(g) (“Qualified inspectors making the first field inspection of air tanks . . . shall stamp on the tank a State serial number . . . which shall become a permanent means of identification. This assigned number . . . shall be stamped adjacent to the manufacturer’s ASME Code stamping”)

⁵ The Judge noted that the purpose of the NBIC is to maintain the integrity of pressure vessels *after* they have been placed into service, and the NBIC requires that inspections be

Accordingly, the Judge concluded that the Secretary had established a violation of section 56.13015.

II.

Disposition – Citation No. 8785486

Rain For Rent essentially makes two arguments regarding the citation on review: (1) the Judge impermissibly incorporated California state requirements into the safety standard without proper legal notice and in violation of Rain For Rent’s due process rights; and (2) the Judge’s finding is not supported by substantial evidence. We are not persuaded.

A. The Judge did not rely on California state law.

Rain For Rent argues that Inspector Basich issued the citation because the air tank lacked a state serial number stamp assigned in accordance with Cal. Code Regs. tit. 8, § 462(g). Rain For Rent contends that this California regulatory requirement was incorporated into the federal mandatory safety standard without due process of law.

Rain For Rent is wrong. The Judge did *not* find a violation of the standard because of a failure to satisfy the California Code.⁶ Instead, the Judge held that Rain For Rent failed to provide any evidence demonstrating that a person with a National Board Commission had inspected the tank as required by the plain language of section 56.13015(a). 39 FMSHRC at 1452; 30 C.F.R. § 56.13015(a) (“pressure vessels shall be inspected by inspectors holding a valid National Board Commission”).

The standard provided Rain For Rent with adequate notice that an inspection by a person with a valid Commission was required. *See Canyon Fuel Co.*, 39 FMSHRC 1578, 1582 (Aug. 2017) (notice is established when the language of the standard provides unambiguous notice of its requirements) (citations omitted). In short, we reject Rain For Rent’s due process argument.

B. The Judge’s decision is supported by substantial evidence.

Rain For Rent also argues that the Judge’s decision lacks the support of substantial evidence.⁷ Specifically, it maintains that the Judge erred by failing to recognize that a compliant inspection was performed by the manufacturer in 2014.

conducted at the time of installation. Here, the installation occurred after the manufacturer’s inspection. 39 FMSHRC at 1452 n.8.

⁶ The Judge explicitly found California regulations to be inapplicable to this proceeding. 39 FMSHRC at 1452 n.7.

⁷ “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the Judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

There is no evidence in the record that indicates that a person with a valid National Board Commission ever inspected the tank. George conceded that he was unaware of any inspection conducted by an inspector with a valid Commission during the time that Rain For Rent owned it. Tr. 134. Furthermore, Rain For Rent's reliance on the manufacturer's prior inspection as allegedly satisfying the safety standard requirements fails to appreciate the purpose of the NBIC. As the Judge noted, a manufacturer is governed by different inspection standards. 39 FMSHRC at 1452 n.8. The NBIC governs inspections of air tanks *after* they are placed into service and requires the inspection to be performed at the time of installation. *Id.* (citing Sec'y Ex. 4 at 3, 5). In contrast, the ASME (The American Society of Mechanical Engineers) Boiler and Pressure Vessel Code establishes the manufacturer's inspection requirements concerning the construction of the tank.^{8 9} Therefore, according to the NBIC, the existence of a metal plate signifying that Manchester Tank inspected the tank after constructing it does not prove that a person with a valid National Board Commission inspected the tank after it was placed into service.

Rain For Rent also contends that the absence of a record of inspection is not evidence that an inspection was not performed. Section 56.13015 has two subsections: one requires a proper inspection and the other requires that the operator maintain records. The citation at issue alleged a violation of the entire standard. Sec'y Ex. 2. It logically follows that, when an inspection is not performed, there are no records to be maintained. Accordingly, the absence of any record of inspection supports the Judge's finding of a violation.

Rain For Rent further maintains that the Judge erred by failing to follow his prior decision in *D&H Gravel*, 31 FMSHRC 272, 279-80 (Feb. 2009) (ALJ) (vacating a citation

⁸ George referred to the manufacturer's code as the "ASTM" standard and the Judge adopted the use of that term. 39 FMSHRC at 1451 (citing Tr. 86-88, 93; R. Ex. 1). However, the metal plate at R. Ex. 1 appears to contain the insignia of the *ASME*, which publishes the standards governing the construction of air receiving tanks. *See Why "Demand The Mark"* www.asme.org/shop/certification-accreditation/why-demand-the-mark (last visited May 31, 2018). Notably, Rain For Rent introduced no document authored by the ASTM (American Society for Testing and Materials), nor did it provide citation to an ASTM standard.

⁹ The opening paragraphs of the NBIC refer to the relationship between the ASME code and the NBIC. Specifically, it states:

The ASME Boiler and Pressure Vessel Code establishes rules of safety governing the design, fabrication and inspection during *construction* of boilers and pressure vessels.

It is the purpose of the NATIONAL BOARD INSPECTION CODE to maintain the integrity of such boilers and pressure vessels *after they have been placed into service* by providing rules and guidelines for inspection after installation, repair, alteration and rerating, thereby helping to ensure that these objects may continue to be safely used.

Sec'y Ex. 4 at 3 (emphasis added).

alleging a violation of section 56.13015(a) because the operator produced a manufacturer's inspection stamp). However, Commission Procedural Rule 69(d) provides that a Judge's decision does not constitute binding precedent. 29 C.F.R. § 2700.69(d). Accordingly, the Judge was not obligated to follow *D&H Gravel* or any other ALJ decision. Additionally, the Judge expressly recognized that in that case it did not appear that the question of whether the equipment was inspected by someone with a valid National Board Commission was raised by either party.¹⁰ 39 FMSHRC at 1452.

For these reasons, we affirm the decision of the Judge with regard to Citation No. 8785486.

III.

Factual and Procedural Background – Citation No. 8785487

The inspector also observed two red, five-gallon safety cans in the bed of the Rain For Rent service truck during his July 2016 inspection. The safety cans were manufactured with multiple warning symbols and statements on their exteriors, e.g., a statement warning that the safety can is designed to contain flammable liquid. One of the safety cans in the truck contained diesel fuel. Someone had written the word "diesel" on that safety can. The other safety can in the truck contained gasoline. There was no writing on that can indicating that it contained gasoline.

The safety standard at 30 C.F.R. § 56.4402 requires that "[s]mall quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents." Citation No. 8785487 alleges that the can containing gasoline lacked the required label.

The Judge affirmed the citation, concluding that the operator failed to label the can to indicate that it contained gasoline. 39 FMSHRC at 1455.

IV.

Disposition – Citation No. 8785487

Rain For Rent contends that the Judge made multiple errors. For instance, Rain For Rent maintains that the standard's requirement that safety cans be "labeled to indicate its contents" is ambiguous. Therefore, it states that it reasonably relied on guidance from the Occupational Safety and Health Administration ("OSHA"). Moreover, it asserts that in MSHA's Program Policy Letter No. P13-IV-01 (Aug. 13, 2013) ("the PPL"), MSHA certified that compliance with OSHA labeling standards results in compliance with MSHA standards.

While the PPL states that OSHA's Hazardous Communication Standard, 29 C.F.R. § 1910.1200, is compatible with MSHA's HazCom standards at Part 47, it further specifies that some aspects of OSHA's regulations "may not be compatible with other existing MSHA

¹⁰ The decision in *D&H Gravel* followed a hearing on 22 citations in which the operator defended himself *pro se*.

standards.” Moreover, the safety standard at section 56.4402 is found in Part 56 of the MSHA regulations (not Part 47). The PPL also reminds mine operators that they “must comply with all existing MSHA standards concerning physical hazards as they are defined in those [other MSHA] standards.” Accordingly, the PPL does not provide an exception to the specific requirements of section 56.4402.

Rain For Rent further argues that section 56.4402 is overly vague and therefore it lacked notice as to how to comply. In determining whether a safety standard provides adequate notice, the Commission generally applies an objective standard, asking “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 FMSRHC 2409, 2416 (Nov. 1990). Because section 56.4402 requires that a safety can be labeled to identify its contents, a reasonably prudent miner would ensure that the safety can was marked in a way that identified its contents with a reasonable degree of specificity, e.g., “gas” or “gasoline.” We further conclude that a reasonably prudent miner would understand that warnings indicating that the contents are flammable and should not be ingested are not sufficient to identify the type of flammable liquid within.

Finally, Rain For Rent asserts that the safety can was labeled by color. George testified that the operator’s policy requires diesel fuel to be in a yellow can and gasoline to be in a red can.¹¹ However, this defense is significantly undermined by the fact that the diesel fuel in the truck was also contained in a red can.¹²

In any event, as the Judge found, Rain For Rent’s color policy did not provide sufficient information to satisfy the safety standard. As he explained:

Having two red cans with different contents could cause confusion where one can is not labeled. Written labels which indicate the contents of a safety can are intended to help avoid the guesswork of what might be in a can and help guard against the misuse of the can’s contents as a result of a lapse in attention, or fatigue. The lack of the word “gas” or “gasoline” in this instance could result in such misuse.

39 FMSHRC at 1455-56 (footnote omitted).

¹¹ Rain For Rent alleges that the supply catalog excerpt at R. Ex. 3 denotes that the red safety can in use “was designated as red for storage of gasoline pursuant to the manufacturer.” R. Br. at 19. We note that the manufacturer’s catalog actually states that the “Type I red safety can[s] (for flammable liquids) . . . are . . . approved for safe handling and storage of gasoline *and other flammable liquids.*” R. Ex. 3 at 11 (emphasis added).

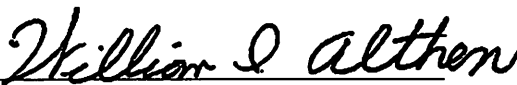
¹² George maintained that a written label was added to the red can containing diesel fuel to denote that the contents of that can varied from the default color code. Tr. 100.

The safety standard requires the can to be labeled. We conclude that the Judge did not err in finding that the safety can lacked an appropriate label. Accordingly, we affirm the decision of the Judge.

V.

Conclusion

The Judge's decision upholding Citation Nos. 8785486 and 8785487 is affirmed.




William I. Althen, Acting Chairman



Mary L. Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Distribution

Byron Walker, Esq.
Emily Mizzell, Esq.
Rose Law Firm
120 East Fourth Street
Little Rock, AR 72201-1309
bwalker@roselawfirm.com
emizell@roselawfirm.com

Lynne B. Dunbar, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450

Ali A. Beydoun, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law Judge Richard Manning
Federal Mine Safety and Health Review Commission
721 19th Street, Suite 443
Denver, CO 80202-2536