

CCASE:  
SOL (MSHA) v. BRIGHTON SAND & GRAVEL  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
The Federal Building  
Room 280, 1244 Speer Boulding  
Denver, CO 80204

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

CIVIL PENALTY PROCEEDING  
  
Docket No. WEST 90-63-M  
A.C. No. 05-04390-05501

v.

Brighton Quarry

BRIGHTON SAND & GRAVEL,  
RESPONDENT

DECISION

Appearances: S. Lorrie Ray, Esq., Office of the Solicitor, U.S.  
Department of Labor, Denver, Colorado,  
for Petitioner;  
Ronald W. Loser, Owner, Brighton Sand and Gravel,  
Brighton, Colorado,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), alleges Respondent Brighton Sand and Gravel violated safety regulations promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 802 et seq. (the "Act").

After notice to the parties, a hearing on the merits was held on November 19, 1990, in Denver, Colorado.

The parties waived the filing of post-trial briefs and submitted the issues on the evidence and oral arguments.  
Threshold Issues

The evidence shows MSHA conducted a CAV (FOOTNOTE 1) inspection of the operator in April 1989. Four months later the same MSHA inspector conducted a regular inspection of the site.

The operator argues MSHA, in its CAN inspection, should have inspected all areas of the plant including the equipment repair shed. Hence the operator asserts any violations not detected in the CAV inspection should be vacated.

The operator has misconstrued the scope of CAV inspections. The program was initiated in 1979 to provide technical assistance to mine operators under certain conditions. A copy of the initial memorandum prepared by the Assistant Secretary of Labor for CAV inspections is attached to this decision. (The memorandum was not offered in evidence by either party but it is attached to show MSHA's policy for its program.)

When a CAV inspection takes place, MSHA cannot guarantee that all areas of a mine will be inspected, nor can it guarantee that all possible violations will be detected by the inspector. This is because the primary obligation for compliance with the regulations rests with the mine operator.

For these reasons, the operator's threshold objections are denied. However, under the broad umbrella of statutory good faith, I note the operator fully abated the 13 CAV notices of violation (FOOTNOTE 2) and further abated the violative conditions in this case.

#### Citations

The five citations in this case were issued under the authority of Section 104(a) of the Act.

#### Background

Jake J. DeHerra, a federal mine inspector and a person experienced in mining, inspected Respondent's plant on August 21, 1989. The operator's owner, Mr. Ron Loser, only accompanied the inspector when he entered the tool shed.

Mr. Loser has been in business for 40 years. No disabling injuries have occurred in the business and he does not permit unsafe conditions to exist. He has also received awards for safety.

#### Citation No. 3451630

In the tool shed, the inspector found the grounding plug was missing from a service cord, a battery charger, a bench grinder, a power saw, a vacuum cleaner, and a ventilating fan.

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Since all of this equipment was electrically powered, the inspector concluded that a violation of 30 C.F.R. 56.120253 existed.

The operator argued that this equipment was double insulated and no grounding plug was required. The equipment itself was marked "UL."( FOOTNOTE 4)

On this credibility issue, I credit the inspector's testimony: the equipment was not protected against shock, since it was not enclosed in plastic nor was it marked with the "Double D," ("DD") symbol.

In the presence of the inspector, Mr. Laser immediately abated these violations by cutting the ends off the plug. He intended to prevent the equipment from being used.

Citation 3451630 should be affirmed.

The operator was negligent, since he should have known of this condition. Further, I accept the inspector's view that the gravity was moderate.

Citation No. 3451631

Inspector DeHerra observed that a piece of conduit was broken loose from the connection box.

He originally cited this condition as a violation of 30 C.F.R. 56.12005, but he later changed the regulation to 30 C.F.R. 56.12004.

Exhibit P-3 was drawn by the inspector to illustrate his testimony.

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It is true that the conduit had broken loose at the main electrical box. However, the condition as described, does not fall within the purview of 30 C.F.R. 56.12004.

Citation No. 3451631 and all penalties therefor should be vacated.

Citation No. 3451632

Mr. DeHerra wrote this citation when he saw an unguarded tail pulley. (FOOTNOTE 5) The witness further illustrated his testimony in drawing Exhibit P-4.

The tail pulley was not in a normal work area but there was a nearby walkway. If a worker fell or slipped into the pinch points, he could be injured.

The uncontroverted evidence establishes a violation of the regulation. The citation should be affirmed.

Concerning civil penalties:

This condition could have been observed by the operator. A failure to remedy it indicates the operator was negligent.

Since the unguarded equipment was not in a regular work area, the gravity is low.

Citation No. 3451634

During the inspection, Mr. DeHerra observed a discharged fire extinguisher. (FOOTNOTE 6) A needle on the extinguisher gauge indicates whether it is charged or discharged. If discharged, there would be no pressure in the equipment.

However, there was a pressurized replacement fire extinguisher in the operator's office but there was no record of the date it was inspected.

The uncontroverted evidence establishes a violation of the regulation. Citation No. 3451634 should be affirmed.

Since there was a nearby replacement fire extinguisher (even without an inspection tag), these factors indicate the operator's negligence and gravity were low.

Citation No. 3451635

Mr. DeHerra testified that the regulation (FOOTNOTE 8) involved here requires a test of the grounding system. Although the system was grounded, it had not been checked. When the inspector asked for the records, Mr. Loser stated he had contacted an electrical contractor but no action had been taken.

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The facts establish that the continuity of the equipment grounding conductors had not been checked since the plant was moved. These facts establish a violation of the regulation which requires the system be tested immediately after installation.

In this case, it is uncontroverted that a test was made by an electrical contractor. However, the check was after the

citation had been issued.

Citation No. 3451635 should be affirmed.

I consider the operator's negligence to be moderate since the company was aware of the testing requirements. However, the gravity is low, since the electrical system was grounded.

#### CIVIL PENALTIES

Respondent argues the regulations involved here are "Mickey Mouse." I disagree. The regulations clearly relate to safety and, given unfavorable factual circumstances, severe injuries could result. I further note that the Mine Act mandates that a penalty be assessed if a violation is found to exist.

Section 110(i) of the Act further establishes certain criteria to be considered in assessing civil penalties.

In this case, the Secretary proposed penalties of \$20 for each violation. The evidence as to negligence, gravity and good faith have been previously discussed.

In connection with the remaining criteria, I find the operator must be considered as small, even miniscule, since only Mr. Loser and his son customarily operated the business. Mr. Loser also indicated he has now sold the business.

The operator's prior history is very favorable. The computer printout, Exhibit P-2, fails to establish any prior violations.

On balance, I consider the penalties as hereafter assessed to be proper.

For the foregoing reasons, I enter the following:

ORDER

1. Citation No. 3451630 is AFFIRMED and a penalty of \$20 is ASSESSED.

2. Citation No. 3451631 and all penalties are VACATED.

3. Citation No. 3451632 is AFFIRMED and a penalty of \$10 is ASSESSED.

4. Citation No. 3451634 is AFFIRMED and penalty of \$10 is ASSESSED.

5. Citation No. 3451635 is AFFIRMED and a penalty of \$10 is ASSESSED.

John J. Morris  
Administrative Law Judge

FOOTNOTES START HERE:

1. Courtesy Assistance Visit

2. The 13 CAV notices are contained in Exhibit P-1.

3. 56.12025 Grounding circuit enclosures

All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

4. Underwriters Laboratory

5. The cited regulation reads:

56.14107 Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

7. The cited regulation reads:

56.4203 Extinguisher recharging or replacement.

Fire extinguishers shall be recharged or replaced with a fully charged extinguisher promptly after any discharge.

8. The cited regulation 30 C.F.R. 56.12028 reads:

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.

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U.S. Department of Labor

Mine Safety and Health Administration  
4015 Wilson Boulevard  
Arlington, Virginia 22203

MEMORANDUM FOR: THOMAS J. SHERICH  
FROM: ROBERT B. LAGATHER  
Assistant Secretary for Mine  
Safety and Health  
SUBJECT: Compliance Assistance Visits

In the past MSHA has received many requests from mine operators for MSHA inspectors who, by virtue of their training and experience, possess significant expertise in mine safety and health and knowledge of mine safety and health standards and regulations, to assist the operators in their efforts to comply with the Mine Act of 1977. Operators have requested that MSHA representatives visit their mines for the purpose of pointing out any conditions or practices which are in violation of the Act or standards so that the operator may correct them, but that no monetary civil penalties be assessed.

In response to the operators' requests, MSHA has analyzed the question and has concluded that inspectors may make visits to mines in certain situations to point out potential violations without monetary civil penalties being proposed. Section 502 (b) of the Mine Act directs the Secretary "\* \* \* to the greatest extent possible, to provide technical assistance to operators in meeting the requirements of this Act and in further improving the health and safety conditions and practices in coal or other mines."

The situations in the mining industry where such a program would be feasible are: (1) new mines not yet producing, (2) seasonal, closed or abandoned mines prior to reopening, and (3) new installations in mines prior to their becoming operational. A common element in all these situations is that the mine has either been closed (or has not yet been opened) or that there is a new installation not yet operational. MSHA experience and statistics show that the start-up period for a mine, new construction, or new equipment is a particularly high-risk period. It is also a period when practices initially started tend to become a permanent part of future operations. If the new operations are begun correctly, there are indications that there will be fewer accidents, injuries, and fatalities during both the initial start-up period and the later operations.

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Therefore, beginning immediately, I am instituting a program for metal/nonmetal of making inspectors available upon the request of operators to conduct compliance assistance visits (CAV) in the following categories:

1. New mines not yet producing;
2. Seasonal, closed, or abandoned mines prior to reopening;
3. New facilities or new installation of equipment in an operating mine.

A CAV would be conducted pursuant to a request made by an operator to the appropriate subdistrict manager. In order that MSHA may be most responsive, such requests should be made at least one to two weeks in advance of the date on which the operator wants the visit. The CAV would cover one or more of the following areas as requested by the operator:

1. Miscellaneous iron installations (guards, walkways, stairways, etc.);
2. Equipment with moving parts (conveyor belts, crushers, screens, etc.);
3. Mobile equipment (trucks, loaders, etc.);
4. Proposed plans and designs;
5. Planned training, and
6. Other areas as appropriate.

The inspector, while conducting a CAV, will issue notices of violation whenever he observes a potential violation or imminent danger situation. Each notice will be clearly marked "CAV-NONPENALTY" and will not be included in any fashion in the assessment process. The purpose of the notice is to alert the operator to a potentially hazardous condition or practice so that the operator may correct it prior to the beginning of operations, or use of the installation, equipment or plan, etc. Operators should be aware, however, that regular inspections will be made of the operations once they have begun and that during the regular inspections the inspector will look at all of the notices issued during the CAV to insure that the conditions and practices noted have been corrected. If the correction has not been made, an appropriate citation or withdrawal order will be issued. No additional penalty, monetary or otherwise, will be proposed solely because of the previous CAV.

With regard to the CAVs of new mines or new installations of equipment in operating mines, the CAV is limited to the future

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use of the mine, installation or equipment under construction. The inspector, in conducting a CAV, is to proceed directly to the site of the CAV and is not to conduct a regular inspection of the premises. However, should an imminent danger situation be observed, an appropriate order will be issued.

This is a new program and like any new program, problems and questions will arise and adjustments will have to be made. I want to encourage resolution of the problems and questions at the field level; however, I want to be timely advised of the problems and questions and their resolutions. I also want to encourage suggestions for improvement of the program.

I firmly believe that this program will increase the cooperation between MSHA and the mine operators, will reduce accidents, injuries, and fatalities and will, in general, enhance the safety and health of the miners. Therefore, I want each of the district and subdistrict managers to give their personal attention to insuring that the program achieves these goals.