

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

June 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2009-994-M
Petitioner	:	A.C. No. 01-03331-000195920
	:	
v.	:	
	:	
	:	
	:	
JOHNCO MATERIALS, INC.,	:	Mine: JohnCo Materials #1
Respondent	:	

DECISION

Appearances: Sophia Haynes, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner;
Clatus Junkins, Esq., JohnCo Materials, Inc., Fayette, Alabama, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“the Act”), charging JohnCo Materials, Inc. (“JohnCo”) with three violations of mandatory standards and seeking civil penalties of \$9,527.00 for those violations. At hearing on May 4, 2011 JohnCo admitted the violations and the findings relating thereto and challenged only the amount of civil penalties proposed by the Secretary. In this regard Respondent maintains that the penalties proposed by the Secretary would affect its ability to remain in business.

Citation Number 6515787

This citation alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14100(b) and charges as follows:

The oxygen/acetylene torch on the service truck had a defect affecting safety (a broken gauge on the acetylene bottle regulator, and another one on the oxygen bottle regulator). The lens was missing on each. The faces of both gauges showed some corrosion, and the needle and the outside case were bent on the one on the oxygen. Dust, dirt, moisture or impact would contribute to these gauges giving inaccurate readings once the protective lens is gone. The torch is used

as needed around the mine, and was up on the crusher platform and had been used by the welder just prior to the inspection. Should a welder use improper pressure, accidents resulting in burns would likely result.

The cited standard provides that “[d]efects 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.”

Issuing Inspector White described the hazard as burns to a miner resulting from inaccurate pressure readings on the oxygen and acetylene bottles and resulting in a hose burst or a torch flare (Ex. G-5). Respondent also admits that the violation was properly characterized as “significant and substantial¹.” The violation was therefore of high gravity.

Respondent does not dispute the inspector’s findings of high negligence. Inspector White noted that the mine’s general manager, Matt Junkin, admitted that he had not been “properly checking the pre-op exams” and had not done one that day. The evidence clearly supports the admitted findings of high negligence (Ex. G-5).

Citation Number 6515788

This citation alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14100(a) and charges as follows:

The service truck was not inspected by the operator prior to being put in to service. The welder had driven the truck and was using the torch and welder on it without inspecting any of the equipment for safety problems. The torch had a defect affecting safety, which the welder should have seen and reported. Should serious defect [sic] go undetected, fatal accidents would be reasonably likely.

The cited standard, 30 C.F.R. § 56.14100(a), provides that “[s]elf propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being

¹ In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained its interpretation of the term “significant and substantial” as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

placed in operation on that shift.”

Inspector White characterized this violation as “significant and substantial.” Respondent admits this finding. White noted that the failure to conduct a pre-op examination would likely result in fatal accidents (Ex. G-6). The violation was therefore of high gravity. Furthermore, Respondent does not dispute the inspector’s findings of high negligence. General Manager Matt Junkin admitted that he had not been properly checking the pre-op exams and had not performed one that day (Ex. G-6). The evidence clearly supports the admitted findings of high negligence.

Citation Number 6515791

This citation also alleges a violation of the standard at 30 C.F.R. § 56.14100(b) and charges as follows:

The back-up alarm installed on the Cat D6H dozer failed to work when tested. The dozer is used about once per month, usually around the pit area, exposing miners to being struck. Should a miner be struck by the dozer, fatal crushing injuries would likely occur.

Inspector White found this violation “unlikely” to cause injuries because there was “good vision to the rear” of the cited bulldozer and “very little foot traffic” in the area (Ex. G-7). Under the circumstances, gravity would properly be characterized as low.

White found Respondent’s negligence to be “moderate” based on the statement of the general manager “that he was not aware of the condition” (Ex. G-7). In light of the additional evidence that the general manager had not been checking the pre-op examinations, I accept the admission as to that level of negligence.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operators ability to continue in business.

The Secretary’s undisputed representations in her petition established that Respondent is small in size and has a moderate history of violations. There is no dispute that the violations herein were abated in good faith. The gravity and negligence of the violations have been admitted by Respondent and have previously been discussed.

As noted, the Respondent claims only that the civil penalties proposed by the Secretary would affect its ability to remain in business. This Commission has held that the mine operator

has the burden of proving such a claim. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1985). To provide the most credible form of financial data, Respondent was afforded the opportunity to produce, post-hearing, an audited financial statement which Respondent agreed to provide. However, Respondent subsequently provided only an unaudited statement from certified public accountants McCabe and Associates dated May 11, 2011. That financial statement has, nevertheless, been marked and admitted as Respondent's Exhibit No. 16.

A second document, purportedly a judgement against the individual, Clatus Junkin, is marked for identification and admitted as evidence as Respondent's Exhibit No.17. I find however that since this judgement is against Mr. Junkin personally, it is not relevant to the corporate entity, JohnCo Materials, Inc. The unaudited statement labeled "Accountant's Compilation Report" provides as follows:

We have compiled the accompanying balance sheet of Johnco Materials, Inc., (an S corporation) as of March 31, 2011 and the related statement of income and retained earnings for the three month period then ended in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants.

A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and accordingly, do not express an opinion or any other form of assurance of them.

Management has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles. If the omitted disclosures and statement of cash flows were included in the financial statements, they might influence the user's conclusion about the Company's financial position, results from operations and cash flows. Accordingly, these financial statements are not designed for those who are not informed of such matters.

Johnco Materials, Inc., with the consent of its shareholders, has elected under the Internal Revenue Code to be an S Corporation. In lieu of corporate income taxes, the shareholder(s) of an S corporation are taxed on their proportionate share of the Company's taxable income. Therefore, no provision or liability for federal income taxes has been included in these financial statements.

(Ex. R-16)

Clearly, with the significant limitations noted in the accountant's report, I find that Respondent has failed to sustain its burden of proving that the penalties of \$9,527.00 would affect its ability to remain in business.

ORDER

Citations Number 6515787, 6515788 and 6515791 are affirmed and JohnCo Materials, Inc., is directed to pay civil penalties of \$9,527.00 within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
202-434-9977

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