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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. VINC 79-154-PM
A.C. No. 20-00044-05001

v.

Alpena Stone Quarry and Mill

CEMENT DIVISION, NATIONAL GYPSUM
COMPANY,
RESPONDENT

DECISION

Appearances: William B. Moran, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia, for Petitioner
Timothy A. Fusco, Esq., Dykema, Gossett, Spencer, Goodnow
& Trigg, Troy, Michigan, for Respondent

Before: Chief Administrative Law Judge Broderick

Statement of the Case

The proceeding arose upon the filing of a petition for the assessment of civil penalty (now called a proposal for a penalty, 29 CFR 2700.27) for 11 alleged violations of mandatory safety standards contained in 30 CFR Part 56. The violations were charged in citations issued to Respondent following an inspection of the Alpena Stone Quarry and Mill between April 25 and May 9, 1978.

Pursuant to notice, a hearing on the merits was held in Bay City, Michigan, on August 9 and 10, 1979. Federal mine inspectors Robert Wallace, Richard Keith, Alex Harju, Frank Gerovac, and Royal Williams testified on behalf of Petitioner. Dennis Charles Lane and Bruce Wagner testified on behalf of Respondent. Both parties have filed posthearing briefs. To the extent the contentions therein contained are not incorporated into this decision, they are rejected.

Statutory Provisions

Section 104 of the Federal Mine Safety and Health Act of 1977 provides in part:

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

* * * * *

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

* * * * *

(e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

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Section 110 of the Act provides in part:

(a) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

* * * * *

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Regulatory Provisions

30 CFR, Part 56 provides in part:

56.4-9 Mandatory. All heat sources, including lighting equipment, capable of producing combustion shall be insulated or isolated from combustible materials.

* * * * *

56.4-33 Mandatory. Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used.

* * * * *

56.9-87 Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

* * * * *

56.11-1 Mandatory. Safe means of access shall be provided and maintained to all working places.

* * * * *

56.12-8 Mandatory. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal 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.

* * * * *

56.12-32 Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

* * * * *

56.12-34 Mandatory. Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.

Issues

1. Whether the violations described in the citations occurred or existed as alleged?
2. In each instance where a violation is found, what is the appropriate penalty for each violation?
3. In each instance where a violation is found, was the additional finding that it could have significantly and substantially contributed to the cause and effect of mine health or safety hazards properly made?

Findings of Fact and Conclusions of Law

Penalty Proceedings Before the Review Commission

A civil penalty proceeding before the Commission is in no sense a review of the actions or determinations of the MSHA inspectors or Assessment Office. It is in fact a de novo proceeding in which the Secretary seeks to have the Commission impose civil penalties for what he contends were violations of mandatory safety standards contained in the Act or in regulations promulgated pursuant to the Act. The Commission must determine on the basis of the evidence presented at a hearing before an Administrative Law Judge, whether the alleged violations occurred. For those found, the Judge will impose a penalty based on the six criteria in 110(i) of the Act. The burden of proof is on the Secretary to establish the existence or occurrence of the violations and, to the extent that he urges that any of the statutory criteria should increase the penalty, he has the burden of establishing the existence of the aggravating factor. The important factors concerning which the parties to these proceedings disagree are gravity and negligence.

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The gravity of a violation depends upon the possible hazard to miners and the likelihood that the hazard will result in injury. Robert G. Lawson Coal Company, 1 IBMA 115. A violation is the result of the operator's negligence if he knew or should have known of the condition and failed to take corrective action. The knowledge of a foreman may be imputed to the operator. The Valley Camp Coal Company, 3 IBMA 463.

Significant and Substantial

Each of the citations involved in this proceeding contain a finding that the condition is "significant and substantial." This phrase I take to be shorthand for a finding that the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a * * * mine safety or health hazard." Section 104(d)(1). In its answer, Respondent challenged these findings. At the hearing, the parties stipulated that the propriety of these findings is properly an issue in the present civil penalty proceeding. In its posthearing brief, Respondent argues that such findings are not proper in a citation issued under section 104(a) and therefore should be vacated. It cites the decision of Judge Koutras in Secretary v. Lone Star Industries, Docket No. VINC 79-21-PM, issued July 3, 1979, as standing for the proposition that such findings are only properly made in a 104(d)(1) citation for unwarrantable failure to comply with a standard.

Petitioner moved "to strike" Respondent's argument because it was not raised prior to the filing of its posthearing brief. The motion is DENIED and the request for additional time to respond is DENIED.

Respondent's position overlooks, however, the fact that under section 104(e), sanctions may be applied for a pattern of violations which are of such nature as could have significantly and substantially contributed to the cause and effect of a mine health or safety hazard. There is no requirement in section 104(e) that the violations be caused by unwarrantable failure. I conclude that findings in a 104(a) citation that the violation is significant and substantial are not improper provided the findings are supported by the facts.

In a decision under the Coal Mine Safety Act, the Board of Mine Operations Appeals interpreted the phrase "significantly and substantially contribute to the cause and effect of a mine safety or health hazard" to include all violations except "violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition." Alabama By-Products Corporation (On Reconsideration), 7 IBMA 85, 94. This tortured construction of language was said by the Board to have been compelled by the decision of the Court of Appeals in International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. den., 429 U.S. 858 (1976). In fact, the court's opinion did not construe the language in question at all, but merely held that the Board had mistakenly

read in a significant and substantial

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requirement for a section 104(c)(1) withdrawal order when no such requirement was contained in the statute. 30 U.S.C. 814(c)(1). When it was issued, I thought the Board's interpretation was wrong and I think it wrong today. However, the Senate Committee on Human Resources in its Report on S 717, which became the Federal Mine Safety and Health Act of 1977, stated:

The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1).

S. Rep. No. 95-181, 95th Cong., 1st Sess. 31 (1977), reprinted in U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 619 (1978).

Therefore, although I would not so interpret the language if it were a matter of first impression, I feel constrained to follow the Board's construction, and conclude that only purely technical violations, and violations which have only a remote or speculative chance of causing any injury, cannot be cited as significant and substantial.

The Violations

(1) Citation No. 288294 charged a violation of 30 CFR 56.9-87 which requires that heavy duty mobile equipment be provided with audible warning devices. When the operator of such equipment has an obstructed view of the rear, the standard requires that the equipment have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up. Respondent had a 120 Hough bulldozer which had an inoperative reverse alarm at the time of inspection. The bulldozer is a large vehicle with an obstructed view. No observer was present. The inspector testified that an individual in the vicinity of the bulldozer could be hurt if that person did not hear the alarm. I find that a violation was established and that it is moderately serious; however, there is no evidence of negligence. Because the violation could result in injury, I find that it was significant and substantial.

(2) Citation No. 288295 alleged a violation of 30 CFR 56.4-9 which requires that all heat sources, including lighting equipment capable of producing combustion, be insulated or isolated from combustible materials. The inspector testified that a foreign substance, possibly oil or grease, contacted the insulation around the number one cyclone duct, causing the insulation to smolder. The inspector stated that the fire was extinguished and the machinery was repaired to prevent any further overheating. The duct was located approximately 4-6 inches from the travel pattern of the

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walkway. The duct was a source of heat and it was not sufficiently separated from combustible materials, namely, oil or grease. A violation was established which was moderately serious. No evidence was presented to show how or when the oil or grease came to be on the duct and therefore negligence was not established. Since the violation could have resulted in injury, I find that it was significant and substantial.

(3) Citation No. 288296 alleged a violation of 30 CFR 56.12-32 which requires that inspection and cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairing. The inspector testified that the paddle switch junction box at the No. 14 conveyor was not provided with a cover. Due to the location of the box, near an elevated walkway, a person who contacted the wires in the box could get a shock and fall 30 to 40 feet. A violation was established and it was serious. The evidence establishes that the condition had existed for some time and should have been known to Respondent. Respondent was negligent. Since an injury could have occurred, the violation was significant and substantial.

(4) Citation No. 288297 alleges a violation of 30 CFR 56.11-1 which requires that safe means of access be provided and maintained to all working places. I find that spillage up to 24 inches existed on the walkway around the head pulley of the #14 conveyor. This spillage created a tripping hazard. The inspector testified that an employee could fall 30 to 40 feet from the walkway to the ground below. The inspector also stated that the spillage was impacted, indicating that it had been present for some period of time. I find that a violation existed. It was moderately serious and was caused by Respondent's negligence. I further find that this violation was significant and substantial.

(5) Citation No. 288298 alleges a violation of 30 CFR 56.12-34 which requires that portable extension lights and other lights that by their location present a shock or burn hazard be guarded. A 200-Watt bulb at the No. 3 high line conveyor was not provided with a guard. The light could have been broken and caused injury to an employee. A violation of the standard was established. The Respondent abated the violation by placing a guard on the bulb. I find that the violation was caused by Respondent's negligence since the condition was obvious to visual observation. However, the evidence does not establish that it was a serious violation. I find that because the violation could contribute to a health or safety hazard, it was significant and substantial.

(6) Citation No. 288721 charges a violation of 30 CFR 56.12-8 which requires that power wires and cables be insulated adequately when they pass into or out of electrical compartments. When insulated wires pass through metal frames, the regulation requires that the holes be substantially bushed with insulated bushings. The electrical power wires entering the switch box at the impactor floor hydraulic cylinder

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did not have a bushing. The inspector stated that the wires could rub against the bare metal and cause an electrical short. He also stated that the weight of the cable could pull the wire free, also causing a short. There is both a burn hazard and a stock hazard. The Government conceded that the violation was not significant and substantial. I find that a violation was established. The violation was not serious. The condition was apparent, should have been known to Respondent and therefore was caused by its negligence. The violation was not significant and substantial.

(7) Citation No. 288722 alleges a violation of 30 CFR 56.11-1 which requires that a safe means of access be provided and maintained to all working places. The evidence established that there was excessive buildup of limestone dust at the top raw grind silo between the 29 and 33 conveyor belts. The evidence further shows, however, that the area in question is not used by workmen, nor is it a means of access to any working place.

Therefore, I find that the Government has failed to sustain its burden of proof and that no violation has been established.

(8) Citation No. 288827 alleges a violation of 30 CFR 56.4-33 which requires that valves on oxygen and acetylene tanks be kept closed when the contents are not being used. The oxygen and acetylene cylinders in the #2 storeroom were in an open position at the time of inspection. There were ignition sources close by and there was a possibility of explosion. A violation was established and was moderately serious. The condition was known or should have been known to Respondent. Therefore, it was caused by Respondent's negligence. Because the violation could have resulted in injury, it was significant and substantial.

(9) Citation No. 288826 charges a violation of 30 CFR 56.12-34 which requires that portable extension lights and other lights that by their location present a shock or burn hazard be guarded. There was an unguarded light bulb in Respondent's carpenter's shop. This is a violation of the standard. Since the condition was obvious, it was due to Respondent's negligence. It was not serious. However, it could have resulted in injury and therefore was significant and substantial.

(10) Citation No. 288566 was issued for an alleged violation of 30 CFR 56.11-1 which requires that a safe means of access be provided and maintained to all working places. An accumulation of limestone was present along the walkway to the tail pulley of the #41 conveyor belt. The accumulation was up to 2 feet deep and covered an area 30 feet long. I find that a violation was established which was moderately serious. Because the condition was evident, I find that Respondent was negligent. I also find that the violation was significant and substantial.

(11) Citation No. 288567 alleges a violation of 30 CFR 56.11-1, which is set forth in the preceding paragraph. A hole measuring 6 inches

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by 8 inches was present at the low end of the #16 walkway. The condition was apparent and obvious to the Respondent. The violation was due to Respondent's negligence and was moderately serious. I further find that the violation was significant and substantial.

Conclusions of Law

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. At all times relevant to this proceeding, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.

3. Except as otherwise found herein, Respondent violated the mandatory health and safety standards as charged in the notices of violation.

4. The penalties hereafter assessed are based on my findings that the violations occurred, and on a consideration of the following criteria with respect to each violation: The operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violations and the demonstrated good faith of the operator in attempting to achieve rapid compliance.

ORDER

Based on the foregoing findings of fact and conclusions of law, Respondent is assessed the following penalties:

Citation No	Date	30 CFR Standard	Penalty
288294	04/18/78	56.9-87	\$ 150
288295	04/25/78	56.4-9	75
288296	04/25/78	56.12-32	150
288297	04/25/78	56.11-1	250
288298	04/25/78	56.12-34	50
288721	04/25/78	56.12-8	50
288722	04/27/78	56.11-1	0
288827	05/09/78	56.4-33	150
288826	05/09/78	56.12-34	50
288566	05/02/78	56.11-1	150
288567	05/04/78	56.11-1	150
		Total	\$1,225

Respondent is ORDERED to pay penalties in the total amount of \$1,225 within 30 days of the date of this decision.

James A. Broderick
Chief Administrative Law Judge

