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SOL (MSHA) v. FMC CORPORATION
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 83-69-M
A.C. No. 48-00152-05512

v.

FMC Mine

FMC CORPORATION,
RESPONDENT

Appearances: James H. Barkley, Esq., and Margaret Miller, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
John A. Snow, Esq., VanCott, Bagley, Cornwall &
McCarthy, SaltLake City, Utah,
for Respondent.

DECISION

Before: Judge Lasher

This proceeding, arising under the Federal Mine Safety and Health Act of 1977 (FOOTNOTE.1) calls for interpretation and application of the mandatory safety standard provided in the second sentence of 30 U.S.C. 57.9-6 which provides:

57.9-6 Mandatory. When the entire length of a conveyor is visible from the starting switch, the operator shall visually check to make certain that all persons are in the clear before starting the conveyor. When the entire length of the conveyor is not visible from the starting switch, a positive audible or visible warning system shall be installed and operated to warn persons that the conveyor will be started.

(emphasis added).

During an inspection of the FMC Mine on November 22, 1982, MSHA Inspector William W. Potter issued Citation No. 2008100 under Section 104(d)(1) of the Act. The citation alleged:

"The conveyor belt for panel 7CM does not have adequate start-up warning system. The visible warning used

on this conveyor is flashing lights. From the light at the crusher feeder it is approximately 1000 feet to the next working light. There was another warning light installed approximately 750 feet from the crusher feeder but this light was not working. There was approximately 700 feet of this belt that was not protected by a start-up warning system. If the other light had been working there would have still been approximately 400 feet of this belt that was not protected by a start-up warning system. The services Supt. allowed this belt to be released to the production crews to use in this condition. This conveyor has been operating in this condition since day shift on the 7th of this month. Maintenance and clean-up persons are required to work on and around this conveyor. This is the 4th citation (sic) to be issued on this practice since 5/05/81. The same person has been the Services Supt. during this time. During previous meetings with the company it had been determined that these warning lights should not be over 400 feet apart and at no time over 500 feet apart, at 400 feet a person would not be over 200 feet from a warning light. When a belt has been running there is dust in the air and this will cut the visibility considerably".(FOOTNOTE.2)

At the commencement of the hearing, the parties stipulated that the entire length of the conveyor belt in question was not visible from the starting switch, thus making operative the last (second) sentence of 30 U.S.C. 57.9-6. The Respondent had installed a visible warning system-as distinguished from an audible warning system which is also authorized by the regulation-consisting of three flashing 200-watt, 250 volt bulbs. (FOOTNOTE.3) A bulb was placed at each end of the 1000-foot conveyor belt in question, and the third light was installed 375 feet from the inby end, making it a distance of approximately 625 feet (Tr. 66) from the outby end.(FOOTNOTE.4) The three bulbs, which cast a white light, flash automatically for a period of 30 seconds after the conveyor belt is started before the belt actually starts to move. One or more of the three lights can actually be seen-are visible to the naked eye-from any point along the 1,000-foot length of the conveyor.

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At the time of Inspector Potter's inspection the middle light was not working. It was the Inspector's opinion that even had the middle light been working, the "start up warning system" was inadequate to warn miners working at the more extreme distances from the nearest warning lights.

The reliable evidence of record indicates that even from a distance of 750 feet (FOOTNOTE.5) a flashing light would be visible to the naked eye if there was not a lot of dust (Tr. 54). The question posed by this record is whether or not such flashing light, although actually visible, would be sufficient to attract the attention of a miner working in the area and alert him to the danger created when the conveyor belt is started up (Tr. 92). In this connection, it should be noted at the outset that there are no specific spacing distances (including the "400-foot" requirement emphasized by the Inspector) provided in the mandatory regulation cited (30 C.F.R. 57.9-6) nor any other regulation or requirement published in the Act, the Federal Register (Tr. 26), or any safety or health plan submitted by Respondent and approved by MSHA. Nor was there any written memorandum of understanding or agreement with respect to the distances between such lights reached between MSHA (including the inspector) and Respondent (Tr. 57, 132). Although on direct examination Inspector Potter testified he had discussed the matters with Respondent's management (FOOTNOTE.6), Respondent's witnesses adamantly and persuasively denied that they acquiesced in the inspector's position as to spacing distances between lights. Respondent's Mine Safety Supervisor, David L. Thomas, also testified that the Inspector had not been consistent in the past with respect to the distances he thought appropriate (Tr. 125-132).(FOOTNOTE.7) The Inspector's testimony also was somewhat confused about prior light-spacing citations involving the same conveyor belt system (Tr. 16, 20, 22, 25-28).

It should be noted initially that the gravamen of the alleged infraction--as cited--is that the 3-light system itself was inadequate even with consideration of the fact that one light was burned out on the occasion the Citation was issued. This was the apparent basis upon which the matter was tried by both parties.

The essential issue is whether the 3-light visual warning system in place on November 22, 1982, was sufficient to warn miners working along the conveyor belt. There is no question but that a miner actually facing any of the lights from any place along the belt would be able to see the flashing light if he were facing it (Tr. 52-54, 59). Nevertheless, the Inspector gave the flat opinion that if one were "turned around facing the conveyor" when the light came on, "it would not draw (one's) attention at all" (Tr. 53). According to the Inspector, this would be true even if there were no dust (Tr. 53).

In direct contradiction to the Inspector, Respondent's safety engineer, Charles Wilkinson, Jr., testified that the visual warning system was adequate because of the "illumination" from the lights, and that he had never seen the area so dusty that the light could not be seen (Tr. 91). He indicated that the illumination from the lights would be seen even in dusty conditions-and that such conditions do not occur very often (Tr. 69-72, 85-86, 89-92, 102).

Since there is no precise standard as to spacing distances for lights under a positive visible warning system, no approved plan for such, nor even a voluntary agreement or understanding between the operator and MSHA, the question of adequacy must rest upon the subjective judgments and opinions of witnesses. The Inspector's opinion that the visible warning system in question was not adequate to warn miners working in the area along the conveyor is weakened by the convergence of several factors. To begin with, as noted above, there is no clear standard with specific subfactors against which the alleged infraction can be tested. The looseness and generality in the wording of the Citation itself was repeated at hearing by the government's witness. There were discrepancies and possibly confusion, both as to the spacing distances between the lights and the areas involved in Citations which were previously issued. The Inspector's belief that some concrete standard as to spacing distances had been created by prior enforcement and or by agreement between the parties was credibly denied by Respondent. The record otherwise lacks support or corroboration (such as experimental testing and the testimony of miners) for the opinion relied upon by the government. By contrast, the opinion of Respondent's expert witness seemed to be based on a closer knowledge of the conditions existent in the area of the mine involved and to some extent it was less general and more detailed in rationale. Evaluation of the system even with the middle light not functioning leads one to conclude that it was sufficient to warn in view of the superior force of Respondent's evidence relating to the general visibility of the end lights and the "illumination" therefrom when they were activated.

position.