CCASE:
SOL (MSHA) V. ST. JOE ZINC CO.
DDATE:
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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 Proceedings Docket No. WILK 79-41-PM 30-00591-05003
v.	
ST. JOE ZINC COMPANY, RESPONDENT	Docket No. WILK 79-72-PM 30-00591-05001 Docket No. WILK 79-73-PM 30-00591-05002 Balmat #2 Mine Docket No. WILK 79-74-PM 30-01184-05001 Balmat #3 Mine Docket No. WILK 79-75-PM 30-01688-05001 Hyatt Property Docket No. WILK 79-76-PM 30-00591-05001 Edwards Mine & Mill

DECISION

Appearances: Anthony C. Ginetto and Deborah B. Fogarty, Esqs., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Sanders D. Heller, Esq., Gouverneur, New York, for Respondent

Before: Administrative Law Judge Michels

These proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The

petitions for assessment of civil penalties were filed by the Mine Safety and Health Administration on December 7, 1978, and January 18, 1979; timely answers were filed thereafter by Respondent. A hearing was held on September 18 and 19, 1979, in Watertown, New York, at which both parties were represented by counsel.

WILK 79-74-PM

At the beginning of the hearing, the parties proposed to settle in Docket No. WILK 79-74-PM, Citation Nos. 224253 for $44 which is the full amount of the original assessment; 224255 for $66, the original assessment; 224227 for $228, a reduction from the original assessment which was $255. As grounds for the proposed settlements, Petitioner represented that less negligence was involved than originally considered by the Assessment Office. Motions were introduced to vacate the two remaining citations in this docket, Nos. 224254 and 224257. Both parties indicated their agreement to this disposition for the citations in WILK 79-74-PM. The justification for the proposed action appears on pages 3-8 of the transcript. A decision was rendered at the hearing approving the settlement for the three citations and the vacation for the remaining two (Tr. 8-9). I hereby AFFIRM that decision.

WILK 79-75-PM

Thereafter, the parties moved to settle Citation Nos. 210406 and 210407 in WILK 79-75-PM for the full amounts of the original assessments, $72 and $44 respectively (Tr. 9-11). This settlement was approved by the court under the terms and conditions mentioned on the record which included a reduction of Respondent's negligence points (Footnote 1) (Tr. 11). The bench decision is hereby AFFIRMED.

WILK 79-76-PM

With regard to the one citation, No. 209615, in this docket, the parties proposed a settlement for the original assessment of $52 and a reduction of the negligence factor for assessment purposes (Tr. 11-12). The settlement was approved and this decision is hereby AFFIRMED.

The parties agreed to the following stipulations for the remaining dockets: (1) Respondent has a prior history of violations, (2) Respondent had 3,061,602 production tons for the year 1978; the production for the particular mine was 359,402 tons, (3) Respondent would not introduce evidence of inability to pay any penalties (Tr. 13-15).

Thereafter, the parties presented evidence in a consolidated fashion on Citation Nos. 210082, 210083, and 210084.

The following bench decision found at pages 108-110 of the transcript, with some corrections, was issued at the hearing:

> JUDGE MICHELS: Unless there's something further, gentlemen, I'll proceed to make the decision.
>
> This matter, as I've stated before, involves WILK 79-41-PM. The petition for assessment of civil penalty charges St. Joe Zinc Company with violations of three mandatory standards. The nature of these charges and all other pertinent information has been fully developed on the record. A major defense, which is a threshold issue raised by the Respondent here, concerns the independent contractor issue, a matter which I was fully prepared to address myself to. However, based on the evidence, and specifically the testimony of the inspector, it now appears that the charges were addressed to a company that's not before this Court, namely the E.K.P., Inc., a sub-contractor doing work for the Respondent, the St. Joe Zinc Company. Now, counsel for the Secretary has characterized this as a technical matter. It is extremely difficult for me to understand this as technical at all. The inspector knew who the mine owner was and he's specifically charged the E.K.P., Inc., rather than the mine owner. That was his intention, and the records reflect that. Now, then, at some later date, the Secretary in the petition charges St. Joe Zinc Company as the Respondent, but as I indicated, the citations here were addressed to an entirely different company, a company not here present. I know of no precedent in this field of law by the Board of Mine Operations Appeals or the courts that would suggest that this technicality, if you will, is such that you could sustain a charge against the company not cited in the citations. I previously alluded to the fact that part of the difficulty is that a dismissal on the ground of what is really a failure of proper notice would possibly subject the company to a citation for these same charges. As I have indicated, I think that would be a very bad result because there should

be finality in these cases. It's been clearly brought out that this lack of notice or the fact that St. Joe Zinc Company was not named was brought out in the answer. The Secretary has been aware of this, and it could have [within an] appropriate time, amended the citations or issued new citations which would address themselves to St. Joe. Under those circumstances, I think the government has had its day in court. I think this matter ought to be final. On that basis, I will dismiss these charges with prejudice. That is my decision.

The above decision vacating the citations and dismissing the petition in WILK 79-41-PM is hereby AFFIRMED.

WILK 79-72-PM

The parties agreed to settle Citation No. 210003 for $66, the full amount of the original assessment, based upon a lowering of the negligence categorization (Tr. 110-112). Additionally Petitioner moved to vacate Citation No. 210021 (Tr. 112-113, 255-256). Both proposals were approved at the hearing and I hereby AFFIRM that decision.

Thereafter, evidence was introduced on Citation No. 210007. At the conclusion of the parties' presentation, the following bench decision found on pages 141-146 of the transcript, was issued:

JUDGE MICHELS: My decision on this citation is as follows: Since prior to this I have not made findings on the criteria, I will also do that now for this citation, but the general findings for the general criteria, I will not make hereafter. This is citation 210007. The inspector charged a violation of 30 CFR 57.15-4, alleging as a condition or practice, "Safety glasses were not worn by the driller while operating a jack leg drill." This mandatory standard reads as follows: "All persons shall wear safety glasses, goggles, or face shields, or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

My finding as to the fact of the violation is as follows: It is clear, and there is no dispute that the miner in this instance was not wearing goggles. The question is, or seems to be whether he was, in fact, in or around an area where a hazard existed. The testimony differs, at least to some extent, on that issue. The inspector clearly indicated his belief that there was a hazard, that material at different stages of the drilling can be thrown off and into the eyes of the miner. Mr. Stevens,

witness for the operator, testified that he had never seen an accident to the eyes by such drilling due to the fact that the miner is some six feet away, at least in the beginning of the drilling, and that because of the nature of the material and the use of water, the danger of chips flying off did not exist. However, upon my question, as I understood it, he did admit that it was possible for chips to fly off and affect the eyes. In this instance, I will accept the testimony of the inspector. He was at the scene and saw the condition as it existed. He also had responsibility of requiring goggles for such a situation even though at the particular or precise time there may not have been chips flying off. The situation such as he described in his testimony, that because of the blasts of air and other factors, show there are at least two stages where the eyes can be subjected to danger. I don't know that I can make a finding as to whether such injury is very likely, but it does seem at least that it could happen, and it is the purpose for the standard. Accordingly, I find that there was a violation of 57.15-4 as charged.

My findings as to the criteria are as follows: A computer printout was submitted, Petitioner's Exhibit 10, showing the past history. The history is for previously issued citations and none of these are violations of this particular standard. In my judgement, this is not a significant history, and I so find.

As far as the size of the company is concerned, there is a stipulation for production tons -- I believe that it was 359,420 for this particular mine. There is no evidence as to the number of employees. I am not exactly clear in my own mind just from those production figures as to where that would place this mine and operator as far as size. It seems to me, however, that it is a substantial amount of production, and for the purposes of this record, at least, I would find that it was a medium-size operator.

There is no evidence that the fines that will be levied here will affect the operator's ability to continue in business. I find as to the gravity of the violation, since this involves a hazard to the eyes, it could be a serious violation. However, taking into account the substantial testimony that there is a relatively low likelihood of that happening, I would find it relatively minor seriousness, and I'm confining that to the circumstances of this record. On the negligence, the inspector testified to the affect, according to my notes, that the operator could not have known or predicted that this miner would not have worn these glasses. The testimony was that the mine

operator did provide the glasses and also training in the use of glasses, so there is a slight negligence on that. On good faith, the violation was abated within the time set.

On this violation, the assessment of the assessment officer was $30, but taking into account the very low negligence and the evidence that shows the low relative seriousness, I am going to reduce that by one-half, so my fine would be $15 for this violation.

The above decision is AFFIRMED.

Evidence was then introduced on Citation No. 210013. At the conclusion of which, the following decision was rendered from the bench (Tr. 168-170):

JUDGE MICHELS: I will proceed to make the decision. This is citation 210013. The inspector issued a citation charging the violation of 57.9-2. The condition or practice which he alleged was as follows: "The 500 level Eimco 911 loader left front wheel hub was not in good repair -- One stud was broken." This mandatory standard, that is, 57.9-2, reads as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

On the fact of the violation, I find as follows: There is no dispute that a stud was missing from the wheel or from the hub in question; therefore, the machine was not in good repair. The defense has been raised, however, that the machine was not in use and was out of use for the purpose of being in repair. The testimony of Mr. Stevens is to that effect. Mr. Mitchell the inspector, testified that he did not know or had no reason to know whether the machine was out for repair. At this time, according to the testimony, the company was not using a tag to indicate on the machine being in repair status. I should add that this was shortly after the Act became effective, so far as this company was concerned. As I understand it, the company does now use such tags. In my view, the inspector, knowing what he knew, was justified in issuing the citation. However, the evidence received does indicate that the machine was out for repair. The inspector has admitted that had he known that it was not being used, but was in a repair status, he would not have issued this citation. So then I say he was justified on the basis of what he knew; nevertheless, because of the circumstances now brought out, and we know, in fact, that it was out for repair, my finding would be that there was no violation. Accordingly, Citation No. 210013, is hereby vacated, and the petition as to that citation is dismissed.

This bench decision vacating the citation is hereby AFFIRMED.

Following this decision, evidence was introduced on Citation No. 210019. The following bench decision was issued on the merits of that citation (Tr. 251-255):

> JUDGE MICHELS: This citation is 210019. The inspector cited a violation of 57.3-22 alleging a condition or practice as follows: "Adequate scaling and ground support was not provided at the water course zone in the surface decline. This was the principle travelway to the working faces." The standard in question, which is 57.3-22, contains a number of provisions, at least two of which require the testing and examination for conditions. The inspector testified to the effect that these two provisions were not complied with, but it would be my view that there was not substantial evidence to support that. Two other provisions, however, in the standard read as follows: "Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary." Now, the issue before me is not whether or not the inspector was correct in issuing an imminent danger order. At least, as I understand it, the only issue before me is whether or not the conditions which I just read existed, and then, if they did, of course, the penalty that should be assessed. I hope I'm clear on that, that I am not here passing on the exercise or the discretion of the inspector in issuing an imminent danger order. The fact is, he could issue such an order if he thought there were dangerous conditions even though no violation of any mandatory standard existed.
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> In this case, it so happened that the inspector did charge, in addition that there was, in his words, a lack of adequate scaling and ground support. Now, the testimony is, I suppose you might call it, somewhat contradictory on the question of whether there was or was not adequate support, which I am addressing myself to. The inspector, on the one hand, considered that there wasn't adequate support, but as I understand it, that did not have to do with the water course itself. That had to do with the area around the water course, and the testimony of other witnesses, I believe it was Mr. Stevens, was that there was twelve to fifteen pins in this area, and that the purpose of these pins was to support the whole area. The inspector, on the other hand, was unable to testify as to the number of pins. The inspector testified that a rock was scaled down, and there is some other testimony that is in the nature of hearsay and indirect to the effect that there was nothing scaled down.

I will accept the inspector's testimony that a rock was pulled down because he was the only person who testified who was there at the time. In spite of the fact that other witnesses did testify, and I believe sincerely that they had examined this area, and that it was, in their opinion, safe, the fact that a rock could be scaled out of the area suggests to me that it was, in fact, not safe and needed additional support. My decision has no relation to the support that was eventually given to the roof. I am not passing on the abatement, but I am just simply stating and deciding that because of the fact of the loose rock to which the inspector testified, I find that the ground conditions had not been scaled or supported as necessary. On this basis, I find there was a violation of 30 CFR 57.3-22.

There are three criteria which, in addition to those previously found, that I will take into account. So far as the gravity is concerned, it is obvious that rocks and loose material which may fall represented a grave hazard, and I find that this was a serious violation. On the question of negligence, as I previously indicated, the witnesses for the operator testified uniformly that they had examined this area and had come to the conclusion it was safe. I don't think this record shows how common it is to require a fence or to put a fence up for protection such as was done here. I have the impression, however, that it may be extraordinary. Furthermore, there is at least the possibility that the loose rock was simply a type of rock that could not be ordinarily detected under the conditions. So for that reason, I would find a small degree of negligence in this case. There is no issue on the good faith abatement because the mine or the area was closed due to the imminent danger. No finding is necessary on that. The assessment, in this case by the assessment officer, was at $325. In view of the fact that I have found a small degree of negligence, * * * I will assess a penalty of $150 for this violation. That completes the decision on citation 210019.

The above decision on Citation No. 210019 is hereby AFFIRMED.

Thereafter, the parties presented evidence in a consolidated fashion on Citation Nos. 210027 and 210028 which both allege violations of 30 CFR 57.3-20. At the conclusion of the parties evidence, the following bench decision, recorded at pages 356-362 of the transcript, was delivered:

JUDGE MICHELS: This is the decision on citation number 210027. The inspector charged a violation of 30 CFR

57.3-20, listing the condition or practice as, "The ground control method was not adequate to control deterioration between the roof bolts." The mandatory standard 57.3-20, [states]: "Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used." I note that this was an order of withdrawal and it was issued on the basis of the inspector's determination that this was, in his view, an imminent danger. It is my understanding that the issue of imminent danger is not before me, except insofar as it may be applicable to one of the criteria, namely, the question of gravity. The operator may ask for a review of an imminent danger order, but it is not my understanding that such a review has been requested here. Accordingly, my decision is confined solely to the question of whether or not the mandatory standard was violated and, of course, if so, the amount of the assessment.

In this citation, the evidence, as I understand it, is seriously in conflict on several vital points. The inspector has a basis for his determination and testified that there were roof bolts hanging down in the pertinent area which was fifteen-by-fifteen foot area, from two inches to one foot. Also, upon his request, a miner sounded out the area and, according to the inspector's testimony, it was drummy. Mr. Streeter, who was with the inspection party, testified that there were not any hanging bolts. Furthermore, he testified that he did not hear any drummy sounds. Mr. Stevens, who had seen the area before and also after the screen was put in, testified that there were no hanging pins or bolts. The decision that I'm going to make has nothing to do with the [truthfulness of the testimony] of any of the witnesses. So far as I can determine, they were telling the truth of the situation as they saw it. As is not unusual, different persons saw the same situation in entirely different ways, which brings me, then, to the precise decision.

I emphasize that I'm not passing on the question of whether the inspector was entitled to issue an imminent danger order. It is not before me. I don't believe, however, that on the state of the record that I have, that I could conclude that the government has proved its case by a preponderance of the evidence, which is the requirement under the Commission's rules. There's equally plausible evidence on both sides. I should stress that I understand

the inspector's determination to be based on his determinations that bolts were hanging down and that it was dry. It is my further understanding that he would not have issued that order had he not found those conditions. His findings, however, are contradicted by other evidence, and under the circumstances, it seems to me that there has been a failure of burden of proof. The witness that might have been helpful, who actually did the sounding, was not called, and there is no information in the record as to what his testimony might be. Accordingly, as to 210027, I find that because of the failure of proof by a preponderance of the evidence, there is no violation shown of 30 CFR 57.3-20. I hereby vacate the citation and the petition will be dismissed as to that citation.

The decision as to citation 210028 is as follows: The inspector, again, charged a violation of 30 CFR 57.3-20, stating the condition or practice to be, "Loose ground was not removed on the 1100 D-2 decline, the back and the ribs, from the 1100 to the face." I have already quoted the mandatory standard of law. The inspector testified as to this citation that he saw hairline cracks in an area approximately one inch wide by two inches in length on the back or roof, and he also observed loose ground on the ribs. He testified that several small pieces of approximately one pound were removed. In this instance, he testified that the roof was sounded and it indicated a drummy sound. The inspector did not observe roof bolts. He further testified that, on returning to the area, he believed that a piece of material had been removed from the roof or back, based on the fact that the area looked clean.

The witnesses for the Respondent were Mr. Streeter and Mr. Stevens. Mr. Streeten testified that no material was brought down off the roof or back. However, he did agree that there was loose material on the side which was observable. He testified that it was gapped open. Mr. Stevens testified that he did not see, upon observing the area after abatement, any part of the roof or back in which material had been scaled down. It is obvious therefore, that the testimony is in disagreement as to the fact of whether there was loose material or ground on the roof or back. It is not in disagreement that there was loose material on the rib. It is my finding that this loose material on the ribs does violate the standard 57.3-20. [Further], I do not think the evidence sufficient to support a finding that there was loose, unsupported material on the roof or back.

> Findings have already been made heretofore as to the criteria except for gravity, negligence, and abatement. So far as the gravity is concerned, since the finding concerns only the loose material on the ribs, it is not as serious as if there had been loose material on both roof and ribs. However, I do find that it is a serious violation. On negligence, the inspector testified that the operator should have known of the condition, and he believed that a foreman passed through the area on a daily basis because it was a travelway. Mr. Streeter also conceded that the foreman would have inspected the area at least in the prior night shift, although, he might have missed observing this particular condition. I find ordinary negligence. There being nothing to the contrary, I find that the condition was abated rapidly in good faith. For the violation found in citation 210028, the assessment office has asked for a penalty of $395. In light of the finding of lesser gravity, I will reduce that penalty to $200. The sum of $200 is, therefore, the assessment for this violation.

The above bench decision vacating Citation No. 210027 and assessing a penalty of $200 for Citation No. 210028 is hereby AFFIRMED.

Following this, Petitioner proposed that Citation No. 210032 be settled for $90 and Citation No. 210036 be settled for $105. These citations were originally assessed at $180 and $210, respectively, but Petitioner stressed that a lesser degree of negligence was involved than that which was originally considered by the Assessment Office (Tr. 363-364). These settlements were approved at the hearing and I hereby AFFIRM that decision.

Petitioner also proposed to vacate Citation No. 210039, which is the remaining citation in WILK 79-72-PM, and that the petition be dismissed as to that citation (Tr. 364-365). This action was approved at the hearing and that decision is AFFIRMED.

WILK 79-73-PM

Thereafter, the parties moved to settle in WILK 79-73-PM, Citation Nos. 210057 for $39 (originally assessed at $78), 210062 for $105 (originally assessed at $210), 210064 for $113 (originally assessed at $225), 210065, 210068, and 210069 for $150 each (originally individually assessed at $325 each). Petitioner represented that less negligence was involved than was originally considered (Tr. 365-372). Also, Petitioner moved to vacate Citation No. 210063 since the equipment involved was out of service for repair (Tr. 367-368). Decisions were rendered from the bench approving the settlements for the six citations and the vacation for the one. I hereby AFFIRM those decisions.

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The summary of the dispositions in these dockets is as follows:

WILK 79-74-PM

Citation No.	Action taken
224253	settled for $ 44
224255	settled for $ 66
224227	settled for $228
224254	vacated
224257	vacated

WILK 79-75-PM

Citation No.	Action taken
210406	settled for $72
210407	settled for $44

WILK 79-76-PM

Citation No.	Action taken
209615	settled for $52

WILK 79-41-PM

Citation No.	Action taken
210082	vacated
210083	vacated
210084	vacated

WILK 79-72-PM

Citation No.	Action taken
210003	settled for $ 66
210021	vacated
210007	assessment of $ 15
210013	vacated
210019	assessment of $150
210027	vacated
210028	assessment of $200
210032	settled for $ 90
210036	settled for $105
210039	vacated

Citation No.

210057	settled for $ 39
210062	settled for $105
210064	settled for $113
210065	settled for $150
210068	settled for $150
210069	settled for $150

ORDER

It is ORDERED that Respondent pay total penalties of $1,839 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge

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1 I have approved these and other settlements mentioned below because the parties have agreed to settle for the full amounts of the original assessments which were determined to be proper penalties. As a part of the settlements MSHA agreed to reduce the negligence points charged against Respondent in the assessment process. It is not exactly clear how the Respondent is benefited from this, but because the parties incorporated such penalty point changes into their agreements, the procedure was accepted as part of the settlements.