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SOL (MSHA) V. ORACLE RIDGE MINING PARTNERS
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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. WEST 79-248-M
A/O No. 02-00840-05003

v.

Oracle Ridge Project

ORACLE RIDGE MINING PARTNERS,
RESPONDENT

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, Department of Labor, for Petitioner MSHA
Stephen W. Pogson, Esq., Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, for Respondent

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed under section 110 of the Act by the Secretary of Labor, Petitioner, against Oracle Ridge Mining Partners, Respondent.

This case was duly noticed for hearing and heard as scheduled on October 22, 1979.

At the hearing, the parties agreed to the following stipulations:

> One, the operator is the owner and operator of the subject mine; two, the operator and the mine are subject to the Federal Mine Safety and Health Act of 1977; three, I have jurisdiction of this case; four, the inspector who issued the subject citation was a duly authorized representative of the Secretary; five, a true and correct copy of the subject citation was properly served upon the operator; six, a copy of the subject citation is authentic and may be admitted into evidence for purposes of establishing its issuance, but not for truthfulness or relevancy; seven, the operator is small in size; eight, the operator's previous history is in the range of low to moderate; nine, the imposition of any penalty will not affect the operator's ability to continue in business; ten, the alleged violation was abated in good faith (Tr. 4).

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 1-58). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 58). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 62-65).

Bench Decision

The bench decision is as follows:

> This case is a petition for the assessment of a civil penalty filed under Section 110 of the Act.
>
> The alleged violation is of 30 CFR 57.6-20 (c) which directs that magazines shall be constructed substantially of noncombustible material or covered with fire resistant material. In addition, 30 CFR 57.2 states that "substantial construction" means construction of such strength, material, and workmanship that the object will withstand all reasonable shock, wear, and usage to which it will be subjected.
>
> The subject citation recites that an explosive magazine and a detonator magazine were not constructed of substantial material, but were constructed of aluminum sheeting.
>
> The operator's first contention raised at the hearing is that the definition of "substantial construction" in section 57.2 does not apply to section 57.6-20(c). In the operator's opinion, it is sufficient under section 57.6-20(c) if the magazines have been substantially constructed of noncombustible material or covered with fire resistant material without regard to whether they can withstand reasonable shock, wear, or usage. From the Bench, during the course of the hearing, I rejected the operator's position. The definition in 57.2 appears at the outset of part 57 and plainly all the definitions are intended to apply to the entire part.
>
> The fact that 57.6-20(c) speaks in terms of "constructed substantially" instead of "substantially constructed" makes no difference. To adopt such an approach would make form master over substance. Even more importantly, under such an approach, a magazine would be acceptable if it were wholly flimsy so long as its inadequate materials were made of noncombustible materials or covered with fire resistant materials. I cannot read the regulations in a way that would make them meaningless and nonsensical. Accordingly, I conclude section 57.6-20(c) must be applied together

with the definition in section 57.2.

According to both the inspector and one of the operator's witnesses, the two magazines were constructed of aluminum sheeting 1/16th of an inch thick. The detonator magazine also was lined with 3/4 inch plywood. The magazines were located in cutouts in the side of the mountain. The inspector believed that a rock could fall on the top of the magazines, pierce the aluminum, and set off the detonators. The operator's witnesses believed such an occurrence was very unlikely because of the way the magazines were set back into the hill. The sincerity of the operator's witnesses was apparent and I am cognizant of it. However, after due consideration, I believe the inspector's testimony must be accepted. I further believe that the circumstances presented fall within the terms of "reasonable shock, wear, and usage" to which the magazines would be subjected. Accordingly, I find a violation existed.

> I find the violation was serious. If a rock dislodged, a detonator could be set off. I further find that the operator was negligent in allowing this situation to exist.
>
> In accordance with the stipulations of the parties, which I accepted at the outset of the hearing, I find that the operator was small in size, that its prior history was in the low to moderate range, that its ability to continue in business will not be affected by the imposition of any penalty and that the violation was abated in good faith.
>
> Based upon the foregoing, and particularly in light of the operator's small size, a penalty of $122.00 is assessed.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $122 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge