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SOL (MSHA) V. HOMESTAKE MINING
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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. DENV 79-155-PM A.C. No. 39-00055-05001
v.		Yates Shaft Mine
HOMESTAKE MINING COMPANY,	RESPONDENT	

DECISION

Appearances: Steven P. Kramer, Esq., Trial Attorney, Office of the Solicitor, Mine Safety and Health Administration, for Petitioner
Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., and Robert Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent

Before: Judge Fauver

This case was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard at Rapid City, South Dakota, on August 13, 1979. Both sides were respresented by counsel, who have submitted their proposed findings, conclusions and briefs following receipt of the transcript.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Homestake Mining Company, operated a gold mine known as the Yates Shaft, in Lawrence County, South Dakota, which produced gold ore for sales in or affecting interstate commerce.

Citation No. 328801

2. On March 20, 1978, Iver Iverson, a federal mine inspector, accompanied by the relief foreman, Horace Randel, inspected Respondent's crushing

plant at the Yates Shaft. The facility housed four conveyor belts in a large building about 10 stories high, 200 to 300 feet long, and 100 to 150 feet wide.

3. They traveled into the crusher room to the head of the No. 4 belt and walked down about 100 feet of steps that ran alongside the belt. At the bottom of these stairs was a cement floor and passages to the right and left. To the left was the No. 3 belt and to the right was a stairway down to the tail end of the No. 4 feeder belt. The tail pulley of the No. 4 belt, protected by a metal frame, was located in a small recessed area (about 8 x 10 feet) and was about 4 feet directly in front of the stairway, which was the only means of access to this area. Just past the tail pulley was a dead end.

4. The stairway consisted of three metal grating stairs and descended about 3 feet. Each step was about 10 inches wide and 40 inches long. On one side of the stairs was a handrail and on the other side a concrete wall. Overhead lighting was provided.

5. The steps were covered with an accumulation of fine and loose rock pieces about 1 inch to 1-3/4 inches large. The accumulation covered the steps at about a 45-degree angle from the the bottom to the top. Only the metal of the bottom portion of the middle step was at all visible through the accumulation of material.

6. The loose material came from the No. 3 conveyor where it dumped onto the No. 4 belt. The manner in which the material had settled and was packed on the stairs indicated that it had been there for some time. The condition created difficulty in walking down the stairs, and posed a hazard that someone using the steps might fall, including the hazard of falling forward into the metal frame around the tail pulley.

7. At 2:15 p.m., Inspector Iverson issued a citation to Respondent, reading in part:

> Stairway leading to the bottom of No. 4 feeder belt Yates crusher was covered with loose rock, loose material covered each step from front to back at approximately 45 degrees from horizontal. Three steps measured 10 inches wide, 40 inches long with each having a 8 inch drop, measured by a standard rule. Poor footing on step surface created a unsafe condition. Stairway was used by maintenance crew.

The citation was abated the following day.

8. There were three shifts per day, each with three men. One ran the crusher from the crusher platform, one removed chips from the belt, and the third did general cleanup work. In addition, from time to time crusher mechanics performed maintenance on the crusher and screens and greased the conveyors.

9. The cleanup man cleaned around the stairways and belts and through the travelways each shift. He would clean around the equipment in the cited area whenever he found it dirty. The crusher mechanics greased and checked the tail pulley about once a week.

10. Men used the plant's travelways routinely for maintaining the equipment, cleaning the travelways, and while supervising work activities. The travelways would also be used in the event of an injury to one of the crew.

11. The cleanup man would try to keep the cited stairway free from accumulations of loose material; however, a spillage could occur within a matter of a few minutes if a rock became lodged in the conveyor. When the conveyor was in operation, some spillage was expected and occurred frequently. The frequency of spillages was unpredictable and sometimes 2 or 3 hours could elapse without a spillage.

12. Rocks would occasionally become caught in the conveyor and cause a back up or spillage at the tail pulley. The excess load would ultimately trigger a mechanism to shut down the belt. When this occurred, the crusher's panel lights would be activated, indicating that debris was probably accumulating around the tail pulley.

13. This type of blockage and spillage would occur several times per shift depending on the amount of moisture in the rock and on how many rocks became caught in the hopper; it was very difficult to prevent completely.

14. The accumulation cited was left over from at least one prior shift.

15. A preshift examination on each shift consisted of the foreman traveling all the walkways and passageways and checking for safety conditions. No record of these examinations was made. A preshift examination of the cited area had not been made prior to the citation because the Government inspection was already in progress when the supervisor, Gene Pfarr, arrived.

16. Considering that the spillage was left over from at least one prior shift, management knew or reasonably should have known of the condition before it was found by the inspector.

Citation No. 328810

17. As part of its cut and fill mining sequence, Homestake constructs vertical shafts used as ore bins and adjacent manways between levels where mining is taking place. The purpose of the ore bins or "binlines" is to provide a vertical receptacle for loose ore to fall into as it is pulled to the top opening with a "slusher." The mouth of the shaft is 5' x 10' and of this the ore bin is 5' x 5' . The top of the ore bin is normally protected by two "grizzly bars" equally spaced across the opening; these prevent oversized pieces of ore from falling into

the ore bin and act as a guard to

protect the miners from falling in. Also inside the shaft, and adjacent to the ore bin, is a manway containing ladders between the stope and the lower level where the ore is loaded. The ladders are offset on a series of landings about 20 feet apart.

18. The manway is separated from the ore bin by a solid wall. At the top of the shaft the ore is kept from falling into the manway by a "yankee bin." This is a wooden platform that begins over part of the opening of the manway and slants down at about 45 degrees into the ore bin. Most of the remainder of the manway opening is protected by lagging. Normally, only about 18" of the manway entry is open when the manway is used as a travelway.

19. As ore is mined in the stope, the height of the stope increases. Periodically, it becomes necessary to extend the ore bin and manway by adding a vertical extension at the top. This process, called "standing chimney timber," is performed by a small construction crew. After the chimney is installed backfill is placed around it to create a new working surface.

20. On March 30, 1978, construction was underway to extend an ore bin and manway in the 34D stope above the 4250 level. The Government did not prove that any other activity was occurring in the stope at the time.

21. The grizzly bars had been removed from the opening over the ore bin and all lagging boards had been removed from the opening above the manway.

22. In this particular stope, the ore bin descended about 80 feet to the 4250 level, where the ore came out at the bottom of the bin and was loaded into mine cars. The manway in the shaft consisted of offset ladders between landings about 20 feet apart vertically. A cable had been strung across the passageway on the 4250 level which led to the bottom entry of the manway. The cable had a sign on it indicating that the manway was closed. At the top of the manway, which was the only other entry to the manway, the first section of ladder had been removed.

23. At the time of the inspection, three of Respondent's employees were changing a broken cap at the top of the shaft in preparation for standing the chimney. As the shaft was being extended the top of the old timber would first be cleaned off. Six 11-foot, 10" x 10" posts would be placed on top of the old frame and braced. Caps and ties would be placed on the top and then the posts would be laced up with lacing and cement. A platform on which the men could work would also be built.

24. After all the muck was cleared out of the stope, the equipment would be torn down and the slusher would be placed in an area so that when the chimney was finished they could hoist it to the top before backfilling. The inspector estimated that it would take about 2 hours to change the broken cap, and the slusher would not have been used again until a new chimney section had been built and backfilled. There were several steps

involved for backfilling and sometimes a stope would sit idle for quite a while. There

were about 100 chimneys at the Homestake mine. The chimney on the 34D stope was extended about once every 2 months and it required about three shifts to complete an extension.

25. At the time of the inspection, the stope had already been cleaned out and the slusher had been pulled up. There were two 11-foot, 10" x 10" posts leaning vertically against each other at about a 45-degree angle. The grizzly bars had been removed from the ore bin and the first 8-foot section of ladder in the manway had been removed near the top. Both halves of the shaft top were uncovered.

26. At 11:30 p.m., Inspector Iverson issued a citation (No. 328810) to the supervisor, which read in part:

> Miners were standing chimney timber over open raised top measuring 5 feet wide and 10 feet in length with an 18 inch by 5 foot manway opening on the north end, 30 feet to the 4250 level manway landing. The muck in the raise was at a 45 degree from horizontal which bottomed out 10 feet from the top of raise. Location of chimney & raise was in the 34D stope 4250 level 9 ledge.

The condition was promptly abated by placing a 3-inch thick wooden covering over the opening. The Government proved the above-quoted factual allegations.

27. It was the inspector's opinion that one of the 11-foot posts or broken material being handled by the workmen could have fallen down the unobstructed manway injuring someone on the 4250 level or inside the manway. He also believed that one of the men could have stumbled or fallen through the opening to the ore bin. There have been about three fatalities and three or four serious injuries (none while a chimney was under construction) when men, who were working around the opening or were passing over it, stepped backward or stumbled over a loose rock and fell into the opening.

28. At the time of the inspection, the grizzly bars were not in place, the lagging boards had been removed, and the men were not using safety belts. This condition created a hazard to the miners working on the chimney construction.

Citation No. 328401

29. On April 4, 1978, Stanley Sims, a federal mine inspector, inspected Homestake's Yates shaft. In the area of the No. 3 borehole machine at the 1700 level he cited Respondent for a violation of 30 CFR 57.12-18 as follows: "Principal Power Switches at the No. 3 borehole machine, 1700 level, 7 ledge, 46 crosscut, were not labeled to show what units they control."

30. At the time of this inspection, the drill was set up at the right-hand side of the drift. There were three switch boxes on the opposite side

of the drift about 15 feet from the drill. The boxes were not marked to show the units they controlled. The middle box was much larger than the other two. It had two parallel lines of the same color that went from the bottom of the box to the power pack of the borehole machine, but the path of these lines was not clear to the eye as going to the borehole machine. It also had a red plastic handle that controlled the power to the area. The box on the right, the welder's box, and the one on the left, a 110-volt transformer box that controlled the slusher lights, both fed off the large box. There were two other smaller boxes about the size of the welder's box in the drift about 6 feet from the power unit. At the location of the borehole machine, the drift was about 15 feet wide. In other respects, this was a standard size drift--about 90 feet high and 7 to 8 feet wide.

31. There was a separate control panel next to the borehole machine. The buttons on the panel were properly labeled and were not the subject of a citation. A red stop button on the panel could deenergize the machine. Although it would stop the machine, the circuit to the power pack could be re-energized by pushing the start button again. If the stop button were inoperable, the main power box would have to be used to shut off the machine. The borehole machine had no "dead man" control.

32. The inspector considered the switch boxes on the wall as the primary switches because they controlled the feed to the secondary controls. By sight, the inspector was unable to determine readily which units the boxes controlled. He assumed the larger box was the master because it usually was, and that the welding machine and slusher lights were controlled by the other two.

33. There was a danger that, if the driller were in an emergency and unable to reach the drilling machine control panel, others might not know how to shut off the power at the wall immediately because the wall boxes were not marked.

34. It was rare at this mine that a primary switch box would not be labeled to indicate which unit it controlled.

35. The borehole machine would be moved into an area that had been mined out and it would normally take about 3 weeks to drill a 150-foot raise. The power unit had a 200-horsepower electric motor that powered two hydraulic pumps. The helper usually greased the machine, placed the rods in the rocker, and performed normal maintenance duties. He was usually present during periods of drilling. About 6 months of training would be required to become competent in running the drill. One of the first things a helper would learn was how to turn off the borehole machine. He would be the first to turn it on at the start of a shift and the first to turn it off by throwing the switch on the large circuit box on the wall.

36. As of the day of the inspection, the Respondent had recently obtained another borehole machine and the crews were divided. The driller at the site had not yet chosen a permanent

helper and was using laborers instead. No laborer had shown up for work that day.

37. The citation was abated by placing a stencil label: "borehole" on the large circuit breaker box.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 328801

On March 20, 1978, Inspector Iverson charged Respondent with a violation of 30 CFR 57.11-1, which provides: "Mandatory. Safe means of access shall be provided and maintained to all working places." The inspector observed that the stairway leading to the tail pulley of the No. 4 feeder belt was covered with loose material that created an unsafe condition.

The basic issue as to this citation is whether section 57.11-1 applies to stairways such as the one involved here.

Respondent contends that the standard applies only to travelways since section 57.11 is introduced by the heading, "Travelways and Escapeways." By definition, Respondent argues, for an area to be considered a travelway it must be used on a regular basis (which implies more than just being accessible). "Travelway" is defined in 30 CFR 57.2 as a "passage, walk or way regularly used and designated for persons to go from one place to another." Respondent states that "the evidence was clear that the stairs were used on an occasional basis for the sole purpose of access to the tail pulley for infrequent maintenance work %y(3)5C."

Petitioner asserts that the stairway was a travelway within the meaning of section 57.2 because mechanics traveled the stairway to check and grease machinery in the course of their regular maintenance duties, supervisory personnel traveled this area, and cleanup people regularly traveled this area.

Respondent also asserts that even if the stairway leading to the tail pulley was a travelway, section 57.11-1 was not violated because the alcove was not a "working place". "Working place" is defined in section 57.2 as "any place in or about a mine where work is being performed." Relying on the present tense of the definition, Respondent contends the standard applies only while work is in progress and notes that there was no evidence that at the time of the citation work activity was taking place or would be taking place in the area in the immediate future.

Petitioner contends that an area in which regular maintenance, such as greasing and repair work, is performed is a "place in or about a mine where work is being performed."

Finally, Respondent asserts that section 57.11-1 does not apply to the stairs because a more specific section, 57.11-8, applies. Section 57.11-1 speaks generally of maintaining safe access to working places. Section 57.11-8, which is not a mandatory standard, specifically applies to stairways. That section reads: "Ladderways, stairways, walkways, and ramps

should be kept free of loose rock and extraneous materials." Because section 57.11-8 is not a mandatory standard, Respondent contends, it cannot be enforced.

Petitioner agrees that section 57.11-8 is not a mandatory standard and states that it has since been revoked. Federal Register, August 17, 1979, Vol. 44, No. 161, p. 48530. Petitioner contends that section 57.11-1 was the proper standard to cite.

I conclude that at the time of the inspection, 30 CFR 57.11-1 applied to the cited area.

The stairway was used about once a week by the crusher mechanics to maintain and grease the tail pulley. It was also inspected by supervisors and traveled by cleanup men whenever they cleaned a spill or an accumulation of loose materials. Those activities satisfy the requirement of regular use within the meaning of 30 CFR 57.2. The stairway, by its nature, was designed for people to gain access from one area to another and was, therefore, a "travelway" under that section.

I also find that the tail pulley area was a "working place" as defined in 30 CFR 57.2. During periods of maintenance and cleanup around the tail pulley, "work is being performed." In El Paso Rock Quarries, DENV 79-139-PM (December 17, 1979), Judge Moore said: "Inasmuch as employees are required to go into the tunnel to clean and repair, it is a workplace within the meaning of the regulation." I find Respondent's characterization of section 57.11-1 as requiring a safe means of access only "while work is in progress" incorrect.

Citation No. 328810

On March 30, 1978, Inspector Iverson charged Respondent with a violation of 30 CFR 57.11-12 for failing to guard openings above the manway and ore bin. Section 57.11-12 provides: "Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

The threshold issue with respect to this citation is whether the manway was a travelway at the time of the inspection. Respondent asserts that the manway was not a travelway because at the time of the citation the manway was (1) closed at the top where construction was underway and an 8-foot section of ladder had been removed and (2) closed at the bottom by a cable with a danger sign.

The inspector considered the manway to be a travelway within the meaning of 30 CFR 56.11-12. He said the manway remained open around the top while construction was underway and the last step would be to close it off when backfilling started. He believed that while men were still working

around the top the manway could be used as a travelway. At the time of the citation, it had not yet been closed off, and although he would not have expected anyone to descend into the manway (without first replacing the 8-foot section of ladder), he considered the manway subject to travel from above. There was no proof that such travel had ever occurred during this chimney extension or any other. The inspector did not inspect the bottom entry to the manway.

I conclude that the Government failed to prove that the manway was a "travelway" at the time of the citation. Use of the manway as a travelway was effectively stopped at the top by the fact of ongoing construction of the chimney, the removal of the 8-foot ladder section, and the existence and actual use of one or more alternative travelways, such as the one used by the inspector to get to the construction site. Respondent's evidence made a prima facie showing that, at the bottom of the manway, entry to the manway was effectively closed by placing a cable across it and hanging a danger sign. The inspector did not inspect or investigate conditions at the bottom entry; the Government's evidence did not rebut the prima facie showing made by Respondent. There was no solid evidence that miners had ever crossed a cable and danger sign to enter the bottom of the manway, during this chimney extension or any other.

Structurally, the 5' X 10' set of frame timber around which the construction crew was working consisted of two 5' X 5' openings. One of the openings was an ore bin; the other was what had been used as a manway and a Yankee bin. While the chimney was being extended, this half of the top portion became altered to a 5' X 5' opening that was not structurally or functionally intended to be a travelway. As mentioned, there was also a prima facie showing that, at the bottom of the manway, entry to the manway was effectively closed.

The openings at the top of the shaft were a sine qua non of a construction activity: standing chimney timber. Before the 11-foot timbers could be put in and braced, the coverings had to be removed and could not be replaced until this activity was completed.

The Government's evidence did show a dangerous construction activity (the absence of safety belts or lagging over a deep opening) but this did not prove a travelway violation as alleged in the citation. The safety standard on which the citation was based applied specifically to "openings above, below or near travelways." Because the construction sequence of standing chimney timber changed the structure and function of the manway to a construction site, there no longer existed a factual basis for the citation. Since the travelway standard did not apply to this activity, the relevant safety issue was whether the construction activity constituted an "imminent danger" under section 107(a). Since the Secretary did not allege an imminent danger, such issue is not before me.

Citation No. 328401

On April 4, 1978, Inspector Sims charged Respondent with a violation of 30 CFR 57.12-8, which provides: "Mandatory. Principal power switches shall be labelled to show which units they control, unless identification can be made readily by location." The citation reads: "Principal power switches at the No. 2 borehole machine, 1700 level, 7 ledge, 46 X cut were not labelled to show what units they control."

The controlling issues as to this citation are whether the three circuit boxes were principal power switches and, if so, whether the units they controlled could be readily identified by their location.

Respondent asserts that there were two principal power switches at the location in question: The red "stop" button on the control panel controlled the hydraulic power for the borehole machine and the large circuit breaker box controlled the electrical power for the area. It contends that, by their location, these power switches were readily identifiable by "those miners who could reasonably be expected to be present when an emergency occurred and who might be called upon to stop the equipment."

I find that each of the circuit breaker boxes was a principal power switch, that the units they controlled could not be readily identified by their location, and that this condition created a safety hazard.

There were three circuit breaker boxes with power switches on the wall of the drift opposite the borehole machine and about 15 feet from the machine. The large box controlled three units--the borehole machine and the other two boxes; the two boxes controlled, respectively, the slusher lights and the welding machine. Each machine also had its own separate power switch. The borehole machine control panel included a prominent red stop or panic button to stop the machine immediately.

None of the wall boxes was marked. In an emergency, the borehole machine operator could be in danger but unable to reach the borehole control panel. In such an event, his safety could depend on the swiftness with which another person (whether his helper or any other person) could turn off the power at the wall. The existence of three boxes without markings could confuse someone as to the right switch to pull to cut off the power to the borehole machine. Such delay could be significant in an emergency.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and the subject matter of the above proceeding.

2. Respondent violated 30 CFR 57.11-1 by allowing loose material to accumulate on the stairway as alleged in Citation No.

328801. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $100 for this violation.

3. Petitioner did not meet its burden of proving a violation as alleged in Citation No. 328810.

4. Respondent violated 30 CFR 57.11-18 by failing to label principal power switches as alleged in Citation No. 328401. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $100 for the above violation.

ORDER

WHEREFORE IT IS ORDERED that (1) the charge based on Citation No. 328810 is DISMISSED, and (2) Homestake Mining Company shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of $200, within 30 days from the date of this decision.

WILLIAM FAUVER
JUDGE