

CCASE:
SOL (MSHA) V. UTAH INTERNATIONAL
DDATE:
19800302
TTEXT:

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 79-237
MSHA CASE NO. 05-02838-03005

v.

UTAH INTERNATIONAL, INCORPORATED,
RESPONDENT

Mine: Trapper Strip

DECISION

APPEARANCES:

Phyllis K. Caldwell, Esq., Office of the Regional
Solicitor, United States Department of Labor,
1585 Federal Building, 1961 Stout Street,
Denver, Colorado 80294,
for the Petitioner

Ann Victoria Scott, Esq., Utah International
Incorporated, 555 California Street, San
Francisco, California 94104,
for the Respondent

BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

These proceedings arise pursuant to the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.). The Petitioner seeks to assess a penalty against the Respondent for its alleged violation of 30 CFR 71.108(FOOTNOTE 1) by having failed to collect dust samples for two of its employees by the required date. By way of amended answer the Respondent denies it violated the standard in that it did collect the dust sample required for one employee, and that no sample was required in the instance of the other employee.

DISPOSITION OF CASE ON STIPULATED FACTS AND BRIEFS

After the case was set for hearing the parties agreed to submit the case for decision based upon stipulated facts and briefs.

FINDINGS OF FACT

Based upon the stipulation filed by the parties I make the following findings of fact:

1. On January 30, 1979, a respirable dust sample was taken of the mine atmosphere to which Respondent's employee, Frank Self, was exposed on that day, and Mr. Self acknowledged that such sample was taken by signing the sample card.

2. Mr. Self's social security number is 523-62-9438, whereas the mine data card completed by Respondent for Mr. Self bears the social security number 523-69-9438.

3. The data card containing the results of Mr. Self's respirable dust sample taken on January 30, 1979, was mailed to MSHA.

4. MSHA received the data on or before February 8, 1979.

5. The dust sample was required to be taken by February 28, 1979.

6. Mr. Keever was terminated August 15, 1978, as an employee of the Respondent.

7. A change of status card for Mr. Keever was mailed to MSHA on or about December 20, 1979, along with approximately 25 other change of status cards.

8. MSHA did not receive Mr. Keever's change of status card, mailed on or about December 20, 1979.

9. Citation number 9944050 was issued to Respondent April 3, 1979.

10. A second change of status card for Mr. Keever was sent to MSHA on or about April 6, 1979.

~800

11. MSHA received the second change of status card of Mr. Keever on April 9, 1979.

12. MSHA records reflect that the change of status card received on April 9, 1979, was the first notification of change of status for Mr. Keever.

ISSUES

1. In regard to Mr. Self, was there a violation of 30 CFR 71.108 because of the error in listing the social security number on the data card submitted to MSHA?

2. In regard to Mr. Keever, was there a violation of 30 CFR 71.108 for failure to take the dust sample even though Mr Keever no longer worked for the Respondent?

The answer to both questions is no.

DISCUSSION

The findings of fact lead to the conclusion that the Petitioner has established that its records show that there were no dust samples taken as required of the two employees of the Respondent on or before February 28, 1979; and, the Respondent has established that in the instance of one employee, the dust sample was taken timely, and in the other, that no sample was taken because the employee was no longer employed by the Respondent at the time the sample would have been required.

The Respondent has met the burden required of it pursuant to 30 CFR 71.108. Since that regulation requires, during a succeeding 12 month period, the taking of the dust sample of the mine atmosphere to which the miner was exposed, the Respondent fulfilled that requirement on January 30, 1979, well within the due date of February 28, 1979.

~801

The Petitioner argues in its brief that inherent within 30 CFR 71.108 is a mine operator's responsibility to accurately record the data by which a miner is identified and sampled. However, 30 CFR 71.111(FOONOTE 2) and 30 CFR 71.112(FOOTNOTE 3) contain requirements concerning the recording of data by the operator and transmission and analysis of the dust samples by MSHA. At most there may have been a violation of one of these regulations for failure to list the correct social security number, however, no violation of these sections is alleged.

The Respondent also did not violate the provisions of 30 CFR 71.108 by its failure to take, by the due date of February 28 1979, a dust sample of a miner who no longer was employed by the Respondent. The Petitioner states in its brief that "an operator may properly be cited if MSHA does not receive either required dust samples or a change of status card showing that an employee has been terminated." This conclusion may be correct as far as MSHA records are concerned, however, the failure of the Respondent to collect the dust sample for someone no longer employed by the Respondent does not support a conclusion and finding that the Respondent violated 30 CFR 71.108 as alleged. To conclude otherwise would suggest an interpretation considerably broader than the requirement that is contained within that section.

~802

I conclude that the Petitioner has shown why, from its records, the Respondent was charged with the violation for failure to take the two dust samples; but the Respondent has shown, conclusively, I believe, that there was no violation of the regulation in that one required dust sample was, in fact, taken; and in the other instance, no dust sample was required to be taken.

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. Petitioner failed to prove a violation of 30 CFR 71.108 and Citation number 9944050 should be vacated.

ORDER

Based on the foregoing findings of fact and conclusions of law, citation 9944050 and any penalties therefor are vacated.

Jon D. Boltz
Administrative Law Judge

~FOOTNOTE 1

"... the operator shall, during each succeeding 12 month period, take one respirable dust sample of the mine atmosphere to which each such miner sampled is exposed."

~FOOTNOTE 2

"... (b) Each sample shall be accompanied by a completed 3 x 5 inch white data card ... and shall contain the following additional information: ... date of sample, the social security number and occupation of the miner whose environment was sampled, tons of coal produced ..."

~FOOTNOTE 3

"Upon receipt by the Secretary of respirable dust samples taken ... the following data is recorded: (e) The social security number of the individual miner whose atmosphere was sampled."