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SOL (MSHA) V. PACER CORP.
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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 Proceedings Docket No. DENV 79-94-PM A.O. No. 39-01141-05001
v.	White Elephant Mine
PACER CORPORATION, RESPONDENT	Docket No. DENV 79-95-PM A.O. No. 39-00509-05001 Virginia Mine

DECISION

Appearances: Steven P. Kramer, Esq., Trial Attorney,
Office of the Solicitor, Mine Safety and
Health Administration, U.S. Department
of Labor, Arlington, Virginia, for
Petitioner Mike Treloar, Safety Director,
Pacer Corporation, Custer, South Dakota,
for Respondent

Before: Judge William Fauver

These cases were 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 cases were heard at Rapid City, South Dakota, on August 16, 1979. The Secretary was represented by counsel. Respondent was represented by its safety director. Oral arguments were heard at the conclusion of the evidence.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent, Pacer Corporation, operated two pegmatite mines known as the White Elephant Mine and the Virginia Mine, in Custer County, South Dakota, which produced pegmatite ore for sales in or affecting interstate commerce.

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2. Mining operations at Respondent's mines involved drilling a series of small holes near pegmatite deposits in preparation for "shooting" or blasting the rock to recover the ore. The drilling crew consisted of two drillers, a loader operator and a truck driver. Normally, the crew would work several mines at a time.

3. The White Elephant Mine's northwest wall consisted of two highwalls, one about 75 feet high with a 20-foot overhang, and another, to the left, about 25 feet high. A service road provided access to the mine and was a safe distance from the overhang. When they were working at this mine, the crew would position the drilling machinery 60 to 70 feet from the overhang.

Order No. 328209

4. On April 20, 1978, Kenneth Westphal, a federal mine inspector, accompanied by an inspector-trainee, Howard Aspidall, inspected Respondent's White Elephant Mine to investigate a complaint that men were working under an overhang and near loose, unconsolidated ground.

5. Two employees had complained to Inspector Westphal that they had been drilling under what they considered a dangerous overhang and near loose hanging rock. They drilled until about 10 a.m. when the air compressor broke down. They completed their shift at Respondent's Virginia Mine but expected to resume drilling at the White Elephant Mine once the compressor was repaired. They moved the air compressor to the Virginia Mine in the meantime.

6. Inspectors Westphal and Aspidall drove to the White Elephant Mine following the miners' complaint. No one else was there when they arrived. They inspected the northwest wall of the mine (Exh. P-1C) and observed loose rock and boulders near the overhang and on top of the taller highwall. They also observed the other highwall covered with loose rock and one large crack near the overhang.

7. On the day of the inspection, the area was neither barricaded nor posted. They observed about four freshly drilled holes underneath the overhang near the loose rock that indicated that men had been working there recently. The drilling machine was about 10-15 feet from, and slightly to the left of, the overhang. The surface between the drilling machine and the area beneath the overhang was fairly level. The machine's controls were on the side closer to the overhang so that a man operating the machine would have to stand between the machine and the overhang.

8. The hazard associated with this condition was that the vibrations from the drilling activity could cause the loose rock, and possibly the boulders and other material on top of the highwall, to roll down and crush men standing between the drilling machine and the highwall.

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9. Following the inspection, they returned to Respondent's office, and phoned Respondent's safety director, Mike Treloar, to notify him of the condition. When Mr. Treloar arrived, they made a second trip to the mine. When they arrived, the air track machine was still there but the air compressor had been moved to the base of the Virginia Mine. At 11 a.m., Inspector Westphal issued an order of withdrawal to Respondent, reading in part: "Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unstable ground conditions shall be corrected promptly, or the area shall be barricaded and posted." The cited condition was abated on May 4, 1978, by closing down the mine and barricading off the area.

Citation No. 328208

10. On April 20, 1978, Inspector Westphal also inspected Respondent's Virginia Mine and observed that the audible backup alarm on Respondent's front-end loader was inoperable or missing. Respondent was renting the loader and did not have a spare alarm. A request for a replacement had been placed before the inspector arrived.

11. The absence of a backup alarm created the danger that men working in the area (who would be outside the operator's view) would not know when the loader was backing up and would be unable to get out of its path. Normally, the only men who would be working around the loader were the operator and a truck driver.

12. At 9 a.m., Inspector Westphal issued a citation to Respondent reading in part: "The front-end loader No. 175B was not provided with an audible back-up alarm system." The cited condition was abated on May 4, 1978, by installing an audible backup alarm.

Order No. 328452

13. On July 5, 1978, Guy Carsten, a federal mine inspector, inspected Respondent's Virginia Mine to investigate an accident. He traveled to the area of the highwall on the northeast-to-southeast wall. It was about 400 feet wide with several benches or layers extending across its face. Fifty to seventy-five feet from the top of the highwall was a 10- to 12 foot wide bench. From there down to the service road was another 50 to 70 feet. The service road was 15 to 18 feet wide at its widest part and was about 9 feet wide where it passed by an overhang that extended over the inside track of the road. From the service road down to the next bench was about 30 feet.

14. The inspector observed loose hanging rock on the wall and boulders all along the 10- to 12-foot wide bench. There were no danger or warning signs in the area. He observed no one traveling the road, but there was evidence that it had been traveled recently. Both the track drill and the air compressor were also there.

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15. The inspector's notes read in part:

Southeast corner of highwall was broken up and has an overhang, road runs under or alongside the overhang. This was on the crusher feed level. Vehicles travel once a day to fuel the air compressor for drill. Drill crew have a truck to drive to drill, which also uses this road.

16. The hazard associated with this condition was that the vibrations from the drilling activity could cause the loose rock to come down off the highwall and hit people traveling the road. There was also a possibility that the overhang could fall.

17. Inspector Carsten issued an order of withdrawal to Respondent, reading in part:

Loose rocks were observed on the highwall, northeast to southeast wall. An overhang was observed on the southeast corner of the highwall. Service road runs along this highwall. Fuel truck and drill crew truck traveled this road at least once a day when drilling operations are performed. A notice was issued under the old law and abated by barricades and signs. Barricades and signs are missing.

On July 6, 1978, his order was modified to change: "A notice was issued under the old law" to read: "An order was issued under the old law." On July 10, 1978, the order was further modified to change the section violation from section 56.3-5 to section 55.3-5. A final modification was made on July 12, 1978, to allow travel on the service road under the direct supervision of the mine superintendent or the safety director. This would enable Respondent to dress down the face and remove the track drill and air compressor from the area found to be dangerous.

18. On July 19, 1973, a notice of violation had been issued to Respondent under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., for a violation of section 55.3-5 (presence of loose rock on south bank of quarry). On April 4, 1974, an order of withdrawal was issued for failure to comply with the notice of violation requiring removal of the loose rock. On November 17, 1976, the order issued on April 4 was abated by posting the southeast bank of the quarry with a "Keep Out" sign and barricading the bank with rocks.

19. On the day of the inspection, July 5, 1978, the inspector observed that the barricade had been removed and that the loose rock was still present. He determined that loose rock was still present without climbing the bank to observe the top bench.

20. Management should have been aware of this condition because of the earlier noncompliance order and because the foreman and safety director traveled the area frequently.

DISCUSSION

Order No. 328209

On April 20, 1979, Inspector Westphal charged Respondent with a violation of 30 C.F.R. 55.3-5, which provides: "Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted." The basic issue as to this order of withdrawal is whether men were working near or under a dangerous bank.

The Secretary argues that the testimony of the two inspectors established that the Respondent was still drilling and in the process of mining operations at the White Elephant Mine at the time of the inspection. The Secretary asserts that the small pocket of ore to the left of the overhang that Respondent was going to mine was included in the order as being near or under a dangerous area. The Secretary contends that its case was not confined solely to the area under the overhang, which also posed a danger, because there was loose material in the entire area.

Respondent contends that several weeks before the inspection, management had decided to cease mining operations at the White Elephant Mine after a test blast showed the amount of recoverable ore to be minimal. The last mining activity occurred about 2 weeks before the inspection and the only activity in the cited area on the day of the inspection would have been the movement of trucks. The safety director stated that all mining equipment had been removed from the area.

Respondent states that four or five holes had been drilled in an area to the left of the overhang in preparation for blasting a small pocket of ore. This area is depicted in Exhibit P-1A and in the lefthand portion of Exhibit P-1C. Respondent states that the blast would have formed a natural barrier to prevent anyone from traveling near the overhang. Respondent denies that holes had been drilled recently under the overhang and also states that it has never received complaints from employees about dangerous banks.

I find that the Secretary failed to show by a preponderance of the evidence that Respondent had recently drilled holes in, and would soon be blasting, the rock immediately adjacent to the overhang. The Secretary states that besides the four to five holes described by Respondent, there were about five holes underneath the highwall that appeared to be freshly drilled. There was evidence, however, that blasting had already occurred in the cited area, leaving open the possibility that the overhang was created by the earlier blast. The inspector-trainee stated he observed burn marks on the wall. With the track drill located to the left of the overhang, between the two highwalls, the inspector-trainee stated that he was unable to determine if work was being performed on the rock underneath the overhang or considerably to the left.

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I do find that Respondent's employees had recently drilled holes farther to the left and would be returning to blast that area after the compressor was repaired. Because the whole area, including the area farther to the left, was included in the order and was near loose overhanging rocks, I conclude that Respondent violated section 55.3-5 as alleged in the order. Although the Secretary was unable to prove men were working under the overhang, I find that men working in the other area could have wandered near the overhang without a barricade in place. I find no merit in Respondent's argument that the subsequent blast would have created a natural barrier.

Citation No. 328208

On April 20, 1978, Inspector Westphal charged Respondent with a violation of 30 C.F.R. 55.9-87, which provides:

Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The basic issue as to this citation is whether Respondent's front-end loader had an audible backup alarm in operable condition.

I find that the Secretary proved by a preponderance of the evidence that Respondent's front-end loader did not have an operable audible backup alarm.

Order No. 328452

On July 5, 1978, Inspector Carsten charged Respondent with a violation of 30 C.F.R. 55.3-5, which provides: "Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted." The basic issue as to this order of withdrawal is whether men were working near or under dangerous banks.

The Secretary contends that the cited area had already been the subject of an order of withdrawal and had in fact been barricaded and roped off by Respondent. Subsequently, however, Respondent had removed the barrier and resumed travel through the cited area. The Secretary argues that an inference can be drawn that Respondent never actually abated the condition that was the subject of the prior order.

The Respondent argues that the prior order of withdrawal covered a different area from the one cited in the subject order and that at the time of the prior order it was performing mining operations. Respondent contends that on the day of the inspection

it was not mining the highwall that was the subject of the prior order of withdrawal.

The Respondent also argues that its superintendent, Dwayne Jones, had been in the pegmatite mining business for over 20 years and based on this experience, he felt there was no hazard involved in using the service road since mining operations in the cited area had ceased. Respondent contends that any loose rock that might have created a danger to people traveling below had been scaled.

Respondent also argues that the overhang in the cited area had been present for many years and observed on several occasions by inspectors without a violation being cited.

I find that the area of the subject order covering the northeast-to-southeast wall of the Virginia mine was the same area cited in the order of withdrawal issued on July 19, 1973, and in the order of abatement issued on April 4, 1974. I find that on the day of the subject inspection, the barricades were not in place and the service road was subject to travel near or under banks with loose rock and a dangerous overhang.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceedings.

2. Respondent violated 30 C.F.R. 55.3-5 by allowing men to work near or under dangerous banks as alleged in Order No. 328209. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of \$275 for this violation.

3. Respondent violated 30 C.F.R. 55.9-87 by failing to provide a front-end loader with an audible backup alarm as alleged in Citation No. 328208. Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, Respondent is assessed a penalty of \$106 for this violation.

4. Respondent violated 30 C.F.R. 55.3-5 by allowing men to work near or under dangerous banks as alleged in Order No. 328452. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of \$325 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Pacer Corporation shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of \$706, within 30 days from the date of this decision.

WILLIAM FAUVER
JUDGE