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SOL (MSHA) V. FMC 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

v.

FMC CORPORATION,

RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-167-M

A/O NO. 48-00152-05006

Mine: FMC Mine

DECISION

APPEARANCES: James H. Barkley, Esq., Office of the Regional
Solicitor, United States Department of Labor,
1585 Federal Building, 1961 Stout Street, Denver,
Colorado 80294 for the Petitioner Clayton J.
Parr, Esq., Martineau, Rooker, Larsen and Kimball,
1800 Beneficial Life Tower, 36 South State Street,
Salt Lake City, Utah 84111 for the Respondent

Before Judge Jon D. Boltz

Statement of the Case:

Petitioner seeks an order assessing civil penalties against
the Respondent for Respondent's alleged violations of 30 CFR
were proposed pursuant to proceedings provided for by provisions of
the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801
et seq.

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The Respondent is charged in Citation 336428 with having violated 30 CFR 57.9-32 in that its roof bolter was parked with the boom elevated. In addition, Respondent is charged in Citation No. 336443 with failure to maintain its loading machine in a permissible condition in violation of 30 CFR 57.21-78.

The Respondent contends that standard 57.9-32 is not applicable to the roof bolter because that equipment is used to drill holes and set roof bolts and not used for "loading, hauling, and dumping" consistent with the heading of section 57.9. Also, Respondent contends that it did not violate section 57.21-78 because the loading machine in question had been tagged and was voluntarily taken out of service for repairs prior to the inspection and issuance of the citation by Petitioner's mine inspector.

Pursuant to notice, a hearing was held on the merits in Salt Lake City, Utah on February 20, 1980. The transcript of the proceedings was filed with my office on March 7, 1980. Respondent filed its post-hearing brief on April 4, 1980. Petitioner waived the filing of a post-hearing brief.

Issues:

1. In regard to Citation No. 336428, the issue is whether the roof bolter is the type of equipment contemplated in 30 CFR 57.9-32, and, if so, whether its "movable parts" were properly secured or lowered to the ground when not in use.

2. In regard to Citation No. 336443, the issue is whether the Respondent's loading machine, which was tagged out of service and thus not "permissible equipment" at the time of the inspection, had been used by the Respondent in such condition prior to the inspection.

Findings of Fact:

1. During the course of a regular inspection of Respondent's coal mine on December 21, 1978, a MSHA inspector observed an unattended roof bolting machine in a working area of the mine. (Tr. 14).

2. The roof bolter is an electrically powered machine used for installing roof bolts in a mine and roof bolts are used as a means of support for the roof. (Tr. 12).

3. A boom approximately 8 feet long is mounted on the roof bolter so that the operator can move the "drill around and drill holes at various angles in the mine." (Tr. 13).

4. Attached to the boom is the "rack" (Tr. 20) which is about 6 feet long and contains the drilling and bolting machinery.

5. The rack may be rotated from the boom to a vertical position in order in install roof bolts.

6. The MSHA inspector observed the roof bolter with the boom raised approximately 4 feet off the floor of the mine (Tr. 13) with the rack in a horizontal position. (Tr. 20).

7. In order to abate the citation issued, the rack was rotated to a vertical position and placed on the ground. (Tr. 74).

8. If the boom suddenly fell from its raised position 4 feet above the ground, it would drop only 1 foot (Tr. 21, 22) due to a stop built into the roof bolter.

Discussion:

The provisions of 30 CFR 57.9-32, cited as having been violated, are not applicable to the roof bolting machine in this case.

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The above regulation is included under the general heading of 30 CFR 57.9, entitled "Loading, Hauling, Dumping." These general words suggest the intent of including situations in which earth, minerals, or other matter is moved, loaded, hauled, or dumped.

The words "dippers, buckets, and scraper blades" contained within section 57.9-32 suggest equipment used to move earth. (Tr. 25). However, the roof bolter is equipment used simply to drill holes and set roof bolts and does not have the function of moving earth materials. Additionally, by the design of the machine utilized by the Respondent, the boom cannot be lowered any nearer than 3 feet above the ground.

"In the construction of laws...and other instruments, the 'ejusdem generis rule' is, that where general words follow an enumeration of...things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to... things of the same general kind or class as those specifically mentioned". Black, Interp. of Laws, 141; Goldsmith v U.S., C.C.A.N.Y., 42 F. 2d 133, 137 (2d Cir. 1930).

Thus, the general words "and similar movable parts" contained in section 57.9-32 should be construed as applying only to the specifically mentioned words "dippers, buckets, scraper blades", all of which are used for the purpose of "loading, hauling, and dumping." This would not include the function of the roof bolting machine in question.

CITATION 336443

Findings of Fact:

9. During the course of inspecting Respondent's mine on January 17, 1979, a MSHA inspector observed a loading machine not in use or operating, in a crosscut, with a tag or sign on the equipment stating "danger--do not operate" or words to that effect. (Tr. 90).

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10. A "loading machine" is used at the working face of the mine to load blasted material into shuttle cars which transfer the ore back to a dumping point. (Tr. 87).

11. The Respondent's mine was a gassy mine (Tr. 93, 94) in that there was methane gas present.

12. At the time the loading machine was examined by the MSHA inspector it could not be safely operated within a methane atmosphere due to loose junction or control boxes which could cause live electrical wires to be exposed to the methane atmosphere. (Tr. 95, 96, 97, 98, 99).

13. At the time of the inspection, the junction or control boxes on the loader were warm (Tr. 103), and the inspector concluded that the loader had recently been used in the condition in which it was found.

DISCUSSION

Petitioner has the burden of proving by a preponderance of the evidence that the loader was not maintained in a permissible condition and was used beyond the last open crosscut or in places where dangerous quantities of flammable gases were present or might enter the air current. The preponderance of evidence is defined as the greater weight of evidence or evidence which is more credible and convincing to the mind. *Button v Metcalf*, 80 Wis. 193, 49 N.W. 809 (1891). It is also defined as that evidence which best accords with reason and probability. *U.S. v. McCaskill*, 200 F. 332 (Cir. 1912). Petitioner's evidence falls short of a preponderance.

The MSHA inspector testified that he had no intention of writing the citation because the loader had been "tagged out", but when he discovered that the electrical boxes on the loader were still warm, this indicated to him that the machine "had been operating recently." (Tr. 91). Thus, he

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concluded that the machine had been operated while not in a permissible condition in violation of 30 CFR 57.21-78. The Petitioner also argues: "[w]e essentially think they (Respondent's employees) saw him (the MSHA inspector) coming and tagged it (the loader) out, but it had been operating up to that point in time." (Tr. 157). Since the MSHA inspector had not witnessed the loader in operation, in violation of the cited regulation, it was necessary to prove the case by circumstantial evidence. Petitioner's evidence of violation of the regulation is speculative and insufficient. Respondent freely admits that it did operate the machine during the previous shift, before the citation was issued (Tr. 159), and that the machine was not in a permissible condition when the inspector saw it. (Tr. 160).

However, because the equipment was tagged out of service by the Respondent before the inspection took place, I conclude that the Respondent recognized the deficiencies in the machine and took it out of service, requiring repairs before it could again be utilized. Had the equipment not been posted with the "danger--do not operate" tag and removed from service I might conclude otherwise, but in this case I do not believe that the evidence presented by the Petitioner outweighs that presented by the Respondent. The evidence presented by the Respondent shows that the loader was operated during the shift that ended at 7:00 on the date of the inspection. There is no credible evidence upon which to base a conclusion that the loader was used after that time, up until the inspection was made at about 9:55 a.m. The Respondent alleges that the equipment was "tagged out" during the last shift, and the Petitioner alleges that the loader continued to be used in its impermissible condition up until the time that the inspection was made. Although the MSHA inspector testified that the electrical junction boxes on the loader were still warm when inspected,

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there is no evidence to show how long it takes after the loader is used before those electrical junction boxes are cold.

FINDINGS OF FACT

I find the facts to be as stated in paragraphs 1 through 13 of this decision.

CONCLUSIONS OF LAW

1. The provisions of 30 CFR 57.9-32, cited as having been violated, are not applicable to the roof bolting machine in this case and Citation No. 336428 should be vacated.

2. The Petitioner failed to prove by a preponderance of the evidence that the Respondent operated it s loader while it was not in a permissible condition, in violation of 30 CFR 57.21-78, and thus Citation No. 336443 should be vacated.

ORDER

Based on the foregoing findings of fact and conclusions of law, Citations No. 336428 and 336443 and any penalties proposed therefore are vacated.

Jon D. Boltz
Administrative Law Judge

~FOOTNOTE 1

"Mandatory. Dippers, buckets, scraper blades, and similar movable parts shall be secured or lowered to the ground when not in use."

~FOOTNOTE 2

"Mandatory. Only permissible equipment maintained in permissible condition shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gases are present or may enter the air current."