

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
520 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041**

2 JUL 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-424-PM
Petitioner : A.C. No. 05-00604-05001
v. :
 : Docket No. DENV 79-425-PM
DAY MINES, INC., : A.C. No. 05-00604-05002
Respondent :
 : Sherman Tunnel Mine

DECISION

Appearances: James Abrams, Esq., Office of the Solicitor, U.S. Department
of Labor, for Petitioner;
Piatt Hull, Esq., Wallace, Idaho, for Respondent.

Before: Judge Charles C. Moore, Jr.

The above cases were heard before me in Leadville, Colorado, on Tuesday, March 11, 1980. They involve five citations issued to Respondent during two inspections, one conducted October 3, 1978, and another conducted October 11 and 12, 1978. Two citations were settled at the hearing. Citation No. 331792 from Docket No. DENV 79-424-PM was settled for \$84. It alleged a violation of 30 C.F.R. § 57.6-177 concerning proper procedures for the disposal of misfires and carried an assessed penalty of \$12. Citation No. 331462 from Docket No. DENV 79-425-PM was settled for the assessed amount of \$60. That citation was for loose ground (roof) observed by the inspector in violation of 30 C.F.R. § 57.3-22. The settlements were approved.

The parties submitted several stipulations at the hearing addressing the six criteria of section 110(i) for assessing penalties under the Act. I find that the operator's history of past violations is moderate, that any penalties assessed would not affect Respondent's ability to continue in business, and that Respondent abated the citations in good faith. The issues of negligence and gravity will be considered separately for each citation. Respondent employs 89 employees at its Sherman Tunnel operation out of which 80 are miners. It operates two mines and produces approximately 133,136 production tons per year at the Sherman Tunnel Mine making Respondent a medium-sized operator.

The first citation, No. 331787, alleged that a violation of section 57.3-22 was found in the Hilltop Lateral. Section 57.3-22 requires all working places, haulageways and travelways to be periodically inspected for loose roof and scaled as necessary. The Hilltop Lateral is a **dead-end** entry off the main tunnel extending about 300 feet. A sump pump is located approximately 30 feet in from the intersection with the main tunnel.

The inspector observed loose ground starting "about the area of the pump" and continuing 300 feet into the lateral (**Tr. 43-44**). The operator's witness saw no loose ground in the Hilltop Lateral even though it was his habit to look for it when inspecting the sump pump (**Tr. 262**). He never went past the sump pump, however, as he had been instructed to "stay out of there" (id.). This same area was later barred down and barricades were erected **to** abate the citation (**Tr. 265-266**).

The evidence shows there was loose roof in the Hilltop Lateral at least in the area between the sump pump and a point 300 feet into the tunnel. The inspector could not clearly remember seeing loose ground in the area between the pump and the lateral's intersection with the main tunnel (**Tr. 43-44**). This area between the sump pump and the entrance to the **lateral** was clearly a work area, as miners regularly inspected the pump (**Tr. 261**). But the Secretary failed to sustain its burden of proof regarding the presence of loose ground in this area. Therefore, unless the area between the sump pump and the dead end of the lateral is either a work area, haulageway or **travel-way** there was no violation of section 57.3-22.

The area past the sump pump contained tracks and was regularly used for storing cars (**Tr. 19-A, 34**). The inspector testified that an operator's witness told him during the inspection that the area was not barricaded because it was needed for switching cars and storing equipment, which necessitated frequent trips into the area by miners (**Tr. 20**). The operator did not rebut these allegations. Based on this evidence, I find that the area beyond the sump pump was a work area and that loose roof was present. It was testified that this condition develops over a period of 6 months to 2 years, which shows negligence on the part of the operator (**Tr. 23**). This condition was grave as serious injury often results from roof falls. A penalty of \$80 is assessed.

Citation No. 331791 is an alleged violation of 30 C.F.R. § 57.6-177 pertaining to misfire disposal procedures. It is alleged that a misfire occurred at the **P25-410** stope and that the operator failed to danger off the area and dispose of the misfire by either washing out the borehole, attempting to refire the hole **or** by inserting new primers.

The inspector testified that he saw the blasting agent ANFO ***/** and blasting wires in the fired hole. The presence of both indicates that all of the explosive did not detonate and this constitutes a misfire

***/** Ammonium nitrate and fuel oil.

(Tr. 48). He testified in addition that the ANFO was white and the rock face was gray so that the ANFO was visible (Tr. 74). The operator's witness testified on several occasions that he did not see any blasting agent (Tr. 198, 199, 200). This witness washed out the hole with water after the citation was issued and again testified that he saw no ANFO or prell (Tr. 202). This witness, who had also drilled and blasted this hole, testified that due to the vuggy nature of the ground, it was possible that rock could have caved into the drilled hole after it had been loaded, separating the prell so that the portion in front of the fallen rock detonated while the prell behind the rock fall did not. But he concluded that, in his opinion, any remaining ANFO would have detonated a short time thereafter as a result of the surrounding holes detonating (Tr. 197).

Since the inspector testified in detail about the hole, i.e., that the leg wires had been shunted or twisted together and stuffed back into the hole, which was covered with a rock (Tr. 48), and painted with a red circle (Tr. 52), I am inclined to believe that he also saw ANFO in the blasting hole. A misfire is a dangerous condition and can cause fatal injuries. I find that the operator should have followed the procedures in the standard and that in failing to do so its negligence was high and I assess the proposed penalty of \$50.

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Citation No. 333814 alleged a violation of section 57.6-1 which requires detonators to be stored in magazines. The essence of this violation is that two miners who were blasting the face erred when they left a box of detonators in the roadway leading to the face until preparation of the blasting holes had been completed.

Two contract blasters were preparing the face for blasting when the citation was issued. Preparation for blasting consists of drilling a certain number of holes in a designated pattern and loading those holes with detonators and explosives. In this case, the miner who had finished drilling went to get the detonators while the other miner, who testified at the hearing completed drilling his part of the face, which he estimated took 15 minutes (Tr. 130). The inspector testified on cross-examination that the detonators were in the roadway for a period of 25 minutes (Tr. 272).

There is a factual dispute about the location of the box of detonators. Three operator's witnesses testified that the box was next to the rib and not in the roadway. The inspector testified that the box of detonators was in the track in the roadway where it could be run over. The inspector was not asked when he was called back to the stand to rebut the testimony of the operator's witnesses. I find that the box of detonators was next to the rib and not in the roadway.

There was also some dispute about whether the container for the detonators was a magazine. "Magazine" is not defined in the regulations so both parties referred to other explosives standards in an attempt to define the

word "magazine." The inspector stated that while he was not sure the **detona-**tor container conformed to the standard, he did not remember seeing any **exposed** metal, which means that the box was properly constructed of **noncon-**ductive materials (Tr. 104).

The overall procedure described by the blasters was a reasonable one. I find that the length of time the box of detonators was lying next to the rib, whether it was 15 minutes or 25 minutes, did not constitute storage of the detonators in violation of the standard. The Government has not met its burden of proving a violation in this case and Citation No. 333814 is accordingly vacated.

ORDER

It is hereby ORDERED that the operator pay to MSHA within 30 days of the date of this decision the sum of \$274.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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