

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLF AX AVENUE
DENVER, COLORADO 80204

SEP 3 1980

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA),

Petitioner,

v.

UNITED NUCLEAR-HOMESTAKE PARTNERS,

Respondent.

CIVIL PENALTY PROCEEDING

DOCKET NO. CENT 79-377-M
ASSESSMENT NO. 29-00591-05004

DOCKET NO. CENT 79-378-M
ASSESSMENT NO. 29-00591-05005

MINE; SECTION 25

DECISION

APPEARANCES:

Eve Chesbro, Esq., Office of the Solicitor, United States
Department of Labor, Dallas, Texas
for the Petitioner,

Wayne E. Bingham, Esq., of Albuquerque, New Mexico
for the Respondent.

Before: Judge Virgil E. Vail

I. Procedural Background

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The proposals for penalties allege three violations of mandatory safety standards contained in 30 CFR Part 56.

Pursuant to notice, a hearing on the merits was held in Albuquerque, New Mexico, on February 26, 1980. Charles H. Sisk, federal mine inspector, testified on behalf of the petitioner. Ronald W. Guill and Roy Souther testified for the respondent.

II. Stipulations

During the course of the hearing, counsel for both parties entered into the following stipulations:

(a) Respondent had 26 previously assessed violations during the 14 month period preceding the issuance of the citations involved herein.

(b) Respondent acted in good faith in abating the citations within the specified time allowed.

(c) The proposed penalties would not adversely affect the ability of the company to continue in business.

(d) Respondent employed approximately 66 people at Section 25 during 1978.

III. Exhibits.

Petitioner introduced the following exhibits into evidence:

(a) P-1 is a diagram drawn by Charles Sisk.

(b) Petitioner requested that the record be left open after the hearing in order to allow counsel to submit a computer printout sheet from the Office of Assessments. At the time of the hearing, respondent's counsel objected to the admittance of the printout into evidence. The undersigned Judge instructed respondent's counsel to restate his objection after he received a copy of the printout. Since counsel has failed to do so, the printout will be admitted into evidence for the sole purpose of examining respondent's prior history of assessments.

Respondent introduced the following exhibits into evidence:

Respondent's exhibits were incorrectly labelled as 'defendant.' They will be referred to herein as respondent's exhibits.

(a) R-A is a photograph.

(b) R-B is a photograph.

(c) R-C through K-I are weekly shaft inspection reports.

(d) R-J through R-L are photographs.

(e) R-M is a diagram of the gate prepared by Roy Souther.

(f) R-N is a diagram of the bonnet and shaft measurements prepared by Roy Souther.

(g) R-O through R-V are photographs.

-IV. Findings of Fact and Conclusions.

Docket CENT 79-378-M.

Citation No. 151653

Citation No. 151653 alleges a violation of 30 CFR 57.15-5¹ and states that the **action was taken under section 107(a)** of the **Act**. At the hearing, counsel for the petitioner moved to amend the citation to allege section **104(a)** as an alternative basis for the citation.

Respondent objected to the motion and requested that counsel for both parties be permitted to submit briefs. Counsel for the petitioner submitted a position paper and respondent's counsel has, by letter dated March 13, 1980, concurred with the Secretary's motion to amend the citation to allege, in the alternative, that the action was taken under section **104(a)** of the Act.

The citation was issued on June 22, 1979, by Charles Sisk, federal mine inspector. Mr. Sisk **testified that** during the course of his inspection he **requested that Mr. Johnson**, the company supervisor, who was accompanying him during the **inpection** prepare the conveyance for a shaft inspection.

In order to inspect the shaft a bonnet, which is an overhead protective device, is placed over the top of the conveyance so one can stand on top of the conveyance in the open shaft (Tr. 24).

According to Mr. Sisk's testimony, two men positioned the **bonnet** on the conveyance; however, since the conveyance had not **been** spotted precisely -at collar level, it was necessary for one of the miners to step up

1/ 57.15-5 Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

approximately one foot onto the conveyance in order to tighten an attachment to the hoisting rope. The miner who climbed up onto the conveyance was wearing a safety belt, but failed to attach it to the safety line which was provided.

Mr. Sisk testified that he issued a withdrawal order based on his belief that the miner could have fallen or tripped, and in doing so, could have fallen into the adjoining shaft. Since the conveyance had not been spotted perfectly, Mr. Sisk believed that it would also have been possible for the miner to have fallen into a hole on the other side of the conveyance or a gap on the back side (Tr. 27).

Mr. Guill, mine superintendent at Section 25, testified that on the west side of the conveyance there is an open shaft. The two shafts are separated by a guide and three dividers. As illustrated by Respondent's Exhibits V and P, the first divider is approximately one foot or eighteen inches from the ground and the second is three and a half feet from the ground. The third divider is seven feet above collar level. Mr. Guill stated that he believed there existed only a remote possibility that someone could fall into the open shaft (Tr. 113).

Roy Souther, safety director at Section 25, testified that he concurred with Mr. Guill's opinion as to the remote possibility of someone injuring himself by falling from the shaft conveyance (Tr. 124).

I find that a violation did occur. There was conflicting testimony presented as to the amount of space between the conveyance and the front and back of the shaft. The parties also disagreed as to the depth of the drop from the collar level to the ground on the east side of the conveyance. I find the testimony of the respondent's witnesses and its exhibits to be more persuasive than that presented by the petitioner. On that basis, I conclude

that there was no danger of someone falling off the conveyance either on the east side or front or back and, therefore, no violation of the standard. However, I find that there was a possibility of someone **falling** off the conveyance and into the open shaft. **Mandatory** Safety Standard 57.15-5 requires that safety belts and lines be worn when there is a danger of falling. I conclude that a danger did in fact exist.

Section **110(i)** of the Act directs that in assessing a penalty, I consider six criteria: **(a)** the operator's history of previous violations; **(b)** the appropriateness of the penalty to the size of the business; **(c)** the degree of negligence ; **(d)** the effect on **the operator's** ability to continue in business; **(e)** the gravity of the violation; and **(f)** the good faith in achievement of rapid compliance after notification of violations.

As stated above, the parties stipulated to three of the criteria. The respondent employed approximately 66 employees in 1978 and is therefore to be considered as a medium size business.

Although I have concluded that the possibility of someone falling into the open shaft was unlikely, if it were to happen, it would result in serious injury.

The company was unaware that the violation existed. This fact coupled with the fact that the possibility of injury was remote, I reduce the proposed penalty and assess a penalty of \$100.00 for the violation.

Docket Cent 79-377-N

Citation No. 151649

Citation No. 151649, issued on June 21, 1979, alleges a violation of

mandatory safety standard 57.19-100.²

Mr. Sisk testified that he got off the conveyance at the 745 level. The gate at that level which had a metal frame with wire mesh over it, had a hole approximately 1 X 1 1/2 feet. Mr. Sisk stated that he issued the citation based on his belief that the skip tender or anyone else working below the gate could be injured if materials fell through the hole. The inspector stated that there were no materials stored in the immediate area, however, there was a storage area across the track from the gate where trash was stored until it was removed (Tr.40).

Mr. Guill disagreed with the inspector's testimony that the skip tender worked below the gate and would therefore be in danger (Tr.98). However, Mr. Guill did state that on occasion someone could be in the bottom of the shaft to perform an inspection or to change the shaft pump (Tr. 97). In explaining the loading procedures used in removing the trash, Mr. Guill stated that there would be a remote chance that something could fall through the hole and even less chance that someone would be injured (Tr. 99 -100).

I find that a violation did occur. As depicted in Respondent's Exhibit A, the hole was large enough for materials to fall through, and therefore constituted a violation of the Act. The hole was obvious and the company knew or should have known of its **existence**. There was a possibility of serious injury resulting from the violation. I assess a penalty of \$140.00 for the violation.

^{2/} 57.19-100 Mandatory. Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances.

Citation 151654

On June 22, 1979, Mr. Sisk issued a citation alleging a violation of mandatory safety **standard 57.19-106.**³ While traveling on top of the conveyance, Mr. Sisk testified that he was using a dead blow hammer to strike the guides and sets in an attempt to determine if there was any loose material in the shaft. Mr. Sisk testified that when he began to hear a different sound, he hooked the hammer onto the guide and jerked it. As he did so the conveyance moved. He stated that the 37th set up from the 640 level was broken and that 10 to 12 other sets were loose.

Respondent offered Exhibits C through I into evidence which are the company's weekly shaft inspection forms. Exhibit F indicates that a shaft inspection had been performed on June 22, 1979, the same day Mr. Sisk conducted his inspection. The respondent's records show that the employees who inspected the shaft found nothing wrong and did not indicate that any work needed to be performed.

Mr. Guill testified that he went down into the shaft on June 23, 1979, and during his inspection concluded that the guides were in good condition **(Tr. 80)**. Although he found that there was slight movement of the cage, Mr. Guill attributed it to dryness in the shaft which causes movement in the pivot points around the guide hangers (Tr. 81 and 87). He testified that there were no broken sets, although one was cracked **(Tr. 86)**.

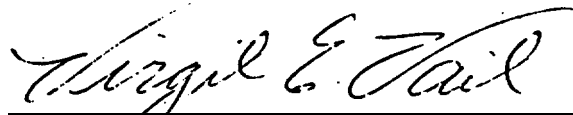
I find that a violation did exist. In the opinion of Mr. Guill all that was needed was to put water into the shaft in order to swell the timbers **(Tr. 83)**. This, however, had not *been* done and Respondent's Exhibit F indicates that the employees who inspected the shaft did not think it was

3/ 57.19-106 Mandatory. Shaft sets shall be kept in good repair and clean of hazardous material.

necessary and had not recommended that it be done. In considering the number of employees who were exposed to the danger and the type of injuries which could result, I conclude that the violation was serious. The testimony reveals a conflict as to whether the Respondent should have known that the violation did exist. I find that Respondent's negligence was slight in light of its weekly inspection and record keeping procedures. I therefore assess a penalty of \$100.00 for the violation.

ORDER

Wherefore, it is ordered that Respondent pay the penalty of \$340.00 within 30 days of the date of this decision.



Virgil E. Vail
Administrative Law Judge

Distribution:

Eve Chesbro, Esq., Office of the Solicitor, United States Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, Texas 75202

Wayne E. Bingham, Esq., PICKERING AND BINGHAM, 920 Ortiz, N.E., Albuquerque, New Mexico 87108