

CCASE:  
SOL (MSHA) V. RALPH FOSTER & SONS  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

v.

RALPH FOSTER AND SONS,  
RESPONDENT

CIVIL PENALTY ACTION

DOCKET NO. WEST 79-397-M  
ASSESSMENT CONTROL NO. 05-03209-05001

DOCKET NO. DENV 79-483-PM  
ASSESSMENT CONTROL NO. 05-02994-05001

MINE: ERDA C G27 and MINERAL  
CHANNEL NO. 12

DECISION

APPEARANCES:

Ann M. Noble, Esq., Office of Henry C. Mahlman, Associate  
Regional Solicitor, United States Department of Labor,  
Denver, Colorado,  
for Petitioner

Robert Foster, appearing pro se, Grand Junction, Colorado,  
for Respondent

Before: Judge John J. Morris

In these civil penalty proceedings Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent violated two safety regulations promulgated under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Pursuant to notice, a hearing on the merits was held in Grand Junction, Colorado on May 19, 1980.

The parties did not file post trial briefs.

ISSUES

The following issues were raised by respondent:

I. Whether the Federal Mine Safety and Health Act violates Article I, Section 8(a) of the United States Constitution.

II. Whether respondent is entitled to a jury trial.

III. Whether respondent is subject to the Act.

IV. Whether respondent operated the mine in this contest, namely ERDA C G27.

V. Whether respondent violated the regulations.

#### DISCUSSION

The jurisdictional issues must first be resolved before the merits of the cases can be discussed.

#### I

Respondent contends that the Act is illegal in establishing the Federal Mine Safety and Health Review Commission. Respondent asserts the Commission is part of the Executive Branch and therefore it is not inferior to the Supreme Court. Respondent concludes that the authority of the Commission is in violation of Article I 8 of the United States Constitution.

Respondent's arguments lack merit. A Review Commission ruling under the Act can be reviewed by the United States Courts of Appeals, 30 U.S.C. 816. The Supreme Court has authority over the various United States Court of Appeals.

"With the right of administrative and judicial review carefully preserved, the mere fact that the initial adjudicative function has been conferred upon the the Commission does not bring this legislation into conflict with the principle of the separation of powers." *McLean Trucking Co. V. OSHRC* 503 F.2d 8 (4th Cir. 1974).

#### II

Respondent's claim that for various reasons he is entitled to a jury trial was ruled to be contrary to his views in the factually similar case of *Atlas Roofing Company v. OSHRC* 430 U.S. 442, 97 S. Ct, 1261 (1977).

#### III

The facts show that the product of respondent's mine, a yellow cake of uranium, can be used for atomic energy throughout the United States (Tr. 12, 13).

Respondent is subject to the Act if the products of the mine enter Commerce or affect Commerce. 30 U.S.C. 803.

The above stated facts constitute sufficient evidence to establish that respondent is subject to the Act. *Wickard v. Filburn*, 317 U.S. 111 (1942); *Marshall v. Kraznack*, 604, F 2d 231 (3rd Cir. 1979).

#### IV

The final two issues require a review of the evidence in the cases.

In Citation 326566 respondent is charged with violating 30  
CFR 57.15-4.(FOOTNOTE 1)

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The evidence is conflicting and I find the following facts to be credible.

1. The inspector observed two men without safety glasses drilling with a jackleg drill at a mine face (Tr. 8-10).
2. Drilling without safety glasses presents numerous hazards (Tr. 11).
3. The ERDA C G27 mine has not operated since 1973 (Tr. 38).

The inspector identified the mine as ERDA C G27 and the citation described it by that name. Respondent states that ERDA C G27 has not operated since 1973. I find the respondent's testimony more credible. He has been mining in this area for forty years. In addition, there is nothing to support the inspector's testimony. Robert Foster's testimony and his sworn exhibit in October 1979 raise this same defense (R-2).

Although a violation occurred, MSHA failed to prove the mine involved in the violation. Citation 326566 should be vacated.

DENV 79-483-PM  
Citation 326433

This citation alleges a violation of 30 CFR 57.14-1.(FOOTNOTE 2) The facts are uncontroverted.

1. At the time of the inspection at Mineral Channel No. 12, a uranium mine, no persons were working underground (Tr. 13).
2. The V belt drive pinch point was unguarded and exposed (Tr. 14).
3. Shortly after respondent closed this mine the inspector arrived; respondent reported the mine was closed (Tr. 25, 36).
4. Respondent had no intention of reopening the mine without remedying the defective condition. (Tr. 25).

MSHA offered no evidence that this mine was operating. This fact in combination with respondent's evidence establishes that there was no exposure to any workers. Citation 326433 should be vacated.

#### CONCLUSIONS OF LAW

For the reasons stated I conclude that MSHA failed to prove a violation of the above standards.

#### ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby enter the following order:

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In WEST 79-397-M:

Citation 326566 and all proposed penalties therefore are vacated.

In DENV 79-483-PM:

Citation 326433 and all proposed penalties therefor are vacated.

John J. Morris  
Administrative Law Judge

~FOOTNOTE\_ONE

1 57.15-4 Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

~FOOTNOTE\_TWO

2 GENERAL -- SURFACE AND UNDERGROUND

57.14-1 Mandatory. Gears; sprockets; chains, drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.