

CCASE:
SOL (MSHA) V. MAUDLIN CONSTRUCTION
DDATE:
19801218
TTEXT:

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

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

v.

MAUDLIN CONSTRUCTION COMPANY,
RESPONDENT
CIVIL PENALTY PROCEEDINGS

DOCKET CENT 80-114-M
A/O NO. 13-01910-05001
DOCKET CENT 80-121-M
A/O NO. 13-01160-05001
DOCKET CENT 80-141-M
A/O NO. 13-01848-05001
DOCKET CENT 80-142-M
A/O NO. 13-01349-05001
(Consolidated)
DOCKET CENT 80-201-M
A/O NO. 13-01349-05001
DOCKET CENT 80-30-M
A/O NO. 13-01802-05001

Mines: Clay County or Stellish Pit,
Solberg Pit, Clark Pit,
Mortvedt Pit and Nelson Pit

DECISION

APPEARANCES:

Eliehue C. Brunson, Esq., Office of the Solicitor
United States Department of Labor, 911 Walnut Street, Room 2106
Kansas City, Missouri 64106,
for the Petitioner

Stewart H. M. Lund, Esq.
P O Box 634, Webster City, Iowa 50595,
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) [hereinafter referred to as "the Act"]. The proposals for penalties allege sixteen violations of safety standards.

Pursuant to notice, a hearing on the merits was held in Fort Dodge, Iowa on May 20 and 21, 1980. Raymond C. Weston, Sr., Carl L. Smith and Charles E. Peaton, federal mine inspectors, testified on behalf of the petitioner. Edward David Ammala, a supervisor for the Mine Safety and Health Administration, testified for the petitioner. Charles P. Becker and Harlan Von Seggren testified on behalf of the respondent. The parties filed post hearing briefs.

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II. Stipulations

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

1. The mine inspectors who issued the citations were employees of the Mine Safety and Health Administration and authorized representatives of the Secretary of Labor.

2. The Administrative Law Judge has jurisdiction of this case pursuant to section 107 of the Act.

3. The proposed penalties would not adversely affect the respondent's ability to continue in business.

4. The respondent is a medium-sized operator in the State of Iowa.

III. Motions

Counsel for the Petitioner moved that the record be left open after the hearing in order to allow him an opportunity to submit a computer printout sheet from the Office of Assessments showing respondent's record of past violations. The undersigned ordered that the record was to be left opened until such time as respondent's counsel received a copy of the printout. Respondent, in its post hearing brief, renewed its objection to the admission of the computer printout sheet on the grounds that respondent did not have the opportunity to cross-examine witnesses as to the history or relevancy of the proposed exhibit.

Respondent's objection is hereby sustained and the exhibit will not be admitted into evidence. Therefore, the penalties assessed herein are based on the assumption that the respondent had no history of any violations prior to the violations alleged in the present cases.

On August 15, 1980, respondent filed a motion to strike petitioner's post hearing briefs. Respondent claims that the petitioner's late filing of the briefs has prejudiced the respondent. I disagree. Respondent has failed to demonstrate any prejudice. Therefore, its motion is denied and petitioner's briefs and the arguments contained therein have been considered.

IV. Settlement Approvals

In the case of Secretary of Labor v. Clay County Highway Department, CENT 80-30-M, Maudlin Construction Company, as the leasee of the Stellish Pit, accepted the defense in this matter. This case involved three alleged violations. Respondent agreed to, and has in fact already paid the proposed penalty of \$32.00 for citation no. 176765. Citation Nos. 176766 and 176767 were dismissed by the petitioner on the ground that the accuracy of the test results could not be proven.

In docket number CENT 80-114-M, the respondent agreed to

affirm citation no. 176800 and pay the proposed penalty in the amount of \$22.00.

The proposed settlement agreements are hereby approved by the undersigned.

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V. Discussion

The five remaining cases involve four different mine sites, the Mortvedt, Solberg, Nelson and Clark Pits. The initial inspections at these pits took place between July 9, 1979 and September 18, 1979.

CENT 80-141-M and CENT 80-114-M

Cases CENT 80-141-M and CENT 80-114-M involve six citations all alleging a violation of mandatory safety standard 56.5-50.(FOOTNOTE 1) These citations, involving similar issues of fact and law, will be dealt with together.

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The following issues pertain to citations nos. 175215, 175217, 175216, 175319, 175320 and 176783:

1. Did the testing procedures employed by the mine inspectors in measuring the noise levels conform to the procedures, as set forth in 56.5-50(a), and

2. Were the instruments properly calibrated in order to assure accurate noise level readings.

Respondent disputes the accuracy of the testing procedures used by the inspectors, attacking them in several ways. Only respondent's first two arguments need to be examined in order to reach a decision.

First, respondent argues that a sound level meter must be used to check or convert the dosimeter readings. (Respondent's brief at p. 4) Contrary to respondent's argument, I have found nothing in the Act that requires that sound level meters be used in conjunction with dosimeters. The applicable standard, found at 30 C.F.R. 56.5-50(a), requires that a sound level meter or a dosimeter with similar accuracy be used in testing noise levels. While respondent's expert, Harlan Von Seggren, testified that he would not use a DuPont 376 dosimeter alone for determining noise levels, nothing in the record supports a conclusion that this type of dosimeter cannot be used to accurately determine noise levels.

Secondly, respondent alleges that the test results are inaccurate due to the length of time between when the dosimeters were calibrated and when the tests were performed. Citations 175215, 175216 and 175217 were all issued on August 17, 1979 by Raymond Weston, Sr.. Mr. Weston testified that he calibrated the instruments on July 20, 1979, a period of 27 days prior to the inspection (Tr. 39). Citations 175319, 175320 and 176783 were issued on July 25, 1979 by Carl L. Smith. The dosimeters used by Smith were calibrated on July 6, 1979, 18 days prior to testing (Tr. 220).

The inspectors testified that they had been instructed that the dosimeters were to be calibrated every 30 days and that the instruments should be calibrated prior to an inspection (Tr. 243). However, neither inspector felt that it was necessary to calibrate the instruments the day before or the day of the inspection.

Edward Ammala, supervisory inspector for the western half of Iowa, stated that one of his duties as a supervisor is to review the citations that have been issued. He stated that he checks for any discrepancy between the sound level meter readings and the results of the dosimeter tests. In doing so he claimed that he can tell by the dBA level approximately what the dosimeter reading will be (Tr. 268). He therefore concluded that the dosimeter readings in the citations in question were accurate.

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I find the testimony of respondent's expert to be more credible than that of the Petitioner's witnesses. Harlan Von Seggren stated that, in order to assure an accurate reading, a dosimeter must be calibrated immediately prior to conducting the test (Tr. 153). According to Mr. Von Seggren, a dosimeter is a very sensitive piece of equipment and can easily be affected by temperature changes, movement and other outside influences. In his opinion, the lapse of time between the calibration of the instruments and the actual tests would invalidate the results. Petitioner failed to offer any testimony to refute the statements of Mr. Von Seggren.

Petitioner's explanation for not calibrating the dosimeters closer to the time when the tests were going to be performed was that it takes approximately twenty minutes to calibrate each machine. I find this explanation unacceptable. Section 104 of the Act requires that when a violation is found that a citation must be issued and a penalty assessed. It is grossly unfair to operators to subject them to testing procedures, the accuracy of which cannot be proven, in order for the inspectors to save time.

The burden of proving the accuracy of test results is with the Petitioner. The Petitioner having failed in his burden, the citations are hereby vacated.

CENT 80-201-M

This case involves three citations. Citation Nos. 176795 and 176796 both allege a violation of mandatory safety standard 30 C.F.R. 56.14-1.(FOOTNOTE 2) Citation No. 176797 alleges that respondent violated mandatory safety standard 30 C.F.R. 56.11-1. (FOOTNOTE 3)

At the conclusion of Petitioner's evidence, respondent moved to dismiss the citations on the ground that the government had failed to establish a prima facie case. Respondent did not present any evidence nor offer any testimony as to these citations. At the time of the hearing, I reserved my ruling on respondent's motion until I had an opportunity to review the record. Having done so, I conclude that respondent's motion to dismiss should be granted and the citations dismissed.

The only testimony offered by Petitioner was that of the inspector who issued the citations. The inspector could not identify the photographs that he had allegedly taken and his notes were contradictory (Tr. 319 and 326).

The issuance of a citation is insufficient to establish a prima facie case. Petitioner having failed to offer any credible testimony to prove the existence of the alleged violations they are hereby dismissed.

Issues:

1. Whether or not the front end loader was equipped with an operative back up alarm and, if so,
2. Did this defect affect the safety of miners.

Discussion

Citation 175313 alleges that respondent violated mandatory safety standard 30 C.F.R. 56.9-2 (FOOTNOTE 4) by failing to have an operative back up alarm on a front end loader.

The uncontradicted testimony of Carl Smith, the inspector who issued the citation, was that the front end loader had been equipped with a back up alarm; however, at the time of his inspection on July 9, 1979 it was inoperative.

Respondent contends that there was no violation, even though the alarm was inoperative, because the alarm was an additional safety feature installed by the respondent, which was not required by the Act. I disagree. The fact that the alarm was inoperative subjects the respondent to liability under 30 C.F.R. 56.9-2, unless there is a showing that even though the alarm was not working it would not affect the safety of respondent's employees.

Witnesses for both parties testified that the operator of the loader would not have a clear view of someone on the ground (Tr. 334 and 355). Although the testimony of the witnesses differed as to how far the view of the operator would be obstructed, it is unrefuted that there was a blind spot. Based on this fact and the testimony of Mr. Smith that he observed other employees working in the immediate vicinity, I find that a violation did occur.

Penalty

The likelihood of an injury resulting from this violation was remote since the loading process was confined to a small area and most of the employees in the loading area would be in trucks. However, if an accident were to occur it could be of a serious nature. The respondent acted in good faith by trying to abate the citation immediately. For these reasons, I find that a penalty of \$40.00 is appropriate.

Citation 176794 alleges that respondent violated 30 C.F.R. 56.12-8 (FOOTNOTE 5) by failing to provide a bushing on the conductor where it entered the distribution box on a light. The uncontradicted facts are that the wires were not equipped with a bushing, but that they were insulated with tape. The power source for the light was a portable generator, that in turn received its power from a diesel engine (Tr. 358). Therefore, there was never any reason for any employees to be in the vicinity of the lightpole (Tr. 359).

I find that a violation did occur. Although respondent argued that the tape eliminated any shock hazard, the standard requires that when wires pass through metal frames the holes must be bushed.

Penalty

I find that respondent's negligence and the gravity of the violation were low based on the evidence presented that the wires had been insulated. It appears there was only a slight chance of anyone being injured since it was not necessary for anyone to be near the light in order to turn it off or on. The respondent promptly abated the citation. For the reasons stated herein, I reduce the proposed penalty and conclude that a penalty of \$10.00 is appropriate under the circumstances.

In citation no. 176799, the petitioner alleges a violation of safety standard 30 C.F.R. 56.4-18, (FOOTNOTE 6) based on the inspector's statement that oxygen cylinders were being stored in the parts trailer where oil and grease containers were also kept (Tr. 313). According to Mine Inspector Carl Smith, this condition created a fire hazard and would add to the intensity of a fire if one were to occur.

I find that a violation did occur. Respondent did not deny that the oxygen was being stored in the same trailer containing oil and gas cans. Respondent contends that a citation should not have been issued since the oxygen bottles were immediately removed. The Act provides that when a violation is found to have occurred that a citation is to be issued. Respondent's promptness in abating the citation goes to the company's good faith. Also, the fact that the trailer was parked away from the area where the employees were working and that they would only be in the area to pick up supplies goes to the gravity of the violation and not to whether a violation did in fact occur.

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Penalty

Under the circumstances, as set forth above, I find that a penalty of \$28.00 is appropriate.

Findings of Fact

1. Seventeen citations were issued to the respondent between July 9, 1979 and September 18, 1979 at five different mine sites. These facts alone do not constitute harassment on the part of MSHA, as alleged by the respondent.

2. Petitioner failed to prove the accuracy of the dosimeter readings.

3. Petitioner failed to establish a prima facie case with regard to the three citations contained in Docket No. CENT 80-201-M. Therefore, respondent's motion to dismiss is granted.

4. The back-up alarm on the front end loader was inoperative. This presented a safety hazard for employees working in the area, since the operator would be unable to see persons walking behind the loader.

5. The hole in the conductor box was not bushed as required by mandatory safety standard 30 C.F.R. 56.12-8.

6. Oxygen cylinders were being stored in the same trailer as containers of oil and grease thus presenting a fire hazard.

ORDER

Case	Citation No.	Assessment
CENT 80-30-M	176765	\$ 32.00
CENT 80-114-M	176800	\$ 22.00
CENT 80-121-M	175313	\$ 40.00
CENT 80-142-M	176794	\$ 10.00
	176799	\$ 28.00
		\$ 132.00

It is hereby ORDERED that Respondent pay the penalties totaling \$ 132.00 within thirty (30) days from the date of this decision.

Virgil E. Vail
Administrative Law Judge

~FOOTNOTE ONE

1 56.5-50. Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971,

"General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure:	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level. Note. When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

$$\text{If the sum } C_1 + C_2 \dots C_n \\ T_1 \quad T_2 \quad T_n$$

then the mixed exposure shall be considered to exceed the permissible exposure. C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\text{Log } T = 6.322 - 0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sound level in dBA.

~FOOTNOTE_TWO

2 56.14-1. 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.

~FOOTNOTE_THREE

3 56.11-1. Mandatory. Safe means of access shall be provided and maintained to all working places.

~FOOTNOTE_FOUR

4 56.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

~FOOTNOTE_FIVE

5 56.12-8 Mandatory. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings [Section 56.12-8 made mandatory and revised at 42 FR 29420, June 8, 1977, effective July 8, 1977].

~FOOTNOTE_SIX

6 56.4-18 Mandatory. Oxygen cylinders shall not be stored in rooms or areas used or designated for oil or grease storage.