CCASE:
SOL (MSHA) v. CRAWFORD MINING
DDATE:
19810506
TTEXT:

Federal Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. SE 81-10-M A.O. No. 09-00264-05005
v.	Rollo Pit
CRAWFORD COUNTY MINING, INC., RESPONDENT	

DECISION

Appearances: Ken S. Welsch, Attorney, U.S. Department of Labor, Atlanta, Georgia, for the petitioner
Curt B. Jamison, Atlanta, Georgia, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing regarding the proposal was held on April 14, 1981, in Macon, Georgia, and the parties appeared and participated therein. Although given an opportunity to file post-hearing briefs and/or proposed findings and conclusions, the parties declined to do so.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated that respondent is subject to the Act, that it engages in mining activities, the products of which affect inter-state commerce, that it employs approximately 24 individuals at the subject mine, and that the mine operates one-to-two shifts, 5-1/2 days a week. Respondent's history of prior violations is reflected in exhibit P-1, an MSHA computer printout reflecting 18 paid citations for a 24-month period November 20, 1978 through November 19, 1980 (Tr. 6-10).

Discussion

Citation No. 099125, 6/12/80, alleges a violation of 30 CFR 56.11-27, and the condition or practice described by the inspector is as follows (exhibit P-2).

> The allon cyclone was not provided with a work platform or handrails. Men had to stand on single wooden boards, when work was performed. Persons could fall about 50 feet to to the ground.

The inspector established the initial abatement time as July 21, 1980, but extended this date to September 1, 1980, for the following reason (exhibit P-2):

> The company is presently deciding whether to build a platform on the allon cyclone or to build a new installation. Safety belts and lines are to be worn at all times on the cyclone until this construction is completed.

The citation was terminated on September 10, 1980, when another MSHA inspector found that compliance had been met, and the justification

for the termination is described as follows (exhibit P-2): "A walkway with handrails were installed around the top of the Allon Cyclone area".

MSHA Inspector Steve Manis confirmed that he conducted an inspection of respondent's mine on June 12, 1980, and that he was accompanied on his inspection rounds by Larry Jamison, the mine manager. Inspector Manis also confirmed that he issued the citation in question after determining that the Allon cyclone did not have work platforms installed where employees were required to perform work. Mr. Manis identified three photographs taken by a fellow inspector at the cyclone location in question, and he identified three areas or "levels" of the structure which concerned him (exhibit P-3). He estimated the height from the top of each level to the ground level to be 50 feet from the extreme top level, 40 feet from the second level, and 30 to 35 feet from the third level (Tr. 12-21).

Inspector Manis testified that the purpose of the cyclone is to separate the fine and coarse particles being pumped into it by water pressure. He determined that employees were required to perform work on the cyclone structure after being told that this was the case by an employee, and he also observed the presence of a fixed, permanent metal ladder attached to the structure, as well as several wooden 2 x 6 boards which were in place at the three levels. He also observed that the rungs of the metal ladder were worn and shiny, which indicated to him that the ladder was used rather frequently. All of these factors led him to conclude that employees were required to climb onto to the cyclone structure to perform work on a regular basis (Tr. 21-22).

Mr. Manis testified that he was told that employees had ocassion to climb the cyclone ladder once or twice a week to go to the top of the cyclone. He was also told that if there is a lot of work to perform on the cyclone someone may have to stay at the top all day. In such situations, he would not accept the use of a safety belt as compliance, but would require the use of a work platform (Tr. 62-63). Although he observed no one on the ladder or the cyclone on the day of his inspection, he was told that the work performed included the changing of the position of the cyclone apex as well as the changing of piping (Tr. 64). He also stated that he was told that the purpose of the boards was to facilitate someone standing on them while performing work (Tr. 64).

On cross-examination, Inspector Manis confirmed that he issued the citation because he believed the entire cyclone location where boards were installed for the purpose of facilitating access to the areas described were not approved working platforms (Tr. 23). In further explanation as to why he issued the citation in question, even though he had issued another citation at the same time for failure by the respondent to provide safety belts on the cyclone, Mr. Manis stated that he could have issued three separate work platform citations for each of the levels which were not provided with platforms. He also explained

that he did not expect the respondent to construct a platform at every area on the cyclone where an employee had to reach for the purpose of performing work. As an example, he cited the cyclone pipeline where a safety belt would suffice because a platform could not be constructed around the pipeline. However, during the construction of the platform and while it was being installed, a safety belt would have to be worn if an employee had to climb the structure to perform some work (Tr. 36-37).

Respondent's Testimony and Evidence

Respondent presented no testimony from any witnesses with respect to the citation. However, respondent's representative Curt Jamison was given a full opportunity to cross-examine the inspector, as well as make an argument in defense of the citation. With respect to the middle level cyclone location, Mr. Jamison asserted that it was used only to store a wrench and other tools used by employees while they were standing on the lower level boards. The mid-level board was only used to facilitate the placing of a wrench, and inspector Manis confirmed that he observed such a wrench there and did not dispute Mr. Jamison's assertion that no employee stood on the mid-level board to perform any maintenance or work. Mr. Jamison conceded that an employee is required to stand on the lower level board "every couple of weeks" to unbolt and replace a discharge portion of the cyclone with a wrench (Tr. 65-67). In addition, Mr. Jamison conceded that someone may have ocassion to go to the lower level of the cyclone "a couple of times a week" (Tr. 67).

With regard to the top portion of the cyclone, Mr. Jamison asserted that the only reason one would have to go there would be to repair a leak in the pipe. In his view, this was not a regular chore, that there are months at a time when no one goes to the top level, and that it is not a daily occurrence (Tr. 67). Mr. Jamison also asserted that abatement was achieved by installing a work platform at the top and lower levels of the cyclone (Tr. 69). It was his view that any danger which may have existed, existed at the top portion of the cyclone and not the lower portion (Tr. 69).

Findings and Conclusions

Fact of Violation

In this case, respondent is charged with one violation of the provisions of mandatory safety standard 30 CFR 56.11-27, which provides as follows:

> Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeguards when necessary.

During the course of the hearing, respondent verified the fact that Inspector Manis issued a second citation (No. 99126) on June 12, 1980, at precisely the same time as the one in issue and that it was issued for failure by the respondent to have a safety belt or line on the cyclone for use of employees who had to climb onto it to perform work, as required by section 56.15-51. Respondent produced a copy of Mr. Manis' narrative statement executed at the time he issued the safety belt citation which reflects that respondent may have been aware of the requirements for safety belts through a prior inspection conducted at the mine site (Tr. 27-29).

In its answer filed on February 17, 1981, to the petitioner's proposal for assessment of civil penalty, respondent asserts that the citation in question is essentially a duplication of the safety belt citation issued by Inspector Manis. Respondent paid the penalty assessment for that citation, and since the same condition or practice is described in both citations, respondent believes it is being unduly penalized for the same violation. Respondent also maintains that the fact the supposedly dangerous conditions were abated renders any other potential citation regarding the same area moot.

Respondent's argument is that the previous citation issued by Mr. Manis for the failure to provide a safety belt on the cyclone was abated by the respondent when it provided the required safety belt or line. Since the inspector was concerned about the hazardous location at the top level of the cyclone, respondent maintains that by providing a safety belt, that somehow eliminated the hazardous condition, and that it is patently unfair to cite the respondent a second time for the identical hazardous condition. Aside from the fact that the respondent does not believe that the cited conditions were hazardous or dangerous, respondent considers the condition described by the inspector as one single assertedly hazardous condition, and in effect argues that to cite the respondent for two separate violations places him in jeopardy twice for the identical single condition.

Respondent asserted that when he discussed the matter with an MSHA conference officer, he was told that the reason two citations were issued was that the inspector was concerned with the lack of safety belts at the very top of the cyclone, and the lack of substantial work platforms at the lower levels of the cyclone. In short, respondent was advised that two citations were issued because of the fact that two dangerous conditions were presented (Tr. 27-35).

Respondent maintains that it was led to believe that safety belts were required at the top location of the cyclone, and its position is that if a safety belt suffices to protect someone at the top, it surely should be acceptable at the two lower levels. Since Inspector Manis was concerned about the entire cyclone structure when he issued citation 099125, the use of safety belts at all three levels which concerned him should suffice as compliance. In short, respondent argues that the

use of safety belts precludes the need for the installation of work platforms. The theory of respondent's case is stated as follows at pg. 41 of the hearing transcript:

> MR. JAMISON: I do. Mr. Manis has testified, however, that this citation 099125 is the whole cyclone area, top to bottom -- top, middle, and bottom.
>
> JUDGE KOUTRAS: That's right.
>
> MR. JAMISON: So if safety belts suffice for safety at the top level, surely they suffice for safety at the middle or bottom level.
>
> JUDGE KOUTRAS: Are you suggesting if you use a safety belt, you don't need platforms?
>
> MR. JAMISON: Yes.
>
> JUDGE KOUTRAS: What you're saying, in other words, if you have a safety belt and there's no requirement that you have scaffolds and working platforms, et cetera, et cetera?
>
> MR. JAMISON: Based on the reasoning behind there being two citations to start with.

MSHA's interpretation of the requirements of section 56.11-27, was succintly stated by its counsel at pages 42, and 44-45 of the transcript. MSHA's position is that work platforms of the type required by the standard were required to be installed at those locations on the cyclone where the respondent had placed the 2 x 6 boards. Once the installation of work platforms is complete, respondent would be expected to use the platforms while performing regular or frequent work or maintenance on the cyclone at those locations. However, in those areas on the cyclone where sporadic or infrequent work or maintenance is performed, respondent may use safety belts or lines in lieu of constructing platforms. In addition, during the time that a work platform is being constructed, respondent would be expected to use safety belts or lines until such time as the platform construction is completed.

I take note of the fact that the written description of the condition or practice cited by the inspector on the face of the citation, when read together with the abatement or termination notice issued by another inspector, conveys the clear impression that the inspector was concerned with only one hazardous location on the cyclone structure, namely the top level. During the course of the hearing, respondent asserted that it was unaware of the fact that inspector Manis was concerned with three locations on the cyclone, and respondent indicated further that during several discussions with MSHA's office of assessments and the solicitor's office, he was led to believe that the use of safety belts at the top location of the cyclone was sufficient for compliance.

MSHA's counsel candidly conceded that he had discussed the matter with the respondent in advance of the hearing and that he emphasized the fact that the frequency and nature of the work required at any cyclone location would dictate whether a platform or safety belt was required for compliance (Tr. 47). Counsel pointed out that in this case, it was his understanding that respondent installed platforms at all three cyclone levels and has also provided safety belts for the other areas where employees were required to work (Tr. 48). Respondent conceded that he installed the platforms because there are times when there are more employees present then there are belts (Tr. 51).

While there may have been some confusion as to precisely what was required to achieve compliance in this case, I believe that the confusion came after the time the inspector issued the citation for the lack of platforms and safety belts. My analysis of the testimony of Inspector Manis in support of the citation in question leads me to conclude that he was concerned with two distinct hazards when he issued the two citations. His first concern was that the respondent was using 2 x 6 wooden planks as a work platform, and since the planks were not securely in place and lacked handrails, he obviously believed they did not meet the requirements of section 56.11-27, and presented a hazard to anyone standing on them while performing work at the cyclone locations which he testified about. An additional concern was the fact that he believed employees had at some time been at the top of the cyclone without a belt because he saw no evidence that belts were being used or located on the cyclone at the time of his inspection. Respondent stated that he did not discuss the situation with Inspector Manis at the time the citations issued, and that all of the subsequent conversations and discussions concerning the two citations came at later times during the informal conferences with MSHA officials (Tr. 51).

Section 110(a) provides that "each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense". Accordingly, it seems clear to me that any condition or practice found by an inspector during the course of an inspection may constitute a violation of one or more mandatory standards if the conditions cited warrant such a conclusion. On the facts presented in this case it seems clear to me that Inspector Manis intended to cite the respondent for a violation of section 56.11-27 on the basis of his conclusion that the respondent failed to install the required working platforms in question. The fact that he also, at the same time, cited the respondent for failing to provide safety belts where there was a danger of falling, does not render the platform citation illegal or improper. Respondent had an opportunity to challenge the safety belt citation but decided to pay the assessment for that citation. Any confusion which may have resulted with respect to the application of sections 56.11-27 and 56.15-5, occurred after the citations issued and during the conferences held on the proposed assessments.

As I observed during the hearing, the conditions cited by Inspector Manis on the face of the citation which he issued do not include the fact that he was concerned with three distinct unprotected areas of the cyclone in question. Further, the abatement and termination notice reflects that a walkway with handrails was installed at the top area of the cyclone. After consideration of the testimony and evidence presented by the parties, I find that the middle level which concerned the inspector was not used as a work platform. Respondent's evidence that it was used only to facilitate the storage of a wrench and other tools and MSHA has not rebutted this fact. Under the circumstances, if that were the only location cited or testified to by the inspector I would have to vacate the citation. As for the lower and top levels, the evidence establishes that work was performed from those locations and while the gravity of the citation insofar as the lower level is concerned may not have been as great as that which prevailed at the very top of the cyclone, the fact is that petitioner's evidence establishes that both levels were unprotected. Accordingly, I conclude and find that petitioner has established a violation of section 56.11-27, and the citation is AFFIRMED.

Size of Business and Effect of the Penalty on Respondent's Ability to Continue in Business.

I conclude and find that the respondent is a small-to-medium sized operator and absent any evidence to the contrary, which has not been forthcoming, I cannot conclude that the civil penalty assessed by me for the citation in question will adversely affect respondent's ability to continue in business.

History of Prior Violations

Exhibit P-1, reflects that respondent has paid civil penalty assessments for 18 prior citations issued during the period November 20, 1978, through November 19, 1980, and there are no repeat violations of section 56.11-27. Considering the size of respondent's mining operation, I cannot conclude that this history of prior citations warrants any increase in the penalty assessed by me for the citation which I have affirmed.

Good Faith Compliance

The evidence adduced in this case establishes that the respondent achieved compliance by constructing protective working platforms on the cyclone in question. Accordingly, I find that respondent exercised normal good faith compliance in abating the conditions cited.

Negligence

Petitioner established that the respondent has another similar cyclone in operation on its property and introduced a photograph of that cyclone, which clearly shows that a permanent work platform is

in place around the entire structure (exhibit P-4). Respondent asserted that this cyclone was constructed some 20 years ago, and that since it is located in the middle and above four large coned-shaped bins, it presents a hazard of someone falling between the bins straight down to a concrete walkway. This is the reason why a platform was installed (Tr. 54).

Respondent recognized the hazardous location of the "old" cyclone and that is the reason it constructed a permanent type working platform at that location. Its failure to provide similar protection for the cyclone cited in this case was based on its conclusion that it was not hazardous or dangerous. While this conclusion on the respondent's part may be true for the lowest or third level of the cyclone, I believe that the respondent should have been aware of the fact that the very top location of the cyclone which was accessible by the fixed ladder presented a hazard when employees were required to go there to perform maintenance or other work. Since the evidence establishes that this was not an infrequent occurrence I conclude that respondent failed to exercise reasonable care to prevent the condition cited by the inspector at that location. Accordingly, I find that the citation resulted from ordinary negligence by the respondent.

Gravity

Inspector Manis believed that anyone falling from any of the cyclone locations depicted in the photographic exhibits would likely strike the hard ground below and sustain serious injuries. Respondent disputed this fact and asserted that while one falling from the very top of the structure fifty feet below to hard ground would likely suffer fatal injuries, if he fell from the lower third level, he would likely suffer no injuries since he would fall into soft sand from a very short distance (Tr. 25).

Mr. Manis also testified that at the time he issued the citation in question, he observed no one on the structure, that there were no safety belts on the cyclone, and someone told him that none were on the premises, but he did not look for any (Tr. 58). Further, while he indicated that there were sand piles present on three sides of the unprotected cyclone, one side did not contain a sand pile below, and if an employee fell from the very top of the cyclone to the ground level below, some fifty feet, he would likely suffer serious injuries.

I conclude that the failure to install the work platform called for by the cited safety standard in question presented a serious situation which could have resulted in injuries in the event some one fell from the top of the structure. Of course, the severity of any injuries would depend on the particular facts and circumstances presented at any given time. I believe that an unprotected area of the cyclone where men were required to work presented a serious condition. Accordingly, I find that the citation cited was serious.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of $125 is reasonable and appropriate for Citation No. 099125, June 12, 1980, 30 CFR 56.11-27, and respondent is ORDERED to pay the penalty assessed within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge