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SOL (MSHA) v. OZARK-MAHONING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATIVE (MSHA) PETITIONER	Civil Penalty Proceedings Docket No. LAKE 80-336-M A.C. No. 11-01599-05005
v.	
OZARK-MAHONING COMPANY, RESPONDENT	Docket No. LAKE 80-337-M A.C. No. 11-01599-050061
	Barnett Mine

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; M. L. Hahn, Safety and Industrial Relations Director, and Victor Evans, Superintendent of Mining, Ozark-Mahoning Company Rosiclare, Illinois, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

These proceedings were filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. 820(a), to assess civil penalties against Ozark-Mahoning Company for violations of mandatory standards. Upon completion of prehearing requirements, a hearing was held in Evansville, Indiana on February 25, 1981. MSHA Inspector Dennis Haeuber, George W. Winters, and Louis English testified on behalf of MSHA. Frank Golden, Kenneth Clanton, and Tom Dowling testified on behalf of Ozark-Mahoning. Both parties filed posthearing briefs.

ISSUES

Whether Ozark-Mahoning violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalties which should be assessed.

APPLICABLE LAW

30 C.F.R. 57.4-69 provides as follows: "Mandatory. Approved mine rescue apparatus shall be properly maintained for immediate use. The equipment shall be tested at least once a month and records kept of the tests."

30 C.F.R. 57.15-5 provides as follows: "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."

Section 110(i) of the Act, 30 U.S.C. 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this matter.

2. Ozark-Mahoning is a subsidiary of Pennwalt Corporation.

3. Ozark-Mahoning operates a mine called the Barnett Mine.

4. The Barnett Mine is located two miles west of the junction of Routes 146 and 34 in Rosiclare, Pope County, Illinois.

5. There are approximately fourteen (14) to seventeen (17) men employed at the Barnett Mine.

6. The annual hours worked are 35,000.

7. The parties have agreed that George Winters, an employee of Ozark-Mahoning, did suffer an accident on February 7, 1980, while working at the Barnett Mine.

8. An investigation of this accident was made on February 13 and 14, 1980, by Mine Safety and Health Administration Inspectors Jack Lester and Dennis Haeuber.

9. Citation No. 366117 was issued at the time of the inspection.

10. Barnett Mine is an underground mine.

11. Flourspar is the product mined.

12. Approximately ten (10) McCAA's were not operable at the Barnett Mine at the time the citation was written.

MOTION TO APPROVE SETTLEMENT CONCERNING CITATION NO. 365457

At the commencement of the hearing, the parties moved for an order approving a settlement concerning Citation No. 365457. That citation alleged the violation of 30 C.F.R. 57.6-20(e) in that the metal door on the explosive's magazine was not electrically bonded to the existing ground rods. MSHA initially proposed a civil penalty in the amount of $26. The parties requested approval of a settlement of this violation in the amount of $15 because the magazine was located in a remote area and if detonation were to occur, injury would have been improbable since no employees were exposed to injury. Considering the above statements and the criteria contained in section 110(i) of the Act, the motion to approve this settlement in the amount of $15 is granted.

CITATION NO. 366115

Citation No. 366115 was issued on February 14, 1980, to Ozark-Mahoning for violation of 30 C.F.R. 57.4-69. The citation alleged that records were not available to indicate any inspection or maintenance on the ten McCaa self-contained breathing apparatus kept at the mine and the last recorded inspection of the devices was in 1972.

The evidence established that seven miners at the Barnett Mine were killed in 1971 due to exposure to hydrogen sulfide gas. The undisputed evidence established that at all times relevant to this proceeding, the Barnett Mine was affiliated with a central mine rescue station and the mine was not required to maintain its own rescue station. Ozark-Mahoning conceded that the apparatus in question was not maintained or tested as required by the regulation and that there were no records of any tests.

MSHA asserts that because Ozark-Mahoning kept the mine rescue apparatus at its mine, it was required to maintain and test them and keep records of the tests. MSHA further contends that the lack of maintenance could have resulted in the use of defective equipment in an emergency situation causing the death of miners at the work site.

Ozark-Mahoning contends that since it was not required to maintain a mine rescue station at this mine, the storage of defective equipment does not violate the Act or regulation. It further claims that the mere presence of the defective equipment did not present any hazard to the miners because the defects in the equipment would be immediately evident to any trained person who attempted to use it and, hence, the equipment would not have been used.

I have considered the evidence and arguments of the parties. Although Ozark-Mahoning was not required to have the mine rescue equipment at the

Barnett Mine because of its affiliation with a central mine rescue station, the fact that it elected to keep the 10 McCaa self-contained breathing apparatus at the mine imposed upon it the duty to maintain and test the equipment as required by 30 C.F.R. 57.4-69. I find this situation to be analogous to the law of negligence where although a person has no duty to act, if he does act, he may be liable for any affirmative acts which make the situation worse. See Prosser, Law of Torts, 54 (3d ed. 1964). In the instant matter, MSHA correctly asserts that the mere presence of defective equipment may result in additional deaths or injuries if such equipment is used in an emergency. In an emergency, persons untrained in the use of this apparatus might attempt to use it. Moreover, a miner's attempt to use the defective equipment may delay notification to the central mine rescue station. Hence, where a mine operator is not required to maintain its own mine rescue station but chooses to keep mine rescue apparatus at its facility, such apparatus must be maintained and tested according to the requirements of 30 C.F.R. 57.4-69. Accordingly, I find that Ozark-Mahoning's failure t maintain and test the 10 McCaa self-contained breathing apparatus violated 30 C.F.R. 57.4-69.

CITATION NO. 366117

Citation No. 366117 was issued on February 14, 1980, to Ozark-Mahoning for violation of 30 C.F.R. 57.15-5. The citation alleged that a lost time accident occurred when a timberman fell 23 feet down an open manway and that no safety belt was provided.

The undisputed evidence shows that George Winters, a timberman, suffered a broken leg and other injuries on February 7, 1980, as a result of a 23 foot fall through an open manway. Prior to the accident, Winters and two other miners where attempting to land a set of timber being hoisted. Ozark-Mahoning's foreman, Kenneth Clanton, was present and operating the controls of the slusher. After the timber, which was approximately 17 feet long and weighed about 300 pounds, had been hoisted, Winters walked over to a point 2 to 3 feet away from the uncovered 36 by 40 inch manway. The timber struck Winters in the leg and he fell through the open manway. Winters sustained serious injuries and has not returned to work.

MSHA asserts that Ozark-Mahoning violated 30 C.F.R. 57.15-5 in that the operator permitted a miner to work at approximately 2 to 3 feet away from a 36 by 40 inch hole where there was a danger of falling. While the regulation in issue requires the use of safety belts and lines when men work where there is a danger of falling, no such safety belts or safety lines were provided.

Ozark-Mahoning contends that it did not violate the regulation because of the following: (1) Winters did not fall and there was no real danger of anyone falling; (2) the use of safety belts while timbering is not normal industry practice; (3) Winters placed himself in an unsafe position in violation of

specific orders to the contrary; (4) MSHA cited the wrong regulation in the citation.

The undisputed evidence establishes that, at the time of the accident, a miner was standing approximately 2 to 3 feet away from an open manway measuring 36 by 40 inches. There was a drop of 23 feet from the manway to the surface below. Timber was being hoisted through the manway by use of a slusher operated by the foreman. The foreman had an unobstructed view of the area. The timber swung and struck Winters causing him to fall or be knocked into the manway. No safety belts or safety lines were provided by Ozark-Mahoning.

The regulation requires the use of safety belts or safety lines "when men work where there is a danger of falling." The evidence establishes that there is a danger of falling when a person is working 2 to 3 feet from a 36 by 40 inch opening and the surface is 23 feet below. Ozark-Mahoning's foreman and assistant mine foreman concluded that it was possible for anyone working 2 to 3 feet from such opening to loose his balance and fall through the opening.

Whether Winters fell through the open manway or was struck by the timber and knocked into it is irrelevant to this proceeding. The fact is that he was working in close proximity to the opening and there was a real danger of falling. Although Foreman Clanton had an unobstructed view of the area while operating the slusher, he took no action to remove Winters from the place where there was a danger of falling. Although Foreman Clanton contended that he told Winters to stay out of the way of the timber, Winters could not recall such an instruction. At the hearing, it was evident that Winters had a hearing problem and Foreman Clanton admitted that Winters had had trouble hearing directions on prior occasions. The evidence on behalf of Ozark-Mahoning fails to establish that Winters' actions prior to this occurrence were either an aberration or could not be prevented.

Ozark-Mahoning contends that the use of safety belts or lines is not industry practice, would not have prevented Winters' injuries, and would be impracticable. Suffice it to say that safety belts or lines would not be required in timbering if all miners were positioned so that they were not in danger of falling. However, where, as here, a miner is in a position where he is in danger of falling, such a device must be furnished. The evidence establishes that Ozark-Mahoning violated 30 C.F.R. 57.15-5 as alleged by MSHA. While Ozark-Mahoning may also have been in violation of 30 C.F.R. 57.16-9, which provides that men shall stay clear of suspended loads, it is irrelevant to this proceeding since no violation of that standard was charged by MSHA.

ASSESSMENT OF CIVIL PENALTIES

In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. As pertinent here, Ozark-Mahoning's prior history of 14 violations in the previous 2 years is noted. The assessment of civil penalties herein will not affect the operator's ability to continue in

business.

CITATION NO. 366115

Ozark-Mahoning did not abate the violation cited within the time allowed. Subsequently, an order of withdrawal was issued to have the apparatus removed from the mine.

In assessing the negligence of Ozark-Mahoning Company, it is also noted that on May 19, 1978, Ozark-Mahoning was cited for a violation of the identical regulation as established in Citation No. 366115 and paid a $72 civil penalty. Hence, Ozark-Mahoning knew or should have known of its duty to maintain and test mine rescue apparatus and record those tests. I conclude that Ozark-Mahoning is chargeable with ordinary negligence.

As noted above, Ozark-Mahoning was not required to have mine rescue apparatus at this mine because it was affiliated with a central mine rescue station. However, the fact that it had such equipment in defective condition could compound the hazard in the following ways: (1) The McCaas would be used in an emergency with possibly fatal results; and (2) false reliance upon the existence of the McCaas at the mine site might delay notification of the central mine rescue station. I conclude that the gravity of this violation is serious.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $400 should be imposed for the violation found to have occurred.

CITATION NO. 366117

Ozark-Mahoning demonstrated good faith compliance after notification of the violation.

The accident involving George Winters occured in the presence of Ozark-Mahoning's foreman, Kenneth Clanton. Foreman Clanton saw Winters move to a position in close proximity to the open manway and took no action to remove Winters from the position where he was in danger of falling or to supply Winters with a safety belt or line. Thus, Ozark-Mahoning is chargeable with ordinary negligence in connection with this citation.

While the potential injury arising out of a fall is very serious, the likelihood of this occurring is lessened by the fact that men do not ordinarily work where they are exposed to the danger of falling. The manway is usually covered. Here, it was open for the purpose of hoisting timber. Moreover, even if Winters did not hear the instruction of his foreman, he should have been aware of the existence of the open manway when he entered the area. No other miner was exposed to this hazard. Considering all of the above factors, I conclude that the gravity of this violation was serious.

Based upon all the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $1,250 should be imposed for the violation found to

have occurred.

ORDER

WHEREFORE IT IS ORDERED that Respondent Ozark-Mahoning pay civil penalties within 30 days for the violations as follows:

Citation No.	Regulation	Civil Penalty
365457	30 C.F.R. 57.6-20(e)	$ 15.00
366115	30 C.F.R. 57.4-69	$ 400.00
366117	30 C.F.R. 57.15-5	$1,250.00

James A. Laurenson Judge