CCASE:

SOL (MSHA) v. UNION CARBIDE

DDATE: 19810610 TTEXT: Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,

CIVIL PENALTY PROCEEDING

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

v.

DOCKET NO. WEST 80-401-M

PETITIONER

MSHA CASE NO. 42-00473-05006 H

UNION CARBIDE CORPORATION,

MINE: Wilson Silverbell

RESPONDENT

DECISION

APPEARANCES: James H. Barkley Esq. and Phyllis K. Caldwell Esq.

Office of the Solicitor, United States Department of

Labor 1585 Federal Building, 1961 Stout Street

Denver, Colorado 80294,

for the Petitioner

John W. Whittlesey Esq.

Metals Division, Union Carbide Corporation

270 Park Avenue

New York, New York 10017,

for the Respondent

Before: Judge Jon D. Boltz

Pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter "the Act"), the petitioner seeks an order assessing a civil monetary penalty against respondent for the violation of 30 C.F.R. 57.6-177 as alleged in Order of Withdrawal No. 336984-1, as modified. The case was heard on April 23, 1981, in Grand Junction, Colorado.

At the conclusion of all of the evidence, the parties agreed to waive the filing of post hearing briefs and agreed to have a decision rendered from the bench after closing arguments. The bench decision follows:

BENCH DECISION

The petitioner alleges a violation of 30 C.F.R. 57.6-177.(FOOTNOTE.1) In regard to the violation alleged, the petitioner more specifically states in Order of Withdrawal No. 336984, which was modified as 336984-1, that three misfired holes were observed on November 6, 1979, at 2:30 p.m., in the No. 292 heading, which is a location designated in the respondent's mine. The order also alleges that this condition was readily apparent and also that two employees were roof bolting within approximately 8 feet of the face. The respondent denies the allegation.

The issues in the case are whether or not there was a violation of the cited regulation and, if so, what penalty should be assessed.

I make the following findings:

- 1. I have jurisdiction over the parties and subject matter of these proceedings.
- 2. The respondent is a large operator and the proposed penalty, if assessed, would not affect the operator's ability to continue in business.
- 3. There is no significant history of past violations.
- 4. The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violation.

It is undisputed that there were three misfires and that they were not reported to any supervisor until their existance was brought to the attention of the respondent by the MSHA inspector. The shot took place at the face at approximately 4:30 p.m. on November 5, 1979. After the shot, the swingshift came to work and the misfires were not discovered during that 8-hour shift. The misfires were also not discovered on the subsequent shift on November 6, 1979, until approximately 2:30 p.m. It is also undisputed that the MSHA inspector observed a fuse at the face of the number 292 heading. The fuse as described by the inspector was white and approximately 18 inches in length.

A miner who worked with a mucking machine at the face of the ore body after the shot had taken place and before the MSHA inspector made his inspection testified that he checked the area of the blast but observed no misfires. Additionally, there were other persons who passed by the area, but did not observe any of the misfires. The fuse described by the inspector was easily observed by him even though he was there only for the purpose of checking radiation levels in the mine. The other two misfires were not easily seen since they were near the bottom and were covered up with rock. There is no evidence that the fuse observed by the inspector was not in place from the time the shot took place at approximately 4:30 p.m. on November 5, 1979, until approximately 2:30 p.m. on November 6, 1979, when it was observed by the inspector.

In my view, the cited regulation, which states that misfires shall be reported to the proper supervisor, is violated when the misfire, which in this case was readily observable, is left unattended for at least the length of time that it was in this case. It wasn't until the MSHA inspector brought the condition to the attention of the respondent that remedial action was taken as required by the regulation.

The order of withdrawal is affirmed and I conclude that a penalty should be assessed in the amount of \$2,000.00.

ORDER

The foregoing bench decision is hereby affirmed and the respondent is ordered to pay a civil penalty of \$2,000.00 within 30 days of the date of this decision.

~FOOTNOTE ONE

- 57.6-177 Mandatory. Misfires shall be reported to the proper supervisor. The blast area shall be dangered-off until misfired holes are disposed of. Where explosives other than black powder have been used, misfired holes shall be disposed of as soon as possible by one of the following methods:
- $\mbox{\ \ (a)}$ Washing the stemming and charge from the borehole with water;
- (b) Reattempting to fire the holes if leg wires are exposed; or
- $\mbox{\ensuremath{\mbox{(c)}}}$ Inserting new primers after the stemming has been washed out.