

CCASE:
SOL (MSHA) V. DOMTAR
DDATE:
19811013
TTEXT:

Federal Mine 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. CENT 81-2-M
A.C. No. 16-00358-05017 F

v.

Cote Blanche Mine

DOMTAR INDUSTRIES, INC.,
RESPONDENT

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Petitioner;
Horace A. Thompson II, Esq., McCalla,
Thompson, Pyburn & Ridley, New Orleans,
Louisiana, for Respondent

Before: Chief Administrative Law Judge Broderick

On December 17, 1979, two miners at Domtar's Cote Blanche salt mine were killed when a nearby round of explosives was detonated as they were preparing another round for blasting. The Secretary of Labor, after investigating the accident, charged Domtar with a violation of 30 C.F.R. 57-6-175 which reads, "Mandatory. Ample warning shall be given before the blasts are fired. All persons shall be cleared and removed from areas endangered by the blast. Clear access to exits shall be provided for personnel firing the rounds." In this proceeding, Domtar contests both the Secretary's finding of a violation and the proposed penalty based upon it.

A hearing was held, pursuant to notice, in Lafayette, Louisiana, on June 2, 1981. Witnesses for the Secretary were Jay Durfee and William Wilcox, officials of the Mine Safety and Health Administration (MSHA) who investigated the accident. Witnesses for Domtar were William Coughlan, Manager of the Cote Blanche mine, and Robert Marks, a production foreman who supervised the blasting crews on the day of the accident. Marks was the only witness with personal knowledge of the events preceding and immediately following the accident.

The parties have filed briefs stating their positions. At the hearing and in its brief, Respondent has objected vigorously to the evidence submitted by the Secretary on the ground that it was hearsay. I do not in this decision specifically address those arguments since, as I view the

~2346

case, the facts essential to a decision for the most part are not in dispute. See Respondent's Prehearing Statement submitted May 12, 1981, pages 9-13, and Tr. 37-47. Having considered the briefs and contentions of the parties, and the whole record, I make the following decision.

Findings of Fact

1. Domtar's Cote Blanche mine is an underground salt mine in St. Mary's Parish, Louisiana. Mining proceeds by the room and pillar method, with explosives being used to dislodge the salt.

2. Blasting is normally conducted at the end of the day shift. On December 17, 1979, Robert Marks assigned Herbert Allen and Flowers Hope to blast a "bench round" in Room 23 between O and N South headings. He also assigned Darsey Conner and David Washington to blast a "toe" or "floor trimming" round in N South heading between Rooms 23 and 22.

3. A "bench" is a portion of the mine which stands, in this case, 55 feet higher than the floor of the mine. A bench round consists of a number of explosives drilled down into the bench. When the round explodes, the bench cascades onto the floor, where it is removed for transportation to the surface.

4. A "toe" consists of the remnants of an incomplete bench round explosion. Occasionally, a bench round does not dislodge the entire section of bench which was blasted, leaving a portion intact near the floor of the mine. The object of a toe round is to blast this part of the bench so that the resulting debris can be removed for processing.

5. Marks instructed Conner, Washington, and Allen to use flashlight signals to communicate with each other as they prepared to blast the rounds. Once the two crews arrived at the blasting locations, Allen was to signal the toe round crew that the bench round crew was in place. The toe round crew would then flash back, signifying the same. When the toe round crew had lit their fuse, they were to signal the bench round crew that they were leaving. Upon seeing that, the bench round crew would ignite their fuse and depart.

6. As it happened, both crews apparently signalled to each other when they reached the blasting locations. But, according to Allen, the toe round crew subsequently left the area. He took this to mean that they had lit their fuse, although they had not signalled that they were leaving, as required by the signalling procedure. Consequently, the bench round crew lit their fuse and departed the area.

~2347

7. Allen and Hope parked their vehicle at the shop area and rode an elevator to the surface. Shortly after that, Marks saw the parked vehicle and became alarmed, since Conner and Washington should have arrived before the bench round crew. As he began to look for them, the bench round exploded. Conner and Washington were later found dead near the toe round. They had been killed by the bench round explosion before they ignited the toe round.

8. Jay Durfee, investigating the accident for MSHA, issued a citation to Domtar on December 21, 1979, which is the subject of this case. It alleges a violation of "57.06-175" and, under "condition or practice" reads,

Powdermen D.L. Washington and D. Conners, Jr. were fatally injured when they were blasted by an adjacent bench round that had been fired by another crew (powdermen H. Allen and F. Hope). The two crews had not been instructed by Shift Crew (b) Foreman R. Marks to use effective voice communication between themselves to provide ample warning when firing blasts.

Issues

1. Was Respondent properly charged with a violation of the requirement that all persons shall be cleared and removed from areas endangered by the blast?

2. Did the violation occur as alleged and, if so, what is the appropriate penalty?

Discussion

Domtar has raised two procedural objections to the citation. First, it notes that the citation referred to "57.06-175" instead of 57.6-175 and claims, as a result, that it was not given fair notice of the charge. The ordinary person with even a passing acquaintance with the Mine Act would know the part and section intended. Domtar's claim of lack of notice can only be characterized as frivolous and is rejected.

The citation as originally issued refers only to the first sentence of the cited standard requiring ample warning. The Secretary filed a "modified" citation after this action was commenced, in which it is alleged that all persons were not removed from the area, as required by the second sentence of the standard. Domtar contends that the second sentence may not be considered in this proceeding since it was not raised in the citation.

~2348

A representative of the Secretary issuing a citation is not held to the rules of pleading in formal agency proceedings. I hold that the principal purpose of a citation's narrative portion is to familiarize the mine operator with the facts upon which the inspector relied in issuing the citation. (FOOTNOTE 1) Greater precision, of course, is required of the Secretary if and when he files a formal proposal for a penalty with the Commission. In this case, the proposal added an allegation that "all persons were not removed from the area endangered by the blast" in the Narrative Findings for a Special Assessment. Thus, from the moment civil penalty proceedings began, Domtar was on notice that it was charged with violating the first two sentences in 30 C.F.R. 57.6-175.

Turning to the merits, the undisputed facts show that a violation of the cited standard occurred. It is difficult to seriously argue that the dead miners were given any warning, much less ample warning. It is clear that they had no idea that the bench round had been ignited. It is just as clear that all persons were not cleared from the area endangered by the blast. The fact that the miners' bodies were found in that area is irrefutable proof. (FOOTNOTE 2)

The remaining question is, what penalty should be assessed? This requires an analysis of six criteria. 30 U.S.C. 820(i). Domtar is a large mine operator whose

~2349

ability to continue in business would not be affected by any penalty I may impose. Its history of prior violations is not such that an appropriate penalty for this violation should be increased because of it.

Domtar displayed ordinary good faith in responding to the citation. Blasting procedures were rewritten and MSHA personnel generally commended company officials for their cooperation in the investigation.

Obviously, the gravity of the violation is extremely serious. Two miners were killed.

It is difficult to attribute any negligence to the operator. Robert Marks testified that he instructed the miners in flashlight signalling procedures, which had been used at the mine for years without incident. He repeated his instructions until he was sure they were understood. The Secretary offered no evidence to contradict Mark's testimony so I must conclude that the accident resulted from the miners' failure to obey their instructions.

The Secretary expended considerable effort at the hearing attempting to show that other methods of communicating between the blasting crews would have been superior. (FOOTNOTE 3) On the whole, the evidence was unpersuasive. (FOOTNOTE 4) The issue is not whether Domtar's signalling procedures were superior to any others that could be conceived, but whether they served

~2350

the purpose of providing "ample warning" in the past and would have done so on this occasion had they been properly followed. I conclude that Domtar's negligence, if any, was slight.

Based on the above findings and discussion, I conclude that the appropriate penalty for the violation found is \$3,000.

Conclusions of Law

1. I have jurisdiction over the subject matter and the parties to this proceeding.
2. Domtar violated 30 C.F.R. 57.6-175 as alleged by the Secretary of Labor.
3. The appropriate penalty for the violation is \$3,000.

ORDER

Respondent, Domtar Industries, Inc., is ORDERED to pay the sum of \$3,000 within 30 days of the date of this decision.

James A. Broderick
Chief Administrative Law Judge

AA

~FOOTNOTE_ONE

1 The Legislative History of the Act supports this construction. The Senate Committee on Human Resources, discussing imminent danger closure orders, remarked that "the purpose of the detailed description of conditions is to adequately apprise the operator of the problem involved so he may take appropriate steps to correct the condition or practice. The Committee does not intend that this requirement be a procedural pitfall for the inspector, thus should it not be construed to invalidate orders issued under this section." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 626.

~FOOTNOTE_TWO

2 The Mine Act is generally a strict liability statute. The language of the cited standard and the wording of 110(a) of the Act make it plain that unforeseeability is not a defense to a violation, nor can the operator avoid a violation by placing the blame on a careless employee. MSHA v. El Paso Rock Quarries, 3 FMSHRC 35 (1981); Hendsfels v. Marshall, 2 BNA MSHC 1107 (5th Cir. 1981); MSHA v. Ace Drilling Co., 2 FMSHRC 790 (1980).

~FOOTNOTE_THREE

3 Of course, oral communication is not the only way to provide "ample warning" in compliance with the standard. Any suggestion to that effect by the Secretary is rejected.

~FOOTNOTE_FOUR

4 Witnesses for the Secretary suggested that a nearby fan should have been turned off to allow voice communication. But the mine was classified as "gassy" by MSHA and continuous operation of the fan appears to have been prudent. It was also argued that one of the bench crew could have walked around to the bench directly over the toe crew and observed their work. However, this would have split the blasting crew into three instead of two components and further increased the risk of inadequate communication. The use of two-way radios would have been inadvisable since radio communications near blasting operations create an additional hazard. Both parties concede, however, that the toe round and the bench round could have been fired from a single location. Domtar's new blasting procedures provide that when more than one round is fired, "all members of the crews will be in accompaniment when firing rounds following the firing of the first round."