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

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

v.

ALLIED CHEMICAL CORPORATION,  
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 80-478-M

MSHA CASE NO. 48-00155-05056 V

MINE: Alchem Trona or  
Alchem Mine

Appearances: Robert J. Lesnick Esq., Office of Henry C. Mahlman,  
Associate Regional Solicitor United States Department  
of Labor 1585 Federal Building 1961 Stout Street  
Denver, Colorado 80294, For the Petitioner;  
John A. Snow Esq. Van Cott, Bagley, Cornwall, and McCarthy  
50 South Main Street, Suite 1600 Salt Lake City, Utah  
84144, For the Respondent.

Before: Judge John J. Morris

BENCH DECISION

The Petitioner filed a petition for assessment of a civil penalty against the Respondent for the alleged violation of a regulation promulgated pursuant to the Federal Mine Safety and Health Act of 1977. The evidence having been concluded, the parties agreed to waive the filing of post hearing briefs and also agreed that a bench decision be rendered.

Based on statements and agreements of the parties, I entered the following bench decision.

JURISDICTION

The parties agreed that the Federal Mine Safety and Health Review Commission has jurisdiction to hear and determine this case.

STATEMENT OF THE CASE

Petitioner alleges respondent violated 30 C.F.R. 57.21-12. The cited standard provides as follows:

"Mandatory. Immediately before and continuously during welding or soldering with an open flame, in other than fresh air, or in places where methane is present or may enter the air current, a competent person shall test for methane with a device approved by the Secretary for detecting methane."

ISSUES

The issues in this case are whether respondent violated the standard. A corollary issue is if the standard was violated, what penalty, if any, is appropriate.

FINDINGS OF FACT

Some of the facts in this case are uncontroverted. Those facts that are controverted will be discussed later in the decision. The credible facts are as follows:

1. On April 2, 1980, Inspector William Potter inspected respondent's Trona mine. The mine has been classified as a gassy mine and has produced methane liberating approximately one million eight hundred thousand cubic feet each twenty-four hours.

2. The inspector issued Citation No. 576827 at the J.M.E. Panel where he observed welding being conducted on the head of a continuous miner in the last open crosscut toward the face. The miners were employed by Allied Chemical Corporation, the respondent in this case.

3. None of the miners nor their superintendents monitored for methane.

4. The inspector tested for methane with methanometer Model No. 102. The inby tests that were conducted resulted in the following methane concentrations: .0%, .5%, .2%, .4%, .5%, .4%, .5%, .6%.

5. Methane was found as close as twenty feet from where the men were welding.

6. The methane present might enter the air current.

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7. The explosion range for methane is 5% to 15%.

8. Methane explosions have previously occurred at this particular mine.

9. Foreman Tom Jones advised the inspector that he had not tested for methane since 1:00 a.m. The inspection was being conducted at 2:05 a.m.

10. Welding had been going on for one hour before the citation was issued in this case.

11. Methane can build up in the face area from small cave-ins within a few seconds of such an event or close to instantaneously. Such a build-up could be explosive in nature.

12. Continuous testing was not being conducted at the point of the welding.

#### DEFENSES AND DISCUSSION

Respondent's defense is that everything was working at the time of the inspection and, therefore, methane would not accumulate at this particular work site. I reject that defense, although I do find those underlying facts to be true. If everything was working well, then in the ordinary course of events, there would be no accumulation of methane at the point where the welding was being conducted. However, things are not always in the position where there will not be some difficulty that might cause the accumulation to build up. The regulation itself requires the continuous monitoring, and the regulation says where methane is present "or may enter the air current." It seems to me that on the factual basis where you have methane close to the air current, the methane can, then, enter into it.

One of the issues raised in this case is the credibility of respondent's foreman, Tom Jones, who claimed at the hearing that he was monitoring for methane. I find on this issue in favor of the government's witnesses who related Jones' statement, made at the time of the inspection, that he was not monitoring for methane. Mr. Potter and witness Kinterknecht both testified in this particular regard. I resolve this issue in favor of Mr. Kinterknecht and Mr. Potter because of Mr. Kinterknecht's notes. Although they didn't directly contain the answers therein on this particular issue, they did refresh his recollection as to what was said. As the parties know, the witnesses were sequestered in this case. Mr. Kinterknecht said that his notes that were written at the time of the inspection refreshed his recollection in this matter.

At the hearing, Mr. Jones testified that he was monitoring the particular area for methane, but he was doing it every fifteen minutes. He had been instructed by his supervisors in this regard. Even if Jones' testimony is taken to be true, it is no defense because the standard says that the area shall be "continuously" monitored during welding or cutting with an arc or open flame. So I take the regulation to be that continuous does not mean every fifteen minutes; the regulation means that the monitoring must be without interruption.

Further in support of this view, I note that the equipment approved by the Secretary does in fact, "continuously" monitor. So I see no reason why, technically speaking, if the equipment was there, continuous detection could not have been conducted.

There are several other credibility issues that should be discussed. Witness Potter discussed in detail the various tests he made. When Mr. Jones testified, he only directed his testimony at one of those particular tests. So, as I construe the evidence, Mr. Potter says he conducted nine tests. Mr. Jones only mentions one such test. So, I take it that Mr. Potter's evidence that he tested at least in eight areas and his findings in those areas are uncontroverted.

Further in connection with the case is the testimony of witness Randy Dutton offered on behalf of respondent. Mr. Dutton does not directly contradict the testimony of the compliance officer as to the compliance officer's tests. Mr. Dutton was at the test site after the inspector and he, himself, found some concentrations of methane. As he described it, it was .2%, and he described it as the highest reading he received.

Mr. Dutton further testified that he talked to the MSHA inspector, Mr. Jacobson, concerning monitoring every fifteen minutes or thereabouts. The nature of the defense here is that Mr. Jacobson, in effect, gave permission to respondent to conduct their monitoring on a basis of every fifteen minutes. That is a defense that is in the nature of an equitable estoppel against the Government. The law is clear that an employee or agent of the Government cannot bind the Government to a particular construction of the regulations. Inasmuch as the parties stipulated that Mr. Jacobson did not recall the conversation with witness Dutton, I take it that Mr. Dutton's testimony is correct in this regard. I am not willing to discount that particular evidence because it goes to the negligence of respondent, which is one of the matters to be considered when a penalty is to be assessed in this particular case, if a violation is found.

The last bit of evidence to be considered is the matter of the testimony of the witnesses McLendon and Kovick concerning the ventilation at the work site. I do find that under ordinary circumstances there would be no hazard to employees working in this particular area. I do note that the welding or cutting with an arc or open flame is only prohibited when the atmosphere surrounding that particular flame contains more than 1% of methane as may be determined by a monitoring device. That particular standard is 30 C.F.R. 57.21-13, which immediately

follows the standard in contest here.

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However, as I see it, 57.21-12 is a control standard that would help protect miners by measuring the amount of methane that may be entering the particular atmosphere in which they are working, and that can only be done if it is done continually. Since respondent had not continuously monitored the area in question for methane, I find that the operator did not comply with 30 C.F.R. 57.21-12.

#### PENALTY

In considering the statutory penalty in this case I find that Respondent did rely on an interpretation of the regulations that does not appear to have been correct. I believe that the penalty, as proposed, is excessive. I deem a penalty of \$500.00 to be appropriate.

#### ORDER

Based on the foregoing findings of fact and conclusions of law, I enter the following order:

1. Citation 576827 is affirmed.
2. A penalty of \$500.00 is assessed.

#### POST TRIAL ORDER

The foregoing bench decision is affirmed and respondent is ordered to pay the civil penalty in the sum of \$500.00 within 30 days of the date of this decision.

John J. Morris  
Administrative Law Judge