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

WESTERN STEEL CORPORATION
SUBSTITUTED CONTESTANT,
(FMC CORPORATION, ORIGINAL
CONTESTANT)

v.

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

CONTEST OF CITATION PROCEEDING

DOCKET NO. WEST 81-132-RM

Citation No. 577232

MINE: FMC

Appearances: John A. Snow Esq.
VanCott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144, For the Contestant
Robert J. Lesnick Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294, For the Respondent

BENCH DECISION

Contestant filed a contest of Citation No. 577232 issued by respondent on behalf of the Mine Safety and Health Administration (MSHA). A hearing was held in Green River, Wyoming on September 1, 1981. At the conclusion of the evidence the parties agreed to waive filing of post trial briefs and agreed that a bench decision could be rendered.

Based on the evidence I entered the following bench decision:

JURISDICTION

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

PROCEDURAL MATTERS

Western Steel Corporation has been substituted as a Contestant in this case without objection. Accordingly the case is dismissed as against FMC Corporation, and the caption is amended to reflect the substitution.

STATEMENT OF THE CASE

Contestant seeks an order vacating Citation 577232 issued by the Mine Safety and Health Administration for an alleged violation of Title 30 Code of Federal Regulations, section 57.4-33. The standard provides as follows:

Valves on oxygen and acetylene tanks shall be kept closed when contents are not being used.

ISSUE

The issue is whether Contestant violated the standard. That issue involves a construction of the regulation.

FINDINGS OF FACT

The facts are uncontroverted except as will be hereafter discussed. I find the credible facts to be as follows:

1. On December 3, 1980, witness Warner, a Western Steel iron worker, was fabricating material at the FMC mine.
2. Witness Warner was putting in a dust control system. A torch welder with acetylene and oxygen tanks was being used in connection with the process.
3. Mr. Warner arrived to work on that date at about 8:00 a.m. He set up his cutting tools and turned on the valves and started up the welder.
4. The torch had approximately a hundred feet of hose which led to the acetylene and oxygen tanks.
5. During the process of the morning, witness Warner ran out of angle iron that he was using to make brackets. It was necessary to go elsewhere, approximately forty to fifty feet away, to cut additional pieces.
6. At the place where witness Warner was cutting additional pieces he could not see the torch or the acetylene and oxygen tanks.
7. Mr. Warner testified that he was away for approximately five to ten minutes from the torch cutting head before the inspection team arrived. However, I further find that this time could be as long as twenty minutes, and for the purpose of this discussion I accept the twenty-minute period.
8. There were two sets of shut-off valves. One set was at the oxygen and acetylene tanks and one set was 100 feet away at the torch.

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9. When witness Warner left he turned off the set of shut-off valves that are located at the torch head itself.

10. Mr. Warner intended to turn off the valves at the acetylene and oxygen tanks at the lunch break.

Based on the foregoing facts, I conclude that there was no violation of the regulations, and the citation should be vacated.

DISCUSSION OF THE EVIDENCE

There's only one credibility determination in the case and that involves testimony of MSHA Inspector Potter to the effect that he learned while at the scene and before he issued the citation that the torch had not been in use. He bases this testimony on statements made by three miners at the time of the incident. I find a certain weakness in Mr. Potter's testimony in that I could not determine whether those three witnesses were stating that they themselves had not used the torch or whether they were stating that someone else had not used the torch.

In addition, witness Potter confirms that the torch had been in use at some time. I further find that Warner started at 8:00 a.m. and set up his gear and began operating the torch. He had done so between the time that he started at 8:00 a.m. and the time of the inspection at about 10:35 a.m.

The Mine Safety and Health Administration asserts that there was a hazard because the lines were under pressure and there was a possibility then that an explosion could have occurred. There's no evidence that such an event could have occurred, and no evidence that the lines were in any way weak. In any event, I am not convinced that Warner's actions created any hazard because that condition will always exist whenever the lines are in use. I further find that MSHA Inspector Potter appears to agree that MSHA allows valves to be open for a lapse of time when a worker has to do such a thing elsewhere such as get a piece of steel.

The defense here infers that "in use" means being used at various times throughout the day. There are certain defects in that approach because then no one would be responsible for turning the valve off. The possibility would exist that the first person coming on the scene would use the torch for five minutes and then walk away. Then it wouldn't be turned off until lunch time or the end of the day. I am not willing to go so far as to rule that the valves could be left on for such a substantial period of time.

Here I find that Mr. Warner left his work place near the torch, and he was doing an activity in connection with the further use of that torch. He was gone for a period not exceeding twenty minutes. Therefore, it is my view that the contents of the oxygen and acetylene torches were still "being used" during this twenty minute period. Therefore, there was no violation of the subsection 57.4-33. For that reason, I conclude that Citation 577232 should be vacated.

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I can see the Secretary of Labor's point, but I feel that if he wants a more specific requirement, then he should redraft Section 57.4-33. An employer is entitled to be fairly appraised of prohibitive activity. It may well be that Contestant in this case would be denied due process if I were to hold that these facts constitute a violation of the standard.

In summary, I feel that there could be two extremes involved in a construction of the regulation. One extreme is that the tank contents are not "being used" whenever the oxygen and acetylene are flowing through the lines but the torch itself has been turned off. I'm unwilling to accept that extreme construction because that would mean everytime a welder turned off his torch, he would have to go elsewhere to shut off the oxygen and acetylene. On the other hand, the other extreme would be if a worker used it for five minutes at 8:00 a.m. in the morning and then did not thereafter go back to the welder for a substantial period of time, the contents of the tank would be considered to be "being used" during that time. I do not accept either of these interpretations.

ORDER

For the foregoing reasons and based on the findings of fact and conclusions of law, I enter the following order:

Citation 577232 and the proposed penalty are vacated.

POST TRIAL ORDER

The foregoing bench decision is affirmed.

John J. Morris
Administrative Law Judge