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FMC V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FMC CORPORATION,
CONTESTANT
v.

Contest of Citation

Docket No. WEST 80-495-RM
Citation No. 576956; 8/13/80

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

Docket No. WEST 80-496-RM
Citation No. 576970; 8/13/80

FMC Mine

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

Civil Penalty Proceeding

Docket No. WEST 81-259-M
A.O. No. 48-00152-05045 I

FMC Mine

FMC CORPORATION,
RESPONDENT

DECISION

Appearances: John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy,
P.C., Salt Lake City, Utah, for FMC Corporation
James R. Cato, Esq., Office of the Solicitor, U.S.
Department of Labor, Kansas City, Missouri, for
Secretary of Labor

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above proceedings were consolidated for hearing and for the purpose of this decision. They involve a contest of two citations issued the same day, August 13, 1980, and a civil penalty proceeding seeking penalties for the violations alleged in the same two citations. Pursuant to notice, the cases were heard before Administrative Law Judge John F. Cook on August 11 and 12, 1981, in Green River, Wyoming. Judge Cook left the Commission before he could issue a decision, and the parties have agreed that I may decide the cases on the basis of

the transcript of the hearing and the exhibits introduced before Judge Cook and the contentions of the parties in their posthearing briefs. Terri Matson, and Federal Mine Inspectors William W. Potter and Merrell Wolford testified on behalf of the Secretary of Labor; Jerry Doan, Jeffery Munk, Karl O. Christensen, David M. Smith, Charles R. Maggio, Russell W. Rollins and Dale Force, all employees of FMC, testified on behalf of FMC Corporation. On the basis of the entire record and considering the contentions of the parties, I make the following decision:

APPLICABLE REGULATIONS

1. 30 C.F.R. 57.9-3 provides: Powered mobile equipment shall be provided with adequate brakes.
2. 30 C.F.R. 57.9-37 provides: Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

FINDINGS OF FACT

1. The FMC Corporation (FMC) is the operator of a large underground mine in Sweetwater County, Wyoming, known as the FMC Mine.
2. The subject mine produces trona, a natural soda mineral, and its operation affects interstate commerce.
3. The parties have stipulated that FMC is a large operator, it could satisfy the penalties if any are assessed against it, its past history "is not extraordinary" and that the citations involved in this proceeding were abated in good faith.
4. On August 9, 1980, Terri Matson was employed in the subject mine as a lube truck operator. Her duties including driving her vehicle to the mining machines and providing necessary lubrication to them during the maintenance shift. Her truck included two oil tanks and a grease can all with pumps operated by an air compressor on the truck.
5. On the above date at about 8:00 p.m., she was servicing the miner to prepare it for production which was planned for the second half of the normal maintenance shift. Both lubrication pumps were operating: Matson was outside of the truck and was pumping the hydraulic fluid into the large tank (approximate capacity 50 gallons) on the miner and a mechanic, Roger Brown, was filling the oil tank at the head of the miner.

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6. While the above operation was going on, the lube truck was parked on a slight grade. The motor was running and the truck was in second gear. The wheels of the truck were not blocked and the vehicle was not turned into a rib. No blocks or chocks were present in the vehicle. The parking brake was set.

7. The pumps "ran down" and Matson went back to "rev up" the engine to increase the air pressure. As she did so, the truck started forward. Matson stepped on the foot brake, but it went to the floor and did not respond. The truck struck Roger Brown; he was pinned between the truck and the miner and was injured.

8. The lube truck was equipped with an air over hydraulic braking system, the air acting as a power assist and operating from the same air compressor that powered the lubrication pumps.

9. On August 13, 1980, Inspector Wolford issued a citation under section 104(d)(1) of the Act charging a violation of 30 C.F.R. 57.9-3 because the lube truck did not have adequate brakes.

10. On August 13, 1980, Inspector Potter issued a citation under section 104(a) of the Act charging a violation of 30 C.F.R. 57.9-37 because on August 9, 1980, the lube truck was parked on a grade without being blocked or turned into a rib.

ISSUES

1. On August 13, 1980, did the lube truck in question have adequate brakes?

2. If it did not have adequate brakes, was this caused by the unwarrantable failure of FMC?

3. If a violation of 30 C.F.R. 57.9-3 is found, what is the appropriate penalty?

4. On August 9, 1980, was the lube truck in question parked on a grade and neither blocked nor turned into a bank or rib?

5. If a violation of 30 C.F.R. 57.9-37 is found, what is the appropriate penalty?

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

1. ADEQUATE BRAKES

Inspector Wolford testified that his inspection of the brakes indicated that the modification of the hydraulic braking system to provide the air assistance rendered the brakes marginal when the air compressor provided between 75 and 90 p.s.i. and inoperable when it fell below 75 p.s.i. He stated that the use of the air compressor for the lube system could reduce the air pressure to the above mentioned levels. Jerry Doan, FMC maintenance supervisor, testified that running the lubrication pumps depletes the pressure in the air system and that if the air pressure gets sufficiently low, the hydraulic brakes will fail. The figures referred to by Inspector Wolford were disputed by other witnesses for Respondent, but their precise accuracy is not important. Karl Christensen, FMC Diesel foreman, testified that if the hydraulic system is working properly and the brake pedal goes to the floor, it could be explained by inadequate air pressure. I accept as true and accurate Ms. Matson's testimony that when she stepped on the brake pedal just prior to the accident on August 9, 1980, the pedal went to the floor and the brake did not operate. The only logical explanation for this is a depletion in the air pressure as a result of using the lubrication pumps. On this basis, I conclude that the braking system was inadequate because of the possibility of failure due to its being tied in with the air compressor operating the lubrication system.

There was also testimony (disputed) concerning the holding ability of the parking brake while the vehicle was in second gear, but this is not referred to in the citation and I am not considering it.

(a) UNWARRANTABLE FAILURE

An unwarrantable failure to comply with a mandatory safety standard (section 104(d)(1) of the Act) has been defined as the failure to abate a condition which the operator knew or should have known existed or because of lack of due diligence or

reasonable care. Zeigler Coal Co., IBMA (1977) 1 MSHC 1518. The evidence in this record shows (1) the operator deliberately altered the braking system on the vehicle in question; (2) the operator knew or should have known that the use of the lubrication pumps could deplete the air pressure and cause a failure in the hydraulic braking system. Therefore, I conclude that the violation was caused by FMC's unwarrantable failure to comply with the regulation in question.

(b) PENALTY CRITERIA

The violation was directly responsible for the injury to Roger Brown. I conclude that it was serious. Since I have previously concluded that it was an "unwarrantable failure" violation, ipso facto, it was due to FMC's negligence. FMC is a large operator, with more than two and one half million man hours worked each year. The history of prior violations is not such that penalties otherwise appropriate should be increased because of it.

2. FAILURE TO BLOCK WHEELS OR TURN INTO BANK OR RIB

There is little or no dispute that on August 9, 1980, Terri Matson parked her mobile vehicle in order to lubricate the miner. The vehicle was on a slight grade and was not blocked. The vehicle was facing an upward grade and the rear wheels were 5 or 6 feet from the rib. That is, if it rolled backwards, it would roll 5 or 6 feet before being stopped by the rib. I conclude that these facts establish a violation of the standard contained in 30 C.F.R. 57.9-37.

(a) PENALTY CRITERIA

Clearly the violation could have resulted in injury. However, because the grade was gradual and the distance the vehicle could have rolled was limited, I conclude that the violation was only moderately serious. This violation did not cause or contribute to the injury to Mr. Brown.

Matson testified that she had no blocks on her vehicle and had never blocked the vehicle in question. She stated that she did not block the vehicle on August 9, 1980 and did not turn the wheels into the

rib. She further stated that she had never seen other miners in her crew block the wheels of their vehicles or turn into a rib when they parked the vehicles.

Jeffrey Munk testified that although vehicles are supposed to be chocked or turned into a rib when parked, Ms. Matson (Foley) only "occasionally" followed this procedure. For his own part, Munk admitted that prior to August 9, 1980, he "might have been a little lax on it, but for the most part we did, yes." Matson's foreman testified that he instructed her to block her vehicle when she parked it. However, I conclude on the basis of all the testimony that the policy was not strictly or vigorously enforced. I therefore further conclude that the violation was caused by FMC's negligence.

ORDER

IT IS ORDERED that the Contest of Citations 576956 issued August 13, 1980, and 576970 is DENIED and the citations are AFFIRMED.

IT IS FURTHER ORDERED that Respondent in the penalty proceeding, FMC Corporation, shall within 30 days of the date of this decision pay the following civil penalties for the violations found herein to have occurred:

Citation	30 C.F.R. Standard	Penalty
576956	57.9-3	\$ 500
576970	57.9-37	\$ 300
	Total	\$ 800

James A. Broderick
Administrative Law Judge