CCASE:
SOL (MSHA) V. ALLIED CHEMICAL
DDATE:
19840319
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. WEST 79-165-M
v.	ASSESSMENT CONTROL NO. 48-00155-05010
ALLIED CHEMICAL CORPORATION, RESPONDENT	MINE: Alchem Trona

Appearances:

Edward H. Fitch, Esq., Office of the Solicitor,
United States Department of Labor, Arlington, Virginia,
For the Petitioner

John A. Snow, Esq., VanCott, Bagley, Cornwall and McCarthy,
Salt Lake City, Utah,
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Allied Chemical Corporation, (Allied), with violating various safety regulations adopted under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Respondent denies that the violations occurred.

After notice to the parties a hearing on the merits was held in Green River, Wyoming.

ISSUES

The issues are whether Allied violated the regulations and, if so, what penalty, is appropriate.

CITATION 336653

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.9-2 which provides as follows:

> 57.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

FINDINGS OF FACT

The evidence is conflicting. I find the following facts to be credible.

In Allied's mine the mineral trona is sheared from the face and deposited on a chain conveyor. By other conveyors and crushers the trona is then moved to a shaft area (Tr. 36). The mining technique at this site features a longwall mining unit. The roof of the mine at this location is supported by an overhead canopy which is a portion of the longwall miner. The canopy is, in turn, supported by hydraulic jacks. There are probably 180 chocks, or jacks, in the 400 feet of the longwall mine. There are six legs supporting the canopy at the tailgate and headgate areas (Jansen 20, 64).

The cause of this litigation is a 3/4 inch soft steel bolt (FOOTNOTE 1) either six or eight inches long which intersects the chock near the point where the cylinder fits into a two or three inch cup (Tr. 35, Jansen 20-21, 38; G 27, G 29).

The purpose of the steel bolt is to keep the chock from twisting. If the chock twisted it could tear up the packing (Jansen 20-21). In addition, hydraulic lines are wrapped around the legs. If, due to the twisting motion, the lines broke you would start to loose hydraulic pressure (Jansen 22). The bolts are of a soft steel and are designed to break (Jansen 24, 38).

The citation here was issued because two bolts were missing (Tr. 111, 231). MSHA inspector Wolford's opinion was that this was a serious maintenance defect affecting safety (Tr. 232). Further, in Wolford's view anything made to certain specifications should be maintained that way (Tr. 242).

The metal of the longwall unit weighs 50 tons and each chock can support 100 tons of overburden (Jansen 61, 64). As the mining for the trona advances the longwall miner and its chocks are pulled forward (Jansen 64).

DID A VIOLATION OCCUR

The vital portion of the standard in contest requires that "equipment defects affecting safety" shall be corrected.

It is uncontroverted that the soft steel bolts in two different chocks were missing. It is clear that the steel bolts (FOOTNOTE 2) prevent the chocks from twisting. By preventing the twisting the integrity of the fittings and their attached hydraulic lines is preserved. The absence of any bolt is accordingly an "equipment defect."

The next and more difficult question is whether, within the terms of the regulation, the described equipment defect was one "affecting safety."

Allied strenously argues that only its experts are credible since they have worked for many years with this complex machine which is the only one in the area and the only one in the United States not located in a coal mine.

Allied also vigorously attacks the credibility of the MSHA inspectors due to their lack of expertise concerning any longwall miner.

The Commission does not blindly follow any expert witness. However, I am persuaded by MSHA's evidence. In view of the close issue concerning the respective experts I deem it necessary to set out MSHA's credible evidence on this point. The testimony of inspector Jacobson: you would want the bolt in place to prevent it from detaching itself (Tr. 47-48). A lack of bolts could bring about a serious failure in the equipment (Tr. 54). If after the machine is moved forward there wouldn't be proper support without the bolt (Tr. 63). If the chock fell it could fall on a person working under them (Tr. 63). Further, inspector Wolford testified that Allied was cited because the ram was out of the socket and the bolts were out (Tr. 231-232). In Wolford's opinion this was a serious maintenance problem affecting safety (Tr. 232).

I have studied Allied's contrary evidence but I am not persuaded. Allied's expert evidence is simply not credible. In addition, witness Jansen principally focused on the stop valve in the equipment. Briefly stated, Jansen's uncontroverted evidence shows that if all the chocks lost pressure the canopy wouldn't come down because a stop valve prevents the hydraulic equipment from failing. In fact, if the stop valve becomes operative it would be necessary to go in and bleed off the equipment to release the canopy (Jansen 22-26).

Allied misjudges the thrust of 30 C.F.R. 57.9-2. The standard requires the remedy of equipment defects "before the equipment is used." Allied's stop valve can only become operative after use of the equipment, and after a failure of the pressure in the hydraulic jacks (Tr. 54).

Allied asserts that it cannot be held liable because the bolts were being replaced in the chocks. This evidence arises from the testimony of Bertagnolli and Jansen (Tr. 201, Jansen 10). Further, Allied asserts as a defense that there was no power in the longwall unit (Tr. 169).

I am not persuaded by Allied's evidence concerning repairs. Assigning a mechanic to do the work and having it done are two different facets. As will be noted, infra, Allied produced an electrician who had been assigned to repair equipment and who was doing it when later events interrupted him. In addition, I find the testimony of MSHA inspector Wolford to be credible: no one claimed maintenance work was being done at the time. Further, he didn't recall seeing any tools lying about (Tr. 236, 237).

The applicable law is stated in Ziegler Coal Company, 3 IMBA 336, 373 (1974) wherein the Interior Board held as follows:

> The presence of defective equipment in a working area of a mine is prima facie evidence of the violation of the Act; however, such evidence can be rebutted by the operator, and where he demonstrated by a preponderance of the evidence that the equipment was under repair, and had not been used, and was not to be operated until it met the required safety standards, no violation of the Act has occurred.

Allied relies on Phelps Dodge Corp., WEST 79-67-M, 1 MSHC 2286 wherein Judge Merlin cites Plateau Mining Company, 2 IMBA 303 (1973), and Ziegler Coal Company, supra. None of the cited cases support Allied. Basically Allied did not demonstrate by a preponderance of the credible evidence that the equipment was under repair, and had not be used, and was not to be operated until it met the required safety standards. I note that at a CAV (no penalty) inspection several weeks before these citations were issued some 32 or 34 bolts were missing from the chocks (Tr. 38-41).

It further follows that the mere fact there was no power in the shear at the time of the violation does not relieve Allied from liability for violating the standard.

In sum, within the meaning of 30 C.F.R. 57.9-2, an "equipment defect" arises when equipment is not maintained in the manner in which it is received from the manufacturer. Further, on the basis of the evidence as stated, MSHA has proven that the equipment defect affected safety.

APPLICABILITY OF STANDARD

An additional issue here is whether 30 C.F.R. 57.9-2 applies to chocks. Allied asserts that safety regulations under 57.9 relate only to loading, hauling, dumping as stated in the heading at 30 C.F.R. 57.9. Allied also relies on the evidence from MSHA inspector Jacobson's testimony that the chocks do not relate to loading, hauling and dumping. Further, in support of its position Allied cites Judge Broderick's decision in The Hanna Mining Co., Docket No. 79-103-M (1 MSHC 2488).

Reliance on a heading to determine the scope and application of a standard is inconsistent with the usual rule of statutory construction. As noted by the OSHA Review Commission titles and headings are useful tools for resolving doubt as to the interpretation to be accorded a standard or regulation but they cannot be used to limit or alter the meaning of the text, Continental Oil Company, OSHRC Docket No. 13750 (June 1979); Wray Electric Contracting, Inc., 78 OSHRC 78/A2, 6 BNA OSHC 1981, 1978 CCH OSHD %57 23,031 (No. 76-119,1978).

In reviewing the text I note that 30 C.F.R. 56.1 defines the purpose and scope of the regulations as follows:

> 56.1 Purpose and scope.
>
> The regulations in this part are promulgated pursuant to section 6 of the Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 725) and prescribe health and safety standards for the purpose of the protection of life, the promotion of health and safety, and the prevention of accidents in sand (including industrial sands), gravel and crushed stone operations which are subject to that Act. Each standard which is preceded by the word "Mandatory" is a mandatory standard. The violation of a mandatory standard will subject an operator to an order or notice under section 8 of the Act (30 U.S.C. 727).

Simply stated, the scope of the regulations is to prevent accidents in those operations which are subject to the Act. To construe the heading in the manner urged by Allied would conflict with the broad scope of the text.

For a comparison note how the text in 30 C.F.R. 57.1 limits the various headings. It provides, in part, as follows:

> Those regulations in each subpart appearing under the heading "General - Surface and Underground" apply both to the underground and surface operations of underground mines; those appearing under the heading "Surface Only" apply only to the surface operations of underground

> mines; those appearing under the heading "Underground Only" apply only to the underground operations of underground mines.

I am aware of Judge Broderick's contrary decision in The Hanna Mining Company, supra, and I disagree. I am also aware that the Commission reviewed and affirmed that decision on September 22, 1981. However, a reading of the decision on review indicates the Commission did not consider that particular aspect of Judge Broderick's decision (2 MSHC 1433).

Allied finally contends that no violation occurred because there was no evidence that the bolts were missing before use. The basic argument urged by Allied arises from the evidence that bolts are checked every shift, that is, every eight hours.

I disagree with Allied's position. I presume Allied would have an inspector wait until the equipment is used and possibly a miner exposed to a hazard before an operator could be cited for the violation. The enforcement of a mandatory safety or health regulation is not amenable to being reduced to such a charade.

Further, in support of its position Allied cites Grove Stone and Sand Co., 1 MSHC 2473 (July 1980). Allied has misread Judge Steffey's decision. The actual use of equipment is not a condition precedent to establish a violation of 56.9-2.

For the above stated reasons I conclude that the citation should be affirmed.

CIVIL PENALTY

The Secretary proposes a penalty of $114 for the violation of 30 C.F.R. 57.9-2. The statutory criteria for assessing a civil penalty is set forth in Section 110(i) of the Act [30 U.S.C. 820(i)] which provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In connection with the violation of this regulation the record indicates that in 1979 Allied had 17 violations of 57.9-2. On the other hand Allied abated the condition.

At the trial the Secretary requested that the Commission increase the proposed penalties (Tr. 4, 5). However, this contention was not further pursued in the Secretary's post trial brief.

Considering the statutory criteria I deem that the proposed civil penalty of $114 is appropriate.

ELECTRICAL VIOLATIONS

Citations 336654, 336655, and 336656 respectively allege violations of Title 30, Code of Federal Regulations, 57.12-30, 57.12-25 and 57.12-32. The cited regulations provide as follows:

> 57.12-30 Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.
>
> 57.12-25 Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.
>
> 57.12-32 Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

SUMMARY OF THE EVIDENCE

The evidence is conflicting. I find the following facts to be credible.

On January 26, 1979 MSHA inspectors were conducting a 103(i) gas inspection at the longwall mining unit of Allied's trona mine. Inspector Hansen indicated that the methane concentration exceeded one percent and Allied personnel agreed (Tr. 19-23, 156). Hansen issued a closure order. Schultz and Bertagnolli, Allied supervisors, told the workers to stop their work and leave (Tr. 158-159). At this time electrician Bruton was trying to repair or replace a flag switch box (Bruton 10, G 25, G 26). While working on the box Bruton found it necessary to secure additional tools which were in his jeep in the intake airway. When Bruton was enroute to his jeep Bertagnolli told him to get out of the mine. Bertagnolli refused Bruton's request to return to the flag switch box to retrieve his tools (Tr. 159, Bruton 20). There was also a new box sitting alongside the box

being repaired (Jansen 6). The work Bruton was doing required the longwall miner to be down (Bruton 21). All of the orange colored lights were off. This would indicate that the flag switch box was not energized (Tr. 195).

Three days later, after ventilation had removed the methane, Allied's Jansen and the MSHA inspectors returned to the longwall panel. The inspectors noticed the disconnected wires, and the missing bolts at the flag switch. Jansen said the power was off [because of the closure order] and there was no power in the longwall miner or the flag switch box (Jansen 6).

DISCUSSION

The electrical violations, involving a single flag switch box, were cited after the methane closure order was issued and before it was lifted. When they reentered the mine the inspectors "had not abated the order and had not given the company permission to start their operation at that point" (Tr. 83).

On reentering the mine the inspectors found three bare wires protruding six to eight inches from an emergency stop control device (Tr. 68, 69, 89). The device, also called a flag switch box, was located 25 to 60 feet from the face of the longwall (Tr. 71-72).

The Secretary contends that the citation was properly issued because the wires were exposed at a time when the lines were energized. They believed the lines were energized because an unidentified electrician checked them.

On the other hand Allied claims that the inspectors did not call for an electrician. Further, Allied asserts there was no power in the lines feeding the flag switch box and the longwall miner. Allied contends that its electrician Bruton was interrupted by the methane closure order as he was repairing the flag switch box.

Prior events often cast a shadow. In this case, when the methane closure order was issued, the MSHA and Allied safety experts were dynamic in their reaction: all workers were immediately withdrawn and all power to the longwall unit was cut (Tr. 144-145, 163, 177, 194, Hansen 17).

At this point in time Bruton, who was repairing the flag switch box, was ordered from the mine by his supervisor. On their return the MSHA inspectors decided the wires were energized because "we had an electrician come up and check the wires." I do not credit the Secretary's evidence because it is considerably less than unequivocal. The witness characterizes this pivitol testimony as "to my knowledge" (Tr. 82), "just a recollection, this is two years ago" (Tr. 82). Further, "it seems to me we had an electrician come up . . . ." (Tr. 83), and "to the best of my recollection there was power on . . . ." (Tr. 84).

The Allied representative flatly contradicts the Secretary's evidence on this point. The inspector didn't ask for an electrician and the power was off (Tr. 49, 50, Jansen 6).

In addition, I further credit Allied's version that there was no power in the longwall miner and the flag switch box because they were familiar with the two electrical systems at this location. The inspectors disclaimed any electrical expertise and Allied's representative knew the power was off because it had been shut off and locked out at the time of the closure order. In addition, there were no orange colored lights burning at this location.

The facts involved in the missing bolts in the chocks are different from the alleged electrical violations. The principal difference lies in the fact that Bruton was repairing the flag switch box when he was interrupted by the closure order. I conclude that the circumstances surrounding the electrical citations invoke the doctrine expressed in Plateau Mining Company and Ziegler Coal Company, supra.

For the foregoing reasons citations 336654, 336655, and 336656 should be vacated.

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

ORDER

1. Citation 336653 and the proposed civil penatly therefor are AFFIRMED.

2. Citations 336654, 336655, and 336656 and all proposed penalties therefor are VACATED.

John J. Morris
Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 The bolt received in evidence was larger than the type used on the chocks in this case (Exhibit 18).

~FOOTNOTE_TWO

2 A portion of Allied's case dealt with the evidence that the bolts did not, and could not, bear any of the downward pressure from the roof. I agree. The evidence clearly supports this view.