

CCASE:
SOL (MSHA) V. FMC
DDATE:
19820326
TTEXT:

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

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

v.

FMC CORPORATION,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

DOCKET NO. WEST 79-101-M
A/C No. 48-00152-05004

DOCKET NO. WEST 79-166-M
A/C No. 48-00152-05005

MINE: FMC

DECISION

APPEARANCES:

James R. Cato Esq. Office of the Solicitor
United States Department of Labor
911 Walnut Street, Room 2106
Kansas City, Missouri 64106,
For the Petitioner

Clayton J. Parr Esq.
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111,
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

These proceedings were brought pursuant to section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The petitions for assessment of civil penalties were filed by the Mine Safety and Health Administration (MSHA), on September 17, 1979 and timely answers were filed thereafter by respondent. A hearing was held in Salt Lake City, Utah, at which both parties were represented by counsel.

WEST 79-166-M

At the beginning of the hearing, the petitioner moved to withdraw Citation No. 336426 issued under Docket No. WEST 79-166-M, Assessment Control No. 48-00152-05005, for the reason that the citation was issued under the wrong standard. As the respondent had no objection to this, a decision was rendered at the hearing approving petitioner's motion of dismissal. I hereby AFFIRM that decision.

WEST 79-101-M
STIPULATION

The parties agreed to the following stipulations for the remaining docket: (1) That the respondent is the operator of the FMC Mine which is a large mine; (2) The history of prior violations is not extraordinary; (3) That issuance of the order/citation was in accordance with proper procedures of MSHA; (4) Respondent's ability to continue in business after imposition of a reasonable civil penalty is not an issue; (5) That respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 and I have jurisdiction over these proceedings.

STATEMENT OF PROCEEDINGS

Thereafter, the parties presented evidence regarding order/citation No. 335727. Witnesses for the Secretary were M.C. Jacobson, field supervisor for MSHA, William W. Potter, mine inspector. Witnesses called by the respondent were John V. Corra, respondent's assistant production superintendent at the time the order was issued, Don Warne, area supervisor for the section of the mine involved herein, Julius Jones, company safety manager, Warren Sherwood Coleman, co-chairman of the Union safety committee and steward of the Union at the time the citation was issued, William G. Fischer, respondent's chief mining engineer and Mahlon Grubb, general mining superintendent.

The parties have submitted briefs stating their positions and, having considered them and the evidence adduced at the hearing, I make the following decision.

Regulatory Provision

Title 30, Code of Federal Regulations, section 57.3-22, reads:

Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

ISSUES (FOOTNOTE 1)

The issues are:

1. Whether the conditions cited and described by the inspector in the

~515

order issued in these proceedings existed in respondent's mine on September 18, 1978?

2. If so, was the condition a violation of 30 C.F.R. 57.3-22?

3. If a violation occurred, what is the appropriate penalty?

FINDINGS OF FACT (FOOTNOTE 2)

1. On September 16, 1978, a roof fall occurred at the intersection of number 5 room and number 26 crosscut in respondent's mine. The fall caused no injuries but put a stammler feeder located in this area out of commission. MSHA was notified of the roof fall (Tr. 26, 139). (FOOTNOTE 3)

2. On September 18, 1978, at approximately 9:30 a.m. mine inspectors Jerry Thompson, William Potter and Gary Ferrin, accompanied by company employees proceeded to 1 East 2C panel in respondent's mine to conduct an examination of the roof fall (Tr. 27 and 39).

3. As the inspection party proceeded to the roof fall site, areas of loose rock were observed in the 1 East 2C panel near the site of the roof fall which areas were ordered barred down by inspector Thompson (Tr. 43, 44, 85, 86, 89 and Exhibit R-1).

4. At the intersection where the roof fall occurred and men were working, a loose slab was observed which was ordered barred down by Thompson (Tr. 89, Exhibit R-1).

5. A miner (electrician) was observed working near an energized circuit center in room 7 between crosscut 27 and 28 under loose rock located on the rib above him (Tr. 58, Exhibit P-3).

6. Respondent's employees barred down the loose rock observed on the way to the roof fall with very little effort (Tr. 46).

7. A flat piece of loose material approximately 5 or 6 feet tall and a couple of feet wide on the rib near the crosscut where the roof fall occurred and the stammler was located was barred down at the request of inspector Thompson. It was near the travelway used by miners to get to the stammler (Tr. 48 and 49).

8. A piece of loose rock on the rib near the energy circuit breaker was removed by touching the rock which fell in pieces approximately one or two feet in size (Tr. 57 and 58).

~516

9. There was no production or mining of ore in progress at the time of the inspection in section 1 East 2C panel of the mine. However, miners were in the area working to remove the stammler and a man was tramping back and forth getting material out (Tr. 51 and 90).

10. The size and condition of the loose rock observed was such that it could be reasonably expected to cause death or serious physical harm to miners working in the area.

11. The condition was obvious and should have been noticed by miners working in the area.

12. The respondent demonstrated ordinary good faith in abating the violation.

DISCUSSION

The FMC Mine, located near Green River, Wyoming, is one of the largest underground mining operations in the United States. The mine produces approximately 4.5 million tons of trona ore per year utilizing the room and pillar mining method. On September 16, 1978, at approximately 6:30 p.m., a roof fall occurred at the intersection of number 5 room and number 26 crosscut in section 1 East 2 C panel. The fall caused no injury to miners, but placed a stammler feeder (machine used to crush and feed ore onto a conveyor belt) out of commission. The respondent notified MSHA of the roof fall shortly thereafter and all miners, except personnel assigned to cleanup were removed from the panel (Tr. 104 and 106).

On September 18, 1978, mine inspector Thompson and inspector trainees Potter and Ferrin proceeded to the FMC Mine to conduct an examination of the roof fall. The inspection party was accompanied by respondent's employees into the mine. Inspector Thompson, who issued the order involved in this case, was unavailable as a witness at the time of the hearing. Inspector Potter testified at the hearing that the inspection party entered the mine at approximately 9:30 a.m. and proceeded towards the roof fall. He testified that while enroute Thompson stopped the inspection party on two occasions so that loose material could be barred down from the back and rib of the area they were traveling through (Tr. 42 and 44). At the intersection where the roof fall occurred he described a flat piece of material five or six feet tall and a couple of feet wide on the rib which was loose and Thompson requested it be pryed (barred) down (Tr. 49).

Potter testified that he saw a man working near the power center which is the power source that feeds power to the stammler and other equipment. The inspection party proceeded to the power center where loose material was observed on the rib (side of the drift) above the electrician working there. Potter testified that he observed that the material only required to be touched and it fell down in what was described as being a "bunch" of small rocks anywhere from one to two feet in size and weighing one to 50 pounds (Tr. 58 and 59). Inspector Thompson issued a

withdrawal order after he left the mine based upon what he had observed (Exhibit P-1 and P-3).

Respondent introduced evidence that 1 East 2C panel had presented poor ground conditions due to unusual geologic conditions including difficulties in maintaining roof control integrity. Testimony was presented that slabbing and spalling of the roof and ribs occurred with greater than usual frequency and that supervisory personnel and miners were conscious and aware of this condition (Tr. 110, 112, 129, 156 and 170). Respondent argued that the section of the mine cited by inspector Thompson had not been operating for over 36 hours pending cleanup and securing the area after the fall. Because the panel had been inactive for over a day and a half, the slabbing that had occurred was not surprising. (FOOTNOTE 4) Further, that the order's references to loose ground at the 27 crosscut between rooms 5 and 6 and inspector Potter's testimony in reference to 26 crosscut between rooms 5 and 6 was not supported by other witnesses as to location or degree of seriousness. Respondent's safety director Julius Jones testified that the slab observed in the 27 crosscut did not constitute a danger and did not need to be barred down as the pieces were locked in the roof with steel mats that were secured to the roof with roof bolts (FOOTNOTE 5.) Jones further testified that in his opinion inspector Thompson did not test the slab in the rib at the southeast corner of the 27 crosscut at room number 5 intersection to determine its stability and that rather than being barred down, the slab was removed with a cutting machine (Tr. 120 and 133). Testimony was also presented regarding other areas included in the order and described by inspector Potter contradicting the danger or seriousness of these conditions.

A careful review and consideration of all the evidence in this case persuades me that inspector Thompson and Potter observed loose rock at various locations in 1 East, 2C panel which constituted a danger to miners working in the area. Potter identified the areas as best he could under the circumstances and testified that in each situation described in the order, he was of the opinion that loose material needed barring down. This opinion was based upon his ten years of underground mining experience. The facts further show that a roof fall had occurred in this area which fortunately did not result in injury but indicates the area was unstable. In refuting the violations included in the order, respondent presented a distinguished and experienced array of witnesses who contradicted the petitioner's witness that the various areas cited therein presented a danger. However, I find the testimony of inspector Potter more credible than respondent's witnesses as to the condition in the mine and the dangers presented at the time of the inspection. Further, respondent's witnesses in their testimony confirmed that a problem existed in this section of the mine with slabbing and spalling of the roof and ribs occurring with greater than usual frequency which contradicts their argument that the area was not unsafe. The issue here is not whether there was an imminent danger that warranted a withdrawal order but whether there was a violation of mandatory standard section 57.3-22.

1 The respondent did not file a timely appeal as to the issuance of a 107(a) withdrawal order in this case. Therefore, this is not a proceeding to review the order but rather a civil penalty proceeding and the issue is whether the violation charged in the order's citation occurred.

~FOOTNOTE_TWO

2 The parties stipulated that the Commission has jurisdiction in this case.

~FOOTNOTE_THREE

3 Respondent's Brief, page 4.

~FOOTNOTE_FOUR

4 Respondent' Brief, pages 7 and 8.

~FOOTNOTE_FIVE

5 Respondent's Brief, page 9.