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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

Civil Penalty Proceedings

Docket No. WEST 81-238-M
A.O. No. 42-00716-05012

v.

KENNECOTT MINERALS CO.,
UTAH COPPER DIVISION,
RESPONDENT

Magna Concentrator

Docket No. WEST 81-239-M
A.O. No. 42-00712-05017

Arthur Concentrator

DECISION

Appearances: James Barkley, Attorney, U.S. Department of Labor, Denver,
Colorado, for the petitioner John B. Wilson, Esquire,
Salt Lake City, Utah, for the respondent

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing civil penalties for three alleged violations of certain mandatory safety standards found in Part 55, Title 30, Code of Federal Regulations. The citations and proposed penalty assessments are as follows:

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Citation No.	Date	30 CFR Section	Assessment
0584162	11/13/80	55.9-2	\$114
0584163	11/14/80	55.18-25	\$140

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Citation No.	Date	30 CFR Section	Assessment
0583701	11/28/80	55.14-1	\$240

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Respondent filed timely answers in these proceedings denying that it had violated any of the safety standards detailed in the petitioner's proposals for assessment of civil penalties. In addition, in Docket WEST 81-238-M, respondent filed a motion to dismiss on the ground that MSHA lacks jurisdiction to enforce any mandatory safety and health standards governing working conditions of employees working at respondent's power plant. The citations in question were issued at the power plant, and while conceding that respondent's Magna Concentrator is a "mine" subject to the provisions of the Act, respondent asserted that the Act does not apply to the power plant. Respondent argued that pursuant to the provisions and terms of an MSHA-OSHA Interagency agreement, 44 Fed. Reg. 22827, April 17, 1979, effective March 29, 1979, MSHA does not, should not, and cannot exercise enforcement jurisdiction over a power plant facility.

Petitioner filed a response and opposition to the motion to dismiss and by Order issued October 7, 1981, I denied the respondent's motion to dismiss without prejudice to its reassertion at a scheduled hearing where the parties would have a full opportunity to present additional facts and evidence in support of their respective jurisdictional arguments.

These proceedings were initially docketed for hearing in Salt Lake City, Utah, October 22-23, 1981, but the hearings were cancelled and continued because of certain budgetary travel restrictions placed on the Commission. The hearings were subsequently rescheduled for hearings in Salt Lake City, March 30, 1982, and the parties were so advised by notice of hearing issued on January 4, 1982. The hearings were convened and the parties appeared and participated therein.

Discussion

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The 104(a) Citation No. 058162, November 13, 1980, cites a violation of 30 CFR 55.19-123, states that the violation is significant and substantial, and describes the following condition or practice:

The wire hoist rope on the north crane, west hoist, was dry and not lubricated according to manufacturer's specifications. This could cause excessive wear on the hoist rope, creating a hazard to persons working around it.

The 104(a) Citation No. 0584163, November 14, 1980, cites a violation of 30 CFR 55.18-20, (FOOTNOTE a) states that the violation is significant and substantial, and describes the following condition or practice:

A person assigned as coal conveyor operator was working alone without adequate communications being available. Part of the conveyor ran through a long inclined tunnel. In the event that he was caught in a section of machinery, or otherwise injured or trapped, his cries for help could not be heard. A periodic check by another person was not made.

Petitioner's counsel advised that upon further investigation of this case in preparation for trial, he has concluded that MSHA cannot now establish the fact of violations with regard to the citations in issue. Under the circumstances, counsel moved for leave to withdraw the proposed civil penalty assessments, to vacate the citations, and to dismiss Docket No. WEST 81-238-M.

With regard to citation no. 0584162, petitioner's counsel stated that upon further consideration of the facts presented, MSHA cannot prove that a violation existed.

With regard to citation no. 0584163, counsel stated that further investigation of the facts connected with the issuance of the citation revealed that there were no dangerous conditions present at the time the citation issued, that the walkways adjacent to the conveyor in question were clear, that the lighting was adequate, and that the inspector overlooked the fact that an emergency stop-cord was installed along the conveyor and that it could have been used to stop the belt in the event of an emergency. Given these circumstances, counsel asserted that MSHA could not establish that a violation existed.

Petitioner's counsel asserted that he consulted with the inspector who issued the citations and that he was in agreement with the proposed disposition of the citations in question. Respondent's counsel stated that did not oppose the dismissal of the citations and the withdrawal of the proposed civil penalty assessments. However, counsel does not waive the jurisdictional arguments advanced in his answer, but agreed that the issue is moot in light of MSHA's withdrawal of the proposed civil penalties and vacation of the citations.

Findings and Conclusions

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In this case the parties advised me that they had reached an agreement for disposition of the case without a trial on the merits. Respondent does not now dispute the fact of violation and indicated a desire to pay the full amount of the proposed civil penalty assessment and to withdraw its "notice of contest." The parties were advised that I would consider the case as a proposed settlement disposition, and pursuant to Commission Rule 30, 30 CFR 2700.30, the parties were afforded an opportunity to present oral arguments in support of their proposed settlement disposition of the case.

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Fact of violation

Respondent conceded that citation no. 0584701, issued on November 28, 1980, citing a violation of mandatory safety standard 30 CFR 55.14-1, was properly issued and that the conditions or practices cited therein by the inspector constituted a violation of the cited standard. Under the circumstances, respondent opted to waive its right to assert any affirmative defense in this matter.

History of prior violations

Petitioner presented a computer print-out reflecting 57 prior violations for which respondent paid civil penalties totalling \$7,051 for the period December 8, 1978 through December 7, 1980, for citations issued at its Arthur Concentrator. Three of these are for prior violations of mandatory standard section 55.14-1.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business.

The parties agreed that respondent is a large mine operator and that the Arthur Concentrator facility employs 853 miners working three shifts seven days a week. Respondent does not assert that the civil penalty assessment made in this case will adversely affect its ability to remain in business.

Gravity

The parties agreed that the violation was serious and I adopt this as my finding in this case.

Negligence

The parties agreed that the violation resulted from the failure by the respondent to exercise reasonable care and that this amounts to ordinary negligence. I adopt this as my finding in this case.

Good Faith Compliance

Petitioner asserted that the respondent exercised normal good faith complinace in abating the violation and I accept this conclusion as my finding in this case.

ORDER

Petitioner's motion to withdraw its proposals for assessment of civil penalties in Docket No. WEST 81-238-M, is GRANTED, and the citations are VACATED.

