

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

FMC CORPORATION,
PETITIONER

v

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

Application for Review and
Notice of Contest Proceeding

Docket No: WEST 82-72-RM
Citation No: 578862

Docket No: WEST 82-73-RM
Citation No: 578863

Docket No: WEST 82-75-RM
Citation No: 578865

Docket No: WEST 82-76-RM
Citation No: 573980

Docket No: WEST 82-77-RM
Citation No: 573981

Docket No: WEST 82-78-RM
Citation No: 573982

Docket No: WEST 82-79-RM
Citation No: 573983

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

v.

FMC CORPORATION,
RESPONDENT

Civil Penalty Proceedings

Docket No: WEST 82-134-M (FOOTNOTE 1)
A.O. No: 48-00152-05056

Docket No: WEST 82-135-M
A.O. No: 48-00152-05059 H

Docket No: WEST 82-172-M
A.O. No: 48-00152-05061

Docket No: WEST 82-183-M
A.O. No: 48-00152-05012

FMC Mine

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Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy,
50 So. Main Street, Suite 1600, Salt Lake City, Utah
for Respondent and Stephen Kramer, Esq., Office of the
Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard,
Arlington, Virginia

Before: Judge Moore

DECISION

The following "Statement of Facts" is adopted from Respondent's brief.

"FMC owns and operates 9 mobile cranes in conjunction with the operation and maintenance of its surface facilities at its mine in Westvaco, Wyoming. Periodically, the mobile cranes were used to lift men from the ground to elevated positions where they could perform repair and maintenance tasks. (Trial Transcript, hereinafter "Tr." 153, 154). This practice was conducted by all of the mine operators in the trona basin. (Tr. 7).

In March or April, 1981, Merrill Wolford, an inspector for the Mine Safety and Health Administration ("MSHA"), became concerned about the practice of lifting men with mobile cranes. (Tr. 7, 55). Wolford discussed the situation with his supervisor and his district manager, and a decision was made to apply the man-hoisting standards embodied in 30 C.F.R. 57.19 to the practice of lifting men on the surface with mobile cranes. (Tr. 7, 8, 55, 56). This decision represented a departure from past MSHA policy where inspectors were "basically directed not to issue citations" on this practice. (Tr. 56)

In accordance with this decision, Wolford informed FMC that MSHA was going to begin applying the 57.19 Man-Hoisting standards to surface crane operations beginning July 1, 1981, and until that date, FMC was required to use "spotters" whenever men were lifted with mobile cranes. (Tr. 8, 9, 35, 36). In response, Julius Jones, safety manager for FMC, on June 4, 1981, informed Melvin Jacobsen, MSHA's supervisor of mine inspectors, that FMC felt that the 57.19 Man-Hoisting standards applied only to underground or shaft operations utilizing hoists and not to surface repair and maintenance operations utilizing mobile cranes. (Tr. 9, 10).

FMC continued using mobile cranes on the surface to lift men. MSHA inspectors continued to visit the FMC mine, and, even past the July 1, 1981 deadline, citations were not issued to FMC for their practice of lifting men with mobile cranes.

On approximately November 25, 1981, Wolford visited the FMC mine and made inquiries concerning FMC's practice of using mobile cranes on the surface to lift men. (Tr. 11). He issued no citations. Wolford returned to the mine on December 8, 1981, with Paul Talley, another MSHA Inspector

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and issued the Order and Citations at issue herein. (Tr. 12). FMC filed an Application for Review and Notices of Contest on December 21, 1981, and a hearing was held in Green River, Wyoming, on April 13, 1982."

Also it was stipulated that although the civil penalty cases associated with the review proceedings had not yet been filed, evidence pertaining to those penalty cases would be received so that they could be decided, based upon the record already made. The civil penalty cases listed in the caption above were assigned to me after the trial.

The order and all of the citations allege violations of various subsections of 30 C.F.R. 57.19. That section has the heading "Man-hoisting". The preamble under the heading states as follows:

The hoisting standards in this section apply to those hoists and appurtenances used for hoisting persons. However, where persons may be endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied.

Emergency hoisting facilities should conform to the extent possible to safety requirements for other hoists, and should be adequate to remove the persons from the mine with a minimum of delay.

The first paragraph quoted is a prime example of studied ambiguity. The first sentence says the standards apply to hoists "used for hoisting persons." The second sentence says the standards apply to other hoists. If the drafter of this preamble had the desire to foster litigation, I am confident that the desire will be fulfilled. Fortunately, in this case, I do not have to make a decision as to whether hoists that are not used for man-hoisting are covered by the standards. While the Solicitor's brief makes the argument that such non-manhoists are covered, MSHA has not taken that position in this case because the only cranes cited were those the inspector thought had been used for man-hoisting.

It is obvious that a mobile crane is a hoist in the sense that it lifts things. It can hoist men and materials from one elevation to another. The terminology used for various parts of the mobile crane (See Gov. Exh. 1), include a point sheave for the gib-boom hoist, a point sheave for the main hoist, and a main hoist rope. But if any device which is used to hoist material is a "hoist" within the meaning of 30 C.F.R. 57.19 it raises the question of why it took the inspector almost 8 months after he learned that men were being hoisted with the mobile cranes before issuing the withdrawal order and citations. At the trial I tried unsuccessfully to determine when and why MSHA changed its position regarding the applicability of the standard in question to mobile cranes. (FOOTNOTE 2)

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MSHA's hesitancy becomes more understandable upon reading the definition of hoists in 30 C.F.R. 57.2. That definition says that hoist "means a power-driven windlass or drum used for raising ore, rock, or other material from a mine, and for lowering and raising men and material." The clear implication is that the men, material rock and ore are to be lowered into an underground mine and raised from it by means of a hoist. Nothing in this

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definition would seem to include a crane which raises men on the surface up to various structures for the purpose of making repairs and adjustments. Likewise, the definition contained in A Dictionary of Mining, Mineral, and Related Terms published by the Bureau of Mines in 1968 makes no mention of mobile cranes in the definition of hoist. (FOOTNOTE 3) The only way a mobile crane can fit into these definitions would be if it were positioned over a shaft and used to lower and raise men and materials in the shaft.

Some of the mandatory standards under 30 C.F.R. 57.19 are inconsistent with the idea of a mobile crane that is used to lift men from the surface to elevated structures coming within the meaning of the word "hoist" in those standards. For example

57.194 says that "any hoist . . . shall be equipped with brake . . . capable of holding its fully loaded cage . . . at any point in the shaft." 57.19.2 states "hoists shall be anchored securely." Mobile cranes are not anchored. 57.19.95 provides for signaling devices on the shaft bottom or lower deck of the sinking platform.

that Mr. Snow brought up. Why wasn't there an imminent danger when you first found it? Why did it become an imminent danger on December 8?

MR. WOLFORD: Well, at the time I found it and observed it, as I said, I contacted my supervisor, identified the people----

JUDGE MOORE: Well, why did you contact him?

MR. WOLFORD: Because I wanted some instruction on whether or not we could apply the hoisting standards to these cranes. We didn't have any other standards that would really apply.

JUDGE MOORE: Well, that's what I meant a while ago. Was there some reason why you didn't think they applied at one time.

MR. WOLFORD: I haven't been an inspector that long and I have been--my self and Mr. Talley have asked for, over the last three years, have asked for direction?

MR. WOLFORD: Yes, sir.

JUDGE MOORE: Now, was it--did you ask for the direction because of the imminent danger part of it rather than just the citation.

MR. WOLFORD: No. I felt it was a hazard and had been for some time. And really it had been basically directed not to issue citations on it and--I haven't personally seen anyone being hoisted and I had a conflict there. And I had told my supervisor that if I found it, I would issue the appropriate citation on it. And he started checking. I haven't personally observed anyone being hoisted until the one time at another mine. And these people used spotters from that point on until they got the devices installed on the cranes. In fact, all of the other operators here did it with the exception of FMC.

JUDGE MOORE: Well, if FMC had been, on December 8, hauling men and you went out there and using a spotter, would you have still said it was an imminent danger?

MR. WOLFORD: No, sir. I think if they were using the new safe guidelines that we had laid out earlier----

JUDGE MOORE: That would be the difference between imminent and non-imminent danger?

MR. WOLFORD: Yes.

MR. SNOW: In fact, they are still using the crane without the two-blocking device--anti two-blocking device?

MR. WOLFORD: I don't know.

MR. SNOW: You don't know if FMC is still using that?

MR. WOLFORD: Not officially.

MR. SNOW: Well, you do know that from your supervisor telling you that FMC is still using the crane, don't you?

MR. WOLFORD: He has mentioned that he has allowed FMC to use the crane.

MR. SNOW: And they're still using it as far as you know based on what your supervisor told you?

MR. WOLFORD: I don't know.

JUDGE MOORE: What was your answer? I didn't hear.

MR. WOLFORD: Not that I know of.

JUDGE MOORE: You don't know whether they're still using it or not?

MR. WOLFORD: No. I received a call from FMC, from Mr. Bob May-- I don't know--two to three weeks ago telling me they had a job and they wanted to hoist some people. And I told him I would have to talk to my supervisor about it. But as far as I was concerned I would not allow it.

Mr. SNOW: But you know your supervisor has permitted it?

MR. WOLFORD: Yes. I think he has.

~FOOTNOTE_THREE

3 hoist. a. A drum on which hoisting rope is wound in the engine house, as the cage or skip is raised in the hoisting shaft. Pryor, 3. b. An engine with a drum, used for winding up a load from a shaft. See also winding engine. C.T.D. c. The windlass mechanism incorporated as an integral part of a power-driven drilling machine used to handle, hoist, and lower drill-string equipment,, casing, pipe, etc., while drilling, or to snake the drill from place to place. Long. d. The act or process of lifting drill-string, casing, pipe, etc., while drilling, or to snake the drill from place to place. Long. d. The act or process of lifting drill string, casing, or pipe out of a borehole. Long. e. A power-driven windlass for raising ore, rock, or other material from a mine and for lowering or raising men and material. Long. Also called hoister. Fay. f. The mechanism by which a bucket or blade is lifted, or the process of lifting it. Nichols. g. The amount of ore, coal, etc., hoisted during a shift. Fay. h. See draw works. B.S. 3618, 1963, Sec. 3.