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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 PROCEEDING

DOCKET NO. WEST 80-380-M

v.

MINE: FMC

FMC CORPORATION,
RESPONDENT

DECISION

Appearances:

Robert J. Lesnick, Esq., Office of
Henry C. Mahlman, Associate Regional Solicitor
United States Department of Labor
Denver, Colorado,
for the Secretary of Labor

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

Before: Judge John J. Morris

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent, FMC Corporation, (FMC), with violating two safety regulations adopted under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (Supp. III 1979).

After notice to the parties a hearing on the merits was held in Green River, Wyoming on September 1, 1981.

FMC filed a post trial brief.

ISSUES

The issues are whether respondent violated the regulations and, if so, what penalties are appropriate.

CITATION 575950

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

Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

The evidence: on March 13, 1980 MSHA representative Merrill Wolford inspected a GMC pickup truck owned by Western Steel Company, a subcontractor for FMC (Tr. 3, 19, 27-28).

Another person turned the steering wheel of the truck while Inspector Wolford checked the suspension system. He observed that the idler arm, the ball joint, and the tie rods were loose. The loose linkage showed excessive wear (Tr. 4-7, P5).

In the opinion of the inspector excessive play in the steering system could cause the driver to loose control of the vehicle (Tr. 17-18). In addition, there could be a complete failure of the ball joint. It could come out of the socket or crystallize and break (Tr. 15).

The truck was being operated in the mine area in the presence of numerous workers (Tr. 9-10).

DISCUSSION

The evidence establishes a violation of the regulation, 30 C.F.R. Section 57.2.

Respondent attacks the credibility of MSHA's evidence, and relies on its own evidence.

I find MSHA's evidence to be credible. Inspector Wolford has had considerable experience in motor vehicle mechanical work. And the experience included work with front end alignments, tie rods, and ball joints. (Tr. 1, 2). In addition the credible evidence establishes the linkage and tie rods were loose and showed excessive wear (Tr. 6, 7, P6). The record establishes that there existed an "equipment defect" within the meaning of Section 57.9-2. It is also apparent that the defect "affected safety" since such excessive play could cause the operator to loose control of the vehicle (Tr. 17-18).

On the other hand I am not persuaded by FMC's defense. FMC offered no evidence to contradict the inspector's testimony as to the condition of the suspension system. The fact that Wolford did not drive the truck to check its steering would not, in my view, destroy his credibility. The inspector used a proper method to check the truck's suspension system.

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In support of its view FMC relies on Judge George Koutras's decision in *Medusa Cement Company*, 1 MSHC 2554, (1980). It is apparent in *Medusa Cement* that Judge Koutras concluded that the worn steering control arm did not present a real safety hazard. I find to the contrary in this case: the defective parts, that is, the loose tie rods and the loose ball joints did affect safety.

For similar cases construing the meaning of 30 C.F.R. 57.9-2 compare *Phelps Dodge Corporation*, 4 FMSHRC 1078 (1982), and *Allied Chemical Corporation*, 4 FMSHRC 503 (1982).

The citation should be affirmed.

The parties do not address the proposed civil penalty of \$106. Considering the statutory criteria, 30 U.S.C. 820(i), I deem that the proposed penalty is appropriate.

CITATION 575955

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.12-16 which provides as follows:

Mandatory. Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power Switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The evidence: before the FMC electrician began to solder the lines on the 480 volt air conditioner he turned the electrical switch to "off." (Tr. 3-6, 8). The air conditioner could not become operational with the switch off (Tr. 15). But the unit remained energized where the lines entered it and at the top of the contactors (Tr. 17, 20).

As he was soldering the electrician's left arm was two feet from the energized portion of the unit (Tr. 30). It was not necessary to have the unit energized in order to solder the lines (Tr. 48).

The center and bottom cover plates were removed because the worker intended to attach his air-conditioning hoses to the high side pressure valves (Tr. 15, 43). The electrical switches in the motor control center controlling this unit were not tagged or locked out (Tr. 32).

DISCUSSION

The evidence establishes a violation of the regulation. The 480 volt air conditioner was not deenergized before the FMC

electrician soldered the lines.

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FMC contends that the condition described in the citation is authorized by 30 C.F.R. Section 57-12. 32 and in any event, FMC asserts no violation occurred.

FMC initially contends that a different regulation, 30 C.F.R. Section 57-12.32, specifically authorizes the removal of cover plates during testing and repairs. And FMC says the citation was only issued because of the hazard that the worker might contact the energized portion of the air conditioner which were exposed because the cover plates had been removed.

The exception for "testing or repairs" contained in 30 C.F.R. 57.12-32 provides:

Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

I disagree with FMC's view of the evidence. The FMC electrician was soldering at the top right portion of the unit (Tr. 9, P1). At that point the energized portion of the unit were below him and to the left (P1). The removal of the bottom cover plate appears completely unrelated and several feet from the soldering repair. I agree that the cover plate had to be removed after the soldering but it was removed in order to attach the high pressure hoses to the valves. But the FMC electrician indicated he could have locked out the equipment while he was doing the welding, then reenergized it, and thereafter checked the pressure (Tr. 20). These circumstances render 30 C.F.R. 57.12-32 inapplicable.

FMC cites Bill's Coal Company, 1 MSHC 2088 (1979), a decision by Judge Forrest Stewart which involves a "testing or repairs" regulation similar to the one relied on by FMC. In that decision a cover plate had been removed in order to replace a drive motor. Judge Stewart vacated the citation as he concluded that the repair exception applied. This pivotal fact did not occur in the instant case. The record is clear: the electrician did not have to remove the cover plate to weld the lines (Tr. 13, 14, 15). It was more convenient to do so because after the welding was completed he could hook up the high side pressure valves and then test the unit.

Repondent has the burden of proving that an exception rather than a mandatory regulation is applicable. On this record FMC did not carry its burden.

FMC further contends that Section 57-12.16 is designed to protect workers from mechanical rather than electrical hazards. FMC bases this view on the grounds that the contested regulation does not refer to "circuits". And the succeeding regulation, Section 57.12-17, is designed to prevent electrical hazards.

A reading of Section 57.12-16 indicates it refers to "electrically powered equipment." An air conditioner would be such equipment. On the other hand Section 57.12-17 clearly

refers to power circuits.

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FMC's final argument is that its worker deenergized the air conditioner by use of the "off" switch which was always in view of the worker and 4 1/2 feet away from where he was soldering (Tr. 13-14).

No defense is presented. The regulation requires that the equipment be deenergized. Merely turning the air conditioning switch to "off" did not deenergize it. The unit remained energized at the points where the power entered the unit and at the top of the conductors (Tr. 18-20, P1).

The failure to deenergize the equipment establishes the violation.

The citation should be affirmed.

The parties raise no issue as the proposed civil penalty of \$52. Considering the statutory criteria, 30 U.S.C. 820(i), I deem that the proposed penalty is appropriate.

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

ORDER

1. Citation 575950 and the proposed civil penalty of \$106 are affirmed.

2. Citation 575955 and the proposed civil penalty of \$52 are affirmed.

John J. Morris
Administrative Law Judge