

CCASE:
SOL (MSHA) V. AMAX CHEMICAL
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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. CENT 81-129-M

DOCKET NO. CENT 81-241-M

v.

AMAX CHEMICAL CORPORATION,
RESPONDENT

MINE: Amax Mine & Mill

UNITED STEELWORKERS OF AMERICA,
AUTHORIZED EMPLOYEE
REPRESENTATIVE,
INTERVENOR

FINAL ORDER

CENT 81-129-M

On November 1, 1979 the Secretary issued Citation d Citation 161852 against respondent AMAX Chemical Corporation. The citation, alleging a violation of 30 C.F.R. 57.5-5, provides as follows:

Condition or practice the Marretta Miner operator in the 110 mining section was exposed to a Time Weighted Average (TWA) of 26.11 Mg/M3 of total particulate nuisance dust in a dust survey taken on the 11-01-79 for a 8 hour survey. The Threshold Limit Value (TLV) was 10 Mg/M3. Feasible engineering controls were not being utilized to reduce this dust concentration, to eliminate the need to wear respirators. This citation was written on the 01-21-80 after dust results were received from the analysis center in Denver, Colorado.

Several extensions of the citation were issued and the citation was terminated on September 30, 1980.

On December 12, 1980 petitioner filed his proposed penalty assessment and on February 4, 1981 Amax filed its notice of contest. Subsequently the Secretary filed his complaint before the Commission.

CENT 81-241-M

On February 27, 1979 the Secretary issued Citation 161808 against respondent Amax Chemical Corporation. The citation, alleging a violation of 30 C.F.R. 57.5-5 provides, as follows:

Condition or practice the slusher operator working in the warehouse area was exposed to a time weighted

average (TWA) of 39.9 Mg/M3 of total particulate bearing nuisance dust, where as the Threshold Limit Value (TLV) is 10 Mg/M3. Feasible engineering or/and administrative controls were not being utilized to reduce this amount to acceptable standards and eliminate the need to wear respirators. This citation was written on the 04-11-79 at 0935 hours. The dust analysis results were received on this date.

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Several extensions of the citation were issued and on April 14, 1981 the citation was terminated.

On June 18, 1981 the Secretary filed his proposed penalty assessment and on June 30, 1981 Amax filed its notice of contest. The Secretary subsequently filed his complaint before the Commission.

Pursuant to Commission rule 29 C.F.R. 2700.12 the above cases were consolidated.

The standard allegedly violated, 30 C.F.R. 57.5-5 provides as follows:

57.5 Air quality, ventilation, radiation, and physical agents.

57.5-5 Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentration of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Mine Safety and Health Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.

(b) A respirator program consistent with the requirement of ANSI Z88.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88.2-1969, approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

(c) When respiratory protection is used in

atmospheres immediately harmful to life, the presence of at least one other person with backup equipment and rescue capability shall be required in the event of failure of the respiratory equipment.

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On July 29, 1982 the United Steelworkers of America, (Steelworkers), representatives of the miners at the Amax facility, sought to intervene as a party.

On August 9, 1982 the Secretary moved to withdraw his complaints. In support of his motion the Secretary stated that his citations were previously vacated in accordance with MSHA policy memorandum No. 82-12MM issued July 9, 1982.

On September 15, 1982, pursuant to Commission Rule 29 C.F.R. 2700.4, the Steelworkers were permitted to intervene. The parties were further invited to brief the issue of whether the Commission should grant the Secretary's motion to withdraw his complaints.

The Steelworkers object on the grounds that the Act requires the Commission's approval for withdrawal of the citation (30 U.S.C. 820(k)); further, the Steelworkers argue that the policy relied on by the Secretary is not a proper reason for dismissing these cases. Finally, the Steelworkers argue that the Secretary's enforcement policy is inconsistent with the Act.

The Act expressly accords a miner several rights the exercise of which will not subject him to discharge or discrimination. However, there is nothing in the Act authorizing affected miners or their representatives the right to prosecute a contested citation if the Secretary elects not to do so. Cf Secretary v. Kocher Coal Company Penn 80-174-R, (December 8, 1982); Marshall v. Occupational Safety & Health Review Commission et al 635 F 2d 544; Oil, Chemical and Atomic Workers International Union v. Occupational Safety & Health Review Commission 671 F. 2d 643 (1982). cert denied. %y(3)6D

Accordingly, pursuant to Commission Rule 29 C.F.R. 2700.11, I enter the following:

ORDER

1. The motion of the Secretary to dismiss his complaints is granted.
2. The cases are dismissed.
3. The objections of the United Steelworkers of America are denied.

John J. Morris
Administrative Law Judge