

CCASE:  
FMC CORP. V. SOL (MSHA)  
DDATE:  
19800304  
TTEXT:



The foundational document involved in both proceedings, which were consolidated for hearing and decision by my order at the commencement of the hearing, is a Citation and Order of Withdrawal numbered 577554 which was issued by MSHA Inspector William W. Potter on March 18, 1982. The allegedly violative condition described in the Citation and Order of Withdrawal is that:

"The swing shift hoistman on #2 hoist has been operating this hoist without a current physician's certificate. This hoistman was last examined and approved on February 2, 1981, this approval expired on February 2, 1982. This hoistman has continued to operate this hoist to this date. This hoistman had another examination on February 15, 1982, and was found not qualified by Dr. Elmer S. McKay. The company continued to let this hoistman perform his duties as a hoistman on #2 hoist."

The Citation and Order of Withdrawal charges FMC with a violation of 30 CFR 57.19-57 which provides:

"No person shall operate a hoist unless within the preceding twelve months he has had a medical examination by a qualified, licensed physician who shall certify his fitness to perform this duty. Such certification shall be available at the mine."

The general issue involved in this matter is whether a violation of the above-quoted standard occurred as alleged by Inspector Potter. FMC contends that the subject safety standard applies only to hoists which are used to hoist persons as distinguished from hoists which are used to hoist ore. The resolution of this issue necessitates an interpretation of the standard above-quoted as well as the two-paragraph preamble to 30 CFR 57.19 which provides:(FOOTNOTE 1)

"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."

During the hearing the parties provided stipulations with respect to the nature of the FMC Mine wherein the alleged violation occurred, jurisdictional agreements and stipulations with respect

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to four of the six statutory penalty assessment criteria. In addition to Inspector Potter, two other witnesses testified for the Secretary of Labor (herein the Secretary), Ralph Portillo, the hoistman who was the central figure in this litigation, and Albert Battisti, President of Local Union 13214, United Steel Workers Union.

On March 18, 1982, Inspector Potter issued the subject Citation and Order of Withdrawal based on records provided by FMC, particularly a hoistman decertification by Dr. Elmer S. McKay (Exhibit M-1) which stated: "This is to certify that Ralph Portillo has this date 2-5-82 been examined by me and is hereby physically qualified to not perform the duties of a hoistman as required by standard 57.19-57 of the Mine Safety and Health Act." An additional typed notation on the decertification indicated: "Because of this man's hearing loss he should not be a hoistman without a hearing aid. (Please test after he gets a hearing aid and without noise exposure for sixteen (16) hours.)"

Although the McKay decertification of hoistman Portillo was issued on or about February 5, 1982, FMC permitted Mr. Portillo to continue in the exercise of his hoistman duties at shaft #2 at the FMC Mine located at Westavaco, Wyoming, until the Citation and Order of Withdrawal was issued on March 18, 1982.

There are eight shafts at this mine, Numbers 1 and 6 are ventilation shafts, Numbers 5, 7, and 8 are shafts where "men and materials" are hoisted, and shafts Numbers 2 and 4 are used to hoist ore. Shaft Number 3 is in the process of being closed down and has no particular significance in this proceeding. Although shaft Number 4 is used to hoist ore, unlike shaft Number 2 no hoistman is necessary since it is a more modern feat of construction.

The Number 2 shaft is not used for hoisting men and at all times material herein was used solely for hoisting ore except when inspections of the shaft were conducted or repairs on the shaft were conducted. The frequency of the hoist at shaft Number 2 being used to hoist men into and out of the shaft to make repairs or inspections is three or four times annually.

Approximately twenty hoistmen are employed at the FMC Mine; it is not the policy of FMC to substitute one hoistman for another in the sense that it is not its policy to substitute "ore" hoistmen for "man" hoistmen (see testimony of Albert Battisti). FMC, however, maintains its right to exercise the option to substitute hoistmen even though in practice this is rarely done.

The Number 2 shaft which is the only shaft requiring a hoistman where the hoist is used solely for handling ore was not at the times material herein part of FMC's emergency

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evacuation plan, although in an emergency all hoists, including the one at shaft #2, presumably would be used for escape purposes.

Mr. Portillo, who is sixty-one years old, was not advised by FMC management, including his immediate supervisor, Foreman Gary Hornsby, that he was not to hoist men (persons). Mr. Portillo during the period of February 5, 1982, through March 18, 1982, in fact did not operate the hoist at shaft #2 or any other shaft to hoist persons.

After receipt of the McKay decertification of Mr. Portillo, FMC management told Gary Hornsby, who was the immediate supervisor of all of FMC's twenty hoistmen on all three shifts that worked at the FMC Mine, that Mr. Portillo was to be used only on the #2 shaft and that he was not to hoist men.

Following the issuance of the Citation and Withdrawal Order, Mr. Portillo was given non-hoistman duties for approximately one week. Thereafter, Mr. Portillo was sent by FMC for further hearing tests at the University of Utah and was fitted with a hearing aid by an audiologist in Salt Lake City after which the FMC Medical Department certified Mr. Portillo as fit for the duties of a hoistman by issuance of a "hoistman certification" stating: "This is to certify that Ralph Portillo has this date 3-26-82 been examined by me and is hereby physically qualified to perform the duties of a hoistman as required by standard 57.19-57 of the Mine Safety and Health Act." A handwritten note at the bottom of the certification stated in addition: "Must wear his hearing aids when working or operating hoist." (Exhibit C-3).

At the time Mr. Portillo was decertified--on or about February 5, 1982--FMC had been using new hearing testing equipment as part of the annual examination given the hoistmen. Nine of the twenty hoistmen were detected to have hearing problems of one kind or another. Because this was unusual, FMC questioned the results of the tests and conducted an investigation into various aspects of the situation. It also reevaluated the range of hearing that was required for the satisfactory performance of hoistman duties and sent at least six of the nine hoistmen at different times for additional hearing tests in the manner that Mr. Portillo was sent for additional testing. As a result of its investigation the equipment and testing procedures were found to be satisfactory and FMC's management concluded that the situation resulted because in past years the hearing deficiencies discovered were not of sufficient severity to be disqualifying.

The last time Mr. Portillo operated a hoist to hoist men was in January of 1982 when he was assigned to operate the hoist at the #7 shaft when the hoistman there was not available

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for duty. Mr. Portillo operated the #7 shaft hoist for approximately two days. The #7 shaft hoist can be operated both manually and on automatic, whereas the #2 shaft hoist is an automatic hoist. Mr. Portillo was not using a hearing aid in January of 1982.

The #2 shaft hoist, which also can be operated manually when men are being hoisted, is the hoist at which Mr. Portillo had been assigned for several years prior to 1982. Although there is a "bonnet" over the ore skip on the #2 shaft which is used when a hoist is used to carry men when inspections are conducted and repairs are made, the #2 hoist is not designed to carry men as are other hoists. So-called man hoists are required to have a canopy and to be enclosed.

The #2 shaft hoist is not an "emergency hoisting facility" as that term is used in the second paragraph of the preamble to 30 CFR 57.19-57.

There was no evidence of record establishing special or unique conditions or circumstances in connection with or peculiar to the #2 shaft and/or the hoist at the #2 shaft which would endanger persons.

#### DISCUSSION

FMC contends that 30 CFR 57.19 applies only to man hoists. I find this contention meritorious. The heading of Section 57.19 is entitled "Man Hoisting". The numerous safety standards which follow the preamble to Section 57.19, i.e. 57-19-1 through 57.19-135, reflect that the drafters of these standards were fully aware of the distinction between man hoists and hoists which are used for handling ore and other materials. It is clear that by using the specific limitation of "man" hoisting in establishing the category of subjects to be covered by these various safety standards that the drafters intended to limit the coverage of these standards to hoists which handled men and not other hoists. Thus the general category "hoisting" would have been used if all hoists were intended to be covered. This view is further reinforced by a consideration of the general subjects covered by part 57 of 30 CFR where the specific category "57.19, Man Hoisting" appears as an exclusive category, and not part of any other subject matter related to hoisting in general.

My colleague, Judge Charles C. Moore, Jr., in a grouping of combined contest proceedings and penalty proceedings, (Docket Nos. WEST 82-72-RM through 79-RM; and WEST 82-134-M, 135-M, 172-M, and 183-M) dealing with the same mine, also found the necessity to recognize the difficulty of interpretation posed by the preamble to Section 57.19. Unless a reasonable construction of the coverage of these hoisting standards is reached then indeed the argument made by FMC in this matter that enforcement

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of the standards to ore hoisting would be a denial of due process may well have merit. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of the law. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1925).

After considerable deliberation I conclude that the saving grace of the preamble to Section 57.19 is its manifest purpose in specifying the coverage, or at least in attempting to specify the coverage of the subsequent standards which follow it relating to man hoisting. In concluding that the 57.19 standards apply only to man hoists and not to ore hoists, it must also be noted that there are two exceptions to this limitation: One, for emergency hoisting facilities, and two, where persons may be endangered by ore hoists.

The Secretary contends that of its three theories of liability in this case the preamble supports two of them. First, that the operation of the hoist at the #2 shaft by an uncertified hoistman is a violation because--within the meaning of the first paragraph of the preamble--persons may be endangered. The factual foundation of this theory is that those subjected to the hazard are men engaging in inspections and making repairs. I find, however, that there is no evidence in the record of any special or separate condition, practice or circumstance which would trigger the operation of this (endangering persons) exception to the general limitation of the hoisting requirements to man hoists. Thus for the medical certification requirement of Section 57.19-57 to become operable it first must be shown that there's some condition or practice or other factor involved in the operation of an ore hoist, such as the shaft #2 hoist, which would create a hazard calling for bringing into operation an appropriate standard among those specific standards which were intended to apply to man hoists only. Accordingly, I conclude that this theory, based upon the first exception of the preamble to the limitation of the standards to man hoists, is not applicable.

The Secretary's second theory that a violation occurred is based upon the second paragraph of the preamble and rests upon the testimony primarily of Albert Battisti, the President of Local Union 13214, to the effect that should an emergency situation occur every shaft might have to be used for escape purposes. However, the record is clear that shaft #2 is not part of the mine operator's emergency evacuation plan and has received no designation or other particular recognition as an emergency hoist. I conclude that it is not an "emergency hoisting facility" which must conform to the extent possible to the safety requirements for man hoists under Section 57.19 and its sub-paragraphs. Even were one to conclude that shaft

#2 is an emergency hoisting facility the language of the pertinent paragraph of the preamble is sufficiently vague to leave it unascertainable whether or not Section 57.19-57 is one of the standards which should be applied to it. The phrase "to the extent possible" carries with it a tenor of a guideline rather than a mandatory standard.(FOOTNOTE 2)

The Secretary's third theory of violation is that the #2 shaft hoistman, Mr. Portillo, was available to be used elsewhere to operate, presumably, man hoists. I find no merit to this contention in view of the fact, as previously noted, the overwhelming evidence was to the effect that Mr. Portillo had not operated a man hoist after he was decertified and that his foreman had been directed not to assign him to operate man hoists.

The third theory of violation presented by the Secretary is one in which the possibility must come to fruition before a violation can be said to have occurred. That is, if Mr. Portillo had been observed operating a man hoist during the period of time from February 5, 1982, through March 25, 1982, then the infraction of the applicable standard could be said to have occurred. The standard is couched in language of prohibition, i.e., "No person shall operate a hoist unless. . . he has had a medical examination, etc." Thus, the Secretary's argument that Mr. Portillo was available to be used elsewhere is nothing more than a statement that a violation might possibly occur rather than one that a violation did occur.

Having found that the #2 shaft hoist was used "solely for handling ore" within the meaning of that phrase and in the context of the preamble to Section 57.19, and having further found that the #2 shaft hoist was not an emergency hoisting facility and that there was no evidentiary basis for bringing into operation the second sentence of the first paragraph of the preamble, i.e., evidence of endangerment of persons by the #2 shaft hoist and appurtenances, I conclude the safety standard charged to have been violated, 57.19-57, was not operable to the shaft #2 hoistman, Ralph Portillo, on March 18, 1982, and all pertinent times prior thereto. FMC's Notice of Contest is therefore found meritorious.



ORDER

In Docket WEST 82-154-RM FMC Corporation's Notice of Contest having been found meritorious, Citation and Order of Withdrawal No. 577554 dated March 18, 1982, is vacated.

Docket No. WEST 83-10-M(b), (FOOTNOTE 3) in which the Secretary of Labor seeks a penalty for the alleged violation charged in Citation and Withdrawal Order numbered 577554, is dismissed.

All proposed findings of fact and conclusions of law not expressly incorporated in this decision are rejected.

Michael A. Lasher, Jr.  
Judge

~FOOTNOTE\_ONE

1 Section 57.19 is labeled "Man Hoisting".

~FOOTNOTE\_TWO

2 The Secretary's proposed finding of fact to the effect that had there been an emergency or an absence of one of the hoistmen at shaft #7 Mr. Portillo would have been assigned to operate a man hoist is rejected as entirely speculative. The record is clear that at no time after he had been decertified on or about February 5, 1982, was Mr. Portillo assigned to operate a man hoist, and the record is also clear that Foreman Hornsby, who was the only management representative empowered to assign work to Mr. Portillo, was instructed not to assign Mr. Portillo to hoist men.

~FOOTNOTE\_THREE

3 Special docketing has occurred in this matter and four separate alleged violations which are contained in a related docket, WEST 83-10-M(a), are not dealt with in this proceeding or in this decision.