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HOMESTAKE V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

HOMESTAKE MINING COMPANY, CONTESTANT	CONTEST OF CITATION PROCEEDING
v.	DOCKET NO. CENT 80-416-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 329888
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	MINE: Homestake
v.	CIVIL PENALTY PROCEEDINGS
HOMESTAKE MINING COMPANY, RESPONDENT	DOCKET NO. CENT 81-108-M MSHA Case No. 39-00055-05048
	DOCKET NO. CENT 81-109-M MSHA Case No. 39-00055-05049
	MINE: Homestake

DECISION

Appearances:

Eliehue C. Brunson, Esq., Office of the Solicitor
United States Department of Labor 911 Walnut Street,
Room 2106, Kansas City, Missouri 64106,
For the Petitioner

Robert A. Amundson, Esq., Amundson & Fuller 215
West Main, Box 898 Lead, South Dakota 57754,
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The first case listed in the caption above, Docket No. CENT 80-416-RM, is a notice of contest filed by Homestake Mining Company, (hereinafter "Homestake"), pursuant to section 105(d) of the Federal Mine Safety and Health Act, 30 U.S.C. 815(d), (hereinafter "the Act"), to challenge the validity of citation no. 329888 issued by an inspector of the Mine Safety

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and Health Administration, (MSHA), for an alleged violation of 30 C.F.R. 57.19-100 (1982). The citation alleged that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and that there was an unwarrantable failure on the part of the contestant warranting action pursuant to 30 C.F.R. 104(d)(1) of the Act. Subsequently, in Docket No. CENT 81-108-M, captioned above, the Secretary of Labor (hereinafter "the Secretary"), filed a petition proposing the assessment of penalties based upon eight citations (FOOTNOTE 1) issued to Homestake including citation No. 329888 involved in Docket No. CENT 80-416-RM.

In Docket No. CENT 81-109-M, captioned above, the Secretary filed a petition proposing the assessment of a penalty pursuant to section 104(a) of the Act based upon citation no. 567066 issued to Homestake alleging a violation of 30 C.F.R. 57.12-6.

These three cases were consolidated and a hearing was held in Lead, South Dakota. At the conclusion of the hearing, the parties waived closing arguments and agreed to submit post hearing briefs following receipt of the transcript.

MOTIONS TO DISMISS

At the hearing, the Secretary moved to withdraw the unwarrantable portion of citation No. 329888 under section 104(d)(1) of the Act and amend the type of action to a 104(a) designation and continue with the contention that significant and substantial allegation would still apply. The Secretary contended that the evidence did not support the allegations in the citation that past violations of the same standard existed. Homestake agreed to the withdrawal of the unwarrantable designation in citation No. 329888 and that the remaining issue for trial was the proposed penalty assessment proceeding contained in Docket No. CENT 81-108-M. This motion was approved.

Based upon approval of the motion by the Secretary to amend citation No. 329888 to a 104(a) type of action, Homestake moved to withdraw its notice of contest action thereto. This was granted and Docket No. CENT 80-416-RM was dismissed (Tr. at 8-9).

After receipt of the transcript of the hearing, the Secretary filed a post trial motion to vacate seven of the eight citations included in Docket No. CENT 81-108-M and the one citation included in Docket No. CENT 81-109-M. The basis for this motion was that a review of the testimony and exhibits produced at the hearing did not support the allegations contained in these seven citations. On January 3, 1983, Homestake filed a motion of concurrence. Based upon the representations of the parties, a review of the

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evidence, and a belief that the public interest will be served, the motion of the Secretary is approved and the following citations are vacated:

Docket No. CENT 81-108-M

Citation No.	Standard Violated
00567059	57.12-2
00567060	57.12-2
00567061	57.12-2
00567062	57.12-2
00567063	57.12-2
00567064	57.12-2
00567065	57.12-2

Docket No. CENT 81-109-M

Citation No.	Standard Violated
00567066	57.12-6

Also Docket No. CENT 81-109-M is dismissed.

Docket No. 81-108-M

ISSUES

The remaining issues to be decided in this case involved the one citation No. 329888 and whether respondent violated 30 C.F.R.

57.19-100 of the Act, and, if so, the appropriate civil penalty that should be assessed based upon the criteria set forth in section 110(i) of the Act.

STIPULATIONS

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 7):

1. Homestake Mining Company is the operator of the gold mine at Lead, South Dakota.
2. Homestake is subject to the jurisdiction of the Federal Mine Safety and Health Act.
3. Homestake's ability to continue in business would not be effected by the assessment of a reasonable penalty in this case.
4. Homestake has been issued prior citations, the number to be reported in a printout furnished by the Secretary. This was to be reviewed by the parties and concurrences as to the total was to be agreed upon.
5. Homestake is considered a large gold mining company.

DISCUSSION

On September 13, 1980, during an inspection of respondent's mine, MSHA inspector Jeran Sprague issued citation No. 329888 which stated as follows:

A Safety Gate was not installed on the 5300 Level shaft landing in the #6 shaft man cage compartment. There are two 3 x 12 inch boards across the landing but the station is wet and a person could slip and fall between the boards which are approx. 3p feet apart. Electricians and shaftmen use the level or occasional basis to check equipment. On the level is a water storage tank and electrical power box.(FOOTNOTE 2)

Petitioner contends that respondent's failure to have an adequate safety gate at this location violates 30 C.F.R. 57.19-100 which provides as follows:

Mandatory. Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances.

Petitioner argues in his post hearing brief that the hazard presented here was that miner could fall into the shaft causing a fatal injury. Such a fall would be approximately 2000 feet or more to the bottom of the shaft. It is contended that the violation should have been obvious to the respondent as all of the other landings in the number 6 shaft had an adequate gate.

Respondent argues that the area cited by the inspector is not a shaft landing as designated to be covered in standard 57.19-100 but is a "cut out." Further, respondent argues that the cited standard does not address itself to the possibility of a miner falling into the shaft but instead requires a substantial gate to prevent materials from falling into the shaft.

The evidence of record shows that the area involved in citation No. 329888 was located at the 5300 foot level in the number 6 shaft and consisted of a room cut out of the wall of the shaft approximately 14 feet deep by 14 feet wide and 10 feet high. This area was used by respondent for the placement of a water tank and two junction boxes for power cables. At the opening to the shaft, two 2 x 10 foot wooden boards had been placed horizontally across the opening. One board was located at the bottom or

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floor level whereas the other was approximately 27 3/4 inches higher. Permanent lighting was not installed at this landing to illuminate the area and miners used their miners' lights when they visited this location. A pipeman would stop at this landing one or two times a month to check the valves and float in the water tank. During the time the pipeman was checking the water tank, the man cage would wait for him. A telephone or call horn has not been installed in this area as is required and used at all shaft stations where work is performed on a regular basis.

The threshold issue to be decided is whether the area cited is a shaft landing as contemplated by mandatory standard 57.19-100. The regulations do not define what constitutes a shaft landing. It does indicate that it is a landing in a shaft where men and material are loaded and unloaded from a shaft conveyance. However, the Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Minerals, and Related Terms (1968), defines "shaft" and "landing" as follows:

Shaft. An excavation of limited area compared with its depth, made for finding or mining ore or coal, raising water, ore, rock, or coal, hoisting and lowering men and materials, or ventilating underground workings. (Emphasis added).

Landing. A level stage in a shaft at which cages are loaded and discharged. *Fay c.* The mouth of a shaft where the cages are unloaded; any point in the shaft at which the cage can be loaded with men or materials; (Emphasis added).

Admittedly, the area cited here was not a location in the number six shaft where the man cage stopped frequently or where materials were loaded and unloaded on a frequent basis. However, the area had to be inspected by miners on a regular if infrequent schedule and applying the definitions stated above to the fact that the man cage in the number 6 shaft stopped at this landing to load and unload miners, I find this area cited to be a shaft landing.

The next issue to be considered is the argument by respondent that safety of miners in the landing as described by the inspector in the citation he issued is not the hazard contemplated by the standard alleged to be violated. The inspector described how miners could slip and fall through the wooden barricades placed across the opening and fall in the shaft a distance of 2000 feet. The standard contemplates substantial safety gates so that material will not go through them. It does not mention miners falling into the shaft. The inspector in his description of the hazard does not mention the risk of materials going through the gates into the shaft. In his testimony at the hearing the inspector stated that the hazard here was of a miner slipping on the wet surface and falling through the boards installed across the opening. He did not testify as to materials falling through the gate into the shaft.

In light of the foregoing, I find that the Secretary has failed to prove that the respondent violated standard 57.19-100 in this case. The clear wording of the standard is directed towards a hazard of constructing substantial gates to prevent material from falling into the shaft. See *United Nuclear Homestake Partners*, 2 FMSHRC 24891 (September, 1980) (ALJ) Also *Magma Copper Company*, 3 FMSHRC 584 (February 1981) (ALJ). There is no indication that such a gate is to be installed for the purpose of also preventing a miner from falling in the shaft. Even assuming, however, that the gate would also serve this purpose, that is not the hazard described in the standard. This raises the question of how broad an interpretation can be given to the regulations by the adjudicator. In the case of *Sunshine Mining Co.*, 1 FMSHRC 1535, (October 1979) (ALJ), Judge Koutras considered a similar set of facts and reached the conclusion that standard 57.19-100 applies to the installation of gates to prevent materials from falling into the shaft but that the wording of the standard does not prescribe protection to prevent miners from falling. Judge Koutras stated as follows:

It seems to me that if MSHA desires to protect miners from falling into a shaft at any such mine locations, it should vigorously enforce the existing safety belt and line standard ... And, if MSHA desires to prevent both men and materials at the skip and loading stations or pockets from falling into mine shafts, it should promulgate a clear and concise safety standard covering precisely that situation.

I concur with this conclusion and find from the facts and circumstances presented in this case that citation No. 329888 should be vacated for the reason that the Secretary has not proven by a preponderance of the evidence a violation thereof.

CONCLUSIONS OF LAW

Pursuant to the findings in this matter, it is concluded that:

- (1) The Commission has jurisdiction to decide this matter.
- (2) The area containing the water tank and junction boxes at the 5300 foot level in shaft six is a shaft landing in the respondent's mine.
- (3) The hazard described by the mine inspector in his testimony and also in citation no. 329888 at the shaft landing at the 5300 level in shaft six did not constitute a violation of standard 57.19-100.
- (4) Citation No. 329888 should be vacated.

ORDER

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

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1. Docket No. CENT 80-416-M:

Motion of respondent to withdraw its notice of contest is APPROVED and case No. CENT 80-416-M is DISMISSED.

2. Docket No. CENT 81-108-M:

Post hearing motion by the Secretary to vacate the following citations is APPROVED and Citation Nos. 567059, 567060, 567061, 567062, 567063, 567064 and 567065 is VACATED.

Further, based upon the above findings of fact and conclusions of law Citation No. 329888 is VACATED.

3. Docket No. CENT 81-109-M:

Post hearing motion by the Secretary to vacate Citation No. 567066 is APPROVED and Citation No. 567066 is VACATED.

Virgil E. Vail
Administrative Law Judge

FOOTNOTES START HERE-

1 Citation Nos. 567059, 567060, 567061, 567062, 567063, 567064, 567065, and 329888.

2 The balance of the description in the body of this citation is not pertinent due to the motion by the Secretary to amend which was granted.