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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: CENT 81-101-M
A/O No: 34-00508-05008

v.

Wigley Quarry and Mill

C & O MATERIALS CORPORATION,
RESPONDENT

DECISION

Appearance: Frances Valdez Valdez, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Dallas, TX 75202 Mr. Don C. Cook, President, C & O Materials Corporation, P.O.B. 274, Fittstown, OK 74821

Before: Judge Moore

Approximately 4 years ago the combination imminent danger order and citation (hereinafter citation) that is involved in this case was issued to respondent along with a number of other citations. All of the other citations have been disposed of in one way or another but this citation got sidetracked and the assessment process took about 2 years. Respondent sees something sinister in this delay. He thinks the inspector and MSHA are trying to harass him.

I find that there was no attempt by the inspector, MSHA or the Solicitor's office to harass respondent. It was an oversight.

Respondent plant crushes limestone into gravel and the citation was issued because the inspector saw and photographed two men removing rocks from the crusher feeder and the crusher was de-energized in the sense that the switch was off but there was no lock on the switch as required by 30 C.F.R. 56.12-18. The standard requires that when work is being done on electrical equipment the equipment be de-energized and that the switch be locked in the "off" position with the key in the possession of the miners working on the equipment. It was the inspector's opinion that the feeder was of a type with moving plates forming a metallic belt and that if both the feeder and crusher were energized by someone the two miners would be carried into the crusher and killed or injured.

Complainant's exhibit 3 is the photograph that the inspector took of two men in the feeder. The photograph is deceptive in that it appears that

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the two men are down in a hole at the end of the feeder. Actually, they are crouched down in a grizzly (similar to a cattle guard) which the smaller stones fall through. This grizzly is on the same level and a part of the vibrating feeder system used by respondent. Nothing moves the rocks toward the crusher but the vibrations. If the feeder had been turned on while the men were standing on the grizzly they would have felt the vibrations but I accept respondent's testimony that they would not be pushed toward the crusher.

The entrance to the crusher was guarded by several heavy chains and the rock to be crushed normally passes through these chains and then falls an unspecified number of feet into the impact crusher. A drawing was made by respondent of the operation of the crusher and it was received as respondent's exhibit No: R-5. After the hearing respondent submitted manufacturer's drawing of the equipment.

According to respondent the crusher can not be accidentally started. Two switches have to be closed in sequence and a button held in for thirty seconds before the crusher will operate. In these circumstances, if the imminent danger were before me on review, I would make a finding of no imminent danger, and vacate the order. No one disputed respondent's testimony that if the feeder were in operation it would merely tingle the miner's feet rather than move them through the chains and into the crusher. I find the chance of injury remote. I can readily see, however, how the inspector, thinking that a moving metal belt was involved would have had concern for the safety of the miners.

The citation was abated by putting a lock on one of the switches that energizes the crusher. As respondent points out, the men were not working on the crusher, they were working on the feeder. But even though there are two separate pieces of equipment with separate switches, they are joined together and work together and I think it reasonable to consider the crusher and its feeder as a unit of electrical equipment that the miners were working on when they removed large rocks from the grizzly at the entrance to the crusher.

Under this interpretation, despite the lack of hazard, the miners were working on a piece of electrical equipment and the equipment was not de-energized and locked out as required by the standard.

A standard identical to the one involved in this case, but not concerned with crushed rock, was considered by the United States Court of Appeals for the Ninth Circuit in Phelps Dodge Corporation vs. Federal Mine Safety and Health Review Commission, 681 F 2d. 1189 (1982). In that case the Court found that the standard was designed to protect against electrical hazards not physical hazards, and it referred to the "fair warning" doctrine. Under that doctrine a standard is unconstitutionally vague if it fails to give "fair warning" as to what is prohibited. I read the

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opinion to hold that the standard is unconstitutionally vague except to the extent that it is applied to protect against injury from electrical shock. * This is more than a mere interpretation of a safety standard. It is a statement that if the standard does not mean what the Court thinks it means, then it is unconstitutional. The Court found that Judge Merlin and the Secretary had abused their discretion in applying the standard to non-electrical hazards.

The Commission and ultimately the Courts will have to decide the extent to which the Commission is bound by an unconstitutionality finding of a United States Circuit of Appeals. I am going to follow the Ninth Circuit holding and dismiss this case. I will make the findings, however, that there was good faith abatement, that although the mine has a moderate history of violations it is smaller than average, and that the gravity and negligence involved were extremely low. Were it not for the Ninth Circuit opinion I would have found a violation and assessed a penalty of \$50.

The citation portion of the combined citation and imminent danger order is VACATED and this case is DISMISSED.

Charles C. Moore, Jr.,
Administrative Law Judge

* In MESA vs. Kaiser Steel Corporation, 3 FMSHRC 2463 (November 3, 1981) the Commission considered a similar, but not identical, provision of the Coal Mine Act.