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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 80-446-M
MSHA Case No. 05-03415-05009 V

v.

C-SR-10 Mine

ENERGY FUELS NUCLEAR, INC.,
RESPONDENT

DECISION

Appearances: Robert Lesnick, Esq., Office of the Solicitor, United States Department of Labor, Denver, Colorado, for Petitioner Timothy Borden, Esq., Energy Fuels Corporation, Denver, Colorado, for Respondent

Before: Judge Carlson

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"), arose from a February 12, 1980 inspection of the C-SR-10 underground uranium mine of Energy Fuels Nuclear, Inc. (Energy Fuels). The Secretary of Labor seeks a civil penalty of \$2,000.00 because Energy Fuels allegedly compelled miners to drive a 60 foot ventilation raise while working from ladders, in violation of the mandatory standard published at 30 C.F.R. 57.7-52, which provides:

Persons shall not drill from -

(a) Positions which hinder their access to control levers;

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- (b) Insecure footing or insecure staying; or
- (c) Atop equipment not suitable for drilling.(FOOTNOTE 1)

Energy Fuels denies that any violation occurred. It claims that the inspector acted on misinformation and an erroneous belief that the technique used in the beginning stages of driving the raise was to be used throughout the entire construction process.

The case was heard in Denver, Colorado with both parties represented by counsel. The parties originally asked leave to submit post-hearing briefs, but later asked that the case be decided without briefs.

ISSUE

The issue to be decided here is whether Energy Fuels violated the mandatory standard cited, and, if so, what civil penalty should be assessed.

REVIEW OF THE EVIDENCE

The undisputed evidence of record shows that Energy Fuels, some months prior to the inspection in this case, foresaw a need to drive a vertical ventilation raise from a lower level drift to an abandoned room in an upper level. The planned height of the raise was to be approximately 60 feet. The drift itself was approximately seven feet

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from floor to back. The base of the raise was to be located in a cross-cut intersecting the main drift. The raise was to be approximately 5 x 5 feet in cross section and to rise at an approximate angle of 60 degrees.(FOOTNOTE 2) Work on the drift was begun before the safety inspection on February 12, and was completed after that date. Beyond these few background facts, most of the evidence presented by the parties was in sharp conflict.

The government premised its case upon the understanding of its inspector, Rosendo Trujillo, that Energy Fuels intended to drive the entire raise with miners working from ladders. Since it was undisputed that miners working in the raise would remove the overhead rock by drilling and blasting, it followed that the supporting leg of the drill would have been rested on a ladder rung below the feet of the drill operator. This, according to Trujillo, would have imperiled the driller. Because of the weight of the drill, and vibrations caused by its operation, the operator could easily be dislodged from the ladder, causing a dangerous fall.

Two miners, Clifford Lynn and Leroy Lynn, testified for the Secretary. They had the same understanding as Inspector Trujillo about the techniques to be used in driving the raise.

The first to testify was Clifford Lynn, a shifter or lead miner. He maintained that Doug Mempa, the mine foreman, had asked him to drive the raise. Mempa, he testified, had informed the miners of the plan for the raise project about two weeks before the February 12 inspection. Lynn's understanding was that the entire raise was to be driven by one miner working from a ladder or ladders. The witness stated that he had never worked on a raise, but that he believed, along with other miners to whom the project was explained, that such a procedure was unsafe. According to Mr. Lynn, Mempa made no mention of the use of scaffolds or staging as work platforms for the contemplated drilling; nor were any scaffolding parts available in the mine. Mempa, he said, did mention that the miner would be tied off to a J bolt secured in the back or side of the raise.

Lynn refused to work in the raise, he testified, and was told by Mempa he would be fired. He was in fact discharged on the Monday before the Secretary's inspection.

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Another miner, Leroy Lynn, a cousin of Clifford Lynn, left his employment as a miner with Energy Fuels sometime in "the first part of February." He, too, had refused to work in the raise because of a belief that it was to be driven from ladders. The termination of his employment, however, stemmed from reasons other than his refusal to work on the raise. According to Leroy Lynn, Doug Mempa, the foreman, had asked him to work on the raise, and he had refused. The witness had no experience in driving raises, but he testified that Mempa had explained that the 4 foot by 4 foot wide raise would be driven 65 feet at a 90 degree angle. At the time his employment ended he had not worked in the raise, Lynn testified, nor had he seen any other miner work there. At no time, he testified, did he see any timbering or other supplies which could be used to build scaffolding. The raise had been driven about 6 to 10 feet when he last saw it before his job at the mine was terminated, he said.

Inspector Trujillo came to the mine on February 12 in response to a telephone complaint. According to the inspector, most of his information came from interviews of the two former miners who testified and two other miners who were still on the job. These men gave him to understand that Foreman Mempa had informed them that the raise would be driven from ladders with the pneumatic drill and that the miner who operated the drill would be secured by lanyards to a J bolt anchored in the sidewall.

Trujillo testified that no one was in the raise when he saw it, but that at that time it had been driven to a distance of about 9 to 10 feet above the back of the drift. He also observed a muck pile in the raise which reached to a height of 8 to 9 feet from the back of the raise. The drift itself, he testified, was about 8 feet high (Tr. 100).

Inspector Trujillo also maintained that he had no doubts as to the accuracy of what the miners told him because Doug Mempa, who was present a part of the time, did not deny that management intended to drive the entire raise from ladders. Moreover, Trujillo observed a 10 foot wooden ladder lying in the drift near the raise, but he saw no materials for building a platform. He further testified that Mempa and two other representatives of management asked him, "What's wrong with driving a bald-headed raise?" (A bald-headed raise is one driven from ladders without the use of timbers, staging or platforms.)

The inspector assumed that a series of ladders would be tied or fastened together to achieve the height necessary to complete the entire raise. Use of ladders, he testified, would subject the miner drilling from the ladder to great risk of falling and thus serious injury. His chief concern was that the leg of the drill would necessarily rest upon a ladder step or rung. The vibrations from the

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heavy drill (over 100 pounds) would quite likely break the ladder, Trujillo maintained, or would dislodge the miner from his precarious position even if the ladder did not break.

Energy Fuels' witnesses presented a far different version of the facts. They did agree that at the time of the inspector's visit no staging or platforms were in place. They contended, however, that such structures could not be installed until the raise had been driven several feet above the back of the drift. The stulls or timbers upon which the planking for the platforms were to rest must, of necessity, be fastened to the side-walls of the raise, they maintained.

The operator's general foreman, Robert Mussleman, testified that plans for driving the raise were frequently discussed with miners before the project was begun. According to Mussleman, management's plan had always called for the use of a form of scaffolding or staging which would be moved upward as the raise progressed. Metal supports known as Montgomery Ward hitches would first be inserted into the walls. These would support 8 x 8 inch timbers which in turn support the 2 x 8 inch lagging or planking which would serve as the drilling platform. According to the Mussleman's description, the miner would stand on the planking and rest the leg of the drill there. He would then proceed to drill the back above him with drill steels varying from 2 to 6 feet long. Charges would then be inserted, the planking removed, and charges detonated. The broken rocks would then fall to the floor of the crosscut below. As the raise advanced, new hitches and timbers would then be installed. Additionally, Mussleman asserted, separate safety lines attached to J bolts would be secured to both the miner and the heavy drill.

Mussleman testified that ladders were indeed to be used to allow access to the various levels of the staging as the raise advanced. He also indicated that the first few feet of the raise was, of necessity, to be "bald headed." Explosive rounds, he testified, would be fired to push the raise far enough to install timbers. No drilling, he asserted, would be done from a ladder. Rather, the miner doing the drilling would stand atop the large muck pile in the crosscut at the base of the raise. The top of the raise would be leveled, planking would be placed there to form a solid footing, and the drill leg would rest on the planking. A ladder would be used, he explained, only to insert the charges for the third round. (After the second round, the miner could reach the back of the raise with the drill steel from a fully extended drill to drill the holes, but could likely not reach that far by hand to insert the charges.)

Mussleman claimed that all necessary supplies for the stagings were in the mine by the time of the February 12 inspection. The Montgomery Ward hitches and the planking were at the mine from former projects, he testified, and the 8 x 8 inch timbers were brought in by him in January.

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Mussleman recalled that the raise was between 6 and 12 feet high when the citation issued, and the muck pile was around 5 feet high. At one point he acknowledged that a miner could have stood on the ladder to drill, but that in any event the drill leg would have been rested on the muck pile. He insisted that the drill leg would break a ladder rung if rested there.

Mussleman acknowledged that no plan for the construction of the scaffolding systems had been placed on paper until after Inspector Trujillo's inspection (Tr. 123).

Bernie Willey, a miner whose employment at the mine ended in August of 1980, also testified for Energy Fuels. Willey indicated that he drilled the last 50 feet of the raise from scaffolding. His description of the technique used conformed to the description of the staging system which Mussleman claimed to be management's plan.

Willey also testified that he was present when Mussleman explained the raise plan, including the use of staging or scaffolding. The explanation took place before the inspection. The witness had understood that in the early stages, the miner would stand on a ladder but brace the drill leg on the muck pile (Tr 162). Willey's participation began, however, about a month after the citation. At that time the top of the raise was about 15 feet high.

Doug Mempa, the mine foreman at the times relevant to this case, testified that he explained the raise project to the miners before it began, and that he at no time represented that the raise would be driven from ladders. Moreover, he maintained that all necessary timbers, hitches, and planking were at the mine before the drilling began. The stulls or timbers were delivered by Mr. Mussleman, he testified, during a snowstorm in January; the other supplies were already present. Mempa asserted that he saw the raise daily from the time it was begun.

According to Mempa, a miner named Kenneth Chad did the first work. The first rounds fired by Chad "booted," leaving an uneven hole. Mempa then drilled and shot the next round to "square up" the raise. Mempa insisted that neither he nor Chad drilled from a ladder; it was done from the top of the muck pile. He did not believe a ladder was lying in the drift during Inspector Trujillo's visit, but conceded one could have been, because ladders were sometimes used in the drift.

Mempa testified that at the time of the inspection he measured the height of the raise from the top of the drift and found it to be 9 feet. The drift itself was 7 feet high. Therefore, the total height of the raise was 16 feet. He did not measure the height of the muck pile but estimated it to be about 5 feet. (Tr. 195-196.)

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The drill, with the support leg fully extended reached 8 1/2 feet, according to Mempa, which, with a 6 foot drilling steel allowed a reach of approximately 14 feet (Tr. 222).

Richard D. Husted, mine safety and environmental engineer for Energy Fuels, testified that he saw the raise on February 12, 1980, or a day or two before. While there, he saw materials suitable for building scaffolding.

In rebuttal, Inspector Trujillo testified that in a subsequent visit to the mine on March 18, 1980 to check on abatement of the alleged violation, that it appeared that another round had been fired, making the raise about 2 or 3 feet higher. During his rebuttal testimony he made clear that he had never seen a miner working in the raise. He also acknowledged that if a miner had in fact been able to stand on a lower rung of the ladder to drill while resting the drill leg on the muck pile, such activity might not constitute a violation.

DISCUSSION

Even a cursory review of the record in this case reveals that the Secretary's evidence is wholly circumstantial. Neither the inspector nor any other witness for the government saw anyone at work in the raise. The question, then, is whether the circumstantial evidence is strong enough to establish violation. For the reasons which follow, I hold that it is not.

I have no doubt that if the inspector were correct, if the entire raise were to have been driven from ladders, the procedure would have been patently hazardous and a clear violation of the standard ultimately cited. More particularly, I am convinced that if the leg of the heavy drill were rested on a rung of the same ladder upon which the miner operating the drill was standing, a violation would occur, no matter what the height of the raise. I am not convinced, however, that any violation had occurred at the time of the inspector's citation. The circumstantial evidence presented by the Secretary was of two types: the words of two miners who related their understanding that the entire raise was to be driven from ladders without platforms, and the observations of these witnesses and the inspector of the raise itself up to February 12, 1980.

No one disputes that the raise was finished from platforms of the sort that the inspector approved. The government would suggest, of course, that the Lynns understood correctly that Energy Fuels originally intended to drive the entire raise from ladders, and altered that intent only after the inspector's visit and citation. Assuming that the drilling and blasting activity was done lawfully, up to the time of the inspection, the government's suggestion raises a troublesome question: what steps, if any, may the Secretary take under the Act to prevent a prospective violation?

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I do not believe that that question need be addressed at any length here. As I read the Act, it contains no language which contemplates present sanctions to prevent possible future or intended violations of mandatory standards. That question need not be entertained because I find persuasive the operator's claims that it intended from the time of conception of the raise project to use platforms. In reaching this conclusion, I rely principally on the testimony of Bernie Willey, a miner whose employment with Energy Fuels had ended well before the hearing. He therefore lacked any discernable motive to shade or slant his testimony. Willey fully supported the management testimony that plans to use platforms were made clear to miners before the raise began. I make no judgments as to the good faith of the Lynns in professing otherwise, but I find that they were mistaken in that belief.

This leaves but a single issue to decide. Did the size and shape of the raise at the time of inspection reveal the use of a ladder as a drill rest in violation of the standard? As mentioned before, no witness testified that any miner used a ladder rung as a base for the drill leg. The Lynns inferred that someone did because they had been told that the entire raise would be drilled from ladders. Inspector Trujillo drew the same inference based upon what he was told by miners who never observed the actual work, and from his knowledge of the driving of "bald headed" raises in other mines at other times (Tr. 209-210).

Against these inferences I must weigh the evidence of Doug Mempa, the foreman who actually directed the other miners who worked in the raise before February 12, 1980, and who, himself, apparently did most of that work. He testified emphatically that all drilling was done using the muck pile as a base. He also provided the only testimony concerning the actual measurements of the raise on the date of inspection. I note that Mempa's measurements were generally consistent with the estimates of other witnesses. I further note that, given the height of the raise at the time of the inspection, Mempa's representations that drilling up to that time was done from the muck pile were plausible. Since the top of the raise was 9 feet above the back of the 7 foot drift, the top of the raise was but 11 feet above the muck pile. Thus, a drill which extended to 8 1/2 feet, used in conjunction with a 6 foot drill-steel, could have been rested on the muck pile to allow placement of the last charges detonated before the inspection. I therefore accept the first-hand testimony of Mempa, who actually directed and participated in this early phase of the project, over the speculations of those witness who did not see the work done.

In summary, no one seriously contends that any violation occurred unless a miner rested the drill leg on a ladder rung. No credible evidence demonstrates that the drill was handled in that way. Consequently, I must conclude that no violation was proved.

CONCLUSIONS OF LAW

Based upon the entire record and upon the factual determinations reached in the narrative portion of this decision, it is concluded:

(1) That the Commission has jurisdiction to decide this case.

(2) That the credible evidence of record fails to establish that Energy Fuels violated the mandatory safety standard published at 30 C.F.R. 57.7-52.

(3) That the Secretary's citation and attendant proposal of civil penalty must be vacated.

ORDER

Accordingly, the citation and petition for assessment of a penalty are hereby vacated.

John A. Carlson
Administrative Law Judge

FOOTNOTES START HERE-

1 The inspector initially charged a violation of 30 C.F.R. 57.3-20, a ground support standard. The citation was administratively modified by the inspector to charge a "safe access" infraction under 30 C.F.R. 57.11-1. At trial, counsel for the Secretary moved for leave to amend a second time to charge violation of 30 C.F.R. 57.7-52. While the government's indecision in selecting the appropriate standard is scarcely praiseworthy, all standards mentioned were arguably related to the nature of the hazard described in the citation, and it was apparent at trial that the final amendment occasioned no prejudice to the operator. The final amendment was therefore allowed, and the hearing proceeded upon a charge that 30 C.F.R. 57.7-52 was violated. I also note that the inspector's initial action was designated an "order" under section 104(d)(1) of the Act, but was modified to a citation the next day when the inspector apparently recognized that there was no previous citation under that section which would serve as a proper predicate for a withdrawal order. This case was therefore tried as a citation matter.

2 The Secretary's witnesses insisted that the raise was driven at a 90 degree angle, but I note that the Secretary's own narrative findings for a special assessment, a part of the file, describe the angle as 60 degrees.