

CCASE:
MINERALS EXPLORATION V. SOL (MSHA)
DDATE:
19840214
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MINERALS EXPLORATION COMPANY,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. WEST 80-338-RM
Citation/Order 576874; 4/28/80

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Sweetwater Uranium Project

DECISION

Appearances: Anthony D. Weber, Esq., Union Oil Company of
California, Los Angeles, California,
for Contestant;
Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent.

Before: Judge Morris

Contestant, Minerals Exploration Company, (Minerals),
contests a citation issued by the Secretary on behalf of the Mine
Safety and Health Administration, (MSHA), under the authority of
the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held
commencing on October 5, 1982 in Laramie, Wyoming.

Minerals filed a post trial brief.

Jurisdiction

At the commencement of the trial contestant denied
jurisdiction in WEST 80-338-RM because the case involves a
contract issue (Tr. 3-4).

On this issue the evidence shows that contestant had filed
the legal identity form required by the regulations and received
an MSHA identification number (Tr. 16, 17). Contestant also held
itself out as the operator of the property (Tr. 17).

The foregoing facts establish jurisdiction.

Issue

The issue is whether contestant is liable under the facts.

Summary of the Evidence

In this case Minerals contests Citation 576874 issued by MSHA pursuant to Section 104(a) of the Act. MSHA asserts Minerals violated 30 C.F.R. 55.4-24(b) (FOOTNOTE 1)

The parties agree that a Hensel Phelps' pickup truck on this worksite was not provided with adequate fire protection. The equipment was therefore in violation of Section 55.4-24(b) (Tr. 7-9).

But the parties disagree on whether Minerals was the proper recipient of the citation.

MSHA's evidence reflects the following facts: MSHA Inspector Merrill Wolford issued the citation to Joe Jenkins, a supervisor of Union Oil Company (Tr. 9, 10). The parties in the scenario: Union Oil Company owns Minerals and Kaiser Engineering (Tr. 10). Hensel Phelps was a subcontractor for Kaiser Engineering (Tr. 10).

Inspector Wolford is not sure how Minerals fits into the picture but Minerals filed an operator's application with MSHA and received an identification number (Tr. 17). A large sign at the gate of the worksite states "Union 76, Minerals Exploration Company". The sign also contains the MSHA identification number (Tr. 17).

Inspector Wolford testified that when on an inspection of the premises they would go through a gap in the chain link fence to go from the Minerals mine area to where Kaiser and Hensel Phelps were located in the mill construction area (Tr. 12, 13, 37).

Wolford had been coming to the worksite on several prior occasions for a year. Jenkins exercised authority over subcontractors in handling and abating citations written by Wolford (Tr. 12, 38, 39). On one occasion an electrical contractor refused to abate a violative condition. After a confrontation between the subcontractor and Kaiser

~326

Engineering Jenkins ordered the abatement. The subcontractor abated (Tr. 39).

Project Manager Dykers and General Maintenance foreman Jacobson testified for Minerals. The evidence reflects the following facts:

In April 1980 Minerals was the wholly owned subsidiary of Union Oil Company (Tr. 18, 19). This combination owned the property and had a controlling interest in the ore (Tr. 19-20).

At the time the citation was issued construction was underway at the site. It included a plant, a shop, a mill and related facilities (Tr. 19-20). The mill was being erected by Kaiser Engineering, a wholly independent contractor (Tr. 20).

Joe Jenkins was assigned by Union Oil Company to insure that Kaiser met the design criteria and material specifications of their contract (Tr. 20, 21).

At the time of the inspection the contractor (Kaiser) had essentially completed the maintenance shop and the administration building. A fence separated construction activities from the mining activities (Tr. 21).

Dykers, Minerals' project manager, had no control over construction at the site (Tr. 22). Nor did Minerals have any control over Hensel Phelps, except through Union's corporate management (Tr. 22). In fact, Minerals protocol and procedure prohibited Dykers from dealing directly with Kaiser Engineering or Hensel Phelps (Tr. 22).

Minerals seven safety representatives had nothing to do with the construction at the job site (Tr. 23). Minerals had no operating authority, could not issue orders, and could not discuss any item of business with construction personnel (Tr. 23, 24). If Minerals' safety department found a significant item they would bring it to Dykers. He would pass it through corporate channels (Tr. 24). The purpose of the independent atmosphere was to insure there would be no division of authority or cross purposes (Tr. 24).

Several written Union memoranda issued before and after the inspection confirm Dykers' testimony concerning the separation of the construction activity from the mining activities (Exhibit MEC 1, 2, 3, 4).

Discussion

Minerals' post trial brief relies on Phillips Uranium Corporation, 4 FMSHRC 549 (1982). Minerals contends that the Secretary's issuance of the citation was solely for the Secretary's administrative convenience, a procedure condemned by the Commission in Phillips.

Accordingly, as a general rule, a production operator may be properly cited for a violation involving an independent contractor:....(4) when the production operator has control over the condition that needs abatement.