CCASE:
SOL (MSHA) V. HOMESTAKE MINING
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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 PROCEEDINGS Docket No. CENT 81-42-M A.C. No. 39-00055-05039 Docket No. CENT 81-43-M A.C. No. 39-00055-05041 Docket No. CENT 81-84-M A.C. No. 39-00055-05044 Docket No. CENT 81-85-M
v.	A.C. No. 39-00055-05045 Docket No. CENT 81-207-M A.C. No. 39-00055-05054 I Docket No. CENT 81-251-M A.C. No. 39-00055-05055 Docket No. CENT 81-278-M
HOMESTAKE MINING COMPANY, RESPONDENT	A.C. No. 39-00055-05056 Homestake Mine

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

These consolidated seven cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. In each case, the Secretary seeks to have a civil penalty assessed for an alleged violation of mandatory safety standard. An evidentiary hearing was held in Lead, South Dakota.

At the commencement of the hearing, the parties advised the Judge that they had entered into an agreement to settle a number of citations in the above cases. It was agreed that a written stipulation would be submitted following the hearing presenting the settlement agreement and the reasoning and rationale therefore. On February 13, 1984, the parties submitted a joint motion to dismiss and approve settlement of designated citations in most of the above cases. The provisions of this settlement agreement are discussed further in this decision.

In spite of the settlement of many of the contested citations, several remained to be tried and the hearing proceeded. Based upon the entire record and considering all of the arguments of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

ISSUES

The principal issues presented are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of the filed civil penalties; and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria as set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

STIPULATIONS

The parties stipulated to the following:

1. Homestake Mining Company operates a gold mine of substantial size in Lead, South Dakota.

2. Petitioner has jurisdiction of these cases under the Federal Mine Safety and Health Act.

3. Respondent received the citations, contested them and also received notice of time and place of hearing.

4. The assessment and payment of penalties in these cases would not affect the ability of the operator to continue in business.

Docket No. CENT 81-42-M

The parties agreed to a settlement of two of the three citations contained in this case as follows:

Citation No. 329587 was issued June 10, 1980 alleging a

violation of 30 C.F.R. 57.6-1 and proposing the assessment of a penalty of $170.00. This citation concerned an allegation that five cardboard boxes of electrical blasting caps were observed sitting on a bench on the rib of 29 crosscut at the 5600 level in respondent's mine. They were not stored in the day box. It is stipulated that the caps were stored in protective containers used when in transit and the caps were unlikely to explode. The settlement proposed that the penalty be reduced to $20.00 and given a non-significant and substantial designation. In light of the explanation, this settlement is approved.

Citation No. 330473 was issued on June 11, 1980 for an alleged violation of 30 C.F.R. 57.6-127 and a proposed penalty of $255.00. This concerned a blasting box which was not located in the area in which the blast would be set off but rather 125-150 feet away. Since this box was not connected for blasting or in an area designated to have blasts set off, the parties stipulated that it should be classified as a non-significant and substantial violation and the penalty reduced to $20.00. Based upon the above explanation, this settlement is approved.

Citation No. 330225 was not a part of the proposed settlement agreement and was tried at the hearing set for this day. Petitioner issued this citation alleging a violation of 30 C.F.R. 57.12-30 which provides as follows:

> Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

MSHA Inspector Guy L. Carsten testified that on June 11, 1980, while inspecting 50-52 stope, 21 ledge off the 6200 level, he observed a slit in the outer jacket of the 110 volt electrical power cable to the slusher lights. The slusher lights were unplugged and hanging on a rockbolt. Carsten was of the opinion that they had been used or were going to be used (Transcript at 150, 151).

Respondent argues that the petitioner failed to prove that the cited slusher lights had been recently used or were going to be used and therefore a violation of 57.12-30 had not occurred. James Baumann, respondent's shift boss, testified that he had been along on this inspection with Carsten. He stated that the cited lights had been removed from service and a new one was hanging on the opposite side of the slusher (Tr. at 164).

The specific issue is whether the petitioner has carried his burden of proof in showing that the defective slusher lights had been used in its defective condition or were going to be used. Carstens testified that the lights were unplugged and hanging on the wall. When asked if he remembered seeing other slusher

lights in this particular area, he answered that he was not sure but that one of the stopes had two sets of slusher lights in it (Tr. at 154). Baumann testified that the defective lights being in the stope was a housekeeping problem as a new set hanging on the opposite wall of the slusher was facing out in the stope and were the lights that had been used (Tr. 164).

I find no violation occurred here. The petitioner's evidence did not prove that respondent had used the defective lights or was going to use them in their defective condition and therefore did not violate the standard. I find that respondent's witness Baumann's testimony credible as to the other replacement lights being in the stope and that Carsten's memory on this point vague. Citation No. 330225 is vacated.

Docket No. 81-43-M

The parties agreed to a settlement of all six citations listed in this case as follows:

Citation No. 329591 was issued on June 12, 1980 alleging a violation of standard 30 C.F.R. 57.19-106 with an original assessed penalty of $255.00. It is proposed that it be settled for $20.00 and considered a non-significant and substantial violation. This citation involved maintenance work that had been in progress for an extended period of time and little chance of injury to miners. It is approved.

Citation No. 329593 was issued June 17, 1980 alleging a violation of 30 C.F.R. 57.11-1 with an original assessed penalty of $150.00. It is now proposed that it be settled for $20.00 and considered a non-significant and substantial violation. This involved safe access to a stope which actually had been abated by the shift boss with installation of the required barrier prior to issuance of the citation. This is approved.

Citation No. 330476 was issued June 18, 1980 for an alleged violation of 30 C.F.R. 57.11-4 and a proposed penalty assessment of $140.00. It was proposed that this citation be vacated due to the MSHA inspector who issued the citation being unavailable to testify. This citation is vacated.

Citation Nos. 567053 and 567056 involve alleged violations of the same standard, 30 C.F.R. 57.12-2 and proposed assessments of a penalty of $114.00 respectively. In the settlement agreement, the parties represent that the electrical fuse boxes cited in these instances as not being bolted to the wall of the stope were in fact wired firmly thereto. The standard is silent as to the method required to fasten fuse boxes and probability of injury was extremely low so it is proposed that both citations be settled for $20.00 each and amended to be a non-significant and substantial violation. This settlement is approved.

Citation No. 566924 was issued on June 27, 1980 for an

alleged violation of 30 C.F.R. 57.12-30 and a proposed penalty of $160.00. The disconnect switch on number 9 ledge, 4250 level, had a damaged door preventing the box from being either opened or closed. It was agreed that respondent pay the full amount of the original proposed penalty of $160.00 in settlement of this citation with no change in the original citation language. This is approved.

Docket No. CENT 81-84-M

In Citation No. 329842, issued March 16, 1980, the petitioner alleges a violation of 30 C.F.R. 57.9-2 which reads as follows:

> Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

MSHA Inspector Jeran Sprague testified that while riding on top of the counter-balance in the Ross Shaft of respondent's mine, he observed several loose guides and bolts between the 1700 and 2600 levels (Tr. at 178, 179). In the condition part of the citation, Sprague stated there were other guides and bolts loose from 2600 to 3550 level (Exhibit P-17). Several bolts were exhibiting evidence of having rubbed against the counter-balance as they were shiny (Tr. at 186). Sprague contended that this created a hazard as the counter-balance could catch on the protruding bolts and tear out hundreds of feet of guides causing material to fall down the shaft onto the mancage and possibly causing injuries to miners.

Respondent contends that if a violation of safety standard 57.9-22 had occurred, the equipment defect would have to be corrected before the equipment could be used. In this case, the inspection was conducted on Saturday, March 16, 1980, and respondent was given until March 23, 1980 for abatement. Further, that the citation was actually terminated on June 21, 1980 (Exh. P-17).

The most credible evidence in this case establishes that while conducting a shaft inspection of the counter-weight compartment in the Ross Shaft, the inspector observed loose guides in the area from 1700 to 2600 foot level and also 2600 to 3550 level. I find that such condition, based upon the inspectors experience and expertise, warranted respondent to take corrective action and the issuance of citation No. 329842 for a violation of 57.9-2. However, I do not find that the weight of the evidenc supports the petitioner's contention that this violation was significant and substantial within the guide lines established by the Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). This test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. I find the testimony of the inspector unpersuasive as to the probability

of a potential for injury in the immediate future resulting from the condition of the equipment cited. Further, William Stratton, respondent's shift foreman, testified that it is unlikely that a bolt used to hold the guides in place, and three-quarters of an inch thick, would impede the movement of a 40,000 to 60,000 pound counter-weight (Tr. at 217). Also, the guides were described as being tongue and grooved at the joints and unlikely to come loose even if a bolt were severed (Tr. at 216, 217). It is also respondent's policy to inspect the shafts at the Homestake mine every week and usually find thirty to fifty loose guide bolts during an inspection (Tr. at 219). From this testimony which was most credible, I find no evidence to support a contention that the violation was significant or substantial. I also find a low degree of negligence and gravity. I find that a penalty of $50.00 is appropriate in this case.

Docket No. CENT 81-85-M

There are four citations included in this case.

Citation No. 329836, was issued on December 9, 1979 for a violation of 30 C.F.R. 57.11-12 and a proposed penalty of $195.00. The parties represented that this violation concerned whether or not an area cited was a travelway requiring a guard rail. Evidence established that the area was an emergency escapeway not used in three years and with little probability of a resulting injury as a result of this violation. The parties agreed to settle this citation for $20.00. This settlement is approved. The remaining three citations, were tried at the hearing.

Citation No. 330834 issued August 28, 1980 alleges a violation of 30 C.F.R. 57.9-2 which states as follows:

> Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

MSHA inspector Iver A. Iverson testified that he observed what he considered was a defective plug on the cord that connects the Mancha battery motor No. 068 to the batteries. It was described in the citation as an electrical burn and shock hazard to miners operating the equipment due to damage in the internal grounding device within the quick lock connector. This could cause an arcing between the male and female connector shell (Exh. P-1).

During the inspection, the motorman was requested to disconnect the plug which operation might occur several times during the day. Usually the motorman does this while standing in the cab. However, at this time, the operator could not perform this task from the cab and had to get outside and use considerable force to remove the plug. Iverson opined that when the battery is put on charge in the battery station, any arcing could cause a hazard in the dead-end drift where these stations are located (Tr. at 20).

Respondent argues that the petitioner failed to carry his burden of proof to show that the cited electrical connection was a defect affecting safety. In support thereof, Kermit Kidder, respondent's electrical maintenance engineer, testified that he was familiar with the equipment cited, and that the outside case of the two connecting brass parts is the part that grounds it to the motor (Tr. at 113). The pitting inside the connectors described by the inspector was considered by Kidder to indicate a bad connection in the past (Tr. at 113).

I find that the evidence of record in this case fails to support the alleged violation of 57.9-2 described in the citation. The specific issue is whether the defect described therein affected the safety of any miners. The evidence established that the connector was difficult to disconnect and according to inspector Iverson's testimony contained "several pits and scars, which raise the . . . increase the surface." (Tr. at 29). The evidence is conflicting as to whether there was any electrical defect in this connector. Iverson admitted he did not test it for a leakage to ground (Tr. at 30). In his opinion there had been or was "arcing" but such an opinion was based on what he said was an oxidized, or possible arcing spot around the inner perimeter of the plug (Tr. at 29). He considered this would allow leakage through the internal grounding system into the frame or motor. Respondent's witness denied that the internal grounding system was as described by the inspector and based upon his electrical engineering degree and experience, I am persuaded that his knowledge was more credible. I find that at most the evidence shows the respondent had a maintenance problem through wear and use in this part. The equipment was not ordered removed from service. When the inspector was asked as to the probability of an occurrence or an incident leading to an accident from the condition he cited, he testified as follows: "The use that these motors are put to, and the probability of that happening, would probably be nil. I'd have to say that, in my experience. But if it did happen, it would destroy equipment and there's possible burn hazard to the operator." (Tr. at 40). I do not find a violation proven in this case and citation No. 330834 is vacated.

Citation No. 330835 issued August 28, 1980 alleges a violation of standard 30 C.F.R. 57.6-177 which reads as follows:

> Mandatory. Misfires shall be reported to the proper supervisor. The blast area shall be dangered-off until misfired holes are disposed of. Where explosives other than black powder have been used, misfired holes shall be disposed of as soon as possible

by one of the following methods:

(a) Washing the stemming and charge from the borehole with water;

(b) Reattempting to fire the holes if leg wires are exposed; or

(c) Inserting new primers after the stemming has been washed out.

Inspector Iverson testified that while inspecting 40-42 F stope, 11 ledge and 4850 stope at respondent's mine, he observed blue and yellow leg wires protruding from a hole in a recently blasted area. Further inquiries revealed that this area had been blasted on a previous night shift and that the misfire was not discovered until the next night shift. Two shifts had worked in the area during this time with evidence that miners had been slushing ore within 20 feet of the misfire.

Petitioner argues that these miners should have seen the wires the inspector saw and reported it to their supervisor and removed the misfires. Respondent contends that no one saw the misfire and therefore no violation occurred. Also, if it had been seen it would have been corrected immediately.

I find the evidence of record establishes that a misfire occurred and that the operator did not correct this condition prior to the inspector observing it. The record does not contain any proof that the respondent or any of its employees in that area were aware of this condition existing in the stope. It is surprising that with the several shifts entering this stope following the blast, and the admission that miners look for these conditions, that it wasn't observed prior to the inspector arriving. Apparently it should have been observed as the inspector saw it shortly after entering the area.

Regardless of respondent's argument that it was without notice, I find this is not a defense. First, I am convinced the wires should have been seen by the miners and supervisors working in that area and careful inspection of the area would have revealed the misfire. Also, the Commission has held that an operator may be held liable for a violation of a mandatory safety standard regardless of a showing of fault. Unless the standard so requires, a showing of negligence has no bearing in the issue of whether a violation occurred but is a factor to be considered in assessing a penalty. El Paso Rock Quarries, Inc., 3 FMSHRC 38-39 (January 1981).

I find that the violation of 57.6-177 stated in Citation No. 330835 did occur and that a penalty of $255.00 is appropriate in this case.

Citation No. 330861 was issued on September 10, 1980 for a violation of 30 C.F.R. 57.14-7 which reads as follows:

> Mandatory. Guards shall be of substantial construction and properly maintained.

Respondent was cited for not having a cable guard or other device on a tugger.

Inspector Iverson testified he observed a miner operating the tugger by reaching across the cable to move the handle to engage the motor. He states that a guard would prevent clothing or parts of the operator's body from becoming entangled in the rotating drum and winding cable. Iverson believed that a guard, such as the guide which was observed laying near the tugger, would be adequate.

Respondent contends that the cable guide was intended as a spooling device for the cable as it was rolled on the drum during operation. Respondent further contends that there is no requirement that there be a guard on the tugger.

I find that the most credible evidence in this case supports the arguments of the respondent. First, the tugger is not manufactured with guards installed as suggested by the inspector. The tugger is used as a source of power to pull objects by cable and is operated at a very slow speed. The handle located on one side is spring-loaded so that when pushed forward it causes the drum upon which the cable is wound to move in one direction. When the handle is pulled the other direction, it reverses the drum direction. When the lever is released, it returns to center and the tugger motor stops. The purpose of the guide which the inspector required be put on the tugger was designed to guide the cable onto the drum. It's purpose is not that of a guard at a pinch point. Based upon these facts, I find that there was not a violation of the standard cited in this instance and Citation No. 330861 is vacated.

Docket No. CENT 81-207-M

The parties agreed to a settlement of the one Citation No. 329331 in this case. This citation was issued for a violation of 30 C.F.R. 57.18-2 as a result of a build-up of water in a bore hole. The explanation for such occurrence was that an unknown and unexpected thaw occurred over the weekend. Petitioner agreed to reduce the original proposed penalty of $1,075.00 to $538.00 as he felt the negligence was not as great as originally thought. That settlement is approved.

Docket No. CENT 81-251-M

Citation No. 330687 issued March 10, 1981 alleged a violation of 30 C.F.R. 57.12-6 and proposed a penalty of $98.00. In the settlement agreement dated February 13, 1984, petitioner represents that the MSHA inspector had previously vacated the citation and respondent did not object. Therefore, Citation No. 330687 is vacated.

Docket No. CENT 81-278-M

Three citations were included in this case and all were settled by the parties in the stipulation and joint motion to approve settlement dated February 13, 1984.

Citation No. 329908 was issued on April 29, 1981 for a violation of 30 C.F.R. 57.12-82 and a proposed penalty of $122.00. Based upon recommendation of the MSHA inspector issuing the citation, it is vacated.

Citation Nos. 330645 and 330646 issued on May 12, 1981 each allege violations of 30 C.F.R. 57.12-25 which involved equipment not being grounded to provide protection for miners working in the area. Petitioner agreed in settlement of these two citations to reduce the penalties by 25% due to respondent's good faith and prompt action in abating the violations. Citation No. 330645 originally proposing a penalty of $170.00, is reduced to $127.00 and citation No. 330646 with a proposed penalty of $180.00 is reduced to a penalty of $130.00. These settlements are approved.

CONCLUSIONS OF LAW

Docket No. CENT 81-42-M

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement or Decision
329587	6/10/80	57.6-1	$170	$20.00
330225	6/11/80	57.12-30	84	Vacated
330473	6/11/80	57.6-127	255	20.00
				$40.00

Docket No. CENT 81-43-M

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement or Decision
329591	6/12/80	57.19-106	$255	20.00
329593	6/17/80	57.11-1	150	20.00
330476	6/18/80	57.11-4	140	Vacated
567053	6/24/80	57.12-2	114	20.00
567056	6/25/80	57.12-2	114	20.00
566924	6/27/80	57.12-30	160	160.00
				$240.00

Docket No. CENT 81-84-M

Citation No.	Date	30 C.F.R. Section	Assessment	Decision
329842	3/16/80	57.9-2	$305	$50.00

Docket No. CENT 81-85-M

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement or Decision
329836	12/09/79	57.11-12	$195	$ 20.00
330834	8/28/80	57.9-2	106	Vacated
330835	8/28/80	57.6-177	255	255.00
330861	9/10/80	57.14-7	98	Vacated
				$275.00

Docket No. CENT 81-207-M

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement or Decision
329331	12/24/80	57.18-2	$1,075	$538.00

Docket No. CENT 81-251-M

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement or Decision
330687	3/10/81	57.12-6	$98	Vacated

Docket No. CENT 81-278-M

Citation No.	Date	30 C.F.R. Section	Asessment	Settlement or Decision
329908	4/29/81	57.12-82	$122	Vacated
330645	5/12/81	57.12-25	170	$127.00
330646	5/12/81	57.12-25	180	130.00
				$257.00

ORDER

It is ORDERED that the citations so listed above are vacated. Respondent is ORDERED to pay civil penalties for the remaining citations in the amounts shown above in satisfaction thereof. Payment in the total amount of $1,400.00 is to be made within forty (40) days of this decision and order. Upon receipt of payment by the petitioner, these proceedings are dismissed.

Virgil E. Vail
Administrative Law Judge