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

FMC CORPORATION, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEST 81-100-RM Citation/Order No. 577120; 11/12/80
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	FMC Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	CIVIL PENALTY PROCEEDINGS Docket No. WEST 80-140-M A.C. No. 48-00152-05013
v.	Docket No. WEST 80-477-M A.C. No. 48-00152-05025
FMC CORPORATION RESPONDENT	Docket No. WEST 81-233-M A.C. No. 48-00152-05041 I Docket No. WEST 81-289-M A.C. No. 48-00152-05047 I FMC Mine

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant/Respondent;
Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Vail

STATEMENT OF THE CASE

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. In the four civil penalty cases, the Secretary seeks to have a civil penalty assessed for an alleged violation of a mandatory safety standard. Docket No. WEST 81-100-RM is a request for review by FMC Corporation (FMC) of Citation No. 577120 issued for an alleged violation of 30 C.F.R. 57.3-22. Docket No. 81-233-M is the civil penalty proceeding pertaining to Citation No. 577120 contained in WEST 81-100-RM, and on motion of FMC, was consolidated with WEST 81-233-M.

An evidentiary hearing was held in Green River, Wyoming. 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 in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed herein; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations 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. FMC does not contest the jurisdiction of Federal Mine Safety and Health Act in any of the above consolidated cases.

2. FMC mine would be considered a large operation.

3. The history of past violations would neither cause an increase or decrease in the amount of a civil penalty assessed in these cases.

4. The assessment of a civil penalty would not affect FMC's ability to continue in business.

5. FMC exhibited good faith in the abatement of the issued citations considered in these consolidated cases.

Docket No. WEST 80-477-M

During an inspection of the No. 8 shaft-sinking project at respondent's FMC mine, MSHA inspector Fred Hanson issued a type 107(a) order No. 337405 alleging a violation of 30 C.F.R. 57.19-128 which reads as follows:

> Mandatory. Ropes shall not be used for hoisting when they have: (a) More than six broken wires in

> any lay. (b) Crown wires worn to less than 65 percent of the original diameter. (c) A marked amount of corrosion or distortion. (d) A combination of similar factors individually less severe than those above but which in aggregate might create an unsafe condition.

The inspector stated in the order that a section of the hoist rope, approximately 30 feet in length above the bucket, had numerous broken wires and a considerable amount of distortion. He stated that this created a hazard to personnel working below in the shaft. In a subsequent action, the inspector changed the "part and section" designation in the order to a 30 C.F.R. 57.19-128(d).

Hanson testified that after bringing the rope to the surface it was cleaned with a solvent. He observed approximately 30 feet of the rope was in "very poor shape" with more than 6 broken wires in a lay. (FOOTNOTE 1) The crown wires were very worn with some wires sticking out (Transcript at 11-12). Melvin Jacobson, MSHA Field Office Supervisor, testified that he observed the rope on the day the citation was issued and opined that the rope was in a severe "state of affairs" with broken wires and abrasions (Tr. at 29).

A section of the rope was cut off, tagged, and sent to MSHA Technical Support Staff in Denver, Colorado for examination. In a document dated November 1, 1980, Roy L. Jameson, safety specialist, reported that from the results of the wire rope analysis and a tensil test, it was concluded that this rope specimen was appropriately removed from service because of severe deterioration. The service life of the rope specimen was considered to have exceeded a safe margin of safety for man hoisting (Exh. P-6).

Respondent argues that the petitioner failed to prove by a preponderance of the evidence that a violation of the cited standard occurred. Julius Jones, respondent's safety manager, testified that after the rope had been pulled from the shaft and placed on the ground, he ran a rag over it and found no broken wires. This is an accepted practice used to check for broken wires in a rope (Tr. at 33-34 and Exh. R-1). David Jones, respondent's safety director, testified that he did not observe

distortion in the rope and after unraveling the strands, found some broken wires but less than six in a single lay (Tr. at 57). Also, a measurement showed that wear of the crown wires was less than 35 percent (Tr. at 57-58).

After careful consideration of all the evidence in this case, I find that the petitioner failed to prove that the condition of the cited rope was a violation of 30 C.F.R. 57.19-128(d). The specific issue is whether there was a violation of subsection (d) of standard 57.19-128. That is, were there a combination of factors, less severe than the three listed factors, that might create an unsafe condition. In light of the petitioner's evidence, I do not find that he has proven such a combination of factors. Also, I find that the (d) portion of the standard to be too vague, indefinite, and uncertain to give the respondent notice of what is required to determine when the rope should be replaced.

The testimony as to the condition of the rope is conflicting and confusing. Jameson reported that under microscopic examination, he found crack initiations and crown wear. Although there is considerable general information in his report dated November 1, 1980 (Exh. 6), and the supplement thereto, the specifics do not show a violation of any of the first three provisions of the standard. There was no showing of 6 broken wires in a lay although there was testimony that crack initiations be considered evidence of broken wires.

Also, no distortion was alleged to exist in the tested wire, although some corrosion was found. At the most, the report lacked clarity. The conclusion stated the writer's opinion that the rope should be removed from service due to deterioration. I find no mention of deterioration in the standard as grounds for citing an operator.

Jameson appeared at the hearing and testified regarding his report and stated that the tensil test of the rope had no direct relationship to the possibility of breakage of the rope. It will only tell you whether the rope will break at a higher or lower strength than that assigned in the catalogue listing of its tensil strength (Tr. at 43). The balance of Jameson's testimony failed to explain where in his report it proved a violation of any of the three specific items listed as (a)(b) and (c) under the standard was indicated. It must be assumed from this evidence that the violation occurred under (d).

Petitioner's witnesses testified that the rope was unsafe based upon generalizations. These statements would, in combination, allude to paragraph (d) of the standard which states that conditions less severe than the three specific findings might create an unsafe condition. I find this part of the standard vague and difficult to apply. Any number of situations and conditions come to mind that might create an unsafe condition.

My concern is that such a provision is not specific enough to put the operator on notice as to what the requirement is as to when a hoist rope should be removed from service if it does not meet the first three provisions of the standard. Apparently, the same concerns where recognized by the drafters of these standards as 57.19-128 was rewritten and new standards adopted effective January 24, 1984. These standards are now designated 30 C.F.R. 57.19-24. There is not a reference in this standard similar to (d) in 57.19-128, and the term might has been abandoned in the new adopted standard.

Regarding the issue of vagueness in standards or regulations, the Commission has authority to determine the validity of standards under the 1977 Act. See Sewell Coal Company, 2 MSHC 1345 (1981), Alabama By-Products Corporation, 2 MSHC 1981 (1982). In order to pass constitutional muster, a statute or standard adopted thereunder, cannot be "so incomplete, vague, indefinite or uncertain, that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "laws (must) give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972).

Therefore, in this case the question is whether the operator would know what section (d) of the cited standard required of him. I find that the wording of this section would be difficult to interpret and follow. Also, the drafters of the replacement regulations recently adopted felt the same way and chose not to adopt a similar provision. Therefore, Citation No. 337405 is vacated.

Docket No. WEST 80-140-M

In this case, petitioner issued four citations and proposed penalties therefore as follows:

Citation No.	Date	30 C.F.R. Standard	Proposed Penalty
576186	8/15/79	57.12-18	$210.00
575778	8/16/79	57.15-5	255.00
337305	8/17/79	57.16-6	30.00
337306	8/17/79	57.9-2	305.00

Citation Nos. 575778 and 337306

At the hearing of this case, the parties stipulated that a deposition would be taken of the inspector issuing citation Nos.

575778 and 337306 and furnished to the Judge in order that a decision could be rendered. On April 20, 1984, the petitioner filed a motion to withdraw the proposal for penalties for the mine inspector who issued the citations is not now employed by MSHA and unavailable to provide testimony in support of the citations. The respondent has filed no opposition to this motion and therefore the two citations are vacated.

Citation No. 576186

MSHA inspector Gerry Ferrin issued citation No. 576186, while on a regular inspection, for an alleged violation of 30 C.F.R. 57.12-18 (FOOTNOTE 2) due to the respondent's failure to have a label on a main power switch to show which piece of equipment it controlled. Ferrin testified that identification of which piece of equipment was controlled by the switch could not be identified by its location from the distribution center it was attached (Tr. at 6). The hazard in this case was that a maintenance mechanic or or electrician working on the particular piece of equipment involved could tag or lock out the wrong switch through misidentification and receive an electrical shock (Tr. at 6, 7). There is nominally 480 volts involved here. The equipment serviced by this particular switch and cable was a fan.

The respondent did not present any evidence or submit a brief in this case. I find that a violation of 57.12-18, as alleged did occur. The operator was negligent in failing to properly label the switch involved here. The gravity is that a serious injury could occur to a miner including death as a result of such a failure to provide proper labeling. The operator abated the citation in good faith by labeling the male portion of the plug at the bitter end of the trailing cable that fits into the distribution box (Tr. at 12, 15). I find the proposed penalty of $210.00 is reasonable in this case.

Citation No. 337305

MSHA inspector Martin Kovick, during a regular inspection of respondent's surface operation issued Citation No. 337305 wherein

he alleged a violation of 30 C.F.R. 57.16-6 (FOOTNOTE 3). Kovick testified that he observed a Union Pacific Railroad Company ("Union Pacific") truck near the respondent's load-out area with acetylene tanks standing in the back of the truck with the gauges or regulators on them. The standard requires that when compressed gas cylinders are transported or stored, the regulators (valves) are to be removed and covers are to be put on (Tr. at 21).

Respondent presented testimony at the hearing that the mine site involved in this citation is located on property it leases from Union Pacific and that the railroad's property "pretty much" surrounds respondent's leasehold (Tr. at 28). Robert L. May, respondent's surface safety supervisor, stated that Union Pacific employees and vehicles have a right of entry onto and across the respondent's property including a key to the main gate. Respondent did not produce at the hearing, or subsequent thereto as agreed to at the hearing, a copy of the document or lease agreement covering Union Pacific's rights on respondent's leased property.

Respondent argued that they had entered into the lease agreement prior to the Federal Mine and Safety Act being adopted and that the Union Pacific is not subject to the Act. Also, the Union Pacific retained an exclusive right to right-of-way over the leased property and is not subject to control by respondent (Tr. 31).

The specific issue is whether the violation cited in this case was the responsibility of the respondent. I find that the petitioner has failed to prove that the mine operator in this case is responsible for the Acts of the Union Pacific employees. The facts show that the alleged violation of 57.16-6 did occur on mine property under the control of respondent. Also, the parties agree that the compressed gas cylinders were in a truck owned by Union Pacific and operated by their employees. There is no evidence, or does the petitioner contend, that the Union Pacific is an agent or independent contractor for the mine operator. Therefore, the provisions of the Act and regulations that apply to these two situations are not applicable here.

I am unable to find any provision of the Act or its regulations, or prior decisions by the Commission or the Courts, which gives direction as to whether the mine operator should be

held responsible for all acts on the mine property which violate the Act. In El Paso Rock Quarries, Inc., 1 FMSHRC 35, 32, (1981) the Commission considered the issue of whether the operator may be held liable when its customers or employees of its customers do not comply with mandatory safety standards. In this case, the parties were "rock pickers" who are not employees of the operator but were allowed on the mine property as customers or employees of customers to break up rock blasted loose by the operator and subsequently collected in a truck and hauled away. The Commission affirmed Judge Moore's decision that the "rock pickers" are miners in accord with section 3(g) of the Act which defines "miner" as "any individual working in a coal or other mine."

I find a definite distinction between the customers in the El Paso, case and other decisions involving independent contractors and haulers of materials and the Union Pacific employees in this case. Here, the truck was only passing through the mine property on its way to other Union Pacific property. It would be stretching the usual liberal interpretation of the Act too far to find the employees of Union Pacific in this instance "miners" and, as such, subject to the mandatory standards. Such an interpretation would impose a requirement on the operator to be responsible and check all vehicles that entered on its property for whatever reason. I do not believe there is sufficient control of the Union Pacific employees in this case to justify such an interpretation.

I find that the petitioner has failed to prove a violation here against respondent and Citation No. 337305 is dismissed.

Docket No. WEST 81-289-M

Citation No. 576979 was issued to respondent on September 8, 1980, and charges a violation of 30 C.F.R. 57.9-37 as a result of a maintenance jeep being parked on a grade without the wheels being blocked or turned into the rib. The jeep rolled forward pinning a miner against the belt control box. The accident resulted in injuries to the miner. The cited standard provides as follows:

> Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

Respondent does not deny that the accident occurred or the violation of the standard cited. Instead, respondent contends that the penalty proposed by the Secretary is too high. In support of this argument, respondent contends it was their policy to require that all mobile equipment, when parked on a grade, have chocks placed behind the wheels and that it be turned into the rib. Kim Curtis, the miner involved in the accident in this

case, testified that he was told by his supervisor, that any time he got off the mantrip (jeep), to make sure to put blocks behind the wheels. This conversation occurred approximately two weeks prior to the accident. Curtis admitted that there were blocks available on the jeep. However, he was only going to stop for a half minute and didn't set the blocks (Tr. at 8, 9).

The facts in this case shows that respondent's employee Curtis was negligent in failing to follow the procedure for parking vehicles on a grade. Also, the gravity of the violation is high as evidenced by the resulting injuries to the miner and potential for death that could result. However, the facts also show that the respondent had required that its miners follow the procedures outlined in the standard. Curtis testified that as a result of a similar accident which had occurred earlier, his supervisor had told him that any time he got off the mantrip, to make sure he put the blocks behind the wheels (Tr. at 7).

It is well-settled that under the Mine Act, an operator is liable without fault for violations of the Act and mandatory standards committed by it employees. Allied Products Co. v. FMSHRC, --- F.2d ----, No. 80-7935, 5th Cir. Unit B (Feb. 1, 1982). In Southern Ohio Coal Company, 4 FMSHRC 1464, (August 1982), the Commission reversed an administrative law judge's decision holding that the negligence of rank-and-file non-supervisory employees may be directly imputed to the operator for the purpose of penalty assessment. The Commission stated as follows: "However, where a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct. Nacco, supra, 3 FMSHRC at 850-851."

The only evidence presented in this case regarding this point indicates that Curtis's supervisor had instructed him to follow the procedures outlined in the standard as late as two weeks prior to the accident (Tr. at 6). Based on this, I find that the penalty proposed by the Secretary should be reduced. I find a penalty of $100.00 is reasonable in this case.

Docket No. WEST 81-233-M and
Docket No. WEST 81-100-RM

Citation No. 577120 was issued on November 12, 1980 as a result of an accident on November 6, 1980 involving a rock that fell and struck a miner. The citation alleged a violation of 30 C.F.R. 57.3-22 which states as follows:

> Mandatory. Miners shall examine and test the back, face, and ribs of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground

> control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

The condition or practice described in the above citation reads as follows: "A miner working in 20 cross-cut of #4 room in 7 CM Panel was injured when a rock about 42 inches long, 20 inches wide and from 10 to 4 inches thick fell from the roof stricking (sic) him in the upper back. The roof was approx. 7 1/2 feet above the floor. The miner stated that he checked this rock at the beginning of the shift but did not continue to check it or support it. Approx. two hours after checking the rock it fell and struck him. This man's foreman had not been in this area during the shift prior to the accident. The shift started about 0001 hours 11/6/80 and the accident happened about 0240 hours 11/6/80. The miner arrived at his working place at approximately 0045 hours 11/6/80. The miner stated that he had sounded the rock but had not tried to scale it down." The citation was abated by holding a safety meeting and everybody was cautioned about working under bad ground and the proper way to scale and support.

As a result of the issuance of the above citation, respondent filed a notice of contest which is docketed at WEST 81-100-RM and has been consolidated with the penalty proceeding WEST 81-233-M. In the request for review, respondent requested that the citation be vacated.

The facts in the above consolidated cases are not basically in dispute. I find that on November 6, 1980, Ivan Miller, respondent's employer, commenced work at the FMC mine at 12:00 midnight. For six months, Miller, as part of a crew, was working in a section of the mine described as 7 CM Panel of the mine, and on the night of the accident, in 20 cross-cut of #4 room. Miller had been working in this same area for the preceding six months and during that time, was in the area 3 or 4 times a week and the only shift working in the area during that time (Tr. 7). Miller testified that he entered the mine at midnight and after loading up the welder, it took approximately one and a half hours to get to the area where he was to work (Tr. at 23).

The area where the roof fall occurred was in an established part of the mine and the roof had been bolted. Miller stated that he examined the roof by "sounding" it and barred down some loose rocks (Tr. at 6). Miller did not know where the rock that struck him fell from so did not know if he barred that area.

Miller testified that he started cutting with a welding torch on a steel plate and continued working for approximately an hour to an hour and a half, after his arrival at the location, when a rock fell and struck him in the back causing injuries. He also stated that he had frequently checked the roof while he was working (Tr. at 8).

MSHA Inspector William Potter testified that he went to the FMC mine to investigate this accident shortly after it was reported by the respondent. When he arrived at the location underground, the injured miner had been removed to the hospital. He examined the site and concluded that the rock that struck the miner had fallen from a point right over where the miner was working. Potter stated that he would call the location where the rock had fallen from as the "brow." (Tr. at 48).

There is some testimony by Potter in this case that a crack had existed in the area from where the rock fell for a period of time and that Miller and other miners whose names he did not know had indicated that they had tried unsuccessfully in the past to bar this down (Tr. 46). I reject this as being unsupported by the most credible evidence of record. First, it is denied by the injured miner Miller who testified at the hearing that he did not know where the rock fell from. Also, the other sources of information was based on reference to statements made by unidentified miners who were present during the investigation but did not testify at the trial. No testimony of any witness corroborated this information and fails to refute the testimony of Miller.

Based on the most credible evidence in this case, I find that petitioner, has not proven a violation by respondent of 57.3-23 in this case. This was not a new section of the mine but rather an established area where the injured miner had been working for six months. Miller was an experienced underground miner and familiar with the conditions in a trona mine such as the FMC mine. The evidence is not disputed that Miller examined the roof of the area upon arrival and, in fact, barred down some loose before he began his work. He also checked the roof "frequently" while he worked. Potter testified that he thought checking the roof on a basis of every 45 minutes to an hour would be sufficient (Tr. at 33, 34). It is not determined here what more the respondent, or its employee, could have done to have prevented this accident. The procedure for supporting the roof in this area of the mine is to use roof bolts on four foot centers. This had been done. For a dangerous looking rock or area, that cannot be barred down, timbering is used. However, the credible evidence does not establish that such a situation existed in this case. I therefore ORDER that Citation No. 577720 be vacated.

ORDER

1. In Docket No. WEST 80-477-M Citation No. 337405 is VACATED.

2. In Docket No. WEST 80-140-M, Citation Nos. 575778 and 337306, in accordance with motion by petitioner to withdraw its petitions for penalties, are DISMISSED. Citation No. 576186 is affirmed and a penalty of $210.00 is assessed. Citation No. 337305 is DISMISSED.

3. In Docket No. WEST 81-289-M, Citation No. 576979 is affirmed and a penalty of $100.00 is assessed.

4. In Docket Nos. WEST 81-233-M and WEST 81-100-RM, Citation No. 577720 is vacated.

Respondent is ordered to pay a civil penalty in the total amount of $310.00 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE

1 Lay. The direction, or length, of twist of the wires and strands in a rope. Zern. d. The length of lay of wire rope is the distance parallel to the axis of the rope in which a strand makes one complete turn about the axis of the rope. Bureau of Mines U.S. Dept of Interior, A Dictionary of Mining, Mineral and Related Terms (1968).

~FOOTNOTE_TWO

2 57.12-18 Mandatory. Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

~FOOTNOTE_THREE

3 57.16-6 Mandatory. Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.