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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 80-312-M A.C. No. 29-00166-05005
v.	
DUVAL CORPORATION, RESPONDENT	Nash Draw Mine

DECISION

Appearances: Eloise V. Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Lina S. Rodriguez, Esq., Bilby, Shoenhair, Warnock & Dolph, Tucson, Arizona, for Respondent.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"), arose from an inspection of respondent's Nash Draw Mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated two safety regulations promulgated under the Act.

Respondent denies that any violations occurred.

After notice to the parties, a hearing on the merits was held in Carlsbad, New Mexico on November 2, 1983.

The parties filed post trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropirate.

Stipulation

The parties stipulated as to certain evidence and they further agreed that the size of respondent's Nash Draw mine is 179,041 man hours. The company's total size is 5,773,849 annual man hours (Tr. 10).

The two citations here allege respondent violated Title 30, Code of Federal Regulations, Section 57.19-120 and Section 57.11-50.

Citation 162288 provides as follows:

> 57.19-120 Mandatory. A systematic procedure of inspection, testing, and maintenance of shaft and hoisting equipment shall be developed and followed. If it is found or suspected that any part is not functioning properly, the hoist shall not be used until the malfunction has been located and repaired or adjustments have been made.

Citation 162289, provides as follows:

> 57.11-50 Mandatory. Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.
>
> In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his workplace.

Summary of the Evidence

MSHA's evidence: Sidney Kirk, a supervisory mine inspector, testified for MSHA (Tr. 14-17).

At approximately 11:30 a.m. on January 9, 1980 Inspector Kirk received a call from Marvin Nichols, his supervisor. The supervisor advised him that respondent was having hoisting control problems on the No. 5 hoist at the Nash Draw mine. Nichols had told the company the oncoming miners should not go underground until the malfunction was corrected (Tr. 18). In the interim the company was directed to inform the MSHA office in Carlsbad of any developments (Tr. 18).

About 3:30 p.m., respondent's representative Merle Elkins called Inspector Kirk. He indicated the electrical malfunction was continuing. Elkins stated he was familiar with sections

57.19-120 and 57.11-50 (Tr. 19). Kirk said they should consider the impact of the regulations before putting any miners underground. Kirk also inquired about the 3 p.m. shift. When he learned the miners had gone underground, he immediately went out to the mine (Tr. 19).

At the mine Kirk learned from supervisor MaGraw, and others, that the No. 5 hoist would operate on man speed but not on ore or automatic speeds (Tr. 20, 22, 50). Ore speed is automatic and much faster. Man speed requires manual control. The hoist control system permits the operator to twist a handle to convert to man from ore speed (Tr. 20). Man speed runs about 650 feet per minute. This is about 200 to 250 feet per minute slower than ore speed (Tr. 19, 20). McGraw felt he was in compliance with the regulations because there were ladderways in each shaft. They could be used as an escape device from the 900 foot level (Tr. 21).

At Kirk's request the skif was automatically loaded. When the hoistman applied power to raise the skif it started creeping down. Brakes were required. In the meantime the company electricians continued checking various components in the control box cabinet (Tr. 22, 23).

MaGraw declined to bring the miners out without an MSHA order. Kirk obliged. The citation issued at 1737 hours states respondent was in violation of Section 57.19-120 (Tr. 23-25, Exhibit C2). The company was cited because if a fire or a blowout occurred underground, a second escapeway was not available. After the inspector arrived at the mine the company contended the hoist would operate on manual. But it went backwards instead of coming up the shaft (Tr. 26, 27).

The hoisting logs reflected these malfunctions had been reoccurring since about 2 a.m., on January 8. (Tr. 27, 28). There had been a full shift on January 9 and the company was 3 to 4 hours into the afternoon shift when the imminent danger order was issued (Tr. 27, 28).

The other mine shaft, the regularly used man shaft, incorporates the exhaust ventilation system. In the event of an underground catastrophe, such as a detonation, fire, or smoke accumulation or blowout the 13 or 15 miners could not exit via the intake shaft because of the hoist malfunction (Tr. 28, 29, 35).

Citation 162289 was issued because respondent did not have a second escapeway since the hoist was inoperative (Tr. 30-33). Management contended the ladders furnished the second escapeway.

But the inspector felt that was insufficient. This is because Section 57.11-55 provides that an incline in excess of 300 feet shall be provided with emergency hoisting equipment (Tr. 33)

Inspector Kirk returned to the mine about 1:00 p.m. but, contrary to expectations, the hoist was not then functioning correctly. The inspector modified the citation to permit some miners to go underground to load the skif so it could be tested. The citation was terminated at 2 a.m. the following day (Tr. 39, 40, 64, 67).

The inspector did not observe any miners being hauled out by the No. 5 hoist. Nor was any attempt made to do so. The workers were brought out via the No. 6 shaft after the imminent danger order was issued (Tr. 53, 62). The statutory definition of imminent danger is contained in 30 U.S.C. 802(j). The withdrawal order was issued here because of the electrical problems. While the miners were underground there was but a single exit (Tr. 55).

MSHA's policy is this: If a malfunction occurs, they will allow the shift below to stay underground provided the miners do not open any new ground. But the policy prohibits the next shift from going underground. The miner's representative must concur in any decision of the miners to remain underground (Tr. 69).

Norman Gonder, John Solar, John Magraw, Jack Hunt, and Harry Awbrey testified for respondent.

The Nash Draw mine, an underground potash mine, is mined by the roof and pillar method. The potash exists in a salt formation. The formation is relatively safe since the potash is in a noncombustible ore body. In addition the formation is non-gassy, is without water, and requires no timbers for support. While the mine has won safety awards there have been roof falls, blowouts and fatalities at the mine (Tr. 77, 78, 100, 101).

The hoists (No. 5 and No. 6) are in separate shafts about 300 feet apart. The No. 5 is a counterbalance system with two separate hoist conveyances (Tr. 87-89, 95, 96, Exhibit R2A, R4). The No. 6 shaft is large enough to accommodate a vehicle (Tr. 92, 93).

The shafts extend as deep as the 900 foot level. To reach the ore a miner goes down two more slopes, an additional 170 vertical feet (Tr. 98).

In July 1983 Warren Traweek, the 40 year old assistant safety director climbed out of the mine via the ladders. The climb took 39 minutes. He stated that he took his time and didn't hurt himself (Tr. 99, 103). In an emergency you could

climb out in about 20 to 25 minutes (Tr. 105). If the hoist was operating on man speed a miner could get up the shaft in about a minute (Tr. 104-105).

John Solar, respondent's electrician, and others started working on the No. 5 hoist when it broke down. He worked all day and part of the next night to correct the malfunction (Tr. 110-112). The malfunction of No. 5 did not affect the No. 6 hoist. The hoists are controlled by separate motors (Tr. 111, 112). In checking the system Solar had to occasionally turn off the power. Solar never permitted anyone to operate the equipment while they were checking it (Tr. 113-115, 124). Escapeways include the No. 6 hoist and the ladders in the No. 5 and No. 6 shafts (Tr. 114).

On the day the citation was issued there was no fire underground nor were any miners in danger (Tr. 115, 116). Solar identified respondent's weekly maintenance log on the No. 5 hoist (Tr. 117, 118, 123, Exhibit R9). The hoistman checks out equipment and Solar performs the maintenance. A mechanic also performs various periodic equipment checks (Tr. 119, 120).

The No. 5 hoist would still run by hand controls and miners could be brought out with that control. But the hoist wouldn't run right on automatic (Tr. 125). If a malfunction occurred when on automatic you could turn it off by hand (Tr. 125). Miners could still be brought out if you were operating it by hand (Tr. 125, 128). The hoist was not malfunctioning other than when it was in the automatic mode (Tr. 128).

John Magraw, respondent's manager for mine development, did not prohibit the 3 p.m. shift from going underground (Tr. 134). He felt there was no danger to the miners (Tr. 134, 135).

Jack H. Hunt, respondent general superintendent, was aware they were having intermittent hoist problems. He called the MSHA Dallas office about 11:00 a.m. (Tr. 142-145). Marvin Nichols (MSHA) told Hunt it is normal procedure to finish the shift being worked but not to lower the next shift (Tr. 146). About 3:15 p.m. Hunt directed that Sid Kirk, at MSHA's local office, be advised of the situation (Tr. 147). Hunt and Kirk discussed the hoist problem. Kirk was displeased that the second shift had gone underground (Tr. 149).

At no time did Hunt see any miners being hauled by the No. 5 hoist (Tr. 153).

After Kirk arrived he indicated he would not abate the citation unless he tested the skif with a load. Accordingly, Kirk modified his order to permit a foreman and a few workers to go underground to place some ore in the pocket (Tr. 153, 154).

If the No. 6 hoist malfunctioned while the miners were underground the miners could have used the ladders in the No. 5 and No. 6 shafts (Tr. 156, 157). Hunt was not aware of any miners using the No. 5 hoist after the malfunction (Tr. 159).

Harry Awbrey, respondent's chief electrician, didn't find too much wrong with the electrical equipment. He checked the directional relays and latched them back. Except for low voltage the equipment seemed normal (Tr. 182, 183).

The No. 5 hoist operates on DC current. This automatic static regulated hoist is exceedingly complicated. In contrast, the No. 6 hoist operates on AC current and requires lower voltage than the No. 5 hoist (Tr. 184).

It was established that the problem was not with the hoist but with the incoming Public Service Company voltage from a temporary transformer. The No. 5 hoist is so sensitive that it triggered out from the voltage drop when the current fluctuated. Hoist No. 6 is not as sensitive. Public Service Company replaced the temporary transformer with a permanent one (Tr. 186-188).

Discussion

As a threshold matter respondent contends that by virtue of 30 C.F.R. 57.19 no violation of 57.19-120 can be sustained. In short, respondent claims that Citation 162288 must be vacated.

The regulation relied on by respondent reads:

> 57.19 Man hoisting.
>
> The hoisting standards in this section apply to those hoists and appurtenances used for hoisting persons. However, where persons may be endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied.
>
> Emergency hoisting facilities should conform to the extent possible to safety requirements for other hoists, and should be adequate to remove the persons from the mine with a minimum of delay.

Respondent's argument lacks merit. While the No. 5 hoist is primarily a production hoist it is uncontroverted that the hoist had been identified as a "second escapeway" in the company's escape plan (Tr. 51, 82-83). This causes the No. 5 hoist to be an apparatus "used for hoisting persons" within the meaning of 30 C.F.R. 57.19.

A credibility issue focuses on whether the hoist was used before the malfunction was repaired. On this issue I credit Inspector Kirk's testimony. His review of the hoisting logs indicated that the hoist began to malfunction on January 8, continued through the night of January 9, and when he issued the MSHA withdrawal order the company was 3 to 4 hours into the afternoon shift (Tr. 27, 28).

This evidence is further confirmed by the obvious fact that a production crew and a preparation crew were underground when the withdrawal order was issued. But when Inspector Kirk wanted to test the hoist at 9 p.m. on January 9 there was no available ore. It was then necessary to modify his withdrawal order to permit four employees to go below to muck the ore so the hoist could be loaded and retested. The ore had no doubt been removed by the No. 5 production hoist. In view of this finding I necessarily reject the company electrician's testimony to the contrary (Tr. 108, 112-114).

Exhibits R9, R10, and R11 do not assist respondent's position. These exhibits are copies of entries from notebooks entitled "5 and 6 Hoist Log Book Electrical"; "Hoist Safety" and "Hoist and Ropes-Log." Respondent's case is not aided because none of these exhibits reflect the use or non-use of the No. 5 hoist during this incident. I particularly note that the inspector as well as the company's chief electrician referred to the hoisting logs. The "records would show that it hoisted ore" (Tr. 27, 28, 195, 196).

Respondent's post trial brief pivots on certain facets. Initially, it is asserted that at no time during this incident did any miners use the No. 5 hoist. I completely agree with respondent's statement of the evidence. However, Section 57.19-120 applies to any malfunction regardless of whether the hoist lifted miners.

Respondent's brief further asserts once it became apparent that the hoist was malfunctioning it was not used for any purpose other than testing. This point has been reviewed and ruled against respondent.

For the foregoing reasons I conclude that the hoisting regulation applies to respondent's production hoist. In addition, I find that the hoist was used in production before the malfunction was located and repaired.

Citation 162288 should be affirmed.

Civil Penalty

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. 820(i).

Following the statutory directives I find that the evidence reflects that in the two years before this citation respondent was assessed 18 violations at the Nash Draw Mine (Exhibit C1). The penalty, as proposed, appears appropriate in relation to the stipulated size of the respondent. The negligence of the operator was high inasmuch as it continued to use the hoist after the malfunctioned occurred. When a company fails to introduce any financial data a judge may presume that payment of a penalty will not cause the company to discontinue in business. Buffalo Mining Company 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974). The gravity of the violation was not severe since no miners used the No. 5 hoist. The Secretary's Office of Assessments did not credit respondent with any statutory good faith. I concur in the disallowance of that credit. Respondent's evidence indicates that the hoist was malfunctioning the day after the inspection. Further, the records would show they hoisted ore during this time (Tr. 195, 196).

On balance I deem that the proposed penalty of $395 is appropriate and it should be affirmed.

Citation 162289 alleges a violation of Section 57.11-50.

In essence the regulation requires that an operator shall maintain at least two separate escapeways. In addition, such escapeways shall be so positioned that damage to one shall not lessen the effectiveness of the other.

The evidence established that there were two separate ladder escapeways in each shaft. The shafts were not interconnected and they were 300 feet apart. Accordingly, damage to one could not lessen the effectiveness of the other.

The Secretary's post trial brief asserts that Section 57.11-50 must be construed in conjunction with Section 57.11-55, which provides:

> 57.11-55 Mandatory. Any portion of a designated escapeway which is inclined more than 30 degrees from the horizontal and that is more than 300 feet in vertical extent shall be provided with an emergency hoisting facility.

The Secretary's argument runs along these lines: Section 57.11-50 requires that the escapeways be "properly maintained." This means they must have an emergency hoisting facility. Since the hoisting facility in the No. 5 shaft was not operative a violation occurred.

I disagree with the Secretary's theory. The requirements of Section 57.11-55 cannot be transposed as a requirement for Section 57.11-50. If the Secretary had wished to do so he could

have charged respondent with violating Section 57.11-55. Possibly he did not do so because no evidence deals with the incline of the escapeway from the horizontal, an essential feature of Section 57.11-55.

The cases relied on by the Secretary do not support his position. In Peggs Run Coal Co., Inc., 5 IBMA 144 (1975) and Consolidated Coal Co. v. Mine Workers, 3 FMSHRC 405 (1981) the designated escapeways were inadequate because of accumulated water, a faulty roof, and minimal clearance in the passageway. No such situation exists here.

The Secretary has failed to establish a violation of Section 57.11-50. Accordingly, Citation 162289 and all proposed penalties should be vacated.

Briefs

The solicitor and respondent's counsel have filed excellent detailed briefs which have been most helpful in analyzing the record and defining the issues.

In connection with Citation 162289 respondent's brief contains an extensive recital of the regulatory and legislative history of 30 C.F.R. 57.11-50. Since I do not find a violation of that regulation I do not reach that particular issue.

To the extent that the briefs here are inconsistent with this decision, they are rejected.

Order

Based on the findings of fact and conclusions of law stated herein, I enter the following order:

1. Citation 162288 and the proposed penalty of $395 are affirmed.

2. Citation 162289 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge