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SOL (MSHA) V. MAGMA COPPER
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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

v.

MAGMA COPPER COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 83-17-M
A.C. No. 02-00152-05501

Superior Mine

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California, for Petitioner;
N. Douglas Grimwood, Esq., Twitty, Sievwright &
Mills, Phoenix, Arizona,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

Pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802 et seq. (the "Act"), the petitioner seeks an order assessing a civil penalty against the respondent for an alleged violation of 30 C.F.R. 57.19-128. (FOOTNOTE 1)

An evidentiary hearing was held in Phoenix, Arizona, on March 6, 1984. Both parties filed post-hearing briefs. Based on the evidence presented at the hearing and considering the contentions 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.

The principal issues presented in these proceedings 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

This case was heard in conjunction with two other cases. At the outset of the hearing, the parties stipulated to the following:

1. At all times pertinent to these proceedings, respondent was the owner and operator of an underground copper mine and mill near Superior, Arizona, known as the Superior Division, Magma Copper Company.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the subject mine and mill, and I have jurisdiction over the parties.

3. Respondent is considered a large mining company with a moderate history of past violations. It was stipulated by the parties that any penalty imposed as a result of this citation should neither be increased or decreased because of this history.

4. Payment of the proposed penalty in this case would not affect the respondent's ability to remain in business.

5. The citation involved in this matter was issued on the date indicated thereon and was abated promptly and in good faith.

6. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a

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determination of the appropriate penalty to be assessed. The penalty hereinafter assessed is based on the criteria in section 110(i) of the Act.

FINDINGS OF FACT

1. On June 10, 1982, MSHA inspector Juaguyn G. Sepulvada issued a 104(d)(1) type Citation No. 383670 alleging a violation of 30 C.F.R. 57.19-128(d) in which it was stated as follows: "The counter balance (weight) wire rope of the No. 9 shaft man-hoist had within a distance of 100 ft 64 broken and some distorted wires in different lays. Inspector's reports revealed and employees stated that this condition had been reported on several occasions. Efforts were not made to correct the condition by changing of the rope until 6-8-82 before the inspection." (Exh. P-16).

2. In June 1979, during a regular inspection of the counterweight cable, respondent's cable inspectors reported observing steel slivers throughout its length. Further inspection convinced Joseph L. Clark, maintenance supervisor, that these were not steel slivers on the wire rope, but were fibers from the center core working through the cable strands. Measurements of the cable diameter persuaded Clark that there was no great loss of fiber. (Exh. R-6 and Tr. at 132, 133).

3. A semi-annual electromagnetic test of the entire counterweight cable in February 1982 revealed several anomalies which would indicate broken wires in the following distances above the conveyance; 882 ft., 140 ft., 1475 ft., 1520 ft., 2380 ft., and 2608 ft. Other variations in the test indicated the normal rope pattern with slight lay irregularities (Exh. R-7 and Tr. at 138). A visual inspection of the above locations was performed and according to Clark, no problems were found (Tr. at 140).

4. Early in June 1982, Scott asked Doug Dutton, mechanical engineer, to inspect the counterweight cable to evaluate its condition. On June 3, 1982, Dutton reported the results of his test verbally and later, on June 14, 1982, furnished a written report (Tr. at 140 and Exh. R-8).

5. On June 8, 1982, Scott requested permission from Frank Florez, general manager, to replace the counterweight cable on July 4, 1982. Florez suggested the rope change be done on June 19, 1982. Scott informed the employees in the "shop" and the underground general maintenance foreman that the rope change would occur on June 19, 1982 (Tr. at 144).

6. On June 9, 1982, Scott learned that a citation would be issued on June 10, 1982 against the counterweight cable. A meeting was held the following day between Sepulvada and

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respondent's employees including Joe Vindials who told Sepulvada that the rope was to be replaced June 19, 1982. Sepulvada's MSHA subdistrict manager requested that he permit the respondent to wait until June 19, 1982, to replace the rope. Sepulvada agreed to the requested extension of time for abatement of this violation (Tr. at 101, 102).

7. Approximately a month after the cable was removed from the shaft and placed on a storage reel, respondent cut off a 12 foot piece considered to be the "worst section" and sent it to Bethlehem Wire Rope Company for testing. The test results revealed that this section of wire rope had a breaking strength of 355,000 pounds. The catalog breaking strength for this particular type wire rope is 358,000 pounds (Tr. at 150 and Exh. R-9).

8. In February 1983, MSHA representatives, including Roy L. Jameson, examined the wire rope involved in this citation at respondent's mine. They also removed a section of the wire rope for further inspection. Jameson, at that time, was a health and safety specialist with MSHA's Denver Technical Support Center. After conducting an initial examination at the mine and a later analysis at the laboratory facility in Denver, Colorado, Jameson concluded that the continued use of this wire rope had created an unsafe condition (Tr. at 43). This conclusion was based upon the number of fractured wires, loss of wire rope from wear, that it had been "peened" (FOOTNOTE 2), had a "popped" core, and extended lay length. Jameson found 12 broken wires in one lay length of the wire rope (Tr. at 30, Exh. P-2). He also found the core sticking out of the wires and exceedingly dry (Tr. at 31 and Exh. P-3).

9. At the hearing and following a visual inspection of petitioner's exhibit P-2, Robert Donner, wire rope and sales engineer for Bethlehem Steel Wire Rope Division, counted six broken wires in one strand of Exhibit P-2 (Tr. at 117-118). He also observed some "nicks" and "peening" but was of the opinion that the wire rope could have been used for another three or four weeks.

DISCUSSION

Counsel for respondent argues in his post-hearing brief that 57.19-128(d), as applied in this case is too vague to convey the standard of conduct required of the mine operator. However, he does concede that subsections (a), (b), and (c) of the cited

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standard does specifically state objective criteria by which an operator can guide his actions to avoid MSHA sanctions (Resp's brief at p. 15).

If I were to have found from the facts in this case that there was not a violation of one or more of the first three subsections of 57.19-128, and the petitioner was required to rely on subsection (d) to support a violation, I would have to agree with the respondent. In FMC Corporation, Docket No. WEST 80-477-M, --- FMSHRC ---- (May 4, 1984) (ALJ) involving a similar question, I dismissed a citation for the reason that subsection (d) of 57.19-128 was too vague. However, I find that in the case at issue here a violation of subsection (a) of 57.19-128 was established as the most credible evidence shows there were more than six broken wires in one lay of the cited wire rope on the counterweight. Jameson testified that he counted twelve. Respondent's expert witness, Robert Donner, testified that he could see six broken wires of the wire rope when he examined it visually on the witness stand (Finding Nos. 8 and Tr. at 117-118).

Respondent argued that some of the wires identified by Jameson were identified as "cracked" and should not be considered broken wires as required under the standard. However, Jameson stated that a "crack" must be considered a break within the meaning of the standard for the danger is there has been a loss of a part or percentage of strength in the wire from each crack (Tr. 78). Also, Donner testified that a crack in a wire of a lay of wire rope would constitute a broken wire if it were "significant". He defined "significant" as that which could be seen with the "naked eye" (Tr. 126-127).

Based upon the above evidence, which is not refuted, I find that the violation of 57.19-128(a) occurred. In addition to the broken wires, there was evidence of wear to the rope, peening, and extended lay length as testified to by petitioner's witnesses. Respondent's witnesses contended that these latter factors were not significant. However, the historical facts refute this contention as these same employees had continued to closely examine and observe this wire rope for a period of time prior to the date the citation was issued. The evidence shows that the wire rope had exhibited a deteriorating condition to the extent that it was scheduled for removal and replacement eight days prior to the date the citation was issued.

As to the above, respondent argues that it was complying with 57.19-128 in a manner consistent with conduct of a reasonable and prudent mine operator familiar with the practices in the industry (Resp's brief at p. 12).

I find that this argument fails in light of the requirement of the standard's wording that states in part as follows: "Ropes shall not be used for hoisting when they have: (a) More than six

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broken wires in any lay." (Emphasis added). It is clear that replacement of the wire rope is required when such a condition is found. The evidence in this case is not clear as to whether an imminent danger existed from continuing to use this particular wire rope. Petitioner in his brief states that it is not his contention that failure was imminent or immediate (Pet's brief at p. 4). Also, MSHA extended the abatement period for several days to allow the wire rope to be replaced on the date originally scheduled by respondent. I find the question of imminency goes to whether a significant and substantial violation occurred in this violation. Based upon the above evidence, and concession by the petitioner, I find it did not.

PENALTY

Petitioner suggests in his petition proposing a penalty that the amount should be \$210.00. He argues that the violation was significant and substantial; that respondent was aware of the condition for several months showing a high degree of negligence.

I disagree that the evidence shows a high degree of negligence. MSHA's requirement at the time of this violation under 30 C.F.R. 57.19-126 required that operators examine hoist ropes over their entire length at least every month. The respondent had established a practice of having the rope crew inspect the full operating length once per week (Tr. at 135). As to the rope cited here, the evidence shows that respondent was watching the rope carefully and had made a determination to replace it prior to being cited. During the time leading up to this decision, several outside experts were called in to examine the rope and give their opinions as to its continued use. I do not find this history to reveal a high degree of negligence but rather slight negligence in delaying the replacement of the wire rope.

As to gravity, the facts show that the counterweight attached to the rope cited here travels in a vertical steel tube which runs from a point 60 feet above the collar of the shaft to a point 15 feet above the bottom. The counterweight moves at 1500 feet per minute inside the tube. There is a 1/2 inch clearance between the weight and the tube with the force of air passing over the tapered, aerodynamically designed end keeping it centered in the tube.

The 3/8 inch thick steel tube housing the counterweight is in a separate compartment in the shaft from that which houses the hoists used to lift men and materials. Should the rope break, the counterweight would fall to the bottom of the shaft. It is unlikely that it would crash or break through the tube housing it. Also, it is unlikely that anyone would ever be at the bottom of the tube. Also, the counterweight is used to reduce the energy requirements of lifting the load on the hoist and is attached to

