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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. WEST 81-326-M
A.C. No. 48-00155-05076 A

v.

THOMAS E. JONES,
RESPONDENT

Alchem Trona Mine

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
John A. Snow, Esq. VanCott, Bagley, Cornwall &
McCarthy, Salt Lake City, Utah, for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

This a civil penalty proceeding under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq. (the Act). (FOOTNOTE 1) The Secretary seeks a civil penalty against respondent, Thomas E. Jones (Jones), a mine maintenance foreman at the Alchem Trona Mine operated by Allied Chemical Corporation (Allied) near Green River, Wyoming.

Jones is charged with knowingly authorizing, ordering, or carrying out as an agent, the corporate mine operator's violation of the mandatory safety standard 30 C.F.R. 57.21-12 which provides as follows:

Immediately before and continuously during welding or cutting with an arc or open flame or soldering with an open flame, in other than fresh air, or in places where methane is present, or may enter the air current, a competent person shall test for methane with a device approved by the Secretary for detecting methane.

~1953

The corporate mine operator's violation was cited in a 104(d)(1) type Citation No. 576827 issued on April 2, 1980, and alleged as follows:

In Room No. 3 of JME Panel there was a person welding with an arc on No. 3 miner head in the last open cross-cut. There was no person testing for methane with a methane detecting device. The content of methane in the air at the miner head was .0%. Less than 20 feet away, the methane content was from .2% to .5%. The readings were taken with CSE Model 102 methane detector, the charge was checked after the readings and was found to be 3.8. The detector was last calibrated 0015 hours 4/2/80. The panel foreman was aware that his men were welding at this location.

Jones denied the allegation.

After notice to the parties, a hearing on the merits was held in Green River, Wyoming. Post-hearing briefs have been filed by both parties. Based on the evidence presented at the hearing and 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.

STIPULATIONS

At the hearing, the parties agreed to the following stipulations which were accepted (Transcript at 5).

1. Federal Mine Safety and Health Review Commission (Commission) has jurisdiction over the matter at issue here.
2. Allied Chemical Corporation is, in fact, a corporation.
3. Thomas E. Jones is an agent of Allied Chemical Corporation.

FINDINGS OF FACT

1. On April 1, 1980, Melvin R. Jacobson received a telephone call from a Thomas C. Dean. Jacobson is the supervisor in the Green River, Wyoming, Mine Safety and Health Administration (MSHA) field office. Dean is a miner and employee of Allied Chemical Corporation at their Alchem Trona Mine. Dean stated that during the graveyard shift on March 31, 1980, Tom Jones, a supervisor, allowed a piece of schedule 24 equipment (lube truck) to be parked and operated in and beyond the last open cross-cut in the south area of the mine. Also, that welding

~1954

was being performed during this time in and beyond the last open cross-cut. Dean further stated that methane monitoring was not being conducted during the welding operation (Tr. at 10 and Exhibit P-1).

2. As a result this complaint, Jacobson sent MSHA inspectors William W. Potter and Robert Kinterknecht to the Alchem Trona Mine to conduct an investigation.

3. On April 1, 1980, Dean had arrived at the No. 3 room of J.M.E. panel of the Alchem Trona Mine at approximately 12:30 a.m. to commence work on the graveyard shift. Dean's job was to use an acetylene torch to cut out the bit holders on the cutting head of the continuous miner. Thomas E. Jones, the foreman, had made a methane check at 12:30 or 1:00 a.m. on the graveyard shift (Tr. at 24). No other methane test was conducted by Jones during the graveyard shift at the location of the continuous miner where Dean was working (Tr. at 26).

4. During the lunch hour on the graveyard shift on April 1, 1980, Dean and Bernie Caldwell told Jones that they should not be welding in the last open cross-cut. Jones didn't answer the miners (Tr. at 32 and Exh. P-3).

5. On April 2, 1980, at approximately 1:00 a.m., Jones again made a pre-shift examination for methane in the J.M.E. panel (Tr. at 38). MSHA inspectors Potter and Kinterknecht arrived at the mine at 1:45 a.m. on April 2, 1980, to investigate Dean's complaint of welding in the last open cross-cut of the J.M.E. panel. The two inspectors proceeded underground and met with Jones at approximately 2:25 a.m. The group then proceeded to the J.M.E. panel arriving at approximately 2:40 a.m. Potter observed a miner welding in the last open cross-cut and saw no one monitoring for methane (Tr. at 89). Potter issued Citation No. 576827 (Exh. P-2).

6. At the time the citation was issued, the No. 3 continuous miner was parked in the last open cross-cut of the J.M.E. panel with the head in the drift or No. 3 room (Exh. R-1 and Tr. at 91). Potter took 10 methane readings in the area with a methanometer. The first test was at the point where welding was being performed and the reading was .0%. The next test was at a location just inside the cross-cut towards the face. The reading was .02%, and a few feet nearer the face, a reading was registered at .05%. As Potter progressed towards the face of the drift, the readings were from .04% to a .6% at the face (Tr. at 93 and Exh. P-4). The Alchem Trona Mine is considered a very gassy mine and is subject to a MSHA five day inspection schedule (Tr. at 95).

~1955

7. Citation No. 576827 was terminated soon after it was issued when Jones gave Caldwell his methanometer to check for methane where the welding was being done (Tr. at 101).

ISSUES

The issues in this proceeding are:

1. Whether Jones, as an agent of the corporate operator, knowingly authorized, ordered, or carried out a violation of 30 C.F.R. 57.21-12?

2. If so, the appropriate civil penalty that should be assessed against Jones for the said violation of the Act.

DISCUSSION

Jones admits in his testimony that on April 2, 1980, as maintenance foreman, he was assigned the task of having certain maintenance work performed in the J.M.E. panel of Allied's Alchem Trona Mine. This included repairs to a continuous miner located in said panel. After Jones received his assignment, and fire-bossed the J.M.E. panel at 1:00 a.m., he assigned miners of his crew to various jobs. Two miners were assigned specifically to perform work which involved welding on the continuous miner (Tr. at 171-173).

Jones further admitted that the continuous miner had been moved earlier to the last open cross-cut of the panel but could not be taken further from the face area because of various obstructions, so repairs were made while the miner was in the last open cross-cut (Tr. at 177-183).

Jones further testified that the last open cross-cut in the J.M.E. panel is not a return air corridor, as in other mines, but contains fresh air (Tr. at 236). For ventilation purposes, Allied uses a system of tubing designed to remove dirty air (air that may contain methane) from the face. Jones also admits in his brief, that although the continuous miner was in fresh air, under Allied's safety practices, when welding is done in the last open cross-cut, continuous monitoring for methane is required (Resp's brief at p. 3). Jones further admits that he knew about a memorandum issued by Allied on March 4, 1976 which stated such a requirement (Exh. P-5).

On April 2, 1982, all of Allied's continuous methane monitors were under repair and not available to Jones for use during the work being performed on the continuous miner (Tr. at 172, 173). However, he contends that he had been instructed by his supervisor that while the continuous methane monitors were not working, he could monitor the methane conditions at the location of the continuous miner by using a regular hand held

~1956

methane monitor every 15 minutes (Tr. at 171-173 and Resp's brief at p. 4). Jones contends that he specifically followed this procedure on April 2, 1980. One methane reading was taken when the miners were setting up their equipment to start welding and the second reading approximately 15 minutes later. It was at this time he was called to leave the area and met the MSHA inspectors (Tr. 190-191).

Randy Dutton, safety engineer for Allied, testified that in the later part of March, 1980, the maintenance mine superintendent inquired if work could be done in the last open cross-cut using hand-held methane monitors as the continuous monitors were not working. Dutton said he did not know and would find out. He stated that he called the MSHA district office and told M.R. Jacobson, the supervisor, that the continuous monitors were not working and inquired whether it was permissible to do some welding beyond the last open cross-cut using hand held monitors. Dutton claims Jacobson said they could if they monitor and test for methane every ten to fifteen minutes. This information was passed on to the maintenance supervisor of the mine (Tr. at 224, 225).

Jacobson denied that he had a telephone conversation with Dutton in March of 1980, and in fact, was not well acquainted with him. Jacobson checked a telephone log which he maintains at the MSHA office of all calls he receives and found no calls from Dutton for the period of time involved here. Jacobson did find in his log that on May 4, 1980, Dutton had called in to report an accident (Tr. at 260, 261). However, Jacobson did receive a call from Dutton, in the spring of 1981, after Dutton became Safety Director, involving a proposed regulation to cover checking methane in the last open cross-cut (Tr. at 262).

From the conflicting testimony regarding this issue, I find that the testimony of Jacobson more persuasive than that of Dutton. Jacobson was able to produce his telephone logs to support his statements that the alleged conversation never took place. There was no written evidence or corroboration by Dutton that he had this conversation and received approval from Jacobson for monitoring every 15 minutes as he alleged.

Even assuming, however, that Jones was told by a supervisor that he could monitor every 15 minutes for methane in the last open cross-cut when welding, his defense must fail. The credible evidence in this regard clearly demonstrates that Jones took only

~1957

the one test at the beginning of the graveyard shift on both April 1, and April 2, 1980, and did not test after that. Dean testified that he observed Jones make this one check each day (Tr. at 23, 24 and 36, 37). However, both Dean and Caldwell testified that they did not observe Jones make any further checks for methane on either day. It was after a discussion in the lunchroom on April 1, 1980, that welding in the last open cross-cut without methane monitoring was dangerous and receiving no apparent response from Jones, that Dean telephoned the MSHA office and reported the matter. The seriousness of taking such action by Dean gives credence to his concern about the practice and supports his contention that no monitoring was going on. The evidence does not show that Dean was a complainer or raised safety complaints often. Also, his testimony was corroborated by the other miner Caldwell who was able to observe whether Jones made such methane checks as Jones claimed. There was testimony on behalf of Jones that due to welding glasses and mask, the miners could not observe the tests being made. I do not believe this to be valid as both men should have seen one or more tests performed during a whole shift, if they were being done as claimed by Jones. Also, not one miner or witness of his whole crew testified that the tests were conducted during the dates involved.

Based upon the entire record in this case, I find that Jones was aware of the requirement to check continuously for methane when welding in the last open cross-cut. Also, that he ordered Caldwell and Dean to perform welding work in this area on April 1 and 2, 1980, and did not monitor for methane but once during the entire shift. I find this is a violation of Section 57.21-12.

It was also shown by the evidence that the corporate operator, Allied was found to have violated 57.21-12 involving the same citation No. 576827 and paid a penalty assessment of \$500.00. See Secretary of Labor v. Allied Chemical Corporation, (1981) Docket No. WEST 80-478-M, 3 FMSHRC 2387 (ALJ) and Exhibit P-7.

PENALTY

I find the failure on the part of Jones to check for methane or to not supply the miners with methane checking devices and instruct them to make the necessary continuous test is gross negligence. As a supervisor, he was aware of the company memorandum requiring such tests. Also, assuming *arguendo* that Jones

