

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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OCT 1 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-83-M
Petitioner : A.C. No. 24-01607-05501
v. : Elk Creek Mine
MONTANA CONTRACT MINING CO., :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., and Margaret A. Miller, Esq.
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
Mrs. M.J. Good, Montana Contract Mining Company,
Greenough, Montana, pro se.

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 the Elk Creek Mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies any violations occurred.

After notice to the parties, a hearing on the merits was held in Missoula, Montana on April 18, 1984.

The parties waived their right to file post-trial briefs.

Issues

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

Citation 578245

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.11-50, which provides:

Escapeways - Underground Only

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 work place.

Summary of the Evidence

On February 22, 1982, MSHA Inspector Eric Shanholtz inspected respondent's underground barite mine. The inspection failed to locate a secondary escapeway. Miners entered and left the mine through the main portal (Transcript at pages 27 and 30).

The hazard arising from the failure to have a secondary escapeway focuses on the fact that miners can remain trapped in the mine if they cannot use the main escapeway. An unplanned explosion or fire could block the main exit. Powder was stored between the miners and the main portal (Tr. 33, 34).

The condition was abated by installing an escapeway (Tr. 32).

An admission from respondent in the file indicated a lack of funds prevented the installation of the escapeway. Further, the failure to provide it was not a deliberate act (Tr. 311).

Respondent presented no evidence as to this citation.

Discussion

The facts establish a violation of the regulation. There were not two escapeways. As the inspector indicated miners could easily have been trapped in this mine.

The citation should be affirmed.

Citation 578246

This citation alleges a violation of 30 C.F.R. 57.3-20 which provides:

Underground Only

57.3-20 Mandatory. Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used.

Summary of the Evidence

Federal Inspector Eric Shanholtz issued this citation on April 12, 1982. On that date he tested the ground. It sounded drummie and hollow (**Tr. 35**).

Respondent's admission, a letter in the file, confirms that the back was drummie and hollow. But respondent further states that no one was working in the area (**Tr. 34**). However, the inspector testified that miners were actively mining as they passed through the area at the time of his inspection. Several slab rounds had damaged the integrity of the shaft. In the inspector's opinion a serious roof fall would occur if this condition remained unabated (**Tr. 35-36**). If a roof fall occurred death or a serious injury could result (**Tr. 36**).

Discussion

I credit MSHA's evidence concerning this violation. The inspector has a background in mining and is experienced in this area. He was present and observed two miners actively working in close proximity to the violative condition. Cf. White Fine Copper Division Copper Range Company, 5 FMSHRC 825 (1983).

Respondent's witness Mrs. M.J. Good is not shown to have been present at the time of the inspection. For this reason I am not persuaded by her testimony.

. The citation should be affirmed.

Citation 578252

This citation alleges a violation of 30 C.F.R. § 57.6-168, which provides:

57.6-168 Mandatory. Misfires shall be reported to the proper supervisor and shall be disposed of safely before any other work is performed in that blasting area.

Summary of the Evidence

Inspector Shanholtz issued the above citation at Elk Creek Mine on May 18, 1982 (Tr. 36, 37; Exhibit P1). The violative condition consisted of approximately 80 misfires located in the secondary escapeway. The escapeway had been completed as a result of a previous citation issued to respondent. The misfires were 10 to 15 years old. With the passage of time powder becomes unstable. As it decomposes the nitro separates. These misfires were unstable. An explosion with resultant serious injury could occur (Tr. 40, 41, 47, 48; Exhibit P2).

The inspector originally set an abatement date of June 16, 1982. When he returned he issued a 104(b) order because the defect had not been corrected: further, respondent had made no effort to remove the misfires (Tr. 38-40).

Respondent's representative, Mrs. M.J. Good, indicated the miners felt they were asking for trouble if they attempted to correct this condition. The company, at MSHA's insistence, put on a work shift to take care of the problem (Tr. 44).

Discussion

The factual setting here establishes a violation of the regulation. The unstable condition of the powder has presented a serious hazard for many years.

Respondent's evidence does not present a defense. While the miners may have felt unsafe in attempting to correct the misfires they could have sought MSHA's expert guidance on how to proceed in abating this condition.

The citation should be affirmed.

Citation 578255

This citation alleges a violation of 30 C.F.R. § 57.9-54, which provides:

57.9-54 Mandatory. Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

Summary of the Evidence

Inspector Shanholtz issued this citation when he observed two workers dumping at a waste site from a young buggy ^{1/} and a loader. The vehicles came to the edge of the 20 foot high,

^{1/} A young buggy is a three wheel that can be unstable (Tr. 47).

fairly steep, bank (Tr. 44-47). There were no berms to prevent overtravel of the vehicles (Tr. 44, 45).

The hazard from this condition is that the vehicle can go over the edge. The operator of the vehicle, due to the lack of a berm, does not know when he is on the edge (Tr. 46).

Respondent's evidence indicated the company had eliminated this problem. In addition, some of respondent's evidence dealt with the differences between the ore dump and the waste dump (Tr. 50-52).

Discussion

The evidence establishes a violation of the regulation. The waste dump lacked a berm to prevent overtravel by the dumping vehicles.

Respondent's evidence does not raise a defense to the violation.

The citation should be affirmed.

CIVIL PENALTIES

The criteria for assessing civil penalties are contained in 30 U.S.C. 820(i)..

In connection with these factors, on this consolidated record I find the following facts: In the two years before December 29, 1982, respondent was assessed six violations (Exhibit P1 in WEST 83-55-M).

The proposed penalties do not appear inappropriate in relation to the size of the operator. The operator's negligence was high inasmuch as all of the violative conditions were readily apparent and could have been corrected. The penalties proposed should not affect the operator's ability to continue in business. The record reflects the company has been shut down since March 15, 1983. But it is further indicated the company is waiting for market conditions to improve (Tr. 25, 26). On the record the gravity of each violation is high. A fatality could result from each violative condition.

The final statutory criteria is respondent's demonstrated good faith in attempting to achieve rapid compliance after being notified of the violation. On this issue Inspector Shanholtz indicated that respondent lacked direction, was shoddy, unexperienced and engaged in poor mining practices (Tr. 48). On the other hand Mrs. Good testified that the company had always

fully cooperated with MSHA. In addition, three of her four employees had considerable mining experience. Further, the company relied on such experienced people (Tr. 49, 54, 55).

On this issue I credit MSHA's evidence. In the event respondent's employees were experienced on this record I can only conclude they failed to use their expertise.

After carefully considering all of the statutory criteria I am unwilling to disturb the penalties proposed by the Secretary.

Accordingly, I enter the following:

ORDER

1. The following citations and proposed penalties are AFFIRMED,

<u>Citation No.</u>	<u>Penalty</u>
578245	\$ 20.00
578246	74.00
578252	370.00
578255	68.00

2. Respondent is ordered to pay to the Secretary the sum of \$532 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

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