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SOL (MSHA) v. HOMESTAKE MINING
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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 84-14-M A.C. No. 39-00055-05519
v.	Homestake Mine
HOMESTAKE MINING COMPANY, RESPONDENT	

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor, Department of Labor, Kansas City, Missouri, for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits commenced on October 30, 1984, in Rapid City, South Dakota.

The parties filed post-trial briefs.

Issues

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

Stipulation

At the commencement of the hearing the parties stipulated as follows:

Respondent is subject to the Act and operates a gold mine in Lead, South Dakota. Respondent's products enter interstate commerce. The proposed penalties, based upon the assessments, would not have a detrimental effect on the company's operation. In addition, the citations that are in issue here were properly delivered to the company during the course of an inspection.

This citation alleges respondent violated 30 C.F.R. 57.4-6 BB4 and a civil penalty of $20 is proposed.

At the hearing the Secretary moved to vacate his citation.

Pursuant to Commission Rule 11, 29 C.F.R. 2700.11, the motion to vacate was granted.

Citation 2097665

This citation alleges respondent violated 30 C.F.R. 57.9-2 which provides:

> 57.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

Summary of the Evidence

MSHA inspector John C. Sprague issued this citation for a condition he observed on a Jarvis Clark Electric LHD vehicle. A button used to initiate the fire suppression system was wrapped with a piece of wire. The wire prevented the removel of the retaining pin which must be removed before the system will function (Tr. 339-343).

The wire itself held a load counting device. Such a device is used by an operator to keep a record of the number of loads. It took the operator about a minute to remove the wire. The inspector further indicated that there were over five but less than ten wraps of wire in the area of the pin. But the wire itself did not extend through the large ring which must be pulled to activate the equipment (Tr. 348-353, 384-387).

Larry M. Isaac, an LHD maintenance foreman, testified that the fire suppression device is automatic after the two-inch pin is pulled and the plunger button activated. In addition to the automatic controls, the equipment has a fire extinguisher. In the witnesses' view the operator could still pull the pin even though the blasting wire was wrapped around it (Tr. 367-374).

In Isaac's opinion, there was no equipment defect here because the hand held fire extinguisher was adequate. In his view, the automatic system is not always superior to a hand held fire extinguisher (Tr. 380-382).

Discussion

A credibility issue arises here. The pivitol issue is whether the facts establish an equipment defect. In short, did the five to ten wraps of the blasting wire prevent the ready activation of the automatic fire suppression equipment.

I am persuaded that the pin which activates the device could not be readily pulled.

The photograph (Exhibit C) shows the wire was wrapped in a relatively close area. Further, in abating the defect it took the operator about a minute to remove the wire. That length of time indicates this was more than a mere loose wrap of wire.

Further, I am not persuaded by Homestake's evidence. On the merits of the case I note that Isaac was not present with the inspection team and he did not know how the wire was wrapped around the equipment (Tr. 375).

I further reject Isaac's opinion that the hand held fire extinguisher equipment was adequate (Tr. 378, 379). Once Homestake installed the automatic equipment it was bound to maintain the equipment without defects that affect the safety of the miners.

On the record, I find a violation of 57.9-2 and this citation should be affirmed.

Citation 2097868

This citation alleges respondent violated 30 C.F.R. 57.11-12 and a civil penalty of $20 is proposed.

At the hearing the Secretary moved to vacate his citation.

Pursuant to Commission Rule 11, 29 C.F.R. 2700.11, the motion to vacate was granted.

Citation 2097872

This citation alleges a violation of 30 C.F.R. 57.11-2 and a civil penalty of $20 is proposed.

At the hearing the respondent moved to withdraw its notice of contest.

Pursuant to Commission Rule 11, 29 C.F.R. 2700.11, the motion to withdraw was granted.

Citation 2097938

This citation alleges a violation of 30 C.F.R. 57.19-126 and proposes a civil penalty of $329.

The cited standard provides as follows:

> 57.19-126. Hoist ropes shall be examined over the entire active length at least every month to evaluate wear and possible damage. When such examinations or other in

spections reveal that the rope is worn, and at least every six months, caliper measurements or non-destructive tests shall be made at the following locations:

a. Wherever wear is evident;
b. Immediately above the socket or clip and above the safety connection;
c. Where the rope rests on the sheaves;
d. Where the ropes leave the drums when the conveyances are at the regular stopping point;
e. Where a layer of rope begins to overlap another layer on the drum;
and
f. At 100 feet intervals (measurements shall be made midway between the last previously calipered points).

Summary of the Evidence

MSHA inspector Iver Iverson issued this citation on September 13, 1983 when he found that no entries had been made in the 52 man cage hoist log book for the 1700 level. Corrective measurements and entries thereof should have been made six months after May 4, 1982. In addition, the record book did not show any caliper measurements or non-destruct tests (Tr. 397-401). The condition was abated by Homestake cutting the elevator rope and making entries in its log book (Tr. 398).

On May 4, 1982, the inspector had recommended that corrective measures be taken and this condition was forcefully brought to the attention of the operator when he wrote a 103(k) order. The inspector felt the company's negligence in this situation was high because no corrective action had been taken. In addition, if the rope failed and the conveyance fell the condition could result in a fatality (Tr. 400; Exhibit P16, P17).

In reviewing the log books from May 4, 1982 the inspector saw an entry that a Rotesco test had been made on March 1, 1983. This was ten months after the 103(k) order. The regulation requires testing every six months (Tr. 401, 402).

The members of the rope crew told the inspector that they hadn't noticed the damaged area on the hoist ropes. In addition, they hadn't taken measurements at the sheave wheel (Tr. 404-406).

The inspector agreed that a Rotesco test is acceptable. If such a non-destructive test is made it complies with the regulation (Tr. 415, 416).

Elmer Sorensen and Michael F. Johnson testified for Homestake. Sorensen, the rope repair foreman, testified that the service rise at the 52 cage, 1700 level, is checked once a week. The ropes are measured monthly with calipers (Tr. 441, 442).

In May 1982, upon receiving the first citation, Sorensen measured and found that the rope was 1/32 oversize at the crossover point (Tr. 445). The records reflect that the calibrations made on the 52 crossover cage are within the limits set by the regulations (Tr. 446, 447).

The members of the rope crew know their jobs (Tr. 448). Employees record the rope information in the log books (Tr. 452).

Michael F. Johnson, a Homestake mechanical engineer, tested this particular rise twice a year with Rotesco equipment. The Rotesco machine tests the rope for loss of metallic area (Tr. 468). Johnson performed Rotesco tests on the following dates:

March 16, 1982
October 20, 1982
March 4, 1983
September 16, 1983
October 20, 1983
March 15, 1984
September 14, 1984
(Tr. 472, 473, 478, 479).

In cross-examination, Johnson admitted that when he tests the equipment he documents it in the log book. However, he did not know why the October 20, 1983 test had not been entered in the book (Tr. 478, 479).

Johnson routinely gives his test results to department head Pontius. Inspector Iverson had been given a copy of the test dated March 4, 1983. Further, Pontius told the inspector that he couldn't produce any records but he said he'd produce them. The inspector indicated he would vacate the citation if the record was produced. Johnson had no idea why Iverson was not furnished with a copy of the results of October 20, 1982.

Witness Johnson explained at length how the Rotesco test is accomplished (Tr. 489-496).

In Johnson's opinion the rope could appear worn but still be within the perimeters of the regulation (Tr. 496, 497). From March 16, 1982 through September 14, 1984 the rope didn't warrant any change (Tr. 498).

Discussion

The thrust of the Secretary's case focuses on the proposition that Homestake failed to test its hoist ropes within six months after a defective rope condition was found on May 4, 1982.

The Secretary's case is based essentially on the inspector's testimony that the hoist log book failed to record the required

inspection. On the other hand, Homestake's witnesses claim a non-destructive Rotesco test was done within six months of May 4, 1982.

On the credibility issues concerning this citation I generally credit Homestake's witnesses Sorensen and Johnson. I was particularly impressed with the expertise of these individuals. Johnson, who performs the Rotesco tests on the hoist, testified that he ran the tests on October 20, 1982 (Tr. 472). I reject the Secretary's evidence because, as discussed hereafter, it is confusing and inarticulate.

The Secretary basically centers his argument on the credibility aspects of the evidence. He contends his case should prevail for a number of reasons. Initially, it is argued the inspector thoroughly examined the wire rope (Tr. 404, 414). In addition, he examined the log book and found no entry. Further, the rope crew stated that the rope was worn and defective. Finally, Homestake had an opportunity to produce the records to avoid the issuance of this citation but it failed to do so.

I am not persuaded by the Secretary's arguments. The basic difficulty is that Inspector Iverson testified concerning an inspection on May 4, 1982 (Tr. 399-402); on August 24, 1983 (Tr. 405, 406, 413, 141); and when this citation was issued on September 13, 1983 (Tr. 406).

It is true that the evidence the Secretary relies on is in the record but a careful reading of the transcript indicates that the proferred evidence is not directly connected to the instant citation. In the absence of such a nexus the evidence cannot be held supportive of the Secretary's case.

It is true that the test in question had not be recorded in the Homestake log book. But, as previously stated, I find Homestake's testimonial evidence persuasive on this issue.

Evidentiary Ruling

An evidentiary ruling arose in this case concerning the application of the informant's privilege. The judge declined to extend the privilege so as to protect the identity of the members of the Homestake rope crew who had made statements to the inspector (Tr. 421-434).

This case was heard in October, 1984. Subsequently, the Commission articulated the scope of the informant's privilege in Secretary on Behalf of Logan v. Bright Coal Company, Inc., 6 FMSHRC 2520 (November 1984). The members of the rope crew did not testify in this case and the judge's evidentiary ruling would not affect the ultimate decision concerning this citation.

For the foregoing reasons this citation should be vacated.

Citation 2097942

This citation alleges respondent violated 30 C.F.R. 57.11-6 which provides:

> 57.11-6 Mandatory. Fixed ladders shall project at least 3 feet above landings, or substantial handholds shall be provided above the landings.

Summary of the Evidence

MSHA Inspector Iver Iverson issued this citation when he found a ladder in the 6200 borehole was not extended three feet above the top landing. In addition, there were no substantial handholds. An employee could fall 120 feet if he fell into the borehole (Tr. 514-516).

The inspector considered the gravity of this violation to be high; a fatality was likely to occur if a worker fell 120 feet (Tr. 516; Exhibit P18, P19).

At the time of the inspection there were miners down the raise as well as miners working on the concrete pad (Tr. 520).

The workers told the inspector that extenders on the ladder would be in the way. Extenders are mounted by attaching them to the ladder with 1/2 inch bolts (Tr. 524, 525).

Homestake's evidence indicates that on the date of this inspection Leonard Feterl was on the surface at the 6200 borehole. He was lowering material by means of a cable attached to a tugger to his partner/son (Tr. 525-538).

There was just about five feet of room around the area. Only Feterl and his son worked at this borehole until it was completed (Tr. 541). When the borehole is finished the men would put on ladder extenders. If it is not completed after a given day's work they would block the area with a cable and post a "keep out" sign. No one enters the borehole until it is finished (Tr. 543).

The working procedure is for one of the miners to lower himself into the hole with a safety rope. The worker on the surface would then withdraw the rope. The two men alternate their respective positions every four hours (Tr. 541, 542). When it is time for a worker in the borehole to come out his partner drops him the rope. He uses it to pull himself out (Tr. 544).

Feterl and his shift boss, Johnny Smith, both expressed the view that the extenders are hazardous and cause problems. These arise because it is necessary to guide the loads around the extenders in a narrow five foot space (Tr. 539, 566-572). After the citation was issued the extenders were placed back on the

ladders. The men worked four additional hours to finish the job (Tr. 563, 564).

Discussion

A credibility issue arises concerning whether workers were using the ladder to enter and leave the borehole. On this issue I credit Homestake's evidence. Inspector Iverson, in his direct examination, stated employees were mounting and dismounting the ladder during the working shift. However, in cross examination, he admitted they were doing some type of construction work at the borehole (Tr. 526). Further, the inspector agreed that he failed to observe any workers going up and down the borehole at the time of the inspection (Tr. 528).

Homestake's evidence to the contrary is more persuasive (Tr. 540). In my view the men doing the construction at the borehole would know if other workers were using the ladder.

The purpose of 57.11-6 is two-fold. It requires fixed ladders or handholds for workers entering and the borehole. In this factual setting no workers were using the landing as contemplated by the regulation. It is uncontroverted that the borehole was in a construction mode. It follows that the Secretary's application of the regulation seeking to require fixed ladders is beyond the purview of the regulation. In addition, as indicated hereafter, the borehole did not constitute a travelway.

However, the Secretary's allegations and proof establish a factual basis that the borehole landing lacked substantial handholds.

However, as noted in Homestake's post-trial brief, 57.11-1 through 57.11-41 falls generally under the subtitle of "Travelways". The definition section states that a "travelway" means a passage, walk or way regularly used and designated for persons to go from one place to another, 57.2.

In this scenario this borehole was not a travelway because it was under construction and roped off. It was also signed at quitting time. Cf Homestake Mining Company, 2 FMSHRC 493 (1980).

For these reasons Citation 2097942 should be vacated.

Civil Penalties

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

Citation 2097665 is to be affirmed. The negligence and the gravity in connection with this citation is high. The open and

obvious condition virtually eliminated the fire suppression device on this equipment.

In considering these factors and in view of the stipulation of the parties I deem that the proposed penalty of $206 for this citation should be affirmed.

The proposed penalty of $20 agreed to by the parties in connection with Citation 2097872 is proper and should be affirmed.

Briefs

Counsel for both parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Citations 2097664, 2907868, 2907938 and 2097942 should be vacated.

3. Citations 2097665 and 2097872 should be affirmed.

ORDER

Based on the foregoing facts and conclusion of law I enter the following order:

1. Citation 2097664 and all penalties therefor are vacated.

2. Citation 2097665 and the proposed penalty of $206 are affirmed.

3. Citation 2097868 and all penalties are vacated.

4. Citation 2097872 and the proposed penalty of $20 are affirmed.

5. Citation 2097938 and all penalties therefor are vacated.

6. Citation 2097942 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge