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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 83-21-M  
A.C. No. 39-00055-05505

v.

Homestake Mine

HOMESTAKE MINING COMPANY,  
RESPONDENT

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor,  
U.S. 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 three 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.

Citation 2097201

This citation alleges respondent violated 30 C.F.R. 57.3-22, which provides as follows:

57.3-22 Mandatory. Miners shall examine and test the back, face, and ribs of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground

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control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

#### 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.

#### Summary of the Evidence

Federal inspector Wayne Lundstrom, a person experienced in mining, issued this citation. The company was cited because its miners were working under loose ground (Tr. 108-113). The inspector considered the negligence and gravity of the violation to be high. The loose could strike the miners and cause disabling injuries (Tr. 115-117).

The inspection team consisted of the inspector as well as Ed Wiedenmeyer and Richard Frybarger. As the three men entered the stope, the inspector stepped off of the ladder and noticed a water as well as an air hose 10 to 20 feet from the ladder. He walked out six to seven feet and saw that the back had not been bolted (Tr. 118). When he first saw the two miners in the stope he observed that they were under supported ground. However, the inspector indicated that his notes reflect that the workers were working under an unscaled area (Tr. 123, 139). The inspector also saw 50 to 80 feet of air and water hoses under the loose area. The miners stated they had thrown the hoses out under the loose (Tr. 124, 129). The inspector disputed their claim; he felt that the hoses could not have been thrown that distance and could only have been dragged into that position. Inspector Lundstrom also saw a grub hoe and drill steel under the loose (Tr. 125, 126). The hoses themselves attached to a jackleg which was under secured ground (Tr. 142, 143). The inspector agreed that the miners could have been roof bolting from under secured ground (Tr. 142-144).

Richard L. Frybarger, a member of the inspection team, entered the stope at the 5150 foot level (Tr. 154). The two miners he observed were under secured ground (Tr. 157, 160).

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The inspector walked about 50 feet, beyond where the roof had been bolted. Schultz, normally Frybarger's partner in the stope, warned the inspector about the loose (Tr. 160).

Ten to fifteen feet of hose had looped under the loose ground area. Schultz indicated he had flipped it out there (Tr. 161). Frybarger believed he could have done that (Tr. 162, 163). Frybarger didn't agree with the allegations in the citation but he didn't want to argue about it (Tr. 164).

Contract miners, such as Schultz, are responsible for their own hoses (Tr. 168).

Frybarger felt there was no violation because the miners had not been working under the loose.

Edgar Wiedenmeyer, Homestake's shift boss, testified that when they entered the stope the miners were bolting the roof (Tr. 188-190). There were no miners under the unsupported roof. But about 15 to 20 feet of air hose and water hose were under the unsupported roof (Tr. 190, 191, 193, 201, 202). Schultz said he had flipped the hose out there (Tr. 191). It definitely didn't look like there was 50 to 80 feet of hose under the loose (Tr. 192).

The inspector was warned by the miners when he went out under the loose (Tr. 192, 193).

Wiedenmeyer agreed that the inspector was in a better position than he and Frybarger to see any tools under the loose area (Tr. 205).

#### Discussion

This case presents certain credibility issues.

At the outset: it is clear that no witness, including Inspector Lundstrom, observed the miners working under the unsupported roof, which is commonly called "loose". The inspector was emphatic that the miners were not under the unsupported area (Tr. 122). His notes of the inspection reflect to the contrary. But such a conclusion, in my opinion, is based on the position of the hoses in the area.

We have thus arrived at the pivotal portion of the case. Did the miners place the hoses under the unsupported area or were the hoses merely flipped out into that area.

On this issue the evidence is conflicting. The inspector indicated he saw about 50 to 80 feet of hose under the loose. If so, I conclude that it must necessarily have been placed in that position by the stope miners. At the time of the inspection the inspector refused to accept the miners' explanations. He stated it was not possible to "throw" that much hose.

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I credit the inspector's version for several reasons. He was emphatic that there was 50 to 80 feet of hose under the loose. In addition, he saw a grub hoe and drill steel under the loose. Homestake's witness Wiedenmeyer agreed the inspector was in a better position than Homestake's witnesses to see the grub hoe and the drill steel (Tr. 206, 207).

Finally, I am unwilling to discredit the inspector's conclusions. He testified that in his opinion the miners must have carried the hoses under the loose. On the other hand, Schultz, the stope miner, did not testify at the hearing although he was still in Homestake's employ at that time (Tr. 212, 213).

Homestake, in its post-trial brief, contends that the petitioner cannot prevail because there was no immediate threat to miners since they were not working under the loose, but were securing the area.

It is true that the miners were not observed under the loose. But the thrust of the Secretary's case establishes that the hoses, grub hoe, and drill steel were under the loose. Further, they could only have been placed there by the miners in the stope. For the reasons stated in the analysis of the evidence I find the petitioner's evidence to be credible.

It follows that ASARCO, Incorporated, 2 FMSHRC 920 (1980), relied on by Homestake, is not factually compatible with the instant case.

Homestake further argues that the citation was based on the inspector's erroneous assumption that the miners performed work under the loose. Homestake contends that this circumstantial evidence is wholly insufficient to establish a violation. The operator relies on Ozark Lead Company, 4 FMSHRC 29 (1982); Energy Fuels Nuclear, Inc., 5 FMSHRC 1878 (1983), and National Independent Coal Operators Association v. Morton, 494 F.2d 987 (D.C.Cir., 1974), aff'd 423 U.S. 388 (1975).

The cases cited by Homestake are not persuasive. In Ozark Lead Company, there was no credible evidence that the miners were exposed to the loose material. Obviously, this is not the situation presented on this record. ASARCO, Incorporated would require the judge to adopt the operator's defense. However, I have specifically rejected such a finding for the reasons already stated. National Independent Coal Operators Association involves an overview of certain procedural aspects of the Act. Hence, it is not controlling authority in this case.

For the reasons stated herein, Citation 2097201 should be affirmed.

### Civil Penalties

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

In connection with this citation I find that the negligence and gravity are relatively high.

In considering these factors and in view of the stipulation of the parties, I deem that the proposed penalty of \$157 for the violation of 57.3-22 is proper and it should be affirmed.

### Briefs

The 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.

### Citation 2097303

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 this citation.

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

### Citation 2097610

This citation alleges respondent violated 30 C.F.R. 58.19-100 and a civil penalty of \$20 is proposed.

At the hearing the Secretary moved to vacate this citation.

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

### 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.

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2. Respondent violated 30 C.F.R. 57.3-22; accordingly, Citation No. 2097201 should be affirmed and a penalty of \$157 should be assessed.

3. Citation Nos. 2097303 and 2097610 should be vacated.

ORDER

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

1. Citation No. 2097201 is affirmed and a penalty of \$157 is assessed.

2. Citation No. 2097303 and all penalties therefor are vacated.

3. Citation No. 2097610 and all penalties therefor are vacated.

John J. Morris  
Administrative Law Judge