

CCASE:
ALLSTATE ERECTORS V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ALLSTATE ERECTORS, INC.,
CONTESTANT

CONTEST PROCEEDINGS

v.

Docket No. CENT 86-50-RM
Citation No. 2661028;
1/21/86

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Docket No. CENT 86-51-RM
Order No. 2661030;
1/22/86

DECISION

Appearances: L.G. Clinton, Jr., Esq., L.G. Clinton Jr. and
Associates, Houston, Texas, for Contestant.
Max Wernick, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Contestant Allstate Erectors, Inc. (Allstate) challenges the validity of a citation issued January 21, 1986, charging a violation of 30 C.F.R. 56.15-3, and a subsequent withdrawal order issued January 22, 1986 for failure to abate the condition alleged in the citation. Pursuant to notice, the case was heard in Dallas, Texas, on March 10, 1986. Jimmy L. Jones, a Federal mine inspector testified on behalf of Respondent the Secretary of Labor (Secretary). Bernard O. Harold and Frank Clayton Wamble testified on behalf of Allstate. Both parties have filed post hearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Allstate was an independent contractor performing work on January 21 and 22, 1986 in the Dallas Quarry and Plant for General Portland, Inc. At the plant, limestone is quarried, crushed and milled into cement. Allstate was fabricating a handrail which was to be installed on a work platform constructed above a kiln in the plant. At about 3:15 p.m. on January 21, two employees of Allstate were working on the

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handrail, one welding a flange to the handrail, the other grinding with a hand-held grinder. The rail contained vertical sections 4 to 5 feet long and horizontal sections 12 to 15 feet long. The entire assembly weighed over 50 pounds. The flange being welded to the rail weighed about 12 pounds, and the grinder weighed about 12 pounds. The work was being performed on a flat concrete surface.

At about 3:15 p.m. on January 21, 1986, Federal Mine Inspector Jimmy L. Jones issued Citation No. 2661028, alleging a violation of 30 C.F.R. 56.15Å3 because "a welder was observed fabricating sections of handrail while wearing leather work shoes without steel toes. Another employee was working in the area using a hand held surface grinder."

Allstate admits that the employee in question was not wearing shoes with steel toes, but there is a dispute as to the kind of shoes he was wearing. Allstate contends that he was wearing "sturdy work shoes," and submitted a photograph (contestant's Ex. 1) of the welder's lower legs with boots above the ankle. The photograph was taken at some time between January 21 and March 10, 1986. The inspector testified that the photograph did not show the boots worn by the welder on January 21. He stated that the top of the boots worn by the welder were soft and that he could see the outline of the toes through the leather. The welder was not called as a witness, nor was the person who took the photograph. I accept the testimony of the inspector, and find as a fact that the welder was wearing soft-toed leather shoes on January 21, 1986.

The citation established a termination time of 7:00 a.m., January 22, 1986. The inspector told the foreman Bill Harold that the employees were exposed to hazards to the toes and would have to have steel-toed shoes when they reported to work the following day. The inspector returned to the plant on January 22, and at about 9:00 a.m. observed the same Allstate welder working on a section of pipe, welding a flange to the end of the pipe. The pipe was 10 to 12 inches in diameter, and approximately 20 feet long; it was mounted on rollers on top of work horses so that it could be rolled while the welding was being done. The welder was wearing the same shoes as on the previous day. The Allstate foreman told the inspector that he had discussed the matter with his supervisor, and was told that steel toed shoes were not required. The inspector issued withdrawal order 2661030 at 9:00 a.m., January 22, 1986 requiring Allstate to have its employees provided with steel toed shoes. The order stated that "employee was not provided with suitable footwear in that he was wearing soft toed leather shoes. The foreman was instructed that the employees had to wear steel toed shoes." The employees were withdrawn and steel

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toed shoes were provided, and the citation and order were terminated at 10:00 a.m., January 22, 1986.

REGULATORY PROVISION

30 C.F.R. 56.15Ä3 provides as follows:

All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

ISSUES

1. Does the evidence establish the existence on January 21, 1986 of a hazard in the area of the plant involved herein which could cause an injury to the feet?

2. If so, were the employees in question wearing suitable protective footwear?

3. If a violation was established on January 21, 1986, was it abated within the time fixed in the citation?

CONCLUSIONS OF LAW

I. JURISDICTION

Allstate was at all times pertinent to this case an independent contractor performing services at a mine, and was therefore an operator subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act). I have jurisdiction over the parties and subject matter of this proceeding.

II. EXISTENCE OF HAZARD TO THE FEET

On January 21, 1986, Allstate's employees were working with a section of handrail, weighing over 50 pounds. A flange weighing about 12 pounds was being welded to the rail. A hand held grinder weighing about 12 pounds was being used to grind slag from welded areas of the rail. The rail was to be moved to the kiln location. It is thus apparent that the rail, the flange, and the grinder could have been dropped or otherwise come in contact with the employee's feet, causing injury. In addition, the same employees had been working on the kiln handling sections of plate steel, and doing other work involving heavy pipe. I conclude that the evidence establishes that Allstate's employees were working in an area of the mine where a hazard existed which could cause an injury to their feet.

III. SUITABLE PROTECTIVE FOOTWEAR

I have found as a fact that the miner in question was wearing soft toed leather boots and that the outline of his toes could be seen through the top of the boot. It is very clear, and I conclude, that the boots were not suitable protective footwear. Therefore, a violation of 30 C.F.R. 56.153 was established on January 21, 1986. The citation charges that the miner was wearing leather work shoes without steel toes. The standard does not specifically require steel toed footwear, but only suitable protective footwear, and it is certainly conceivable that there are kinds of suitable protective footwear which do not have steel toes. Nevertheless, the evidence shows a clear violation of the standard, and the overly specific wording of the citation does not affect its validity. The citation was properly issued and should be affirmed.

IV. ABATEMENT

Allstate was given approximately 15 hours (until 7 a.m. the following day) to abate the violation. The reasonableness of the time for abatement was not challenged. At about 9:00 a.m. on January 22, 1986, the inspector found the same employee "not provided with suitable footwear in that he was wearing soft toed leather shoes . . ." the evidence establishes that in fact he was wearing the same shoes he wore on the previous day. Because the violation was not abated, an order of withdrawal was issued under section 104(b) of the Act. The order contained the language quoted above and added "the foreman was instructed that the employees had to wear steel toed shoes." As I indicated previously, the standard does not require steel toed shoes. However, the employee in question was not wearing suitable protective footwear, and therefore the violation was not abated. The order was properly issued and should be affirmed. See Secretary v. Middle Kentucky Construction Co., Inc., 2 FMSHRC 1137 (ALJ 1980).

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. That the notice of contest filed contesting citation 2661028 issued January 21, 1986 is DENIED.
2. Citation 2661028 issued January 21, 1986 is AFFIRMED.

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3. The notice of contest filed contesting withdrawal order 2661030 issued January 22, 1986 is DENIED.

4. Withdrawal order 2661030 issued January 22, 1986 is AFFIRMED.

James A. Broderick
Administrative Law Judge