

CCASE:
SOL (MSHA) V. BRUBAKER-MANN
DDATE:
19861009
TTEXT:

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 85-157-M
A.C. No. 04-00030-05503

v.

BrubakerÄMann

BRUBAKERÄMANN INCORPORATED,
RESPONDENT

AMENDED DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor,
U.S. Department of Labor, Los Angeles, California,
for Petitioner;
Steve Pell, Esq., Ventura, California,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating a safety regulation 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 in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary to respondent's contentions in WEST 84Ä96ÄM.

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2364576

This citation charges respondent with violating 30 C.F.R. 56.6005 which provides as follows:

56.6005 Areas around storage facilities.
Areas surrounding magazines and facilities for the storage

~1531

of blasting agents shall be kept clear of rubbish, brush, dry grass, or trees (other than live trees 10 or more feet tall), for a distance not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet.

Summary of the Evidence

MSHA Inspector Ronald Ainge issued this citation when he found two pieces of lumber within six feet of a power magazine. In addition, there were railroad ties within 20 feet of the magazine (Tr. 58, 129). In the inspector's opinion several hundred railroad ties are unnecessary for a mining operation (Tr. 125, 126). However, there were loading docks in the area (Tr. 126).

The railroad ties were higher than the nearby rock pile (Tr. 124).

While the inspector considered that an accident was unlikely he believed a fire could involve the powder magazine with a resulting explosion (Tr. 58, 125).

Powder magazines also fall under the jurisdiction of other federal, state and county authorities (Tr. 127, 128, 215).

Mr. Mann testified that the area met the requirements of the federal firearm and explosives representatives (Tr. 243, 244). These authorities required the company to install a stone berm approximately 10 feet high and the company complied (Tr. 244).

Evaluation of the Evidence

The facts establish a violation of the regulation. There were two pieces of timber and several hundred railroad ties within 20 feet of the powder magazine. I concur with the inspector's view that such a large number of ties constitute "unnecessary combustible material" as prohibited by the regulation.

Concerning Mr. Mann's testimony: I accept his statements that other federal authorities required a stone berm. But I do not find it credible that they would also require railroad ties in such close proximity to the magazine.

Citation 2364576 should be affirmed.

Civil Penalty

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified 30 U.S.C. 820(i). Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two-year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be

~1532

the two citations vacated in *Brubaker v. Mann*, 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The parties have stipulated that the operator is a small company. The penalty appears appropriate in relation to a small operator and it should not affect the ability of the company to continue in business.

Concerning the negligence of the operator: the condition around the powder magazine was obvious. Several hundred railroad ties are readily apparent. Accordingly, the operator must be considered to be negligent. The gravity is minimal since it is not likely that an explosion would occur. Finally, the operator is credited with statutory good faith since the company abated the violative condition.

On balance, I consider that the proposed penalty of \$20 should be reduced to \$15.

Conclusions of Law

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

1. The Commission has jurisdiction to decide this case.

2. Citation 2364576 should be affirmed and a penalty of \$15 assessed.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 2364576 is affirmed.

2. A civil penalty of \$15 is assessed.

John J. Morris
Administrative Law Judge