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SOL (MSHA) V. IRON MOUNTAIN ORE
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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. WEST 85-142-M A.C. No. 42-01929-05502
v.	Treasure Box
IRON MOUNTAIN ORE COMPANY, RESPONDENT	

DECISION

Appearances: Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Carlyle Johnson, Iron Mountain Ore Company, Cedar City, Utah, pro se.

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 of 1977, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits took place in Las Vegas, Nevada on August 27, 1986.

At the hearing the parties waived their right to file post-trial briefs but subsequently respondent filed a letter. The judge considered the letter to be a post-trial submission. The Secretary was given an opportunity to reply to the letter but did not do so.

Issues

The threshold issue is whether respondent is subject to the Act. If this is resolved in the affirmative then issues arise as to whether respondent violated the regulations and what penalty is appropriate.

Evaluation of the Threshold Evidence

A credibility issue arises concerning the activities being conducted at Iron Mountain.

Inspector Wilson described the activities as an above ground "crushing and screening" operation (Tr. 16, 17). He further stated that he "may be corrected later on" but as he recalled Mr. Johnson's company drills and blasts large boulders.

On the other hand, Mr. Johnson states his company picks up iron ore from the surface. The ore itself was mined some 30 years ago. Iron Mountain then crushes, screens and ships the surface material to its customers specifications (FOOTNOTE 1) (Tr. 97, 98).

I credit Mr. Johnson's version of the manner in which the company functions. As the operator he would be in a position to know. In addition, the inspector's testimony that the company drills and blasts boulders is, at best, vague and hesistant.

The factual situation thus presented is whether respondent is subject to the Act when it merely picks up iron ore from the surface and then crushes and screens it.

Section 3(h) of the Act defines a coal or other mine as follows:

> "(h)(1) "coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools or other property including impoundments, retention dams, and tailings ponds, on the surface of underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

In the unique circumstances involved here I agree with respondent that it did not extract minerals from the land. Hence it is not a mine as defined in (A) of the statutory definition. However, this 30 acre site is land used in the "milling of such minerals".(FOOTNOTE 2) Accordingly, respondent meets the statutory definition as set forth in paragraph (C).

Respondent further relies on the regulations of the State of Utah (Ex. R1, page 64). These regulations, according to respondent, exclude Iron Mountain as a "mining operation."

Respondent's argument is rejected. The determinative issue is whether respondent is subject to the federal Act, not the State of Utah regulations.

In his evidence respondent also adduced evidence that the company had received other MSHA citations but they were not the subject of the instant appeal.

While the Commission has the authority to grant declaratory relief the granting of such relief is discretionary. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447. Such relief should not be granted in this case because the record is inadequate to determine this issue.

Mr. Johnson also protests the action of the inspector in "terminating" the citations when such authority rests with the Commission.

Mr. Johnson has confused the administrative actions of the MSHA inspector with an adjudication by the Commission. When an inspector, as he did here, terminates a citation he does so because respondent has abated the violative condition. Failure of the inspector to terminate the citation could result in subjecting an operator to additional sanctions as contained in Section 104(d) of the Act, 30 U.S.C. 814(d). In this case Inspector Wilson correctly, on an administrative basis, terminated the instant citations. The authority of the Commission, on the other hand, rests on an adjudicatory level as provided by Section 113 of the Act.

For the foregoing reasons, respondent's threshold contentions are denied.

Citation 2360842

This citation charges respondent with violating 30 C.F.R. 48.23 which provides as follows:

> (a) Each operator of a mine shall have an MSHA approved plan containing programs for training new miners, training newly-employed experienced miners, training miners for new tasks, annual refresher training, and hazard training for miners as follows:
> (1) In the case of a mine which is operating on the effective date of this Subpart B, the operator of the mine shall submit such plan for approval within 150 days after the effective date of this Subpart B.
> (2) Within 60 days after the operator submits the plan for

> approval, unless extended by MSHA, the operator shall have an approved plan for the mine.
> (3) In the case of a new mine which is to be opened or a mine which is to be reopened or reactivated after the effective date of this Subpart B, the operator shall have an approved plan prior to opening the new mine, or reopening or reactivating the mine unless the mine is reopened or reactivated periodically using portable equipment and mobile teams of miners as a normal method of operation by the operator. The operator to be so excepted shall maintain an approved plan for training covering all mine locations which are operated with portable equipment and mobile teams of miners.

Inspector Wilson issued this citation because respondent did not have any plan on file with MSHA (Tr. 19, 20).

The inspector discussed the citation with Mr. Johnson. He was not aware such a plan was required (Tr. 21).

The citation was abated (Tr. 21).

Carlyle Johnson testified that he was unaware that he was subject to MSHA's rules (Tr. 74).

Evaluation of the Evidence

The facts establish that respondent did not have a plan filed with MSHA. Mr. Johnson failed to establish a defense to the citation.

The citation should be affirmed.

Citation 2360843

This citation charges respondent with violating 30 C.F.R. 56.18Ä10, now 56.18010, which provides as follows:

> 56.18010 First aid training. Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees.

Inspector Wilson issued this citation when he learned that Mr. Johnson had not received formal first aid training in years (Tr. 21). The other employees had received no or little training (Tr. 21Ä22). The first aid training had not been made available to the employees (Tr. 22). There is no lead time granted for the training of employees in first aid (Tr. 23, 24, 55).

Generally, to be effective first aid training has to be taken every two years (Tr. 55).

The citation was abated (Tr. 22).

Mr. Johnson indicated that he had extensive first aid training at U.S. Steel in the spring of 1984 (Tr. 76).

Evaluation of the Evidence

Mr. Johnson, as a supervisor, was trained in first aid. But such training had not been made available to interested employees.

The citation should be affirmed.

Citation 2360844

This citation charges respondent with violating 30 C.F.R. 56.15Ä1, now 56.15001, which provides as follows:

> Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

Inspector Wilson did not recall seeing any stretchers or blankets on the mine property but there were a few supplies on hand (Tr. 24, 25, 55). The nearest town was 18 miles away (Tr. 25).

The citation was abated (Tr. 25).

Mr. Johnson testified that there were first aid materials and a stretcher on the job. The stretcher, constructed of pipe and wire, was 400 yards from the work area (Tr. 76, 77). After the company was cited Mr. Johnson brought over the ladder (Tr. 76Ä77). Additional first aid material was purchased and brought to the site the following morning (Tr. 77).

At the time of the inspection Mr. Johnson had a standard first aid kit available in his trailer (Tr. 77). The witness did not know if blankets were on hand (Tr. 78).

Evaluation of the Evidence

Inspector Wilson's testimony is credible. Accordingly, the first aid materials, stretchers and blankets were not provided at places convenient to the working area. A stretcher 400 yards away was not at a convenient place.

The citation should be affirmed.

Citation 2360845

This citation charges respondent with violating 30 C.F.R. 56.14Ä1, now 56.14001, which provides as follows:

56.14001 Moving machine parts. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Inspector Wilson issued this citation when he observed an unguarded jaw crusher flywheel (Tr. 25Ä27). The flywheel rotates in a circular motion when the jaw crusher runs at a high rate of speed (Tr. 27; Ex. P1, P2).

The condition was accessible. In addition, this condition has been known to kill or maim miners (Tr. 27, 28, 56). This can occur when parts of their bodies or clothing are caught in the unguarded assembly (Tr. 28).

This type of violation could cause a reasonably serious injury (Tr. 30).

The inspector observed tracks around the jaw crusher but he didn't know when they had been made (Tr. 56).

The citation was abated (Tr. 56).

Mr. Johnson testified that no one had to go near the exposed parts involved in Citation 2360845 and 2360846. Cleanup is done when the machinery is shutdown.

There was considerable room around the equipment (Tr. 79; Ex. R8).

Evaluation of the Evidence

The credible evidence adduced by Inspector Wilson establishes a violation of the regulation.

Mr. Johnson's testimony that was "considerable room" around the equipment does not excuse the violative condition.

The citation should be affirmed.

Citation 2360846

This citation charges respondent with violating 30 C.F.R. 56.14Ä1, now 56.14001, cited supra, for unguarded moving machine parts.

Inspector Wilson observed that a flywheel, a "V" belt and the pulley assembly were unguarded (Tr. 31; Ex. P3).

Numerous fatalities and serious injuries have occurred in industry from such conditions (Tr. 32).

The citation was abated (Tr. 32, 80).

Mr. Johnson testified MSHA was right in requiring that this condition be guarded but there was no necessity to get near the area (Tr. 80; Ex. R8).

Evaluation of the Evidence

The testimony of Inspector Wilson establishes a violation. Mr. Johnson does not contradict the evidence that a violation existed.

The citation should be affirmed.

Citation 2360847

This citation charges respondent with violating 30 C.F.R. 14Ä1, now 56.14001, cited supra, for unguarded moving machine parts.

Inspector Wilson issued this citation when he saw an unguarded conveyor belt and "V" belt. The condition, which could cause a serious injury, was adjacent to a walkway (Tr. 33, 36, 37; Ex. P4, P5). This machinery was moving at 100 rpm's or more (Tr. 34).

The inspector considered this to be a significant and substantial violation (Tr. 36).

The condition was abated (Tr. 37).

For illustrative purposes, Mr. Johnson presented at the hearing a two horse motor mounted on a bearing assembly (Tr. 80). The motors go into a 15 to 1 gear reduction and the head pulley turns at a 15th of 1,120 rpms, or about 75 rpms (Tr. 81). Mr. Johnson differed with the inspector's claim that the condition could cause a fatality (Tr. 81, 82).

Evaluation of the Evidence

Mr. Johnson's evidence is credible and persuasive. I agree that this particular unguarded equipment could not cause a serious injury.

However, the violation existed and the citation should be affirmed.

Citation 2360848

This citation charges respondent with violating 30 C.F.R. 56.12Ä8, now 56.12008, which provides as follows:

> 56.12008 Insulation and fittings for power wires and cables. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes,

> and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector Wilson observed an S.O. cable feeding power to the motor. It was not bushed nor was it provided with an appropriate fitting where it entered the motor makeup box (Tr. 38, 57; Ex. P4, P5).

There was not an appropriate fitting (Tr. 39). The primary purpose of a clamp or a bushing is to prevent the cable from being stressed (Tr. 39Ä40). It also prevents dirt, dust and rain from entering the box (Tr. 40).

The wires here were rubbing against the edge of the metal (Tr. 40). Normally a bushing citation is a minor violation but the inspector considered this to be serious due to the lack of electrical grounding (Tr. 41).

The hazard here involved electrical shock or electrocution (Tr. 41). The inspector had read of numerous fatalities caused by these conditions (Tr. 41). He believed the citation was significant and substantial because of the amperage and because the plant was not electrically grounded (Tr. 41). The entire conveyor belt frame could have been energized (Tr. 42).

The condition was abated (Tr. 42).

Mr. Johnson testified that the grommet provided by the factory had pulled out. There was no short and the wiring was still intact (Tr. 82).

Evaluation of the Evidence

The regulation requires that cables enter metal frames through proper fittings. Inspector Wilson established the violative condition and Mr. Johnson confirmed it.

The citation should be affirmed.

Citation 2360849

This citation charges respondent with violating 30 C.F.R. 56.12Ä25, now 56.12025, which provides as follows:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Inspector Wilson found that the 220 volt AC three phase electrical system was not continuously grounded. However, it was grounded by a copper rod and wire at the box (Tr. 42, 43). In effect, a portion of the electrical system was grounded and portion was not (Tr. 44, 46).

Mr. Johnson told the inspector the equipment was grounded because it was resting on iron ore. In the inspector's view such grounding was inadequate (Tr. 44, 58).

Mr. Wilson discussed various ways the system could be grounded (Tr. 44, 45, 46). But he apparently did not use a meter to test the ground (Tr. 46). The violation was obvious since there was no fourth wire and no bonding (Tr. 47).

In the event of an electrical fault the entire metal conveyor belt frame could be energized. This could cause a fatal electrocution (Tr. 47).

The citation was abated (Tr. 48, 60, 83).

Mr. Johnson testified there was six inches of iron dirt every place you walk. Iron is highly conductive but not as good as copper wire (Tr. 83).

Evaluation of the Evidence

A violation exists in these circumstances. In this connection, I credit Mr. Wilson's expertise that metal resting on iron ore does not constitute adequate grounding.

Citation 2360850

This citation charges respondent with violating 30 C.F.R. 56.40Ä24(b), now 55.4Ä24(b), which provides as follows:

> 56.4Ä24 Mandatory. Fire extinguishers and fire suppression devices shall be: (b) Adequate in number and size for the particular fire hazard involved.

Inspector Wilson found a wooden storage shack containing oil, grease, rags and paper boxes. There were no fire extinguishers in or about the shack which was 50 to 100 feet from the trailer house (Tr. 50, 52, 60Ä61).

The standard requires fire extinguishers in the vicinity of flammable or combustible material (Tr. 51).

The inspector did not consider the violation to be significant and substantial because the shack was away from the work area (Tr. 53).

The violation was abated (Tr. 53).

Mr. Johnson indicated there was a fire extinguisher 50 feet from the building. There were no grease rags; however, they did store unopened oil cans and five gallon buckets of motor oil, as well as grease and paper boxes containing extra parts (Tr. 83, 84).

Evaluation of the Evidence

The parties agree that a fire extinguisher was 50 feet from the shack. However, a fire among combustibles requires a quick response. Valuable time would be lost in obtaining the fire extinguisher under the circumstances involved here.

The citation should be affirmed.

Civil Penalties

In this case the Secretary has proposed the following penalties:

Citation No.	Subject	Proposed
2360842	MSHA approved plan	$20
2360843	First aid training	20
2360844	First aid materials	20
2360845	Unguarded flywheel	74
2360846	Unguarded pulley	74
2360847	Unguarded conveyor belt	74
2360848	No fitting to metal box	74
2360849	Electrical system ungrounded	74
2360850	No fire extinguisher	20

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act.

In reviewing the evidence in relation to the statutory criteria it appears that the company has a favorable prior history since it was not previously cited (Tr. 62). The company had only five or six employees. The number of the employees and its gross income of approximately $511,000 causes me to conclude that the company's size is relatively small (Tr. 88). The company must be considered as negligent since the violative conditions should have been known to Mr. Johnson. The assessment of a penalty would severely affect the company if it were still in business.

At the time of the inspection the company had been in operation for three months. In 1985 the company grossed $511,000 but spent $580,000. Mr. Johnson has financed the company by borrowing on property he owns. However, he is "broke" (Tr. 88, 89). Mr. Johnson's bank balance was $328. From this amount he drew out $100 to come to the hearing. In his personal account he has a balance of $197. At the time of the hearing U.S. Steel owed Iron Mountain $5,000 but payment has been delayed due to the fact that the company is on strike. He also has a bill of $8,000 with the Bank of Iron County but he has no way of paying it (Tr. 95). Johnson stopped operating the mine on October 1, 1985 (Tr. 95).

Except for the unguarded moving machine parts, the gravity of all of the violations was minimal.

The company's good faith was apparent in that they fully abated the citations. They also furnished gloves, safety shoes and hard hats. In addition, the company fully cooperated with MSHA.

As a general rule, the text and legislative history of Section 110 of the Act require the Secretary to propose a penalty assessment for each violation and the Commission and its judges to assess some penalty for each violation found. Tazco, Inc., 3 FMSHRC 1895 (1981). In Tazco the Commission ruled that the Commission and its judges do not have the power to suspend penalties. 3 FMSHRC at 1897. But in Tazco the Commission specifically noted that it was not passing on the propriety of nominal penalties, 3 FMSHRC 1898, footnote 4.

Precedent for the assessment of nominal penalties is contained in Potochar and Potochar Coal Company, 4 IBMA 252, 1 MSHC 1300 (1975).

In the instant case the operator abated the violative conditions and fully cooperated with MSHA. The company has ceased operations and there is no indication in the record that the company intends to resume its activities. The company and its owner, Mr. Johnson, have lost a substantial amount of money. In fact, they are essentially bankrupt.

I do not believe that the imposition of more than nominal penalties in these circumstances would serve the purposes of the Act or the best interests of justice.

Accordingly, a penalty of $1 should be assessed for each violation.

Conclusions of Law

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

1. The Commission has jurisdiction to decide this case.

2. Respondent violated all of the regulations for which it was cited in this case.

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

ORDER

1. Citation 2360842 is affirmed and a penalty of $1 is assessed.

2. Citation 2360843 is affirmed and a penalty of $1 is assessed.

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3. Citation 2360844 is affirmed and a penalty of $1 is assessed.

4. Citation 2360845 is affirmed and a penalty of $1 is assessed.

5. Citation 2360846 is affirmed and a penalty of $1 is assessed.

6. Citation 2360847 is affirmed and a penalty of $1 is assessed.

7. Citation 2360848 is affirmed and a penalty of $1 is assessed.

8. Citation 2360849 is affirmed and a penalty of $1 is assessed.

9. Citation 2360850 is affirmed and a penalty of $1 is assessed.

John J. Morris
Administrative Law Judge

FOOTNOTES START HERE-

1 A 15 x 18 foot jaw crusher reduces the ore to the size of about two-inch pellets (Tr. 65).

2 Milling is defined, in part, as the grinding or crushing of ore. A Dictionary of Mining, Mineral, and Related Terms, 707, U.S. Department of Interior, 1968.