

CCASE:  
SOL (MSHA) V. HYDROCARBON RESOURCES  
DDATE:  
19870203  
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 86-15-M  
A.C. No. 42-01789-05510

v.

Cottonwood #1 Mine

HYDROCARBON RESOURCES COMPANY,  
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Robert K. Murray, Esq., Golden, Colorado,  
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).

A hearing on the merits took place on August 14, 1986 in Salt Lake City, Utah.

The Secretary waived his right to file a post-trial brief but respondent filed a brief.

Issues

The issues concern the appropriateness of the civil penalties to be assessed.

Citation 2360975

This citation alleges respondent violated 30 C.F.R. 57.19110 which provides as follows:

57.19110 Overhead protection for shaft deepening work. A substantial bulkhead or equivalent protection shall be provided above persons at work deepening a shaft.

Summary of the Evidence

The citation and orders in contest here were issued as a result of inspections that occurred on June 5, June 25, and June 26, 1985.

Ronald L. Beason, a metal and nonmetal mine inspector experienced in mining, previously inspected respondent's Cottonwood mine on December 28, 1982 (Tr. 20 Å22).

The inspection occurred because of a fatal accident at the mine (Tr. 22). At that time an imminent danger order was issued to Chad Evans, then vice president of Hydrocarbon Resources. The order alleged respondent violated 57.19110 in failing to build and maintain substantial bulkheads (Tr. 23, 72). The citation was later terminated. The bucket and the bulkhead were used to protect the miners in the shaft (Tr. 24, 25, 86, 87).

This particular gilsonite mine had a 4 foot by 12 foot shaft and it was about 700 feet deep (Tr. 27). The shaft consists of the skip, manway and utility compartments. The shaft was not perfectly vertical but it varied from foot to hanging wall (Tr. 27, 28, 68). There were no guides in its 700 foot length (Tr. 36, 69). This would increase the probability of dislodging a rock (Tr. 36, 38).

The skip compartment is used to haul ore, men, and materials in and out of the mine. At the time of this inspection the vacuum system was transporting the gilsonite. In addition, they were blasting the rock and mucking it into the skip (Tr. 29, 30).

Bulkheads are timbers placed five to ten feet from the bottom of the shaft. They are directly over the miners' heads when they are in the bottom of the shaft. The bulkheads prevent the miners from being struck by falling rock (Tr. 30, 31). The skip itself can dislodge loose and rocks from the foot or hanging wall (Tr. 37, 38).

On the June 5, 1985 inspection the first (and only) bulkhead on the utility shaft was 354 feet from the shaft bottom (Tr. 31, 32, 82). The bulkhead was located approximately at the point where the Green fatality occurred in 1982 (Tr. 32). In addition to the single bulkhead there were various other obstructions such as pipes and lagging in the shaft (Tr. 84).

There was also a single bulkhead on the manway side 38 feet above the shaft bottom. There were no bulkheads on the utility side. Bulkheads are required for the skip compartment but there

~227

were none. Lagging is required under the skip (Tr. 32, 34, 39). Lagging (3 x 8 timbers) is pulled across the bulkhead so the miners are protected while the skip travels to, and returns from, the surface (Tr. 33). There was lagging in isolated places (Tr. 70). The skip can be used as a bulkhead when situated at the bottom but a bulkhead is required when the skip is at the surface or descending or ascending (Tr. 33).

When the inspector arrived at the site the skip was on the surface. In addition, there was no bulkhead at the bottom of the shaft (Tr. 33). There was nothing to stop the fall of any rocks 700 feet in the skip compartment and 350 feet in the utility compartment (Tr. 34).

At the time of the inspection three shifts were working (Tr. 38).

When the inspector descended in the skip the miners were 10 to 12 feet (laterally) from the shaft bottom (Tr. 77). There were not sinking shaft but they were preparing to mine into a stope (Tr. 78, 81). The inspector questioned each miner and he learned that the day shift had completed mucking out the bottom of the shaft. They stated that no bulkheads or timbers had been removed (Tr. 79).

Inspector Beason measured and took notes. He indicated there was no lagging in the skip compartment. His notes directly contradict witness Jorgensen (Tr. 293 Å297; Ex. P3).

Don E. Jorgensen, testifying for respondent, indicated there were continuous glancing boards from the surface to the bottom of the shaft (Tr. 212, 213). There were stulls and lagging every five feet and 3 x 8's on every landing (Tr. 213). Jorgensen observed the inspector measure a hole at 13 inches but many measured two or three inches and they were not covered with pipe (Tr. 213, 214). On the manway side there were 14 foot ladders with landings every 10 feet. The first bulkhead was 38 feet from the bottom of the shaft (Tr. 215). When the June 5 citation was issued for failure to use bulkheads they had flooring out to the sides whenever they were working under the bucket for any length of time. The witness had never seen the bottom of the Cottonwood shaft without timbers or lagging. On the morning of June 5, 1985 the miners had started to mine gilsonite and they had moved out of the shaft (Tr. 216, 217).

Witness Jorgensen claimed bulkheads were used after the first citation was issued. In fact, Hydrocarbon discharged Royce, Grant and Dan Green for failing to use bulkheads when sinking a shaft at another location (Tr. 217 Å221, 248, 249, 256, 257).

Before the June 5 inspection Jorgensen had talked to Royce Green and his two boys urging them to be sure the bulkhead was installed (Tr. 221, 222).

### Discussion

Respondent's answer admits this violation. Further, the parties have stipulated that the only issue concerns the appropriateness of the penalty (Tr. 16 Ä18).

Accordingly, the citation should be affirmed. Issues relating to a civil penalty are discussed hereafter.

### Citation 2359401

This citation alleges a violation of 30 C.F.R. 57.20032 which provides as follows:

57.20032 Two-way communication equipment for underground operations.  
Telephones or other two-way communication equipment with instructions for their use shall be provided for communication from underground operations to the surface.

### Summary of the Evidence

During his inspection on June 25, 1985 inspector Beason was directed by Ken Cooper, shift foreman, to the company telephone. It was located on the bench in the hoist room under boxes, rags and other materials (Tr. 39, 40, 43).

The inspector determined there was no communication with the bottom of the mine (Tr. 40). He found the telephone did not work (Tr. 41). They then took it apart. The panels were rusty and the plug-ins had rusted off. The rust on the phone could not have accumulated within four days. In addition, the inspector did not observe any damage to the box itself (Tr. 42).

Ken Cooper stated the phone had been removed from service because of water in the shaft (Tr. 42).

When Mr. Cooper showed the inspector the telephone he made no claim that it had been damaged by blasting (Tr. 43).

On the following day company representatives, Don Jorgensen and Ralph Musick, told the inspector that the phone was new (Tr. 43). It had just been installed, blasted off the wall and rusted out after two days in a muckpot (Tr. 44). The inspector had the underground water analyzed by MSHA and contacted MSA (Mine Safety Appliance), the manufacturer. The company stated the neutral acidity solution would not cause it to corrode (Tr. 44, 45, 106 Ä115). The inspector's investigation caused him to conclude that the phone was not four days old as claimed by the company (Tr. 45).

Management also asserted their backup communication system involved shutting off the ventilation. They did so five times

~229

over 30 to 45 minutes. The men did, in fact, appear 45 minutes later (Tr. 47). The problem with this system of communication is that the miners below could not communicate to the surface (Tr. 47).

In the inspector's opinion the lack of communication could have aggravated any injury caused to a miner below ground (Tr. 48, 49). On a previous inspection (April 24) the company had a problem with the phone (Tr. 102, 103). The inspector believed the Pager 3 telephone in place on June 25th was the same instrument in use on April 24 (Tr. 104).

The inspector left the mine by signaling the hoistman for the skip. But he did not consider such signals nor a signal board to be effective communication because the hoistman could not return the signal (Tr. 116, 117). In addition, a signal board does not have an emergency code (Tr. 118).

Witness Don Jorgensen disagrees with inspector Beason concerning the telephone. On May 30th the company ordered a new phone. On June 5 he pointed out the new phone to the inspector (Tr. 222, 223).

The new phone had apparently been dislodged in a Friday night blast. As a result it was in the water until Monday morning (Tr. 223).

The original phone, seen in April, was an old instrument (Tr. 223). The witness produced an order for a telephone dated May 30. The order was for a Pager 3 and a battery (Tr. 224). The order bears a date stamp of May 31, 1985 and the witness installed it on June 3 (Tr. 224; Ex. R6).

The company was cited for failing to have a phone on June 25 (Tr. 224, 225). The new phone had to be replaced because it was corroded and rusted from being in the water and muck caused by the Friday night blast (Tr. 226).

Royce Green didn't tell anyone about the phone and Jorgensen didn't hear about it until Tuesday (Tr. 228).

On June 25 the company ordered a Pager and a 12 volt battery (Tr. 229; Ex. R7). The Pager 3 was an MSA phone (Tr. 230).

Witness Jorgensen indicated the signal code for operating the hoist directs the hoistman to either stop, start or position the conveyance at some predetermined location. Nine bells indicates impending danger or accident (Tr. 230, 231). Turning the air on and off also constitutes a signal system (Tr. 231). The signal system is posted at every landing and known to the miners (Tr. 231).

~230

If the phone isn't available a person can talk down the vent pipe or suction pipe (Tr. 232).

The mine had to replace an entire length of galvanized suction pipe because the corrosion in the water had eaten through it (Tr. 233).

#### Discussion

Respondent's answer and the stipulation of the parties confirms that this violation occurred. Accordingly, the citation should be affirmed.

The evidence in a large degree addresses the issue involving the replacement to the telephone and the reason for its replacement. The regulation requires a two-way communication system. It is clear that there was no effective two-way system. Accordingly, the violation existed. The Mine Act imposes absolute liability on the operator. ASARCO, Incorporated, 8 FMSHRC 1632 (1986). Accordingly, the evidence relating to why the telephone was in-operative and why it became that way is relevant only as it relates to the imposition of a penalty. On the credible evidence I find that the telephone was inoperative only for a short period of time. In addition, it became rusted by lying in the water after only two days in the muckpot. These elements reduce the gravity as well as the operator's negligence. These features are hereafter considered in assessing a penalty.

Respondent's evidence that they signaled the miners by turning off the ventilation and by signalling the hoistman totally fail to comply with the regulation. Section 30 C.F.R. 57.20032 requires a two-way communication system.

#### Citation 2359512 and 2359405

These citations allege separate violations of 30 C.F.R. 57.12025 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.

#### Summary of the Evidence

On June 25, 1985, Mr. Beason inspected a 480 volt submersible metal water pump in the bottom of the shaft (Tr. 49, 50).

The previous evening Larry Day, an electrical inspector, had checked the switch box containing 30 amp fuses and he determined that the ground wire had been cut (Tr. 50, 51, 60, 61).

They had abated the citation by connecting the ground wire. Company representatives also indicated they had conducted a continuity test (Tr. 51). Such a test will confirm whether there is an adequate ground to a particular motor (Tr. 52). Based on the company's representations the inspector terminated the electrical citation (Tr. 52).

In continuing his inspection, the inspector observed that the water pump had been spliced and the ground cut out (Tr. 53; Ex. P2). At the inspector's request the splice was cut from the line. It was presented as an exhibit at the hearing (Tr. 53; Ex. P2). The cable had a four wire splice to the cable. After being cut off only three wires led to the pump (Tr. 53, 54). The ground wire terminated in the splice was the same ground wire inspector Day had required to be connected at the panel box on the surface (Tr. 55). A continuity test would have determined that the pump was ungrounded. The pump was ordinarily used to pump out the bottom of the shaft (Tr. 55, 56, 130, 133).

Failure to ground this equipment or to provide equivalent protection presents a shocking hazard (Tr. 56, 60 Å62). In addition, a person could have touched the exposed electrical conductor (Tr. 58).

In the inspector's opinion respondent's management was very neglectful since they resisted the bulkheads, the grounding and the telephone (Tr. 63 Å65, 138).

The company had received prior citations for failure to ground (Tr. 65). Respondent extensively examined the inspector concerning the electrical violation (Tr. 119 Å129).

Cross examination further established that on June 26, 1985 respondent was issued a citation because the company failed to notify MSHA of changes in the partnership and the operator (Tr. 67, 68).

Larry G. Day, an electrical specialist for MSHA, inspected respondent's Cottonwood mine on June 25, 1985 (Tr. 163 Å167). He determined, with a tick tracer, that the metal water pump in the shaft bottom was not grounded nor was there equivalent protection (Tr. 167, 169). The grounding wire connected to the switch box on the surface had been cut (Tr. 168, 168A, 177, 192). An ungrounded pump submerged in water creates a very hazardous condition (Tr. 170 Å179). Submersing the pump in water would be no protection at all (Tr. 179).

The panel contained 30 amp fuses. Exposure to a milliamp could kill a person (Tr. 173).

The inspector considered that the operator's negligence was high since someone ignored a grounding conductor (Tr. 177, 178).



~232

Cross examination indicated that the inspector's experience generally involved 480 volt three phase AC current (Tr. 181). He further testified extensively in connection with Y and delta connections, impedance, grounding and continuity tests (Tr. 181-190).

Day's citation was issued because of the condition at the surface. Beason's citation related to the condition at the other end of the pump (Tr. 192, 193). The number of breaks in the wire would not affect this condition (Tr. 193, 194, 196).

Witness Jorgensen testified for respondent and indicated that the Berkeley pump was installed after the partnership with Thyssen. The pump was used when the mine filled with water (Tr. 234-236). They did not pump when there were miners in the mine (Tr. 235).

After it was cited the company obtained a letter from the sales company (Tr. 238-240; Ex. R5).

Jorgensen purchased the three wire cable and had it installed by an electrician (Tr. 245).

Jorgensen suspected that Jerry Schrup cut the grounding wire on the pump (Tr. 247, 248).

#### Discussion

Respondent's answer questions whether this violation occurred but its post-trial brief asserts that the mineralized ground water provided a suitable ground. In addition, no miner was ever exposed to any danger. Further, the two citations are duplicative since they both involve the same piece of equipment.

I credit inspector Day's expertise to the effect that an ungrounded pump submerged in water constitutes no protection. Further, it is not a requirement of the regulation that miners be exposed to the violative condition. Finally, respondent's claim of duplication is rejected. Two separate violative conditions existed. The fact that it involved the same piece of equipment is a factor to be considered in assessing a penalty.

The citations should be affirmed.

#### Respondent's Evidence as to new Partnership

Don E. Jorgensen was hired as a miner by respondent Hydrocarbon Resources on September 1, 1983. In January 1984 he was promoted to mine superintendent (Tr. 199, 200). His responsibilities included production and safety (Tr. 201). He initially reported to Chad Evans, the mine manager (Tr. 207). Prior to March 1985 a partnership consisting of Miocene

~233

Resources, Hydrocarbon Mining and Ken Wooley operated the mine. On March 15, 1985 that partnership was terminated and a new partnership was formed consisting of Thyssen Mining Construction, Inc. and Hydrocarbon Mining. These partners operated the mine doing business as Hydrocarbon Resources. Thyssen was the operating partner. Hydrocarbon Mining Company was a partner in both ventures (Tr. 201 Å206).

Jorgensen was aware that a citation was issued as a result of the Green fatality (Tr. 203). After he became superintendent he learned why the citation was issued (Tr. 204).

John Edwin McNeeley has been vice chairman of the managing board of Thyssen Mining Construction, Inc., since November 7, 1985. Thyssen, as managing partner, controls 51 percent of Hydrocarbon Resources (Tr. 258, 1259, 273).

McNeeley was responsible for operating the Wild Horse and Midas mines (Tr. 261). Operations were abandoned at the Cottonwood mine in the fall of 1985 (Tr. 261). All other employees of Hydrocarbon Resources were laid off in May 1985 (Tr. 261).

McNeeley discharged Royce, Danny and Grant Green in November for failing to use a bulkhead (Tr. 2262 Å266). The company has set a standard of strict compliance with MSHA regulations (Tr. 264). Subsequently the Greens filed discrimination complaints against the company. The complaints were unrelated to the use of bulkheads (Tr. 261 Å268).

Thyssen Mining Construction, Inc., is a wholly owned subsidiary of Thyssen Mining Construction of Meulheim, West Germany. The principal company sinks shafts, does contract mining and production mining (Tr. 269). Thyssen is one of the largest construction companies in West Germany (Tr. 270). Until it was terminated the members of the managing board of Hydrocarbon Resources were Klaus Wagener, Kenneth Wooley and Chad Evans (Tr. 270).

Lyle D. Weiss, secretary-treasurer of Thyssen Mining Construction, Inc., testified that he is in charge of all financial and administrative matters (Tr. 273, 274).

The partnership agreement between Hydrocarbon Mining, Inc., and Thyssen Mining and Construction, Inc., was executed March 15, 1985 (Tr. 274; Ex. R8). Other than in evaluating the project Thyssen was not involved in the operations before March 15, 1985 (Tr. 275). The partnership was designated as Hydrocarbon Resources Company, (HRC) (Tr. 276; Ex. R8). The parties further agreed that HRC was identical to a joint venture between Hydrocarbon and a company called Miocene Resources, Inc. (Tr. 276).

~234

The vein has ceased to exist at this site at a minable width (Tr. 280, 281). For the nine months ending December 31, 1985 the partnership loss was \$1,050,000. A penalty in this case would not help the situation (Tr. 281).

The witness further indicated that 58,268 man hours were involved and 1,830 tons were mined between March 15, 1985 and December 31, 1985 (Tr. 282, 283; Ex. R9). The man hours included approximately 9,000 hours of construction work (Tr. 284).

The witness had prepared and suggested a penalty assessment based on the Secretary's regulations (Tr. 285 Å291; Ex. R10, R11).

Thyssen is financially sound and a \$9,000 penalty would not impair its ability to continue in business (Tr. 291).

#### Civil Penalties

The Secretary seeks certain penalties for the violations herein. The proposed penalties, as originally assessed, were as follows:

Citation No.		Proposed
2360975	Bulkheads	\$1,000.00
2359401	telephone	750.00
2359512	water pump	750.00
2359405	cut ground wire	500.00

Prior to the hearing the Secretary sought and was granted leave to amend the bulkhead violation to a proposed penalty of \$9,000.

#### Discussion

As a threshold matter respondent concedes that the Secretary may modify his penalty assessment at any time during a penalty proceeding but it asserts that the Secretary's action, without new facts, constitute harassment and intimidation especially after respondent choose to challenge the original proposed assessment.

Respondent's arguments are rejected. It is well settled that the assessment of penalties rests solely with the Commission and are not based on the Secretary's proposals. The Commission may raise, lower or affirm the original assessment. *Sellerburg Stone Company v. FSMHRC*, 736 F.2d 1147 7th Cir. (1984); *Shamrock Coal Company*, 1 FMSHRC 469 (1979); *Consolidation Coal Company*, 2 FMSHRC 3 (1980).

For the foregoing reasons respondent's threshold objections are denied.

Accordingly, it is now necessary to consider the statutory criteria relating to the assessment of such penalties. Section 110(i) of the Act, now 30 U.S.C. 820(i), provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The bulkhead violation (Citation 2360975) involves evidence relating to respondent's negligence and gravity. In 1982 an identical bulkhead citation was issued against respondent after a fatality occurred. In the instant case the judge took official notice of the prior case entitled Hydrocarbon Resources, Inc., 8 FMSHRC 354 (1968), (Order, January 9, 1987).

I agree with respondent that a change in partners creates a new legal entity. Fritz et al v. Commissioner of Internal Revenue, 76 F.2d 460 (1935). I further find from the testimony and the exhibits that when Thyssen Mining Construction, Inc., became the managing and controlling partner on March 15, 1985 a new and entirely legitimate partnership was formed. The transition was in no way a sham arrangement such as discussed by the Commission in Lonnie Jones v. D & R Contractors, 8 FMSHRC 1045, 1054 (1986).

However, the new partnership involving Thyssen Mining is not totally insulated from the prior partnership. This is so because Chad Evans was the mine manager when the bulkhead violation occurred in 1982 (Tr. 157). Subsequently, he was one of the three members on the managing board of the Thyssen partnership (Tr. 270).

The knowledge of supervisory personnel has generally been imputed to an operator under an agency concept Southern Ohio Coal Company, 4 FMSHRC 1459 (1982); Nacco Mining Company, 3 FMSHRC 849 (1981). Accordingly, respondent should have known of the 1982 fatality resulting from the bulkhead violation. This knowledge causes me to conclude that respondent's negligence is high and the gravity of the violation is apparent since the violative condition can and did cause a fatality in 1982.

Respondent's post-trial brief asserts for a number of reasons that the bulkhead citation should not have been issued. The credible evidence here clearly establishes that the four violations occurred.

The gravity of Citation 2359401 (communication system) is low. On the other hand, ungrounded equipment such as in

~236

Citations 2359512 and 2359405 presents the possibility of electrocution. The gravity in such situations should be considered as high.

Since respondent is a separate legal entity it has no prior adverse history.

The testimony establishes that a civil penalty will not affect the operator's ability to continue in business.

Respondent's rapid abatement of all of the violations is to its credit.

On balance, I consider that the penalties set forth in order of this decision are appropriate.

#### 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. Penalties should be assessed for the violations herein.

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

#### ORDER

The following penalties are assessed for the violations herein:

Citation 2360975	(bulkheads)	\$3,000
Citation 2359401	(communication system)	200
Citation 2359512	(water pump)	500
Citation 2359405	(ungrounded wire)	500

John J. Morris  
Administrative Law Judge