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SOL (MSHA) V. FALCON EXPLORATION
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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 87-2-M
A.C. No. 26-01527-05503

v.

Tonopah Divide Mine

FALCON EXPLORATIONS,
RESPONDENT

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco, California,
for Petitioner;
Mr. Everett Berg, Falcon Explorations, Emeryville,
California,
pro se.

Before: Judge Cetti

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Mine Act"). After notice to the parties, a hearing on the merits was held before me at Oakland, California, on January 15, 1987. The parties presented oral and documentary evidence, and submitted the matter for decision, without exercising their right to file post-trial briefs. The mine operator admits the violations charged occurred but questions the appropriateness of MSHA's administrative penalty assessments.

ISSUE

The single issue presented is what penalty is appropriate for each of the admitted violations.

STIPULATIONS

The parties stipulated as follows:

1. The history of previous violations is good.
2. The size of the mining operation was small.
3. The penalty would not affect the ability of the operator to continue in business.

4. The mine operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

SUMMARY OF EVIDENCE

Background

A small three-man heap leaching operation was the only activity at the mine site at any time relevant to this proceeding. The operation consisted of using a weak solution of cyanide, water, and lime in an attempt to extract what minimal gold and silver might remain in the heap leach pad. The mine had been reopened for this limited purpose two months before the inspection. This limited operation was completed and the mine closed six months after it opened.

The only persons employed in this operation was the manager, Mr. Waterson, and his two adult sons. Each of these miners had a mobile trailer home at the site.

On May 20th and 21st of 1986, Federal Mine Inspector Earl McGarrah made a routine inspection of this three-man heap leaching operation and issued three citations charging the operator with violations of Title 30 C.F.R. 56.12068, 56.12028, and 56.15001. Thereafter this proceeding was initiated by the filing of a proposal for assessment of a civil penalty by the Secretary of Labor on behalf of the Mine Safety and Health Administration pursuant to Section 110(a) of the Mine Act. The operator filed a timely appeal.

Citation No. 2673962ÄTransformer Enclosures

This citation charges a violation of 30 C.F.R. 56.12068 which in its entirety provides:

"Transformer enclosures shall be kept locked against unauthorized entry."

The citation charges that three enclosures of energized transformers were not locked and that one person was affected by the violation.

The mine inspector and the mine manager Mr. Waterson drove up to the three transformers to check them out. The transformers were located in an area between the three trailer houses and the small mill building. Each of the two smaller transformers (440 volts) had a factory manufactured enclosure (housing). Each enclosure had an access door which was closed but not locked. When the manager opened the access door for inspection the energized terminals inside the housing enclosure were exposed. The mine inspector testified if a person were to come in contact with the energized terminal he could be very seriously injured or killed.

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The mine inspector testified that the violations were abated by the manager within 30 minutes.

The third transformer (4160 volt) was enclosed by a fence which had a gate that was closed but unlocked. A person would have to open the closed gate to get to the transformer.

The mine manager promptly abated the violations by taking three locks from his trailer home and immediately locking each of the enclosures.

The mine inspector stated that when he asked the manager why the transformer enclosures were not locked the manager told him that he was busy and "just forgot."

On cross examination the mine inspector testified that he made an earlier inspection of the mine site and at that time the three transformer enclosures were "probably" locked since he did look at them and did not issue a citation.

DISCUSSION AND FINDINGS

The mine operator admitted the violation and it is taken here as established fact.

The only issue is what penalty is appropriate under the facts of this case.

In determining the appropriate penalty Section 110(i) of the Mine Act requires the Commission and its Judges to consider the mine operators size, its negligence, its good faith in attempting to achieve rapid compliance after notification of a violation, its history of prior violations, the effect of the monetary penalty on its ability to continue in business and the gravity of the violation.

This was a very small three man operation consisting of a father and his two adult sons. The parties stipulated that the size of the operation was small.

Evidence was presented that the access doors and gate to the transformer enclosures were closed but were not locked at the time of the inspection. No evidence whatsoever was presented as to how long the doors or gate had been unlocked. Appropriate locks were provided by the operator and were readily available. The only evidence we have as to why the doors were unlocked is the hearsay statement that Mr. Waterson "forgot". Accepting this statement as true this constitutes ordinary simple negligence.

The parties stipulated to the operator's good faith in achieving rapid compliance. This was based no doubt on the fact the access doors and the gate to the transformer enclosures were locked within 30 minutes after the violation was first noted.

~771

With respect to the gravity of the violation we are not dealing in this case with a concealed or hidden danger or a trap for the unwary. The danger is an obvious one. Miners are aware of the inherent danger of exposing themselves to the energized electrical parts inside a transformer.

The only way one could be exposed to this hazard is to deliberately and intentionally open the closed access door of the transformer enclosure. It is most unlikely that a miner could accidentally or inadvertently be exposed to the hazard.

While these considerations may be irrelevant as to the existence of the violation they are valid considerations in determining the gravity of the violation for purposes of setting the appropriate penalty.

In this case there was no evidence of actual exposure to the hazard. There was only a possibility that if an unauthorized person were to open the closed door or closed gate of one of the enclosures that the unauthorized person could be exposed to the hazard of contacting one of the energized parts. There was no evidence that any of the three miners who had potential access to the transformers were or were not authorized or qualified persons.

The parties stipulated with respect to four of the six mandatory statutory criteria set forth in Section 110(i) of the Mine Act. The parties in addition to stipulating to the small size of the mining operation and its good history, also stipulated to the operators good faith and to the fact that the penalty would not affect the operator's ability to continue in business. All four stipulations are accepted and adopted as my finding of fact.

After due consideration of the six statutory criteria I conclude that the appropriate penalty for the violation in this case is \$30.

Citation 2673963ÄGrounding Systems Test Record

This citation alleges a violation of 30 C.F.R. 56.12028. This section not only requires testing of grounding systems for continuity and resistance immediately after installation but also requires a record of the resistance measured be made available on request by a Federal mine inspector.

Evidence was presented that two months before the inspection the mine was reopened for a small temporary milling operation. It was a small, three-persons, six-months long, operation to attempt to extract what minimal gold and silver might remain in

~772

the heap-leach pad. Just before the reopening the mill was rewired by Logan Electric for the new Merilcro mill that was installed specifically for this temporary leach pad operation. The grounding system was installed in compliance with all relevant safety regulations. Tests performed after the inspection revealed all measurements and test results were in compliance with the National Electric Code and the relevant safety regulations.

The mine inspector testified that at the time of the inspection Mr. Waterson did not know whether the electrical contractor had "run these tests or not". Mr. Waterson looked for the record but he could not find it.

The mine inspector testified that the purpose of testing the grounding system was to make sure that it was working properly. He stated that if it wasn't working properly its "possible" somebody could be electrocuted.

DISCUSSION AND FINDINGS

30 C.F.R. 56.12028 not only requires testing of the grounding system immediately after installation but also requires a record of the resistance measured during the most recent test be made available on request by a federal mine inspector.

The record clearly shows that the mine manager was not able to make available to the mine inspector a record of the resistance measured. His failure to make sure that the required record be made and kept available on request constitutes ordinary negligence.

Since the grounding system was installed in compliance with the National Electricity Code and with the relevant safety regulations, the violation did not result in any potential hazard. The gravity, therefor, is considered minimal.

The parties stipulated to four of the six statutory criteria mandated by section 110(i) of the Mine Act. The parties stipulated that the history of previous violations was good, that the size of the three man mining operation was small, that a penalty would not affect the operator's ability to continue in business, and that good faith was demonstrated in attempting to achieve prompt abatement of the violation. The stipulations are accepted and adopted as my finding of fact.

In the light of my finding on the six statutory penalty criteria I can conclude the appropriate penalty for the violation in this case is \$10.

Citation 2673964ÄFirst Aid Material

The citation charges that "adequate first aid materials were not provided at the mine. A cyanide kit was not at the property". The operator admits that these allegations are true.

When the mine inspector asked why there was no first aid kit at the mine, Mr. Waterson told him that before commencing the temporary heap leaching operation the mine had been shut down. Since they did not plan on reopening, they sold the first aid and the cyanide kit. Since reopening for the small three-man heap leaching operation he has been so busy he had neglected to purchase a first aid kit or a cyanide kit.

When asked by the Solicitor what was the danger of failing to provide a first aid kit the mine inspector replied "they do have eye washes and things like that in it along with band aids, to aspirin." Asked as to what was the danger of not having a cyanide kit with amyl nitrate, the mine inspector stated that the miners were using cyanide in the heap-leaching operation and the cyanide kit would be used in the event that an employee was overcome by cyanide. He explained that in order to revive such a person you need to immediately get him to fresh air, break open a amyl nitrate capsule, and get him breathing. He stated "its possible" that not having a first aid and a cyanide kit could result in death.

Mr. Berg, the mine owner, testified that the miners used a very weak solution of cynaide mixed with water and lime in the heap leaching operation but that the solution was so very weak and that it was "very unlikely that anybody even drinking the solution would die."

DISCUSSION AND FINDINGS

The operator has admitted the violation of 56.15001 as alleged in the citation and it is accepted here as established fact. 30 C.F.R. 56.15001 mandates that "adequate first-aid materials" shall be provided at places convenient to all working areas.

The purpose of this safety standard is to enable those at the work site to provide needed emergency treatment until such time as professional help can be obtained. When there is a sudden serious injury or illness first aid is an attempt to keep the victim alive and in the best condition possible until medical help arrives. In certain cases there is a critical period in which the availability of adequate first aid materials can mean the difference between life and death for the victim. However, in many other cases the lack of adequate first aid material is not critical. On balance I would evaluate the gravity of the violation in this case as moderate.

The only evidence we have as to negligence is the hearsay statement that the mine manager was busy and forgot. I conclude that this was plain ordinary negligence.

The parties stipulated with respect to four of the six statutory criteria set forth in section 110(i) of the Mine Act. The parties stipulated that the history of previous violations was good, that the mining operation was small, that the penalty

~774

would not affect the operator's ability to continue in business, that the operator demonstrated good faith in attempting to achieve prompt abatement of the violation. These stipulations are accepted and adopted as my finding of fact on four of the six statutory criteria.

With respect to the two remaining statutory criteria it is found that the violation was caused by ordinary negligence of the mine manager (which is properly imputed to the operator) and that the gravity of the violation was moderate.

Based upon my consideration of the six statutory penalty criteria, I conclude that \$60.00 is the appropriate penalty in this case for the admitted violation of 30 C.F.R. 56.15001.

CONCLUSIONS OF LAW

Based upon the entire record and the 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. Respondent violated 30 C.F.R. 56.12068, Citation 2673962 should be affirmed, and a civil penalty of \$30 assessed.
3. Respondent violated 30 C.F.R. 56.12028, Citation 2673963 should be affirmed, and a civil penalty of \$10 assessed.
4. Respondent violated 30 C.F.R. 56.15001, Citation 2673964 should be affirmed, and a civil penalty of \$60 assessed.

ORDER

Accordingly each of the citations herein is ordered affirmed; and Falcon Explorations is ordered to pay a civil penalty totaling \$100.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge