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SOL (MSHA) V. HOMESTAKE MINING
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 87-114-M
A.C. No. 05-00413-05517

v.

Bulldog Mountain Operations

HOMESTAKE MINING COMPANY,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Charles W. Newcom, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Morris

This case is before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act") to challenge the issuance by the Secretary of Labor of a citation charging Homestake Mining Company, ("Homestake") with violating the regulatory standard at 30 C.F.R. 57.18025.

A hearing on the merits took place in Denver, Colorado on December 2, 1987. The parties filed post-trial briefs.

Jurisdiction

As a threshold matter Homestake asserts its mine is not subject to the Act. Specifically, the uncontroverted evidence shows the Bulldog mine ceased all production on January 29, 1985. As a result it does not meet the definition of a "coal or other mine" under Section 3(h)(1) of the Act. In addition, even if it is deemed to be a "mine" this operation did not have products entering commerce and thus falls outside the coverage of Section 4 of the Act.

Discussion

The evidence in this case shows that Homestake, an underground gold and silver producer, has its principal place of business in California. In addition, it has at least two mines in Colorado (Bulldog Mountain Operation and North Amethyst Project). Further, Homestake's legal identity report shows it has a 20% or greater interest in 23 other mines (Ex. R4, R6).

These factors establish that Homestake is clearly subject to the Act and, as a matter of law, its activities affect commerce.

Homestake's narrow issue here concerning jurisdiction is that that the Bulldog mine had ceased all production almost 22 months before MSHA issued its citation. Homestake cites no persuasive authority in support of its view. (Footnote 1) Once an operator is subject to the Act its coverage does not cease at one of its individual mines merely because production stopped at that location. Contrary to Homestake's contention the Bulldog operation continued to be a "mine"; otherwise, why did the company direct its supervisor to maintain the pumps? Under Homestake's defense a miner would be protected one day during production but not the following day when production ceased. However, the Commission has clearly ruled that "[t]he Act provides an expansive definition of a "mine" which Congress stated must be given the "broadest possible interpretation", with doubts resolved in favor of inclusion" Cypress Industrial Minerals Corp., 3 FMSHRC 1 (1981).

For the foregoing reasons Homestake's motion to dismiss for lack of jurisdiction is denied.

The regulation involved here provides as follows:

UNDERGROUND ONLY

57.18025 Working alone.

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

Findings of Fact and Discussion

At the outset it is necessary to consider whether Homestake's supervisor was "working alone" under conditions where his cries for help could not be heard or where he could not be seen. If this is determined in the affirmative it is then necessary to consider whether "hazardous conditions" existed in the areas where he was working.

The uncontroverted evidence on the "working alone" issue is established by Homestake employee Bobby Rae Webb and confirmed by MSHA Inspector Lyle Marti.

BOBBY RAE WEBB, experienced in mining, was Homestake's chief electrician and foreman on December 10, 1986 when the contested

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citation was issued at the Bulldog mine (Tr. 21-26, 115, 117, Ex.R7).

After production stopped on January 29, 1985, Webb was responsible for maintaining the mine and its pumps. No one worked for him at the mine (Tr. 29). However, one hundred fifty miners had been employed at the mine before production stopped (Tr. 29).

The 480 volt three phase insulated and protected pumps, the subject of Webb's inspection, consisted of two deep well pumps, one MRV pump and one fly pump. The cables carrying the electricity for the pumps were located on the same travelways used by Webb. When production terminated the company was shorthanded and Webb personally began checking the pumps. He would check the pumps on Monday and Friday (Tr. 30-34, 103, 104, 112).

Webb's procedure was to advise Bev Larson, the company's Secretary in the main office, that he was going underground. She was located half a mile from the mine and if something happened she could send someone looking for him (Tr. 37). Usually Webb would say he'd be back in two hours. When he came back out Webb would advise her that he had returned. Occasionally Webb would also advise Don Rolfe he was going underground.

After advising Ms. Larson of his intentions Webb would get his cap-lamp and tag out. Thereafter he'd start the main fan, part of the ventilation system (Tr. 40, 86). There was also natural ventilation in the mine (Tr. 41).

Webb would then start the compressors to build up 125 pounds of air pressure in the piping system. This supplied air to the hoist and the air doors (Tr. 43).

During his tenure at the Bulldog mine the hoists have, on occasion, malfunctioned but no malfunction occurred during the time Webb inspected the pumps. The logs for the hoist probably weren't up to date. In addition, there have been power outages in certain parts of the mine (Tr. 142, 143, 146).

Depending on whether he rode the locomotive or a bike it took five to ten minutes to go from the portal to the hoist, a distance of about 5000 feet. At the hoist another air compressor was started. If a power failure occurred the compressors would shut off (Tr. 44, 45).

After waiting a few minutes for a pressure buildup from compressed air Webb would descent 360 feet in the hoist to the 9000 foot level (Tr. 46, 88). He would then exit the hoist and go approximately 5000 feet to inspect the furthest water pump (Tr. 48). He would then return on an electric locomotive to the next pump station 3000 to 4000 feet away (Tr. 49, 50).

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Webb wore rubber boots and the pumps were submerged in water (Tr. 51, 105).

To reach the third pump it was necessary to leave the main drift and go 400 or 500 feet down a crosscut (Tr. 52, 53). Webb could usually do his "tour" in less than two hours, normally 85 minutes (Tr. 54, 55).

After the stripping of the mine had been completed there were no other miners in the mine during Webb's inspections. In addition, no one could see or hear him (Footnote 2) (Tr. 56).

The routes taken by Webb were travelways and under normal operating conditions you could expect to see other miners in these areas (Tr. 66, 76, 77). But even when the mine was active it could be much longer [than two hours] before someone would come looking for the individual checking the pumps (Tr. 110).

The telephones were stripped out of the mines after production stopped. But Webb could not recall when the phones were removed (Tr. 70). He did not carry a pager so there was no way he could have reached the surface when he was underground. Nor was there anyway the surface could communicate with him (Tr. 70, 71).

If Webb broke a leg while underground he would either crawl out or his secretary would send someone to look for him (Tr. 71). Anyone searching for him would not know his whereabouts but they would know the route he was traveling (Tr. 72, 111).

None of the first aid supplies had been removed from the mine (Tr. 75). But they were removed the week before the mine was flooded (Tr. 76).

This was not a gassy mine and the ventilation system provided fresh air for miners (Tr. 80, 87). Webb has no ventilation training but he could feel air on his face and he concluded the mine was ventilated by some kind of chimney effect (Tr. 84, 90, 131). On his inspections he did not carry a flame safety lamp (Tr. 87). He could not hear the fan running at all times while he was underground (Tr. 90).

There were lights at various pump stations. Also there were signal lights down the drifts but no overhead lighting (Tr. 89). Webb and the inspector used cap lights (Tr. 90). None of the lights had been removed in any part of the mine (Tr. 146, 148).

Webb did not keep a bar with him to test any loose (Tr. 93). During the 20 month period the mine was inactive dust accumulated on the back and roof (Tr. 93). The accumulation made it more

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difficult to make a visual determination of the loose (Tr. 94). Webb didn't know if any loose had been barred down during the time he inspected the pumps (Tr. 94). He himself had not done any barring down but if he had observed any bad ground he would have reported it (Tr. 112, 120).

Webb was familiar with the escapeway for the mine but he didn't know the contents of the written escape plan (Tr. 99, 100). There was one mine map at the 9360 hoist and other places. But Webb didn't know the extent to which they were updated (Tr. 100, 101).

The lack of a communication system prevents a miner from being advised of a potential emergency (Tr. 102). The inspector did not comment about any hazard he had observed (Tr. 124, 125). While underground Webb never exposed himself to any hazards that he recognized (Tr. 144).

The Commission has previously reviewed the "working alone" regulation. Specifically, in construing 30 C.F.R. 57.18025 (the unchanged predecessor from 30 C.F.R. 57.18025) the Commission observed that the regulation does not prohibit employees from working alone. Further, hazardous conditions do not automatically exist merely because an employee is "working alone", Cotter Corporation, 8 FMSHRC 1135 (1986).

In Cotter the Commission did not consider the issue of hazardous conditions but addressed "the crucial issue of whether Lopez [the miner] had sufficient contact with other [Cotter] miners" within the meaning of the regulation. Specifically, according to the Commission, the precise issue presented before them was whether the contact between Lopez and the other Cotter employees was (1) of a regular and dependable nature and (2) commensurate with the hazard presented.

After considering the evidence the Commission concluded that the presence of other Cotter workers "was in general accord with a plan to provide periodic contact with Lopez on a regularized basis."

In the case at bar there was no periodic contact whatsoever between Homestake and Webb. At best the evidence shows Webb would advise the Homestake secretary, Bev Larson or his supervisor, that he was going underground. If he did not return in two hours (Footnote 3) she was to advise other authorities to organize a search party.

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Merely advising the Homestake secretary that he was going underground did not constitute communication or contact of a regular or dependable nature as required by the regulation. Further, it is obvious that any cries for help by Webb could not be heard nor could he be seen while he was underground.

Mr. Robertson, Webb's supervisor, testified he knew when Webb was going underground. In addition, they would go look for him if he didn't return. Mr. Robertson's involvement, with a paucity of supporting evidence, is basically on the same level as the company's secretary.

Accordingly, I conclude that Webb was "working alone" within the meaning of 30 C.F.R. 57.18025.

In its post-trial brief Homestake relies on Cotter Corporation, and Old Ben Coal Company, 4 FMSHRC 1800 (1982). However, for the reasons stated above these cases support the Secretary and not Homestake.

Further Findings and Discussion

The Commission has previously observed that the Secretary may promulgate standards prohibiting certain tasks from being performed alone Cotter Corporation, 8 FMSHRC at 1137 (footnote 3).

However, the pivotal issue here is whether there existed "hazardous conditions" (Footnote 4) in the Bulldog mine that would endanger Webb. Inspector Marti's testimony addresses these issues. The hazards, as envisioned by the inspector involved lighting, lack of communication, electrical shock, ventilation, ground conditions, escapeways, and the non-operating status of the mine.

Lyle K. Marti, a person experienced in mining, has been an MSHA inspector since 1975 (Tr. 151-156, 179, 183, 184).

On December 10, 1986, he inspected Homestake's Bulldog mine. It was a regular inspection as mandated by the Act (Tr. 156).

Mr. Marti accompanied Webb on his inspection of the pumps. They followed the general route and procedures as described by Webb in his testimony (Tr. 157). The inspection took three to three and one-half hours. In a non-stop effort the area could be covered in two hours (Tr. 160). If a hazard existed then both the inspector and Webb were exposed to it (Tr. 222).

There were no lights in the area. The men used cap lamps for the four miles they traveled (Tr. 161). At the cage the two

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men discussed the fact that the hoist logs were not being maintained (Tr. 162). One man could not conduct the hoist inspection properly because the controls were not in the same area as the cage (Tr. 163).

After the men left the hoist at the 9000 foot level they had a lengthy discussion about Webb's inability to communicate with the surface if he discovered a hazard, such as a fire. The telephones had been removed (Tr. 164, 166, 173). All mine rescue systems are built around communications.

Webb normally went underground on Monday, Wednesday and Fridays. Webb would also tell his wife whenever he was going underground alone (Tr. 164, 173). He expressed to Marti a specific concern about his safety in working alone. He also was worried about his secretary's memory (Tr. 165).

They mentioned the possibility of electrical shock and the lack of any person to render first aid (Tr. 167). No citation was written for any electrical hazard and Marti agreed he wasn't an expert in the electrical field (Tr. 232, 250).

Mr. Marti observed that at the junction of three crosscuts there was no stopping. This condition could create a short circuit of air (Tr. 167, 168). No citation was written but if a short circuit occurred there would be insufficient oxygen with resulting loss of consciousness (Tr. 168, 218). Two air samples taken by Marti; when analyzed at a later time they showed the air had sufficient oxygen content (Tr. 238, 241, 242, Ex. R8). In the inspector's opinion no one could determine how long the power would be off before the oxygen level became deficient (Tr. 247). In any event the inspector did not consider himself to be an expert in ventilation (Tr. 250). Without other miners in the area no one would be available to check the ventilation or repair it (Tr. 169). At the closeout conference no one disagreed with Marti's assessment of the short circuiting of the ventilation and they agreed the mine map was out of date. The company representatives were non-committal about the lack of communication, and the buildup of dust on the ribs and back (Tr. 170, 171). Marti wrote citations for "working alone" and the "escape plan" (Tr. 171).

In Marti's opinion the lack of production in the mine dramatically increased the hazards to Mr. Webb (Tr. 172).

There was no equipment in the mine to sound the ribs and back (Tr. 201). An abnormal amount of dust had settled on the ribs and backs. This accumulation obliterated the inspector's ability to make a visual determination as to whether these areas were sound (Tr. 202, 203, 225, 229). If you don't visually determine if ground is bad you normally don't test it (Tr. 203). In fact, no bad ground was observed (Tr. 226, 228, 231).

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The mine escape plan was not adequate. An additional development was not shown on the map. An updated plan would show the flow of air, telephones and the location of emergency equipment (Tr. 204). If anything happened to Webb his rescuers wouldn't know his whereabouts (Tr. 205). There were no signs pointing to escapeways (Tr. 206). It was not known when the escapeway had been last traveled (Tr. 207). It is the responsibility of the mine manager to check and maintain the escapeways (Tr. 208). If the escapeways hadn't been checked no one would know whether they were even passable (Tr. 209, 210).

Mr. Marti felt the two citations he issued, when considered with the recommendations as to ventilation and the follow up procedures, were sufficient (Tr. 212). He didn't write additional citations because he has always received good cooperation from mine management (Tr. 249).

The inspector considered that the hazards confronted when Webb was underground alone were significant and substantial (Tr. 217).

In the inspector's opinion, in determining the hazard it makes a difference whether a mine is operational or shut-down (Tr. 252, 259).

Thomas M. Robertson testified for Homestake. He is a person experienced in mining and currently the general manager at the Bulldog Mountain Operation (Tr. 277-278, 284). There were no lost time accidents underground in 1983, 1985, 1986 or 1987. In 1984 there was one lost time accident when a miner broke his finger (Tr. 279). The mine received safety awards for 1983, 1984 and 1985 (Tr. 280, 281).

After production was stopped in the mine all explosives were removed, and all tools were brought to a central location. In the two years before the shut-down about 70 miners worked underground.

The witness was not aware of any tests by the company or MSHA that showed bad air (Tr. 281, 282).

After the mine closed MSHA continued its inspections but the emphasis was on the North Amethyst mine. No citations were ever written for conditions underground (Tr. 282, 283).

Mr. Robertson always asked about Webb's whereabouts in the mine.

On December 10, 1986, the existing escapeway maps covered the area involving Webb's route to the pumps (Tr. 283).

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Since the shut-down in January 1985 Robertson has been in the underground area four times (Footnote 5) (Tr. 285)

In Robertson's opinion Webb was not exposed to any hazard when he inspected the pumps without being accompanied by another person. This is so because he was traveling in a known area where the air was known to be of good quality. Further, the company knew the duration of the visit and the ground conditions were good (Tr. 285). In addition, Webb has good mining experience and was reliable; further, he was a staff supervisor (Tr. 286).

Mr. Robertson did not observe any excessive buildup of dust. There was nothing that would limit a person's ability to assess the ground conditions (Tr. 287).

At the time of the hearing Robertson only had 16 employees. As a result he would be responsible for knowing whether Webb was going into the mine (Tr. 291). It would be important to know when Webb came back out of the mine. If he didn't appear they would go after him (Tr. 292).

Evaluation of the Evidence

The record here addresses several areas of alleged hazardous conditions. As previously noted, these areas, with their varying degrees of complexity involve lack of lighting, lack of communication, electrical shock, ventilation, ground conditions, escapeways and the non-operating status of the mine.

Homestake's broad view is that none of the "hazards" enumerated by Inspector Marti triggered application of 30 C.F.R. 57.18025. It is, accordingly, necessary to review the evidence in further detail.

Concerning the lack of lighting (Footnote 6): Mr. Marti failed to present any credible evidence that the lights were not

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functioning. I credit Webb's contrary testimony that the lights were in place and functioning, just as when the mine was active. Company electrician Webb would be particularly attentative to the lighting conditions. As chief electrician he should have been in charge of removing the lights.

Concerning the lack of communications: It is uncontroverted that the telephone system had been removed from the mine before the inspection. Webb's situation underground was that he could not contact anyone outside the mine and, conversely, they could not contact or respond to him.

In recently reviewing the two way communication requirement (pertaining to underground coal mines) the Commission observed that "(t)he obligation imposed on an operator by the requirement of 30 C.F.R. 75.1600Ä1 that there be an outside person to respond to miners underground in the event of an emergency is an important requirement and any violation of the standard has serious safety implications". Harlan L. Thurman v. Queen Anne Coal Co., 10 FMSHRC 131 (1988).

The parallel regulation affecting Homestake's underground metal and non-metal mine is contained in 30 C.F.R. 57.18013 (Footnote 7). While this case is not an enforcement proceeding for the violation of the communication regulation I find that the Commission's statements constitute persuasive support for the view that the lack of a communication system was a hazardous condition that could endanger Webb while performing work underground.

Homestake asserts that Inspector Marti did not issue a citation for this condition nor did his concern for communications stop him from conducting the inspection.

As noted the issue here is whether "hazardous conditions" existed. The issuance of a citation for a violative condition is not a condition precedent for the proof necessary to establish a violation of 57.18025. I further agree that at no time was Webb ever trapped by a fire. But merely because he was not involved in such a dynamic event his work environment was nevertheless hazardous.

Homestake's position is that its personnel on the surface knew when, where and how long Webb would be underground. This argument overlooks the key reason why the condition was hazardous -- there was a lack of communication between surface and underground.

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Homestake claims Webb had greater contact with the surface after the production shut-down than before. I disagree. Webb had no communication whatsoever with the surface after the communication system was removed.

Concerning electrical shock: no credible evidence indicated the pumps and electrical equipment were hazardous. (Footnote 8) Inspector Marti admitted his lack of electrical expertise.

Concerning ventilation: at the start of his many inspections Webb would turn on the ventilation. The relevant regulation, 30 C.F.R. 57.8527, does not require oxygen deficiency testing. However, the air in all active workings shall contain at least 19.5 percent oxygen (30 C.F.R. 57.5015). The inspector's test, analyzed after the inspection, indicated an oxygen concentration of 20.85 percent (Exhibit R8). The mine has a history of adequate air and, in addition to its ventilation system, it appears to be naturally ventilated.

The foregoing factors cause me to reject the inspector's opinion and conclude that no hazardous conditions existed due to inadequate ventilation (Tr. 189-191).

In their trip underground the two men carried self-contained respirators but the one hour rescuers would be insufficient from the depth of the mine (Tr. 196-199).

Concerning the ground conditions: I find from the credible evidence that an accumulation of dust obliterated the inspector's ability to inspect the back and ribs. However, no bad ground was ever observed. The related regulations, 30 C.F.R. 57.3022 and 57.18002, require examination of working places and adequate action, if necessary. However, on this record, no conditions existed that could have endangered Webb while underground alone.

Concerning the escapeways: the inspector issued a non S & S citation for the failure of Homestake to maintain a current escape plan (Exhibit R9). The citation was not contested. However, I find from the credible evidence that the citation was issued because the mine map failed to include a development unrelated to Webb's routes. However, additional evidence by Inspector Marti is uncontroverted: An updated mine map would show the flow of air, as well as the location of telephones and emergency equipment. Further, there were no signs pointing to escapeways. The failure to provide this escapeway information subjected Webb to hazardous conditions within the meaning of 57.18025.

Concerning the non-operating status of the mine: the inspector expressed the opinion that an added element of hazard resulted from the fact that the Bulldog was not operating. The Commission condemned such a view of the "working alone" regulation in Cotter Corporation, 8 FMSHRC at 1137. In short, the Secretary is obliged to show that hazardous conditions existed, they cannot be presumed because the mine is not operating.

Homestake contends the citation should be invalidated because of MSHA's interpretative statement. The statement, after citing the "working alone" regulation reads as follows:

APPLICATION: This standard is applicable where hazardous conditions exist, such as in development headings, stopes, pillar recovery, shafts and raises, and any area where timber repair or ground control work is required or any unusual measures are necessary to alleviate hazards.

This standard should not be applied to work conducted in areas where the environs have been made safe and are kept well maintained such as is normally found at shaft landings, underground pumphouses, hoist rooms, repair and maintenance shop areas, magazine sites, and travelways that are provided with safeguards, clearances or shelter holes and warning devices. This standard does not apply to examinations of areas of the mine or working places by qualified personnel such as fire bosses, shift bosses, foremen and safety personnel unless unsafe conditions are known to exist prior to such examination and unless such personnel would be endangered by such examination.

Exhibit R1

Contrary to Homestake's views I conclude the initial paragraph is not applicable. The failure to provide a communication system and proper escapeway information, as previously stated, establishes conditions that are hazardous.

The second paragraph does not assist Homestake because those defective situations must have been known to Homestake since the company had removed the system and failed to update the mine map.

On the same basis the third paragraph of the Secretary's bulletin is not applicable.

In any event, MSHA policy is not binding on the Commission, Old Ben Coal Company, 2 FMSHRC 2806 (1980); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C.Cir.1986).

The citation should be affirmed.

three hours.

~Footnote_four

4 "Hazardous" has been defined as [e]xposed to or involving danger; perilous; risky." Black's Law Dictionary 647 (5th ed. 1979).

~Footnote_five

5 The witness also testified he had been underground 12 to 15 times since the shut-down (Tr. 286).

~Footnote_six

6 This is not an enforcement proceedings but the relevant regulation is 57.17001 which provides:

Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

Further, 57.17010 Electric lamps provides:

Individual electric lamps shall be carried for illumination by all persons underground.

~Footnote_seven

7 57.18013 provides that "A suitable communication system shall be provided at the time to obtain assistance in the event of an emergency".

~Footnote_eight

8 For electrical requirements see Subpart K - electricity, 30 C.F.R. 57.12001 et seq.