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

DAKCO CORPORATION,
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. WEVA 87-333-R
Citation No. 2894879; 7/31/87

Docket No. WEVA 87-334-R
Citation No. 2902509; 7/29/87

Martinka No. 1 Mine
Mine ID 46Ä03805 HIV

DECISIONS

Appearances: Ross Maruka, Esq., Fairmont, West Virginia, for
the Contestant;
Mark D. Swartz, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern Notices of Contests filed by the
contestant pursuant to section 105(d) of the Federal Mine Safety
and Health Act of 1977, challenging the legality of two section
104(a) citations, with special "significant and substantial" (S &
S) findings, issued at the mine by MSHA inspectors on July 29 and
31, 1987. The citations were issued because of the alleged
failure by the contestant to provide training for one of its
employees who was performing work at the mine preparation plant,
and its failure to have available at the mine training records
for seven employees who were also performing work at the plant.

The contestant stipulated that as of July 31, 1987, the
cited employee had not received the twenty-four (24) hour new
miner training specified at 30 C.F.R. 48.25, and that on or
before July 29, 1987, it did not have training certificates or
other records required by 30 C.F.R. 48.29(a), certifying that
seven of its employees working at the preparation plant

~1260

had completed MSHA's approved training program. Contestant's defense is that the employees in question were construction workers performing construction work, rather than maintenance or service work, and were therefore excluded from the definition of "miners" found in section 48.22 for the purposes of MSHA's cited mandatory training standards. MSHA takes the contrary position, and asserts that the employees in question were performing repair and maintenance work for frequent or extended periods of time, and were regularly exposed to safety hazards at the preparation plant. Under these circumstances, MSHA asserts that the employees were in fact "miners" within the regulatory definition, rather than "construction workers," and were therefore required to take the training mandated by its regulations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq
2. Sections 104(a) and 105(d) of the Act.
3. Commission Rules, 29 C.F.R. 2700.1, et seq.
4. Mandatory training standards 30 C.F.R. 48.25 and 48.29(a).

Issues

The critical issue in this case is whether or not the contestant's employees are "miners" subject to MSHA's training requirements as that term is defined by 30 C.F.R. 48.22(a)(1). If they are, the additional issues are (1) whether the cited violations occurred, and whether or not they were "significant and substantial" (S & S).

Stipulations

The parties stipulated to the following (Exhibit JÄ1; Tr. 13Ä15):

1. Dakco Corporation is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, Public Law 91Ä173, as amended by Public Law 95Ä164 (Act).
2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Act.

3. Dakco Corporation employees were doing work at the preparation plant of the Martinka No. 1 Mine during the period from May through August 1987.

4. On and before July 29, 1987, Dakco Corporation did not have training certificates or other records certifying that seven (7) of its employees working at the Martinka No. 1 Mine preparation plant had completed the MSHA approved training program. The seven (7) employees had not been trained as of July 29, 1987.

5. Victor Wilson was a Dakco Corporation ironworker working at the preparation plant at the Martinka No. 1 Mine during July 1987.

6. As of July 31, 1987, Victor Wilson had not received the twenty-four (24) hour new miner training which is specified at 30 C.F.R. 48.25.

7. Dakco Corporation was issued section 104(a) Citation No. 2902509 on July 29, 1987 and section 104(a) Citation No. 2894879 on July 31, 1987.

8. The parties stipulate to the authenticity and admissibility of the following documents:

a. A copy of section 104(a) Citation No. 2902509 issued by inspector Alex Volek on July 29, 1987.

b. A copy of section 104(a) Citation No. 2894879 issued by inspector Edwin W. Fetty on July 31, 1987.

Discussion

The contested citations in issue in these proceedings are as follows: (Footnote a1)

DOCKET NO. WEVA 87Ä333ÄR

Section 104(a) "S & S" Citation No. 2894879, issued on July 31, 1987, cites an alleged violation of mandatory training standard 30 C.F.R. 48.25(a), and the cited condition or practice is described as follows:

Victor Wilson, ironworker, has been assigned work duties consisting of maintenance and repair work in and around the preparation plant, not provided with the required training.

A 104(g)(1) order (no. 2894880) will be issued in conjunction with this citation. Don Keffer is the responsible foreman.

DOCKET NO. WEVA 87Ä334ÄR

Section 104(a) "S & S" Citation No. 2902509, issued on July 29, 1987, cites an alleged violation of mandatory training standard 30 C.F.R. 48.29(a), and the cited condition or practice is described as follows: "A copy of the records of training were not available at the mine site for seven of the 28 employees performing maintenance and repair work on the preparation plant."

Respondent's Testimony and Evidence

Albert H. Kirchartz, testified that he is employed by the Southern Ohio Coal Company at the Martinka No. 1 Preparation Plant as a plant mechanic on the midnight shift and also serves as a safety committeeman for UMWA District 31, Local 1949. He confirmed that he performs work in all areas of the plant, including the adjacent loadout, raw coal silos, and dump, and that his work includes the changing out of screens, complete units, pipework, and the repair and replacement of chutes. He explained the purpose of the preparation plant, and confirmed that the coal which is processed by the plant comes from the Martinka No. 1 Mine located approximately

~1263

250 yards from the plant. He also identified and explained the equipment located inside the plant, and confirmed that approximately 16 employees normally work inside the plant on each of three shifts (Tr. 23Ä30).

Mr. Kirchartz stated that he worked at the plant from May through August, 1987, and was present during the July 25 through August 7, 1987 vacation period. He also stated that employees of the Dakco Corporation were in the plant for approximately 6 weeks, from May until "maybe a month after the vacation period." He believed that these employees worked in the plant from the 3 day Memorial Day period, and intermittently from that time through the vacation period from July 25 to August 7, and for approximately a month after vacation. He stated that the employees worked the day shift, starting at 7:00 a.m., and he would observe them coming in and starting to work, including periods when the plant was in operation (Tr. 30Ä32).

Mr. Kirchartz described the work being performed by the Dakco employees, and it included the removal and replacement of coal screens, the removal of handrails and the plant building siding, the removal and installation of new coal chutework, and the removal and replacement of the piping associated with the screens. He confirmed that Southern Ohio employees had previously performed some of this same type of work (Tr. 34Ä36).

Mr. Kirchartz stated that the preparation plant was in operation during the vacation period from July 25 through August 7, and that the midnight shift of July 25 "ran filter cake." He served as the tipple attendant and had to insure that all of the material was going through the chutes to the loading bins to be hauled away by trucks. He also worked in the plant control room the following day running the plant. Southern Ohio employees were also present in the plant during this time operating or testing equipment, and he observed people removing screens from the eighth floor of the plant (Tr. 37Ä38). He confirmed that all employees working in the plant, including Dakco employees, would have occasion to go to the plant control room to lock out equipment and tag it out while they were working on it, and although no coal was being processed through the plant at this time, he believed that "there was as many hazards at that time or just as many as with the coal being run through it" (Tr. 39).

Mr. Kirchartz described the types of hazards presented in the preparation plant during the vacation period when no coal was being processed, including potential fire hazards from the

~1264

use of oxygen and acetylene tanks and welding work, running belts, hoisting hazards, electrical lock-out hazards, slip and falls, blocked escapeways, noise, coal dust accumulated on structural beams and the chutes, and the presence of a 5,000 gallon caustic soda tank located adjacent to a loading crane (Tr. 41-49).

In addition to the aforementioned hazards, Mr. Kirchartz believed that Dakco employees would also be exposed to hazards associated with methane from the coal accumulated in the chutes and storage areas, the elevator hoist area used to carry men and small equipment, which was not always chained off, a warning light on the hoist which was not being used, tie-lines associated with the removal of the plant siding, and the old deteriorated screen framework and chutes which were being removed (Tr. 51-55). Mr. Kirchartz also confirmed that there were no barriers separating the work areas of Dakco personnel and Southern Ohio personnel. He also confirmed that the reason Dakco was doing the work during the 2-week period the mine was down was due to the scope of the work, which entailed the removal and replacement of a number of screens, and this work could not be performed during this time by Southern Ohio employees (Tr. 57).

On cross-examination, Mr. Kirchartz agreed that the previous work performed by Southern Ohio employees in the plant with respect to the screens was not of the magnitude or volume that was being done by Dakco during the vacation period. He also agreed that Dakco's work was performed on the third, eighth, and ninth floors of the plant, and it entailed the gutting, removal, and replacement of chutes, and screens, and tying the new ones into the old workings where necessary, and that any "repairing and patching" work was a necessary and integral part of the overall removal and installation work (Tr. 60).

Mr. Kirchartz confirmed that he was familiar "to a degree" with the citations which were issued to Dakco, and in his judgment, the work being performed by Dakco was "repairing and maintaining" work (Tr. 63). He agreed that the new structures installed by Dakco made for a more efficient system and increased the production capacity of the plant (Tr. 64).

Mr. Kirchartz agreed that the noise levels to which Dakco employees may have been exposed to during the vacation period when the plant was not processing coal was less than the exposure when it was fully operational. He also agreed that the quantity of any accumulated coal dust would be less when coal was not being processed through the plant, but maintained that

~1265

methane would still be present even if the coal were wet. He conceded that he made no actual count of the number of acetylene and oxygen tanks being used by Dakco during its work, and confirmed that all employees performing work on a piece of plant equipment, including Dakco employees, would have access to the plant control room so that they could lock-out the equipment while working on it (Tr. 64Å68).

Mr. Kirchartz confirmed that Dakco employees worked on all three shifts during the time in question, and that while he worked the midnight shift for the first 2 days of the vacation period, July 25 and 26, he began working on the day shift on July 27, and was present in the plant most of the time that Dakco people were performing their work. He also confirmed that the work he and other employees of Southern Ohio were doing in the plant was not the same work being performed by Dakco (Tr. 68Å69).

Alex K. Volek, MSHA Coal Mine Inspector, testified as to his experience and duties, and he confirmed that since October 1986, he has been assigned to inspect the work areas of independent contractors to insure compliance with the mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations, and the training requirements found in Part 48. He confirmed that he inspected the subject plant beginning on July 28, 1987, after determining that contractors were scheduled to do work there, and he identified some of the contractors, including Dakco, which had sub-contracted a job from FairÅQuip. At that time, he met with Mr. Don Keffer, the president of Dakco, and Mr. Keffer confirmed that his employees "would be doing some changing out work with screens, pipes and various other work in the plant." In response to his inquiries, Mr. Keffer speculated that 28 Dakco employees would be on the mine property, and that some of his people were trained. However, Mr. Keffer did not have any training records available at that time, and he informed Mr. Volek that he would make them available for review and discussion the next day, July 29. Mr. Volek stated that "I didn't see no addition to the plant being built. I didn't see any new construction being done" (Tr. 73Å79).

Mr. Volek stated that when he inspected the plant on July 28, with Mr. Keffer, he observed a number of oxygen and acetylene tanks in the elevator approach area which were not secured, and he issued a citation to Southern Ohio. He also encountered an employee leaving an elevator on which he had also stored his equipment, and although he discussed the matter with the employee, he did not issue any citation. He also observed welding and burning work being performed on

~1266

different floors of the plant, and observed burning slag generated by the welding work falling to the floors below through the large holes and openings in the floors from where equipment had been removed. Some of the floor openings, which he estimated to be 15 by 12 feet, had ropes or tape strung along the back side as improvised handrails, and he concluded that they were insufficient to prevent anyone from falling into the floor openings. He also encountered an obstructed walkway and a leaking acetylene tank which had previously been detected and scheduled for change out. Mr. Volek confirmed that he issued no citation for the leaking tank because it was being taken care of, and he could not recall issuing any citations for any of the other conditions which he observed (Tr. 80Ä85).

Mr. Volek confirmed that he returned to the mine on July 29 and reviewed Mr. Keffer's training records which he had brought with him. Upon review of the records, Mr. Volek determined that 21 of Dakco's employees had been trained as reflected by the records produced by Mr. Keffer. However, Mr. Keffer had no training records for seven additional employees who were working at the mine. Under the circumstances, Mr. Volek issued a citation to Mr. Keffer for not having the records available as required by section 48.29(a), and he fixed the abatement time for the next morning, July 30, 1987 (exhibit RÄ1). He subsequently issued a section 104(b) order for non-compliance on July 30, when the records were not produced (exhibit RÄ1ÄÄ) (Tr. 85Ä88).

With regard to the citations issued for the failure of Mr. Keffer to make available any training records for seven of his employees, Mr. Volek confirmed that he characterized the work being performed by these employees as "maintenance and repair work" on the face of the citation and order because he believed that "the work that they were doing, I felt, was maintenance and repair work." He also confirmed that he applied MSHA's guidelines as follows at (Tr. 89):

A. As I -- the guidelines I have in relation to maintenance and repair work versus construction work are such that if the miners are working in the environment of the contractors -- or the contractors are working in conjunction with the miners and they are exposed to mine hazards and there is no building of a new facility or no expansion of a new facility and they are in the work environment of the miners, then they are required to train.

~1267

Mr. Volek confirmed that the guidelines to which he referred are those stated on page 34 and 35 of an MSHA Administrative Manual dealing with Part 48 training and retraining of miners, July 1, 1985 (exhibit ALJÄ1; Tr. 93Ä94; 109). He also confirmed that since Mr. Keffer produced the training records for some of his employees, he must have been aware of the fact that his employees were required to be trained.

Mr. Volek explained that another prime contractor, FairÄQuip, had subcontracted the Southern Ohio preparation plant work to Dakco. At that time, FairÄQuip had its employees working at another plant performing repair and maintenance work, and the employees were not trained. Mr. Volek required them to be trained, and they did in fact receive MSHA approved training. Mr. Volek was sure that he issued a citation to FairÄQuip for not training its employees, but he was not certain (Tr. 101). Mr. Volek concluded that at the time FairÄQuip subcontracted the work to Dakco, FairÄQuip was aware of MSHA's training requirements, and its project manager John Pelagreen was present when he reviewed Dakco's records (Tr. 97).

Mr. Volek confirmed that he did not discuss with Mr. Keffer the reasons for his failure to produce Dakco's training records on July 30, because Mr. Keffer did not appear at the mine that day. Mr. Volek was told that Mr. Keffer was still in his office in Athens getting the records, but since he did not appear at the time the citation was due for abatement, Mr. Volek issued the order (Tr. 103). The order was terminated the next day, July 31, by Inspector Edwin Fetty after Mr. Keffer produced his records that same day (Tr. 103Ä104). Inspector Fetty determined that six of the seven Dakco employees for whom training records had been produced had been trained. Mr. Fetty also determined that one of the employees (Victor Wilson), had not been trained, and he issued a citation to Mr. Keffer on July 31 for not training Mr. Wilson. He also issued an order withdrawing Mr. Wilson from the mine until he was trained (exhibits RÄ2, RÄ2ÄÄ; Tr. 102Ä104).

Mr. Volek stated that contractors are not necessarily required to have their own MSHA approved training plans for their employees. If they choose not to have their own plan, they may use the existing plan applicable to the mine operator who hires them. Mr. Volek confirmed that at the time of his inspection he made no inquiry of Dakco as to whether it had its own training plan or relied on Southern Ohio's plan.

On cross-examination, Mr. Volek stated that he could not recall the type of training received by the 21 Dakco employees

~1268

for whom training records were made available by Mr. Keffer. He agreed that the type of training required of the other seven employees would have required removing them from work and undergoing a one-day long training program, and he was satisfied that the 21 employees did not require further training (Tr. 106Ä107).

Mr. Volek stated that he would not characterize the work being performed by Dakco's employees as "an alteration of existing facilities;" "rebuilding of an existing facility;" or the demolition "of an existing facility or a portion of an existing facility." He could not state whether the work being performed by Dakco was "routine maintenance" without speculating, but then said "I could say, yes, it is routine maintenance" (Tr. 108).

Referring to MSHA's manual guidelines, at pages 34 and 35 (exhibit ALJÄ1) Mr. Volek disagreed that the distinctions between "service and maintenance and repair," as opposed to "construction" was "a fuzzy or gray area," and stated that it was clear to him, particularly when he had to consider that the contractor's employees are working in the same environment and are exposed to the same hazards as miners. He conceded that he made no mention of any hazard exposure by Dakco employees when he issued his citation (Tr. 109Ä111). He also conceded that on the days that he was at the mine, it was not producing coal through the preparation plant, and that following MSHA's guidelines, he would not consider the mine as "operational" on those days (Tr. 111). Mr. Volek also conceded that if one could establish that the mine was down at any particular time and was not operational, an employee engaged in construction work rather than in repair and maintenance work would fall under the exception found in MSHA's training requirements, and he would not be required to undergo training. In these circumstances, there would be no violation, and MSHA's counsel agreed that this would be the case (Tr. 114).

Referring to the language which appears at page 35 of MSHA's Manual (exhibit ALJÄ1), "Installing or rebuilding of a conveyor system would normally be considered construction," Mr. Volek agreed that substituting the words "chute system, screen system" for "conveyor system" would also be considered construction work. He also agreed that what Dakco was doing was "tearing out old and installing new chutework, taking out old and installing new screenwork" (Tr. 115Ä116).

MSHA Coal Mine Inspector/Electrical Specialist Edwin W. Fetty testified as to his experience and duties, including work in the construction industry. He confirmed that he was

~1269

at the plant, beginning on July 28, 1987, to conduct electrical spot inspections of the work being performed by contractors, and was also there on July 29 and 31, 1987. He found no distinguishable barriers separating or distinguishing the work areas of Dakco and Southern Ohio employees, and he observed ribbon placed around exposed areas of the plant which had been cut through with jackhammers to facilitate the installation of pipes and chutes, and he also observed workers removing parts of screens and chutes. He noticed several hazards associated with rope or ribbon replacing handrails which had been removed, welding cables, torch and air hoses, oxygen and acetylene bottles, and materials lying in the walkways (Tr. 124-129).

Mr. Fetty stated that he was instructed to return to the mine on July 31, to follow-up on some pending paper work which Inspector Volek had issued, and after reviewing Dakco's training records with MSHA training specialist Aaron Justice, they found no training record for employee Victor Wilson. Mr. Fetty informed Mr. Keffer that Mr. Wilson would have to be withdrawn and trained and that he would issue an order and a citation requiring Mr. Wilson to be trained and that a record of this training had to be made available to him. Mr. Keffer immediately removed Mr. Wilson, and Mr. Wilson confirmed to Mr. Fetty that he had not been trained. Mr. Keffer advised Mr. Fetty that he needed Mr. Wilson on the job, and Mr. Fetty agreed to make himself available later in the day to abate the order and citation upon Mr. Keffer's proof that Mr. Wilson was trained. Mr. Keffer came by his home later that day, and after producing the required proof, Mr. Fetty terminated his citation and order, and the order previously issued by Inspector Volek (Tr. 129-134).

Mr. Fetty confirmed that during the course of his previous inspection of the plant on July 28, he issued no citations to Dakco. Any inspection of Dakco's work that day would have been in connection with electrical work. He had no knowledge as to how long Dakco may have been at the mine, and he could not recall speaking with Mr. Wilson about the nature of the work he was performing. When asked about any assumptions that he may have made with respect to whether Dakco was performing maintenance and repair work subjecting it to the MSHA's training requirements, Mr. Fetty responded as follows at (Tr. 136-137):

A. No, I didn't really assume. It was in my opinion of being in the construction business and doing things. I have my own distinguishment between what is construction and what is

~1270

construction repair. I feel if you remove something, a portion of, and replace it with something, you're actually restoring it back to what would be to originality or productive means. If you was putting all new chutework in, all new pipework, then that would be what I would consider to be construction work.

Mr. Fetty believed that the screens removed and replaced by Dakco were probably the original screens placed in the plant, and that due to updating and modern technology, Southern Ohio felt it was to their advantage to replace them. He had heard from others that Dakco had been on the property since May, 1987, doing other jobs, and he knew that they were on the property in 1986 doing some work during the miners' vacation period, but he had no records confirming how long Dakco had been on the property. He confirmed that Dakco abated his citation and order concerning Mr. Wilson by giving him 8 hours of refresher training, and Mr. Fetty had no knowledge as to the kind of training given the other Dakco employees (Tr. 139-141).

On cross-examination, Mr. Fetty confirmed that while he did not observe the work being performed by Dakco on July 31, 1987, when he issued his citation, he did observe some of the work being performed by Dakco employees, particularly with regard to the removal of chutes and screens by means of a large crane. Mr. Fetty agreed that the new installation by Dakco upgraded and improved the efficiency of the system being replaced (Tr. 144).

Contestant's Testimony and Evidence

Donald A. Keffer, President, Dakco Corporation, testified that his company has been in existence since 1984, and that it is engaged in construction work in the coal mining industry. He confirmed that his company performed work at Southern Ohio's Martinka No. 1 Mine in 1987, and that prior to this time he had performed work at the mine three or four times, including 1986 when work was performed at the breaker building during the vacation period. Mr. Keffer stated that during the vacation period of 1987, Dakco removed four screens from the eighth floor of the plant, two screens from the seventh floor, and three screens from the third floor. Dakco was on the property on June 17 for the vacation job. It had previously been there from May 20 through 26 removing and replacing an old belt drive at the preparation plant, and when it finished that job, it came back and started on the vacation job. Employees were on the job from June 17 through the vacation

~1271

period which began on July 25, and the work week was Wednesday through Sunday. The work performed before the vacation period involved the replacement of a magnetic separator tank, which was part of the plant upgrading, and during the vacation period, screens and chutes were dismantled, removed, and replaced, and cranes and hoists were used to remove the old screens through an opening in the side of the plant (Tr. 147-152).

Mr. Keffer identified two photographs depicting the removal of screens from the side of the plant opening (exhibits C-1 and C-2), and he explained that the work performed by Dakco in the plant included concrete floor work, and the installation of structural steel on the floors where the screens and chutes were replaced, and he confirmed that none of the work performed by Dakco employees involved "fixing something which was broken so it could then operate correctly." The work consisting of the "gutting out or removing existing chutework and existing pipework and existing screens and replacing them" with new ones. The installation of new equipment upgraded and improved the efficiency of the preparation plant, and Mr. Keffer was of the view that the work performed was construction work, rather than repair and maintenance work. He believed that the plant had been in place for approximately 12 years (Tr. 153-156).

Mr. Keffer confirmed that at the time the citations were issued he discussed the matter with the inspectors and took the position that the training standards did not apply to his employees because the work they were performing was construction work. However, the inspectors interpreted the work as "maintenance and repair" and so stated on the citations. Mr. Keffer also confirmed that Southern Ohio's policy requires that all mine visitors take 15-minute hazard training, including the wearing of hard hats, hard-toed shoes, and hearing protection as required while in the plant (Tr. 156-158).

Mr. Keffer stated that the vacation work performed in 1987 was his first major project at the plant and that 20 to 25 percent of the plant was removed and replaced. Prior work performed in 1986 at the breaker building, which is physically separated from the plant, lasted 2 weeks, and although MSHA inspectors were present during that work, no training citations were issued. He confirmed that the employees working in the breaker plant had received no MSHA training, and that none of the inspectors who were present at that time questioned any lack of training (Tr. 159, 172-173).

Mr. Keffer believed that the mine may have operated on Saturday and Sunday, July 25 and 26, before the citations were

~1272

issued, and that while no coal was run through the plant, "filter cake" was. This was done to collect fine refuse material to clean up the water system, and entailed the operation of some pumps, filters, and one conveyor belt, and the work was done on the third floor next to where his employees were working (Tr. 160).

Mr. Keffer stated that at the time Inspector Volek appeared at the plant, most of "the junk" had been removed from the plant. All of his employees were experienced workers and were not "hired off the street" (Tr. 161). He characterized the previous work performed at the breaker plant as construction work involving the removal and replacement of deteriorated floors and grating, sandblasting, painting, and concrete work on seven floors (Tr. 164).

Mr. Keffer stated that when he discussed the matter with Inspector Volek all of his employees working at the plant had initially received or signed up for the 15-minute hazard recognition training conducted by the foremen, and weekly safety meetings were held. In addition, the employees whose training records he produced to abate the citation had all received 8-hour comprehensive annual refresher training which was given on July 28, 1987, when Mr. Fetty, Mr. Volek, and Mr. Justice took the position that he was engaged in repair and maintenance work. Six or seven employees were pulled off the job and given training that same night to meet MSHA's requirements (Tr. 167, 171). All of the training given his employees at this time, with the exception of the 15-minute hazard recognition, was given in order to abate the citations and to comply with MSHA's requirements as communicated to him by the inspectors (Tr. 172).

With regard to Inspector Volek's citation, Mr. Keffer stated that after issuing the citation on Wednesday, July 29, 1987, Mr. Volek advised him that he would meet with him on Friday morning. However, because of a schedule change, Mr. Volek returned prematurely on Thursday, July 30, and Mr. Keffer was not available because he was in Ohio retrieving his records (Tr. 172).

Mr. Keffer believed that the training citations he received came about as a result of a dispute and grievance filed by the local union against his company for using non-union labor for the Southern Ohio work which he performed (Tr. 173-176). Mr. Keffer conceded that prior to July 28, 1987, except for the 15-minute hazard recognition training required by Southern Ohio's policy, none of his employees had

~1273

ever received the type of training required by MSHA's regulations, and this included the time that work was performed at the breaker building (Tr. 173-176). Not until after he received the citations did he ever subject any of his employees to any training on the assumption that they were subject to MSHA's regulations, and the training was given after the citations were issued so that they could be abated.

Mr. Keffer confirmed that his consistent position has been that his employees were not covered by MSHA's training regulations because they are construction people. He denied that any of his work for Southern Ohio has been maintenance and repair work, except for those instances where a job bid required maintenance and repair work. He stated that his work with Southern Ohio has always been "new" and that "we take out old and put in new" (Tr. 180-183).

Mr. Keffer explained that the work in question at the preparation plant was initially bid by Fair-Quip with Southern Ohio as a non-union job, and after Fair-Quip over-extended itself during the vacation period and could not do the job, it sub-contracted the work to Dakco, with Southern Ohio's approval (Tr. 184-187). Mr. Keffer confirmed that previous work done by Dakco for Southern Ohio consisted of the breaker building job when the refuse belt drive conveyor was changed out during Thanksgiving of 1986, and the replacement of an underflow thickener pump and new piping in the plant. This work was done in December, 1986, and in both instances Dakco was the prime contractor. Mr. Keffer also confirmed that more work is being scheduled for the 1988 vacation period, and that he contested the citations in order to establish a precedent as to the training requirements which he does not agree with (Tr. 188).

On cross-examination, Mr. Keffer identified and explained several training certificates for several of his employees, and confirmed that the training information shown on the forms were to satisfy the requirements of Southern Ohio's hazard training policy (Tr. 189-195). He confirmed that his employees took the longer 8 hour training course in order to insure that he was in compliance with MSHA's requirements, even though he does not agree with them, and that his present company policy is that all of his employees take 8 hours of annual comprehensive training to avoid future citations (Tr. 198-199).

Frederick J. Hastwell, III, testified that he is a senior coal preparation engineer for the American Electric Power Service Corporation, the parent company of the Southern Ohio

~1274

Coal Company, which operates the mine and plant. He confirmed that he was the project manager for the work being performed by Dakco in July, 1987, and that he was on the premises on a daily basis, and also during the vacation period from July 25 through August 7 (Tr. 203-205).

Mr. Hastwell confirmed that Southern Ohio's policy at the time Dakco was performing the work in the plant required that Mr. Keffer and each shift foreman receive hazard training, and they in turn would train their employees regarding specific construction hazards, and this policy applied to everyone coming on mine property. Mr. Hastwell confirmed that he was familiar with the citations issued to Dakco, and he explained the circumstances under which they were issued. He stated that Mr. Keffer became concerned that the inspectors were requiring other contractors present on the job to show that their employees had received MSHA approved training, and he permitted Mr. Keffer to use Southern Ohio's facilities to insure that his employees received the 8 hour refresher training to abate the citations, even though he (Hastwell) did not agree that MSHA training was required (Tr. 203-210).

Mr. Hastwell stated that in all of his dealings with contractors performing work for Southern Ohio, the Dakco case is the first instance that he knows of where MSHA has requested training records from contractors and issued citations for non-compliance (Tr. 211, 213). Inspector Volek disputed this contention, and stated that he has issued prior citations under similar circumstances, but without reviewing his records, he was uncertain as to whether he has issued citations to contractors who claimed that they were only performing construction work. Mr. Volek stated further that although most contractors performing work in preparation plants have taken the position that they are performing construction work, rather than maintenance and repair, they have always accepted the citations and trained their people without contesting the matter. Although these contractors may have a difference of opinion, Mr. Volek stated that he explained to them the same position he has taken in this case that such workers are working in the same environment as those miners in the production and extraction process (Tr. 214-216).

Mr. Hastwell stated that he was present when Mr. Keffer reviewed his training records with Inspector Volek on July 29, and discovered that everyone but Mr. Wilson had been trained. Mr. Hastwell stated that Mr. Wilson's failure to receive training was a mistake, and that the training records for the other seven employees were found not to be in order because of

~1275

insufficient employment applications or improper hazard training (Tr. 222).

Mr. Hastwell agreed that the work performed by Dakco was construction work, and not repair and maintenance work, and that the replacement of the existing plant facilities provided a major improvement in the efficiency of the plant, including increased capacity and money savings. The replacement of the existing facilities resulted in an increased production capacity of over 200 tons of coal an hour, which resulted in an annual savings of millions of dollars. He also agreed that the employees at the mine had never undertaken a project of the magnitude of that performed by Dakco, and while employees in the past have dismantled broken units and rebuilt them, Dakco took out complete units, installed new structural steel, motors, wiring, put in units in completely new floor space configurations, and upgraded the plant. Mr. Hastwell described the work and equipment installation performed by Dakco by reference to a series of slides shown by Dakco's counsel (Tr. 223-233; exhibits C-3A through C-3S).

Inspector Volek was called in rebuttal, and he denied ever suggesting that Mr. Keffer avail himself of union labor for the project in question. He indicated that he did mention that other contractors may be in a position to help him with training, and did so only because he knew that Mr. Keffer and Mr. Hastwell had a job to do (Tr. 238-239).

Mr. Hastwell was called in rebuttal, and he confirmed that the Dakco project took approximately 2 months to complete, starting with preliminary work on June 17, and extending through the vacation period for 2 or 3 weeks to approximately August 24. Since the completion of that project, Dakco has had no other involvement at the Martinka Mine or other Southern Ohio locations (Tr. 242-244).

MSHA's Arguments

In its posthearing brief, MSHA asserts that the Dakco employees working at the preparation plant were "miners" under the definition found in section 48.22(a)(1), because they fall within two of the four categories set forth in that provision. MSHA states that the employees were working in a surface area of an underground mine, namely a preparation plant, and that they were regularly exposed to mine hazards. Secondly, MSHA states that the employees were maintenance or service workers contracted by the mine operator to work at the mine for frequent or extended periods, and that they do not fall within

~1276

the exclusion for construction workers and shaft and slope workers.

MSHA maintains that Dakco's employees were regularly at the preparation plant from June 17, 1987 through at least August 17, 1987, and that they also worked at the plant during May 20 to 26, 1987. With the exception of the vacation period from July 25, 1987 through August 7, 1987, MSHA states that the preparation plant was in operation when Dakco employees were present, that the plant equipment was in operation during the vacation when filter cake was run during the midnight shift of July 25, 1987, and that various pieces of equipment were run dry and tested during the vacation.

MSHA asserts that throughout the time that Dakco employees were working at the plant, employees of the operator, Southern Ohio Coal Company, were working there as well, and that no physical barriers separated Dakco's employees from Southern Ohio's employees, and that both sets of employees were working in close proximity to each other on at least some occasions. Under these circumstances, MSHA concludes that Dakco workers were exposed to any hazards stemming from the presence of Southern Ohio workers in the same work environment, and vice versa. MSHA further concludes that the hazards described by the witnesses during the hearing are those which one could expect to confront at any preparation plant environment, and that most, if not all, of these hazards could have been present even if Dakco workers had not been carrying out the particular project in question. These are hazards which could result from normal preparation plant operations, including maintenance and repairs that might be carried out by the plant employees themselves.

MSHA points out that the work being performed by Dakco was the subject of a contractual relationship between Fair-Quip and Southern Ohio Coal Company, and since Fair-Quip subcontracted its work to Dakco, Dakco's employees thus were "contracted by the operator" Southern Ohio Coal Company. MSHA maintains that Dakco's employees were working at the mine "for frequent or extended periods" in that the particular project in question lasted at least 2 months, from June 17, 1987 through at least August 17, 1987, and that Dakco had also been at the mine three or four previous times, including a project at the breaker building during the 1986 vacation and a project at the preparation plant from May 20-21, 1987. MSHA concludes that the particular project in question in these proceedings was for a substantial period of time and was one of a continuing series of projects carried out by Dakco at the mine.

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With regard to the project in question, MSHA maintains that Dakco workers were performing maintenance or service work, as opposed to construction, because they were carrying out activities at an already existing mine facility. MSHA asserts that the purpose of the Subpart B training regulations is to protect those workers who come in contact with the unique conditions and hazards of a mine environment, and that maintenance or service employees who work in the vicinity of, and in conjunction with, mine products and equipment must receive this training. On the other hand, employees who are merely digging a mine, building a new mine structure, or expanding a mine into new facilities need only construction-oriented training of the sort to be included eventually in Subpart C when it is promulgated.

MSHA takes the position that Dakco's employees were clearly working at an established functioning mine facility, shared the work environment with Southern Ohio employees, and had to contend with walkways, escapeways, equipment, and elevators that are laid out in a configuration unique to mines as opposed to other facilities. Moreover, Dakco employees were performing tasks done on other occasions by Southern Ohio's personnel, albeit on a significantly larger scale.

MSHA maintains that certain details of Dakco's project-whether they upgraded productive capacity, whether they installed structural steel, whether they changed the physical layout of chutes, screens, and piping - are not critical to resolving this case. MSHA asserts that it is irrelevant that Dakco may call itself a construction contractor, and that the key distinction between "maintenance or service" versus "construction" work is based upon whether a new mine facility was being created or changes were being made within an established mine facility. MSHA concludes that in this case, the facts clearly establish that the latter was taking place, and that the work must be defined as "maintenance or service."

MSHA asserts that the eventual purpose of Subpart C of Part 48 of its training regulations, when they are promulgated, will be to insure that appropriate training is provided to workers exposed to construction-oriented conditions and hazards as opposed to these uniquely related to surface mines and surface areas of underground mines. Workers to be covered under Subpart C are therefore excluded from the coverage of Subpart B. "Construction workers" for the purposes of this exclusion should be defined as those employees exposed strictly to construction conditions and hazards as opposed to those also involving mine conditions and hazards.

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MSHA finds it noteworthy that the exclusion found in section 48.22(a)(1)(i) associates construction workers and shaft and slope workers, and it maintains that these are people engaged in digging new mines, not upgrading, rearranging, or maintaining existed mines. MSHA concludes that the definition of construction workers must fit within this context since these workers are building or erecting entirely new facilities or new structures that are extensions of existing facilities, and are constructing or installing an external shell of a facility as well as the equipment to be placed inside.

MSHA asserts that Dakco was not building a new preparation plant, was not adding a new building or section onto the preparation plant, and was not even building a new level onto the existing plant, a project that might arguably involve significant exposure to the mining conditions on other levels and thus be considered maintenance or service work. To the contrary, MSHA maintains that Dakco changed screens, chute-work, and piping in an effort to replace old equipment and upgrade productive capacity at several levels of the already functioning plant, and that in these circumstances, its employees did not fall within the definition of construction workers as contemplated by section 48.22(a)(1)(i).

Dakco's Arguments

In its posthearing brief, Dakco asserts that the sub-contracting work it was performing at the preparation plant consisted of removing 12 year old chutes, screens and piping in completely different configurations, for the purpose of upgrading and improving the efficiency of the preparation plant. Dakco takes the position that the work being performed by its employees was construction work, rather than repair and maintenance work, and that in the circumstances, its employees were excluded from MSHA's training requirements. Dakco maintains that as construction workers, the employees performing the work in question were not "miners" within the definition of that term found in section 48.22(a)(1), and were therefore not subject to MSHA's training regulations. Dakco points out that since both of the contested citations refer to the work being performed as maintenance and repair work, the inspectors obviously relied on this definitional language as the basis for the citations, rather than any concern for employee regular exposure to mine hazards. In short, Dakco contends that the basis for both citations is the inspectors belief that the work being performed was "repair and maintenance," as opposed to "construction."

~1279

In support of its position, Dakco relies on MSHA's policy interpretation and guidelines concerning "construction" work, as opposed to "maintenance and repairs," as found in an August 26, 1985, MSHA Administrative Manual dealing with the training and retraining requirements found in Part 48, Title 30, Code of Federal Regulations (Exhibit ALJÄ1). In this regard, Dakco makes reference to one of the guidelines found in paragraph (2) on page 35, of the manual which states that no training is required if the mine is not operational and workers are performing construction work. Dakco also makes reference to the manual policy interpretation of the term "construction work," which states that such work "involves the building, rebuilding, alteration, or demolition of any facility or addition to an existing facility," and the interpretation of "maintenance or repair work" as including "routine upkeep of operable equipment or facilities and the fixing of equipment or facilities."

Dakco asserts that the mine was not operational, and that the work being performed constituted the replacement of a 12 year old system, which included the rebuilding, alteration and demolition of the chute system, screen system and piping, rather than routine upkeep, or the replacement of a single chute, screen, or pipe. Dakco further maintains that its preparation plant work was not designed to "repair" or "service" or "maintain" the chute system, screen system and piping, so that they could continue to operate at their optimum levels of performance. Rather, the work was done to upgrade the overall system and improve efficiency, with the result being that the upgraded system saved Southern Ohio millions of dollars.

Dakco suggests that MSHA's enforcement action in these cases may have been prompted by union pressure to force it to use union workers for the work being performed at the preparation plant. In support of this assertion, Dakco stated that a grievance was filed by UMWA District 31 a few weeks before the issuance of the citation because Dakco is a non-union contractor, and that Inspector Volek was identified by one of its witnesses as the individual who suggested that experienced miners from the local Union hall could be called to do the necessary work at the plant. Dakco asserts further that in 1986, when it was performing similar work on a breaker system at the mine, MSHA inspectors who were present raised no questions concerning training or training records of its employees, even though they had not received any MSHA training.

Finally, Dakco suggests that any ambiguity found in MSHA's regulations or administrative manual should be resolved

~1280

in its favor, and that on the facts here presented, the citations should be vacated.

Findings and Conclusions

Docket No. WEVA 87Ä334ÄR

Fact of ViolationÄCitation No. 2902509, July 29, 1987, 30 C.F.R. 48.29(a)

The facts in this case establish that Inspector Volek went to Southern Ohio's mine on July 28, 1987, to inspect certain work areas where several independent contractors were either performing work or scheduled to perform work. Mr. Volek spoke with Dakco's President, Donald Keffer, who was at the mine, and Mr. Keffer advised Mr. Volek that he would have approximately 28 employees working at the mine, and that some of them had received training. Mr. Keffer advised Mr. Volek that he did not have any training records available with him at the mine, but that he would make them available to Mr. Volek. Upon his return to the mine, Mr. Volek reviewed the training records made available to him by Mr. Keffer. The records reflected that 21 Dakco employees had received the required MSHA training, and although Mr. Volek could not recall the type of training that they had received, he was satisfied that they did not require any further training. With regard to the remaining seven employees, Mr. Volek found no training records confirming that they had been trained, and he issued the citation because Mr. Keffer could not produce any training records for these employees, and he cited a violation of training standard 30 C.F.R. 48.29(a), which provides as follows:

48.29 Records of training.

(a) Upon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA form 5000Ä23 that the miner has received the specified training. A copy of the training certificate shall be given to the miner at the completion of the training. The training certificates for each miner shall be available at the mine site for inspection by MSHA and for examination by the miners, the miners' representative and State inspection agencies. When a miner leaves the operator's employ, the miner shall be entitled to a copy of his training certificates.

~1281

Mr. Volek confirmed that he issued the citation because he believed the seven employees in question were engaged in maintenance and repair work, and were therefore required to be trained. In making this judgment, he relied on the nature of the work being performed by Dakco, and MSHA's policy guidelines found at pages 34 and 35 of MSHA Administrative Manual 30 C.F.R. Part 48 - Training and Retraining of Miners, August 26, 1985 (exhibit ALJÄ1). Mr. Volek rejected Mr. Keffer's claims that his employees were "construction" workers, rather than "maintenance and repair" workers, and he relied on the manual guidelines which he believed required MSHA training for contractor employees who are working in the same work environment as other miners, and who are exposed to the same mine hazards, and who are not engaged in the construction or expansion of a new mine facility such as the existing preparation plant.

MSHA's training requirements for miners working at surface mines and surface areas of underground mines are found in Subpart B of Part 48, Title 30, Code of Federal Regulations. The specific training requirements are found in sections 48.25 through 48.28. The cited standard, section 48.29, is a record keeping requirement which requires an operator to record and certify on an MSHA form that a miner has received the specified training, and to have the training records available at the mine for inspection by the inspector. I find nothing in this record keeping requirement that requires any particular types of training. Those requirements are found in the aforementioned training standards. Section 48.29 simply requires certain record keeping upon completion of a miner's training. It does not per se mandate training.

Notwithstanding Dakco's assertions that its employees are not required to be trained pursuant to MSHA's training requirement, the fact is that on July 29, 1987, when Mr. Volek reviewed Dakco's training records, Mr. Keffer produced training records for the 21 employees who had received and completed the requisite training, and insofar as these employees are concerned, Dakco was in compliance with section 48.29, because it produced records for the employees who had completed the training.

With regard to the lack of any available training records for the seven employees cited by Inspector Volek, since they had not completed the training which Mr. Volek believed they should have received, no records were available, and this obviously explains the reason why Mr. Volek did not find them. Had the employees completed the training, the failure by Mr. Keffer to produce the records confirming this fact would

~1282

have justified the issuance of the citation. However, based on the facts of this case, and Mr. Volek's testimony, I am convinced that he issued the citation because he believed the seven employees in question had not received the training which he believed was required. Under these circumstances, I conclude and find that Mr. Volek should have cited the applicable training standard requirement, rather than the record keeping standard. Accordingly, I find no basis for concluding that Dakco was in violation of section 48.29, for failing to have training records available for the seven employees in question, and the citation IS VACATED.

Docket No. WEVA 87Ä333ÄR

Fact of Violation - Citation No. 2894879, July 31, 1987, 30 C.F.R. 48.25(a)

In this case, Dakco is charged with a violation of mandatory training standard section 48.25(a), for failure to provide the required training for one of its employees performing work at Southern Ohio's preparation plant. The employee was identified in the citation as Victor Wilson, an ironworker. The facts show that MSHA Electrical Inspector Edwin Fetty was at the mine during July 28Ä31, 1987, conducting electrical spot inspections of certain work being performed at the mine by several contractors. Mr. Fetty returned to the mine on July 31, as part of a follow-up inspection, and to abate the section 104(b) order previously issued by Inspector Volek because of the asserted failure by Mr. Keffer to timely produce the training records for seven of his employees. Upon review of these records, Mr. Fetty found records confirming the fact that six of the employees had been trained, but he found no training record for Mr. Wilson, and he issued the citation because of Dakco's failure to train Mr. Wilson. Mr. Fetty also issued a simultaneous order withdrawing Mr. Wilson until he could be trained. Dakco withdrew Mr. Wilson, provided him with training that same day, and Mr. Fetty abated his citation and order. He also abated Mr. Volek's previously issued withdrawal order.

Section 48.25 requires certain training for new miners. Included among the requirements is a provision requiring no less than 8 hours of training for all new miners before they are assigned to work duties. The 8 hours of training includes an introduction to the miner's work environment, hazard recognition, and health and safety aspects of the tasks to which the new miner will be assigned.

Section 48.22(a)(1) provides the following definition of a "miner" who is required to receive training:

For the purposes of this Subpart B(a)(1) "Miner" means, for purposes of sections 48.23 through 48.30 of this Subpart B, any person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works at the mine on a continuing, even if irregular, basis. * * * * This definition does not include:

* * * * *

(1) Construction workers and shaft and slope workers under Subpart C of this Part 48: * * * (emphasis added).

MSHA's policy guidelines concerning the training requirements of Subpart B, Part 48, Title 30, Code of Federal Regulations, are found at pages 34 through 36 of MSHA Administrative Manual 30 C.F.R. Part 48 - Training and Retraining of Miners (exhibit ALJÄ1). The guidelines for persons performing construction, maintenance, or repair work are found at page 35, and they state as follows:

Construction work includes the building, rebuilding, alteration, or demolition of any facility, or addition to an existing facility. Installing or rebuilding of a conveyor system would normally be considered construction. Maintenance or repair work includes routine upkeep of operable equipment or facilities, and the fixing of equipment or facilities. Replacement of a conveyor belt would normally be considered maintenance or repair.

The training required for persons performing construction, or maintenance or repair work often depends upon: (1) whether or not a mine is operational; (2) whether the work is performed on a regular basis; and (3) whether the

exposure to mining hazards is frequent. Generally, a mine is operational if it is producing material or if a regular maintenance shift is ongoing; it is not operational if it is not producing material due to miners' vacations, strikes, or other shutdown periods. Work performed on a frequent basis is work performed for more than five consecutive working days. Regular exposure to mine hazards is exposure that follows a recognizable pattern on a recurring basis.

The following guidelines should be used to apply the above factors:

- (1) If workers are performing shaft and slope construction work, whether or not the mine is operational - No training is required.
- (2) If the mine is not operational and workers are performing construction work - No training is required.
- (3) If the workers are performing maintenance or repair work on an infrequent or irregular basis, and they are independent contractors or their employees, Hazard training under 48.31 is required. However, if such workers are employees the operator - Comprehensive training under Subpart B is required.
- (4) If workers are performing maintenance or repair work on a frequent or regular basis, whether or not the mine is operational - Comprehensive training under Subpart B is required.

Dakco's president, Donald Keffer, confirmed that all of his workers were experienced, and he conceded that prior to July 28, 1987, none of his employees had ever received the type of training required by MSHA's regulations. However, they did receive 15-minute hazard recognition training as required by Southern Ohio's policy. Mr. Keffer's position is that none of his employees are covered by MSHA's training requirements because they are engaged in construction work, rather than maintenance and repair work. He confirmed that he advised the MSHA inspectors of his position, but they believed his employees were engaged in maintenance and repair work and were required

~1285

to be trained pursuant to MSHA's requirements. Mr. Keffer confirmed that he agreed to remove the affected employees from the job so that they could receive 8 hour training in order to abate the citations, and that he now requires all of his employees to take 8 hours of annual comprehensive training pursuant to MSHA's requirements in order to avoid future citations, notwithstanding his position that his employees are not covered by MSHA's training regulations.

In this case, Dakco is charged with the failure to provide at least 8 hours of new miner training for Mr. Wilson. A "new miner" is defined by section 48.22(a)(2)(c) as "a miner who is not an experienced miner." An "experienced miner" is defined by subsection (b) as a person who received training within the preceding 12 months from an appropriate State agency; a person who has had at least 12 months' experience working in a surface mine or surface area of an underground mine within the past 3 years; or a person who has received new miner training as prescribed by section 48.24, within the preceding 12 months. Although Mr. Keffer testified that all of his employees were experienced workers, no testimony or evidence was forthcoming from Dakco or MSHA as to Mr. Wilson's background, experience, or prior training, and Dakco has conceded that he had not received the training required by the cited section 48.25. However, in order to establish a violation in this case, MSHA has the burden of establishing that Mr. Wilson was a "miner" within the definition of that term under section 48.22(a)(1), and that Dakco was required to provide him training.

The definition in section 48.22(a)(1) of a "miner" subject to MSHA's training requirements found in sections 48.23 through 48.30, includes four categories of individuals performing work at the preparation plant in question, and they are as follows:

- any person who is engaged in the extraction and production process.
- any person who is regularly exposed to mine hazards.
- any person who is a maintenance or service worker employed by the operator.
- any person who is a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods.

~1286

Also included in the definition of a "miner" subject to the training requirements of sections 48.23 through 48.30, are operators working at the mine on a continuing, even if irregular basis. The term "operator" as defined by subsection (e) of section 48.22, includes an independent contractor performing services or construction at the mine. Included in the section 48.22(a)(2) definition of "miner" for purposes of hazard training pursuant to section 48.31, is an "occasional, short-term maintenance or service worker contracted by the operator."

Excluded from the definition of miner for purposes of section 48.23 through 48.30 training are construction and shaft or slope workers under MSHA's Subpart C, Part 48 construction safety and health standards. These standards have not as yet been promulgated by MSHA. The general OSHA construction industry health and safety standards were published in the Federal Register on February 9, 1979, 44 FR 8577, and they are found in Part 1926, Title 29, Code of Federal Regulations. I take official notice of a September 4, 1979, MSHA Memorandum circulated to "interested persons" by its Office of Standards, Regulations, and Variances inviting comments to MSHA's draft safety and health standards for construction work on the surface of mine property. Section 1926.21 of the draft proposed regulations requires employer compliance with the training standards to be promulgated by MSHA as Subpart C, Title 48, Code of Federal Regulations, and it notes that "these regulations are currently under development by MSHA. The term "employer" as defined by draft section 1926.32(k), includes an independent contractor performing services or construction at a mine, and the term "construction work" is defined by subsection (g) of section 1926.32(k), as "the building, rebuilding, alteration, or demolition of any facility or addition to an existing facility at a surface mine or surface area of an underground mine, including painting, decoration or restoration, associated with such work, but excluding shaft and slope work."

In support of the citation in question, MSHA takes the position that the Dakco employees working at the preparation plant were "miners" under section 48.22(a)(1) because they fall within two of four categories set forth therein; namely, (1) they were regularly exposed to mine hazards, and (2) they were maintenance or service workers contracted by the operator to work at the mine for frequent or extended periods. Furthermore, MSHA contends that these employees do not fall within the exclusion for construction workers and shaft and slope workers. Taking into account MSHA's position in this case, in order to establish a violation with respect to Mr. Wilson, it

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has the burden of establishing that Mr. Wilson was either regularly exposed to mine hazards or was a maintenance or service worker contracted by the operator to perform work at the mine for frequent or extended periods of time.

Regular Exposure to Mine Hazards

The parties have stipulated that Dakco employees were performing work at the mine preparation plant from May through August 1987. Mr. Kirchartz testified that Dakco employees were working at the preparation plant during the 3-day memorial day period, which would have been the week-end of May 30-31, 1987, and intermittently from that time through the vacation period from July 25 to August 7, and for approximately a month thereafter (Tr. 30-32). Inspectors Volek and Fetty did not document the actual time frames during which Dakco was present at the plant during 1987, and the citation issued by Mr. Fetty does not state precisely when Mr. Wilson was performing work at the plant. Although the parties stipulated that Mr. Wilson was working at the plant "during July 1987," the only direct evidence establishing his actual presence at the plant is the citation issued by Mr. Fetty which reflects that Mr. Wilson was immediately withdrawn from the mine that day and allowed to return after he was trained.

Mr. Keffer testified that Dakco probably had three or four jobs at the mine prior to 1987, and that during May 20 through 26, 1987, work was performed at the plant removing an old belt drive and replacing it with a new one. After this work was completed, Dakco returned on June 17, 1987, to do some preparation work for the "vacation work," and this work included the replacement of a magnetic separator in the plant. Dakco continued its work at the plant dismantling, removing, and replacing screens and chutes, from June 17 through the vacation period which began on July 25, on a Wednesday through Sunday work schedule (Tr. 149-150). No testimony was elicited from Mr. Keffer as to precisely when Mr. Wilson performed work at the plant, or what he was doing, and Mr. Wilson was not called to testify in this case. In response to pretrial interrogatories, Dakco lists the name of Victor Wilson as an ironworker who performed work at the plant "during the period including July 29, and 31, 1987."

Although Dakco's responses to the interrogatories reflect that it had performed work at the mine during September - December 1985, June - July, and December, 1986, and January and May, 1987, there is no evidence or testimony that Mr. Wilson had ever performed any work during these time periods. In short, the only probative evidence of record

~1288

reflects that Mr. Wilson performed some work at the plant sometime during July 29 and 31, 1987.

The testimony by the inspectors who issued the citations in question establishes that they issued them because they believed that Dakco's employees were performing maintenance and repair work, rather than construction work. Although Inspector Volek confirmed that he followed the manual guidelines, and generally alluded to contractor employees exposure to the same hazards to which other miners are exposed, his belief that Dakco employees were covered by MSHA's training requirements was based on his view that no new facility was being constructed or expanded. His citation makes no mention of any Dakco employees being exposed to any hazards, and although he testified as to several hazards which he believed were present, he issued no citations or violations to Dakco.

With regard to Inspector Fetty's citation concerning Mr. Wilson, the citation makes no mention of any hazards associated with any work being performed by Mr. Wilson. Although Mr. Fetty alluded to several hazards which he believed were generally associated with the work being performed by Dakco at the plant while he was there during July 28-31, 1987, he issued no hazard citations to Dakco, and admitted that when he issued his citation on July 31, 1987, he did not observe the work being performed by Dakco. As a matter of fact, Mr. Fetty could not recall speaking with Mr. Wilson about the nature of the work he was performing, and Mr. Fetty had no knowledge as to how long Dakco may have been at the mine performing work, and he had no factual basis for determining whether or not Dakco may have been present for frequent or extended periods of time (Tr. 138, 141). Having closely examined Mr. Fetty's testimony, it seems clear to me that he issued the citation because he believed the nature of Dakco's work involved restoration maintenance and repair work, rather than new work.

The definition of "miner" found in section 48.22(a)(1) includes one who is regularly exposed to mine hazards. MSHA's general policy guideline found at page 34 of its manual adds the term "frequent" so that the definition reads "regular" or "frequent" exposure to mine hazards. The guideline then defines "regular exposure" as "a recognizable pattern of exposure on a recurring basis," and the term "frequent exposure" as "exposure to hazards for more than five consecutive days." Under the general discussion concerning persons performing construction, maintenance, or repair work, found at page 35 of the manual, the guidelines define work performed on a "frequent basis" as work performed for more than five consecutive working

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days, and "regular exposure to mine hazards" as exposure "that follows a recognizable pattern on a recurring basis."

The contested citation in this case is confined to Mr. Wilson, and no other Dakco employee, and I am constrained to limit my findings and conclusions only to Mr. Wilson and no one else. After careful review and examination of all of the evidence adduced in this case, I conclude and find that MSHA has failed to establish that Mr. Wilson was regularly exposed to any mine hazards within the meaning of that term as found in section 48.22(a), or in MSHA's policy guidelines. The evidence of record in this case does not establish that Mr. Wilson was exposed to any hazards, and any suggestions in this regard by MSHA are simply unsupported, and they ARE REJECTED. Further, although Mr. Kirchartz alluded to several hazards which he believed were generally associated with the preparation plant work environment, there is absolutely no credible evidence establishing that Mr. Wilson was exposed to any of these asserted hazards. In short, MSHA has failed to establish any nexus between Mr. Wilson's work and any existing hazards which would have exposed him to any potential injury.

Maintenance or Service Worker Issue

MSHA's assertion that construction work can only take place when a mine or associated facility such as a preparation plant are initially built and become operational, and that any subsequent work may only be considered maintenance or repair is not well taken. MSHA's policy guidelines clearly state that the rebuilding, alteration, or demolition of any facility is construction work. Maintenance or repair work is construed by the policy as the routine upkeep or fixing of equipment and facilities. (Exhibit ALJÄ1, pg. 35). The guidelines do not distinguish "new" or "old" facilities.

On the facts and evidence presented in this case, it seems clear to me that the work performed by Dakco was construction work entailing an extensive demolition, rebuilding, renovation, and installation of a rather extensive coal chute and screen system in the preparation plant. The work included the removal and replacement of plant siding to facilitate the removal and replacement of complete units, extensive steel and concrete floor work to accommodate the new system, new floor configurations, and the removal and replacement of piping, electrical wiring, and the like. The reconfigured chute and screen system resulted in a marked increase in the plant's productive capacity, with substantial savings to the mine operator. Given the scope of the project, I conclude and find

~1290

that the work performed by Dakco was not "routine upkeep and fixing."

MSHA's further assertion that the exclusion of construction workers from the definition of "miner" found in section 48.22(a), for purposes of mandatory training sections 48.23 through 48.30, is limited only to workers engaged in shaft and slope construction work is likewise not well taken. MSHA's current training regulations found in Subpart B, of Part 48, which are applicable to surface areas of underground mines, contain no mention or definition of the term "construction work." The only Subpart B reference to "construction" is found in the definition of "operator" in section 48.22(e), which includes "any independent contractor identified as an operator performing services or construction at such mine." On the other hand, MSHA's Subpart A training regulations, which apply to underground mines, exclude shaft and slope workers, workers engaged in construction activities ancillary to shaft and slope sinking, and workers engaged in the construction of major additions to an existing mine which requires the mine to cease operations (section 48.2(i)). Subparts A and B both rely on MSHA's unpromulgated Subpart C regulations as the basis for excluding construction workers and shaft and slope workers.

MSHA's draft unpromulgated construction regulations, Part 1926, Title 29, Code of Federal Regulations, at section 1926.32(g), defines the phrase "construction work" as follows:

[T]he building, rebuilding, alteration, or demolition of any facility at a surface mine or surface area of an underground mine, including painting, decoration or restoration associated with such work, but excluding shaft and slope sinking. (Emphasis added).

As noted above, MSHA's unpromulgated draft definition of "construction work" specifically excludes shaft and slope sinking, and the exclusionary language found in section 48.22(i), on its face distinguishes construction workers from shaft and slope workers. Under the circumstances, I have difficulty comprehending MSHA's argument that only shaft and slope workers qualify for an exemption from MSHA's Subpart B comprehensive training requirements. I also have difficulty in accepting the reliance by the parties on regulations such as Subpart C, which have yet to be promulgated by MSHA.

MSHA's policy guidelines concerning the training requirements found in its Subpart B regulations appear to be based on

~1291

a mix of the definition of a "miner" for training purposes pursuant to Subpart A, as well as Subpart B, and to this extent I find the guidelines to be rather confusing and contradictory. For example, guidelines No. 1, No. 2, and No. 4, which appear at page 35 of the policy manual, are premised in part on the fact that a mine may be operational or not. Guideline No. 1 totally exempts shaft and slope construction workers from all training requirements, regardless of whether or not the mine is operational. Guideline No. 2 totally exempts workers "performing construction work," without limitation as to whether or not it is slope and shaft work, as long as the mine is not operational. Guideline No. 4 requires comprehensive training if workers are performing maintenance and repair work on a frequent or regular basis, regardless of whether or not the mine is operational.

I find nothing in MSHA's Subpart B surface area training regulations that even suggests that the operational mode of the mine at any given time is the determining factor as to whether training is required. On the other hand, the definition of a covered "miner" found in Subpart A, section 48.2, for underground mines, includes language that excludes workers engaged "in the construction of major additions to an existing mine which requires the mine to cease operations." If this language found in section 48.2 is the basis for MSHA's policy distinctions between an operational and non-operational mine for purposes of the training requirements found in Subpart B, it would seem that MSHA has published a surface area training policy based on regulatory provisions applicable to underground mines.

Another area of confusion is found in guideline No. 3. That guideline states that maintenance or repair workers of independent contractors who work on an infrequent or irregular basis are only required to have hazard training under training section 48.31. However, the guideline goes on to state that if such workers are employees of the operator, comprehensive training is required. Since the term "operator," by definition, includes an independent contractor performing services or construction at a mine, one could argue that contractor employees working on an infrequent or irregular basis are also required to have comprehensive training.

In the case at hand, MSHA takes the position that Mr. Wilson comes within the section 48.22(a)(1) definition of "miner" for purposes of section 48.23 through 48.30 training because he was a maintenance or repair worker contracted by the operator to perform work at the mine for frequent or extended periods of time. Since I have concluded that Dakco was engaged in construction work, rather than maintenance or

~1292

repair work, it follows that Mr. Wilson's work status was that of a construction worker, rather than a maintenance or repair worker.

MSHA's policy guideline No. 2 states that workers performing construction work at a mine which is not operational are not required to be trained. MSHA's policy states that an "operational" mine is one which is producing material, or one in which there is an ongoing regular maintenance shift. A mine which is not producing material because of miners' vacations is not considered to be operational. In the instant case, MSHA has conceded that the mine was not producing coal and was not operational during the vacation period from July 25 through August 7, 1987, and Mr. Kirchartz confirmed that no coal was being processed during this vacation period (Tr. 39). Inspector Volek conceded that when he was at the mine, no coal was being produced, and he did not consider the mine to be operational (Tr. 111). He further conceded that if an employee were engaged in construction work when the mine was not operational, he would not require training (Tr. 114). MSHA's counsel also agreed with Mr. Volek's position.

MSHA's policy guideline No. 3 requires only hazard training under section 48.31, for independent contractor workers performing maintenance or repair work on an infrequent or irregular basis. If such workers are employees of the operator, comprehensive training is required. Guideline No. 4 requires comprehensive training for workers performing maintenance or repair work on a frequent or regular basis regardless of whether the mine is operational or not. MSHA's policy states that "work performed on a frequent basis" is work performed for more than 5 consecutive working days.

Insofar as Mr. Wilson is concerned, Inspector Fetty had no knowledge as to the nature of his work, nor did he know how long Dakco had been at the mine performing work. Further, he did not document the period of time that Mr. Wilson may have been present at the mine, and the citation which he issued does not state when Mr. Wilson performed any work at the mine. As noted earlier, although the parties stipulated that Mr. Wilson was working at the plant "during July 1987," the only evidence establishing the number of days he was performing work is the citation issued by Mr. Fetty on July 31, 1987, which reflects that Mr. Wilson was withdrawn on that day, and immediately returned to work after he was trained that same day. Dakco's pretrial responses to interrogatories reflect that Mr. Wilson performed work at the plant "during the period

