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FMC WYOMING V. SOL (MSHA) AND
UNITED STEELWORKERS OF AMERICA, DIST 33
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

FMC WYOMING CORPORATION, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. WEST 86-43-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 2647693; 11/23/8 Docket No. WEST 86-45-RM Order No. 2647695; 11/23/85
AND	
UNITED STEELWORKERS OF AMERICA, DISTRICT 33, INTERVENOR	FMC Trona Mine Mine ID 48-00152
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING
AND	
UNITED STEELWORKERS OF AMERICA, DISTRICT 33, INTERVENOR	Docket No. WEST 86-110-M A.C. No. 48-00152-05535 FMC Trona Mine
v.	
FMC WYOMING CORPORATION, RESPONDENT	

DECISION AFTER REMAND

Appearances: James H. Barkley, Esq., Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner; James Holtcamp, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant/Respondent; Stan Loader, Staff Representative, United Steelworkers of America, Rock Springs, Wyoming, Intervenor.

Before: Judge Cetti

The Commission's remand involves two (2) violations, one of 30 C.F.R. 57.5002 and one of 30 C.F.R. 57.18002. The issues which remained after remand are whether the violation of 30 C.F.R. 57.5002 by FMC Wyoming Corporation (FMC) was significant and substantial and the appropriate penalty for each of the two violations.

I

PROPOSED SETTLEMENT

Prior to this decision on remand, the Secretary of Labor (Secretary) and the operator, FMC Wyoming Corporation (FMC), agreed to a settlement resolving all issues remaining before me after the Commission's remand Decision. This settlement agreement included a withdrawal of FMC's notice of contest to both citations and a reduction of the penalties sought by the Secretary.

Pursuant to this settlement agreement with FMC, the Secretary filed a Motion to Approve Settlement and Order Payment. The intervenor, United Steelworkers of America, District 33 (USWA), which has party status pursuant to its request and my prehearing Order granting party status, was neither a negotiator nor a participant in the negotiations of the settlement. USWA objected to approval of the settlement and by my Order dated April 10, 1990. I disapproved the proposed settlement on the basis of Commission Procedural Rule 30 (29 C.F.R. 2700.30(a).1

Thereafter, the Secretary filed a motion, which I now have before me, requesting I reconsider my Order Disapproving Settlement. The Secretary states in part, "While it is true that the Secretary did not seek the concurrence of or consult the union intervenor in this case in reaching a settlement with the operator, the Secretary believes that concurrence of the intervenor is not a requirement" to an agreed settlement of the case.

Both the Secretary and USWA submitted points and authorities in support of their position. Having reconsidered the matter, I find the position of USWA to be meritorious. Under the facts and circumstances of this case, Commission Procedural Rule 30 unequivocally requires that the miner's representative (USWA) be an agreeing party to the settlement before it can be approved. Absent Commission precedent changing the impact of this rule, I am obliged to follow the same, and accordingly my Order Disapproving Settlement is here AFFIRMED.

II

SIGNIFICANT AND SUBSTANTIAL VIOLATIONS

The main issue before me at this time is whether FMC's unwarrantable failure to comply with the mandate of 30 C.F.R. 57.5002 constitutes a significant and substantial violation.

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard," 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In Consolidation Coal Company v. Secretary of Labor, Mine Safety and Health Administration, 8 FMSHRC 890, 897-98 (June 1982), aff'd, 824 F.2d 1071 (D.C. Cir. 1987), the Commission adapted the Mathies formula to a health standard as follows:

> Adapting this test to a violation of a mandatory health standard, such as section 70.100(a), results in the following formulation of the necessary elements to support a significant and substantial finding: (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard -- a measure of danger to health -- contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

In applying the Mathies/Consol test to this case, I find, as I did in my the initial decision, that FMC clearly violated the provisions of the mandatory health standard 30 C.F.R. 57.50022 by its failure to take dust surveys while the maintenance crew removed insulation containing asbestos from its No. 3 turbine. This failure eliminated the possibility of an accurate determination of whether or not maintenance crew employees were overexposed to airborne asbestos. Exposing employees to

airborne asbestos in an unknown concentration is a discrete hazard. Thus, the first and second elements of the Mathies/Consol formula have been established. Skipping the third element for a moment, I find there is no significant dispute as to the fourth element, since the evidence overwhelmingly showed that, if an illness resulted from the exposure, the illness in question would be an illness of a reasonably serious nature.

The third element the Secretary must prove is a reasonable likelihood that the health hazard contributed to will result in an illness. It is generally recognized that the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales which, in turn, depends upon the concentration and duration of each exposure, and that proof of a single incident of overexposure does not, in and of itself, conclusively establish a reasonable likelihood that respirable disease will result. The exposure in this case was for a relatively short period of time to an unknown concentration of airborne asbestos. For this reason, I initially believed that the Secretary had not proven the violation was S & S. Now, however, it has been established by the Commission's finding that FMC's failure to take a dust survey was not due to simple negligence, but was a result of its unwarranted failure to comply with the mandatory health standard. This fact, plus my review of the evidence which indicates a reasonable likelihood that there was an overexposure, leads me to conclude that FMC's violation of the mandatory health standard was significant and substantial under the policy, law, and rationale the Commission set forth in the Consolidation Coal Company case, supra. Furthermore, it is believed that FMC should not be allowed to defend on the basis of its unwarrantable failure to comply with the mandatory health standard, i.e., the failure to take the mandated dust surveys. FMC's violation of the mandatory health standard under the facts and circumstances of this case, is a significant and substantial violation.

III

PENALTY

The only remaining issue is the assessment of the appropriate civil penalties for FMC's violation of 30 C.F.R. 57.5002 and 30 C.F.R. 57.18002. With respect to the latter, the Commission found that FMC violated that portion of the mandatory safety standard that requires the person making daily workplace examinations to be a competent person. In making this finding, the Commission stated that the person FMC designated "cannot be said to have had the ability and experience fully qualifying him to examine the workplace around the turbine for conditions which might adversely affect safety and health."

It is undisputed that FMC is a large operator, and appropriate penalties will not impair FMC's ability to continue in business. The parties stipulated that the operator's history of prior violations is average for an operator of its size, and that the violations were abated within the time period prescribed. The negligence of FMC and the gravity of the violations are both high. Taking into consideration the six statutory criteria in Section 110(i) of the Mine Act, I find that the appropriate civil penalty for FMC's violation of 30 C.F.R. 57.5002 is $2,000 and the appropriate penalty for its violation of 30 C.F.R. 57.18002 is $800. These assessments are considerably higher than MSHA's initial proposed penalty of $500 for each of the violations, but these higher penalties are justified and fully supported by the record.

ORDER

1. Citation No. 2647693 alleging a significant and substantial violation of 30 C.F.R. 57.5002 caused by FMC's unwarrantable failure to comply with the mandatory safety standard is AFFIRMED and a civil penalty of $2000 is assessed.

2. Order No. 2647695 alleging a violation of 30 C.F.R. 57.18002 is AFFIRMED and a civil penalty of $800 is assessed.

3. FMC Wyoming Corporation is directed to pay the Secretary of Labor the above-assessed civil penlaties in the sum of $2800 within 30 days of the date of this Decision.

August F. Cetti
Administrative Law Judge

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FOOTNOTES START HERE

1. 2700.30 Penalty settlements.

(a) General. No proposed penalty that has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission after agreement by all parties to the proceeding. (Emphasis added)

2. 30 C.F.R. 57.5002 provides:

Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.