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SOL (MSHA) v. CYPRUS TONOPAH MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

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

CIVIL PENALTY PROCEEDING
Docket No. WEST 90-202-M
A.C. No. 26-02069-05507

CYPRUS TONOPAH MINING CORP.,
RESPONDENT

Cyprus Minerals

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

After the Citation was issued indicating one miner was exposed to the hazard created by the alleged violation, Respondent abated the conditions constituting the alleged violation and MSHA issued a "termination" of the Citation. Thereafter, MSHA issued a modification of the Citation to show five miners were exposed. Respondent moves for summary judgment on the principle that a Citation, once terminated, cannot be modified. The Secretary opposes this motion. The Secretary's position is found meritorious and is adopted here as though set forth herein.

Briefly, a Citation is usually issued during an inspection based on an Inspector's observation and understanding of what occurred. The Citation has two general aspects--the first describes the nature of the alleged violation, for example, roof control, electrical, etc., the regulation allegedly infringed, and sets a time within which the mine operator must abate the allegedly violative conditions. The second aspect of the Citation sets forth penalty assessment factors which are not readily apparent, i.e., negligence and gravity (including the likelihood of the contemplated hazard coming to fruition and the number of miners exposed).¹ Finally, as noted below, the Citation, in

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Commission procedure and trial practice, serves more as an initial pleading and informs the mine operator and others as to the details of MSHA's allegations of violation more fully than does the so-called Complaint (Proposal for Penalty) commonly filed by MSHA in penalty proceedings. MSHA's administrative termination of a Citation does not VACATE it.

Keeping these points in mind, it is clear that permitting MSHA to amend (modify) the Citation in the manner shown is in effect an amendment of its initial pleading, does not change the nature of the violation alleged, and does not prejudice the Respondent Mine operator. It sets forth MSHA's version of a fact question: How many miners were exposed? Respondent can challenge MSHA's version and present its own evidence on this question.

Accordingly, having considered the matter, it is held that a Citation can be modified after its termination to alter or amend allegations relating to penalty assessment factors but not to materially change the nature of the violation charged, or the description of the violation charged set forth in the Citation.

Respondent's Motion for Partial Summary Judgment is DENIED.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnote starts here:-

1. Two points are noted at this juncture: of the four remaining mandatory penalty assessment factors, two factors are not mature or ripe at the time of inspection; the mine operator's good faith in abatement, and whether the mine operator is going to assert an economic defense (inability to pay penalties) in mitigation of penalty. Another factor--the operator's previous history of violations--is not obtainable until after the inspection and computerized information is tabulated up to the date of the inspection. The fourth factor--the operator's size--is usually not ascertained at the time of the inspection which is focused on safety and health determinations, rather than on penalty assessment factors.

The second point noted parenthetically is that the number of miners exposed to an alleged hazard--in connection with the subject violation charged--is not an element of the alleged violation, that is, it is not a critical consideration in determining whether the violation charged did occur. Should this matter be litigated at formal hearing and the evidence showed that three--not one or five--miners were exposed to a hazard, the proper procedure would be for the prosecution to move to amend its pleading (in Commission practice, the Citation itself) to conform to the evidence and such should be done at hearing and granted.