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SOL (MSHA) v. NEW BUTTE MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard

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

v.

NEW BUTTE MINING INCORPORATED,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 90-168-M
A.C. No. 24-01841-05507

Lexington Mine

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. David W. Kneebone, Esq., Consultant, New Butte
Mining, Butte, Montana,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent, New Butte Mining, Incorporated ("New Butte") with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (the "Act").

A hearing on the merits was held in Butte, Montana, on April 23, 1991.

The parties filed post-trial briefs.

STIPULATION

At the commencement of the hearing the parties filed a written stipulation providing as follows:

1. New Butte is engaged in the mining of gold in the United States, and its mining operations affect interstate commerce.
2. New Butte is the owner and operator of the Lexington Mine, MSHA I.D. No. 24-01841.
3. New Butte is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. New Butte is a small operator of a gold mine with 106,950 control hours in 1989.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

11. On June 27, 1989, David Kneebone contacted Darrel Woodbeck, MSHA inspector, to report the accident. After that, Darrel Woodbeck contacted Jack Petty, former MSHA Assistant District Director, who directed Darrel Woodbeck and Siebert Smith to investigate the company because of the accident.

THE EVIDENCE

On June 27, 1989, Darrell Woodbeck, an MSHA inspector experienced in mining, issued Citation No. 2650622. The citation alleged a violation of 30 C.F.R. 57.1101. On the same date, in a subsequent modification, the citation was modified to allege a violation of 30 C.F.R. 57-11008. (Footnote 1) (Exhibit P-2).

The uncontroverted evidence shows that on June 26, 1989, miner Rick A. Walter was swamping (Footnote 2) for Dana Lentz, the assigned motorman. The two miners in this conventional stope mine were joined by miner Conda Sluga. The men were spotting ore cars under the #3 chute. In the process, a one-inch air hose had become entangled in the rail cars. Messrs. Sluga and Walter proceeded to untangle the hose. In the process, Mr. Walter and the train moved slowly backwards. Mr. Walter backed into the rib. At that point, he was pinched by the ore car and sustained injuries to his neck, chest, and back. Mr. Lentz saw that something was wrong and he immediately pulled the train forward. Mr. Walter was hospitalized for his injuries.

The company took photographs (Exs. P-3 through P-7). Copies of the photographs were later given to the MSHA investigators. However, the photographs were given to MSHA in a spirit of cooperation and the inspector at the scene had indicated there was no reason to write a citation. Subsequently, a citation was issued.

It is agreed the restricted clearance was not marked with any reflectors or warnings. At the most restricted point, as a ground control device, the protrusion of the granite slab had been overlaid by a steel mat. The mat showed evidence that, at times, it had been struck by the ore cars. At this point, there was no clearance between ore cars and the wall.

DISCUSSION

The Commission in *Ideal Cement Company*, 11 FMSHRC 2409 at 2416 (Nov. 1990), stated that in interpreting and applying broadly worded standards, the appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987), *Quinland Coal, Inc.*, 9 FMSHRC 1614, 1617-1618 (Sept. 1987).

The requirements of 30 C.F.R. 57.11008 are clear. Restated, it requires that restricted clearance shall be conspicuously marked under two circumstances. These are where the clearance is restricted and a hazard exists due to the restriction.

As a threshold matter, it is uncontroverted that the area of restricted clearance was not marked in any manner. The restricted space went to zero distance between the ore cars and the wall. A ground control mat at this point showed evidence that it had been struck by the ore cars. The hazard was apparent: the swamper backed against the rib and was struck by the side of the ore car. (Exs. P-3 through P-7).

New Butte raises several defenses. New Butte objects to MSHA using the company's photographs which were originally given in a "spirit of cooperation." New Butte's objections are without merit. MSHA legally acquired the photographs and may use them as evidence in a later hearing. The operator objected to the Secretary's proceeding under 30 C.F.R. 57.11008 when the company had been originally cited under 57.11001. (Footnote 3) Such amendments are permitted under the Federal Rules of Civil Procedure. See Rule 15(a), Fed. R. Civ. P.

The operator also argues the area of this stope was not a travelway. Therefore, by virtue of the headnote of the regulation, Subpart J does not apply.

I disagree, 30 C.F.R. 57.2 defines a travelway as "a passage, walk, or way regularly used and designated to go from one place to another." On this issue I credit the inspector's testimony. New Butte, in fact, recognized this area as a travelway since a walkway existed on the side away from the side of the protrusion. In short, the passage from wall to wall constituted the travelway.

New Butte also contends the accident was not thoroughly investigated by MSHA. The company is not in a position to complain that the inspectors did not go underground. It is uncontroverted that the company blasted the protruding rib before the inspectors arrived to conduct their inspection. MSHA's investigation (Ex. P-2) may contain some errors, but I find it is a thorough outline of the accident. Further, an inspector does not have to observe a violation to issue a citation, *Emerald Mines Co. v. Federal Mine Safety and Health Review*, 863 F.2d 51 (D.C. Cir. 1988).

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New Butte also contends, and its evidence supports the argument, that the primary cause of the accident could have been miner Sluga's activities in distracting the ore train operator and giving him unauthorized signals.

This case is not a hearing to balance the causes of the accident. Even if miner Sluga or the crew's negligence contributed to the accident, the ultimate issue is whether New Butte violated the regulation.

New Butte also contends it did not receive a copy of MSHA's investigation although it requested that information. However, it is uncontroverted that New Butte received the report. While there was some delay, the operator did not establish any prejudice by reason of the delay. New Butte's contentions are without merit and for the foregoing reasons, Citation No. 2650622 should be affirmed.

CIVIL PENALTIES

The statutory criteria to assess civil penalties are contained in Section 110(i) of the Act, 30 U.S.C. 820(i).

The operator's history is favorable, inasmuch as the company has only been assessed eight violations in the two years ending June 26, 1989. The company had no violations before October 15, 1987.

It is stipulated that the company is small and the proposed penalty will not affect its ability to continue in business.

The company was negligent inasmuch as a protrusion was apparent. A mat had been placed at the protrusion as a ground control device, hence the company should have known of it.

The injuries sustained by Rick Walter are indicative of the gravity of this violation.

The operator blasted the protrusion before the MSHA inspectors arrived. However, this action generally falls under the broad umbrella of "good faith."

On balance, I consider the proposed penalty to be appropriate.

For the following reasons, I enter the following:

ORDER

Citation No. 2650622 and the proposed penalty of \$750 are AFFIRMED.

John J. Morris
Administrative Law Judge

Footnotes start here:-

1. The cited regulation provides as follows:

57.11008. Restricted clearance.

Where restricted clearance creates a hazard to persons, the restricted clearance shall be conspicuously marked.

2. A swamper directs the movements of the underground ore haulage train.

3. The standard reads as follows:

57.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.