

CCASE:
SOL (MSHA) v. NAVASOTA MINING
DDATE:
19920211
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
Colonnade Center
Room 280, 1244 Speer Boulevard
Denver, CO 80204

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

CIVIL PENALTY PROCEEDING

Docket No. CENT 91-101
A.C. No. 41-02847-03525

v.

Gibbons Creek Mine

NAVASOTA MINING COMPANY
INCORPORATED,
RESPONDENT

NAVASOTA MINING COMPANY
INCORPORATED,
CONTESTANT

CONTEST PROCEEDING

Docket No. CENT 92-21-R
Citation No. 32422222-03; 9/28/91

v.

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

Gibbons Creek Mine

Mine I.D. 41-02847

DECISION

Before: Judge Lasher

These two proceedings (one penalty and one review case) were consolidated for processing by my oral order on December 4, 1991.

In the penalty docket, the Secretary of Labor (herein "MSHA") originally sought assessment of penalties for two alleged violations described in two Citations, Nos. 3242221 and 3242222.

I. Citation No. 324221.

In its Motion to Amend Complaint Proposing Penalty filed October 24, 1991, MSHA moved to withdraw this Citation, the grounds for which motion, I conclude, being that the violation did not occur. Accordingly, MSHA's motion is granted and Citation No. 3242221 will be vacated as reflected in my order at the end of this decision.

II. Citation No. 3242222

A. Chronology

This Section 104(a) "Significant and Substantial" Citation was issued on August 20, 1990, by MSHA Inspector Gerald Stephen, alleging a violation of 30 C.F.R. 77.1600 (c), more particularly specified subsequently herein. It was "Terminated" on August 22, 1990, by Inspector Stephen after Navasota took corrective action to abate the allegedly violative condition originally cited. On August 30, 1990, a first Modification issued to change the date of the alleged violation from "8-18-90" to "8-17-90." The second modification, numbered 3242222-03, which is the subject of the dispute here, was issued by Inspector Stephen on September 30, 1991, changing the standard allegedly infringed from 77.1600(c) to 77.1600(b).

B. Nature of the Modification

The alleged violation, as originally charged to be an infraction of 30 C.F.R. 77.1600(c) (Footnote 1), described such as follows:

Side clearance of the A-1 haul road proceeding to and exiting from the truck dump is hazardous to mine workers and such area was not adequately and conspicuously marked and warning devices were not adequately installed to insure the safety of the workers. On 8-18-90, two Watco CH-120 haul trucks collided at a location approximately one-fifth mile south of the truck dump on the A-1 haul road after failing to complete a lane change, resulting in fatal injuries to a coal truck operator.

~297

Abatement of this alleged violation, as described in the Termination issued on August 22, 1990, was achieved as follows:

Stop signs and warning devices such as location markers and safety cones were installed as required. Side clearance of the road was improved by reducing the topsoil stockpile height to provide better visibility. Traffic patterns were modified to prohibit lane changes.

After the first modification on August 30, 1990, described above, the second modification (3242222-03) was issued 13 months later, changing the violation charged to one of 30 C.F.R. 77.1600(b) (Footnote 2), to wit:

After additional review of this investigation, this Citation is modified as follows:

1. Change Section 1 - Violation Data, Item No. 8, condition or practice to: Standardized traffic rules, signals, and warning signs were not posted at a location approximately one-fifth mile south of the truck dump, on the A-1 haul road where a lane change had been permitted by management. A fatal powered haulage accident occurred at this location, resulting in fatal injuries to Gloria Smith, a coal haulage truck operator.
2. Change Item 9.c. Part/Section of Title 30 C.F.R. to: 77-1600(b).

In addition to its contention that a terminated citation cannot be subsequently modified, Navasota also contends, inter alia, that:

- a. The Secretary cannot modify unilaterally or otherwise Citation No. 3242222 (which was abated, terminated, and contested before the Commission)

~298

by changing, more than 13 months after its issuance, the condition or practice allegedly constituting a violation from an alleged failure to provide adequate side clearance on a haul road to an alleged failure to post standardized traffic rules, a condition or practice completely different in nature from the condition or practice described in the original citation, and

b. Modification No. 3242222-03 was not issued with reasonable promptness and Navasota is prejudiced by its issuance.

It is preliminarily noted that MSHA has conceded that a violation of 30 C.F.R. 1600(c) did not occur. (Footnote 3) This takes care of the original charge in the original Citation, No. 3242222, and permits focusing on the remaining charge of violation--that contained in the modification, No. 3242222-03. Is a charge of violation of a new safety standard containing a description of a different violative practice or condition properly brought by modification of the original citation after such has been abated and terminated?

The "Termination" in question was achieved here by the MSHA inspector's completion of MSHA Form 7000-3a (Mar. 85 revised) on August 22, 1990, and his checking on Line 8 C thereof (from a choice of "Vacated," "Terminated" and "Modified")(Footnote 4) that the

~299

original Citation was being "Terminated." On the form, the Inspector indicated that the justification for the action was the action taken taken by the mine operator to abate the conditions and practices initially alleged to be an infraction.

Since the "Termination" does not vacate (or modify) the Citation, what then does a termination accomplish? Its clearest purposes and effects are:

- (a) MSHA's acknowledgement that the mine operator has satisfactorily abated the violation charged;
- (b) an ending of the mine operator's duty to engage in further abatement,
- (c) a termination of the mine operator's exposure to "failure to abate" enforcement action under Section 104(b) of the Act.

Most certainly, allowing modification of a Citation to change the safety standard and the description of the violation would cancel "(a) and revive the mine operator's duties and exposures under "(b)" and "(c)."

In any event, and as Navasota points out, I have previously ruled on the issue presented here in a prior matter which is presently on Commission review. (Footnote 5) In my Order Denying Motion for Partial Summary Judgment (January 22, 1991) therein, it was 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" Since this Order was not published, a copy thereof is attached as Attachment "A" hereto.

That ruling is found applicable to the situation in the instant proceeding, where the safety standard itself was unilaterally changed to charge a different violation, and the description of the alleged infraction also was unilaterally modified after abatement and termination to indicate a violation of a different nature than that originally charged.

~300

Navasota's position⁶, replete with a factual background and points and authorities, has been reviewed and found meritorious. It is therefore adopted.⁷ Since all of MSHA's enforcement documentation (two citations and one modification) are involved herein, and the issues raised thereby are resolved favorably to Navasota, the subsequent order disposes of the two proceedings at hand.

ORDER

1. MSHA's motion to modify the original Citation, No. 3242222, is DENIED.

2. Navasota's contest in Docket No. 92-21-R is found meritorious and Modification No. 2432222-03 is VACATED.

3. Citation No. 3242221 is VACATED.

4. Citation No. 3242222 is VACATED.

5. Docket No. CENT 91-101 is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:-

1. This standard, under the general heading "Loading and Haulage" provides:

(c) Where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers.

2. 1600(b) provides:

Traffic rules, signals, and warning signs shall be standardized at each mine and posted.

3. At page 2 of its Motion to Amend Complaint, it states "At this time, the Secretary will not allege that side or overhead clearances on the haulage road which was the subject of the investigation were hazardous. More specifically, on page 2 of its Amended Complaint, MSHA states:

It does not appear that a violation of 30 C.F.R. 1600(c) occurred; however, the Secretary believes that the regulation which should have been cited is 30 C.F.R. 1600(b), which deals with traffic rules, signals, and warning signs.

4. In addition to these options, including the noteworthy alternative of modification, MSHA also at this time could have proceeded to issue other newly numbered Citations for any additional violations it believed were committed.

5. Cyprus Tonopah Mining Corp., 13 FMSHRC 1523, 1527
(September 1991), review granted, November 1, 1991.

6. Set forth in its "Opposition to Secretary's Motion to Amend Complaint and Navasota's Motion to Dismiss."

7. The posture of this matter as framed by the Motion, Opposition, admissions, and pleadings, makes possible final trial-level determination of the issues by decision rather than by an order denying MSHA's motion.