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SOL (MSHA) V. AMERICOLD CORPORATION
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 20, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-128-M
Petitioner :	:	A.C. No. 14-00159-05528
	:	
v.	:	Inland Quarries
	:	
AMERICOLD CORPORATION,	:	
Respondent :	:	

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;

 Bohn A. Frazer, Quarry Manager, Kansas City,
Kansas,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Americold Corporation ("Americold") with violating two safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq. (the "Act").

A hearing on the merits was held in Kansas City, Missouri, on May 11, 1993. The parties waived post-trial briefs and submitted the case on oral argument.

STIPULATION

The parties stipulated as follows:

1. Americold Corporation is engaged in mining and selling of limestone in the United States, and its mining operations affect interstate commerce.

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2. Americold Corporation is the owner and operator of the Inland Quarries, MSHA I.D. No. 14-00159.

3. Americold Corporation is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 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 dates and places 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 penalties will not affect respondent's ability to continue in business.

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

9. Americold Corporation is a small mine operator with 45,327 annual hours worked in 1990.

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.

Citation No. 3907226

The above citation describes the following violative condition:

Ventilation control measures were not provided for the underground shop area to confine or prevent the spread of toxic gases originating from a shop fire. Smoke from a shop fire would most likely travel directly to the active mine face areas.

The shop was located approximately 2,500 feet in the main mine portal entry. The present primary and secondary escape routes, as indicated on the escape and evacuation plan, were located just north of the shop area.

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The citation further alleges that the described condition violates 30 C.F.R. 57.4761. The cited regulation provides as follows:

Section 57.4761 Underground shops.

To confine or prevent the spread of toxic gases from a fire originating in an underground shop where maintenance work is routinely done on mobile equipment, one of the following measures shall be taken: use of control doors or bulkheads, routing of the mine shop air directly to an exhaust system, reversal of mechanical ventilation, or use of an automatic fire suppression system in conjunction with an alternate escape route. The alternative used shall at all times provide at least the same degree of safety as control doors or bulkheads.

(a) Control doors or bulkheads

If used as an alternative, control doors or bulkheads shall meet the following requirements:

(1) Each control door or bulkhead shall be constructed to serve as a barrier to fire, the effects of fire, and air leakage at each opening to the shop.

(2) Each control door shall be--

(i) Constructed so that, once closed, it will not reopen as a result of a differential in air pressure;

(ii) Constructed so that it can be opened from either side by one person or can be provided with a personnel door that can be opened from either side;

(iii) Clear of obstructions; and

(iv) Provided with a means of remote or automatic closure unless a person specifically designated to close the door in the event of a fire can reach the door within three minutes.

(3) If located 20 feet or more from exposed timber or other combustible material, the control doors or bulkheads shall provide protection at least equivalent to a door constructed of no less than one-quarter inch of plate steel with channel or angle-iron reinforcement to minimize warpage. The framework assembly of the door and the surrounding bulkhead, if any, shall be at least equivalent to the door in fire and air-leakage resistance, and in physical strength.

(4) If located less than 30 feet from exposed timber or other combustibles, the control door or bulkhead shall provide protection at least equivalent to a door constructed of two layers of wood, each a minimum of three-quarters of an inch in thickness.

The wood-grain of one layer shall be of the other layer. The wood construction shall be covered on all sides and edges with no less than 24 gauge sheet steel. The framework assembly of the door and the surrounding bulkhead, if any, shall be at least equivalent to

than 24 gauge sheet steel. The framework assembly of the door and the surrounding bulkhead, if any, shall be at least equivalent to the door in fire and air-leakage resistance, and in physical strength. Roll-down steel doors with a fire-resistance rating of 1.5 hours or greater, but without an insulation core, are acceptable provided that an automatic sprinkler or deluge system is installed that provides even coverage of the door on both sides.

(b) Routing air to exhaust system. If used as an alternative, routing the mine shop exhaust air directly to an exhaust system shall be done so that no person would be exposed to toxic gases in the event of a fire.

(c) Mechanical ventilation reversal.

If used as an alternative, reversal of mechanical ventilation shall--

(1) Be accomplished by a main fan. If the main fan is located underground:

(i) The cable or conductors supplying power to the fan shall be routed through areas free of fire hazards; or

(ii) The main fan shall be equipped with a second, independent power cable or set of conductors from the surface. The power cable or conductors shall be located so that an underground fire disrupting power in one cable or set of conductors will not affect the other; or

(iii) A second fan capable of accomplishing ventilation reversal shall be available for use in the event of failure of the main fan;

(2) Provide rapid air reversal that allows persons underground time to exit in fresh air by the second escapeway or find a place of refuge; and

(3) Be done according to predetermined conditions and procedures.

(d) Automatic fire suppression system and escape route. If used as an alternative, the automatic fire suppression system and alternate escape route shall meet the following requirements:

(1) The suppression system shall be--

(i) Located in the shop area;

(ii) The appropriate size and type for the particular fire hazards involved;
and;

(iii) Inspected at weekly intervals and properly maintained.

(2) The escape route shall bypass the shop area so that the route will not be affected by a fire in the shop area.

EVIDENCE

The evidence in connection with Citation No. 3907226 is essentially uncontroverted.

RICHARD LAUFENBERG is a federal mine inspector as well as a mining engineer.

He is familiar with Inland Quarries Mine, which is an underground limestone mine. It is mined by room and pillar method.

On April 2, 1991, Mr. Laufenberg inspected the Inland Quarries to assist Jerry Fuller of MSHA's Denver Technical Support. A ventilation survey was being conducted because in February 1991 a trash fire occurred in the vicinity of the underground shop and MSHA's district manager was concerned. Mr. Gomez, then district manager, instructed Technical Support to do the ventilation survey. This was a Code 36, or "miscellaneous inspection."

Messrs. Fuller and Laufenberg met with Bohn Frazer and they went underground.

Exhibit P-4 is an underground map that shows the main air flow of the ventilation system.

The map is marked in green to indicate the main haulway system in the escapeways. Red arrows show the evacuation route and pink arrows show the primary flow of fresh air.

The shop itself is marked with an "A" in the L-shaped darkened area. Limestone is mined in the places marked "B-1" and "B-2".

The storage area, which is under OSHA's jurisdiction, has been marked with a "C".

The mine portal is marked with a "D". The mine itself and the storage area are not completely separated.

Mr. Laufenberg issued Citation No. 3907226 because this underground facility with an underground shop. Routine and typical shop work was being done and this included work with tools, torches, grinders, and compressors. They were also working on equipment in the shop.

The shop did not control the spread of toxic gases. The area is well lit and about seven to eight times the size of the courtroom. (The courtroom is approximately 120 to 150 feet by 80 feet. Tr. 37).

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The shop is enclosed by pillars, with one opening on the east side and one large opening on the south side. The two openings are 15 to 20 foot wide.

A fire could occur in the shop from the use of torches, as well as grinding and electrical equipment. There was also grease and oil stored in the area. MSHA's regulation required adequate control measures to prevent the spread of toxic gases. The toxic gas most likely to occur was carbon monoxide. In the event the oils and greases caught fire, they would produce carbon monoxide which would flow through the mine.

The shop, which was 5,000 to 7,000 feet from the face area, was also adjacent to the primary and secondary escape routes.

Mr. Laufenberg did not see any control measures. Specifically, there were no control doors or bulkheads nor had the company tried to route the air. In addition, there was no reversal mechanical ventilation possible nor was there any automatic fire suppression system.

Sixteen workers were affected by this condition. It was the inspector's opinion that the violation was significant and substantial. If a fire occurred, the miners would be exposed to carbon monoxide gas and the existing ventilation would carry the gas into the face area. Carbon monoxide can overcome miners. It would be easy for someone to be injured.

Mr. Laufenberg considered the company's negligence to be moderate, as MSHA has regulated underground shops and the company should have recognized the violative condition. The company abated the violation by installing fire control doors.

Mr. Laufenberg identified the operator's ventilation, escape and evacuation plan submitted to MSHA by date of December 2, 1985.

JERRY LEE FULLER serves as a senior mining engineer for MSHA with Denver Technical Support. He is a mining engineer with special training in ventilation. Mr. Fuller provides support for the Metal and Non-Metal Division in MSHA.

After a trash fire occurred at the quarry, he was asked to do a ventilation inspection. The inspection took place April 2 and April 3, 1991.

Attached to Mr. Fuller's report (Exhibit P-5) is a clear overlay map. Exhibit P-5 differs from Exhibit P-4 as it shows the warehouse area more clearly. The map is basically an overlay of P-4.

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The inspection group traveled the ventilation circuit and measured the air quantity. They took measurements throughout the underground operation. The air quantity was calculated per minute and then converted into the total air volume. His partner in the inspection ran the anometer. All of the measurements that were taken are noted on Exhibit P-5.

In this mine most of the air comes in the portal and up past the shop. The air then goes through the openings in the wall and is exhausted out of the mine as shown by the pink arrows on Exhibit P-4.

As a result of his survey, Mr. Fuller concluded the mine was well ventilated.

Mr. Fuller further agrees with Mr. Laufenberg that the violation was S&S. There is an S&S problem if the smoke was not controlled. The basic problem would be toxic gas (carbon monoxide) which would go directly to the face.

Mr. Fuller did not know how long it would take the gas to get to the face. It was entirely likely that the carbon monoxide could get there before any smoke. In his opinion, it was not likely that a miner at the face could see any fire in the shop.

Inland Quarries' Evidence

EARL HUFFMAN is a mechanic at Inland Quarries and he has performed various jobs for the company.

Mr. Huffman indicated that MSHA has never made an issue about a barrier between the pillars or the fire doors for the shop. Mr. Bohn Frazer, the quarry manager, said MSHA wanted to check the warehouse. In addition, he told the employees that MSHA would not issue a citation. Nevertheless, the company received a citation.

The company has always had good ventilation.

WALT KNIGHT is the general manager for the Americold Kansas City operation. The warehouse system was developed in 1988. In 1989 the Occupational Safety and Health Administration (OSHA) changed the carbon monoxide exposure threshold limit value from 50 PPM to 35 PPM. The company knew they could not meet the new requirements and they secured the services of a ventilation engineer who made recommendations. Eventually fans were installed at all of the places on Exhibit P-4. The ventilation changes cost approximately \$300,000.00.

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During Mr. Knight's tenure, MSHA did not inspect the warehouse nor the ventilation system. Mr. Knight permitted entry by MSHA into the warehouse area to inspect the fans. Before the inspection Mr. Laufenberg said MSHA would not issue any citations if the company granted MSHA permission to enter the warehouse area.

It is not possible to physically inspect the fans shown as No. 2, 3, and 4 in Exhibit P-5 because the area is locked and quarry personnel could not enter the area. MSHA previously had never requested permission to enter.

The trash fire that resulted in the inspection occurred on a Sunday morning. However, there was no one working and there was no damage or injuries. The fire was extinguished about noon on Sunday. MSHA had never expressed concern about lack of fire doors.

BOHN FRAZER has been the quarry manager since December 1987.

He received a call from MSHA's representative Laufenberg who indicated MSHA desired to inspect the ventilation in the mine. He further stated that, if they would grant permission, no citations would be issued. Permission was then granted. When Mr. Laufenberg came back to the office with the citation, Mr. Frazer was aghast.

The company takes particular pride in safety and they try and cooperate with the authorities.

When they were told to install a one and a half hour fire door, they obtained a three hour rated door and MSHA said they had to apply for a variance. It took six months to install the door.

These things are a mystery to the company and Mr. Frazer felt the company was not being treated fairly.

Mr. Frazer personally heard Mr. Laufenberg state that, if the company allowed the inspections, they would not write any citations in the mine area. This was agreed during a telephone conversation.

DISCUSSION and FURTHER FINDINGS

The uncontroverted evidence establishes a violation of 30 C.F.R. 57.4761. The underground shop was not equipped with any of the control measures deemed necessary by MSHA's regulation to confine or prevent the spread of toxic gases from a fire originating in the underground shop.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly designated as being S&S "if, based on 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:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 500-501 (April 1988); *Youghiogheny and Ohio Coal Co.*, 9 FMSHRC 2007, 20011-1012 (December 1987).

Following the Mathies formulation, I conclude there was an underlying violation of a 30 C.F.R. 57.4761. A clear measure of danger to safety was contributed to by the violation. Further, I credit the testimony of Inspectors Laufenberg and mining engineer Fuller that the violation was S&S. A reasonable likelihood that the hazard contributed to will result in an injury was established by MSHA's expert witnesses. (Tr. 58, 112-114). Specifically, Mr. Laufenberg testified the violation was S&S because the electrical circuits, oil and greases present made a fire reasonably likely. (Tr. 39-47). The lack of controls would carry carbon monoxide to the active face. Such toxic gases are likely to cause a fatality. (Tr. 46).

Mr. Fuller agreed the violation was S&S. He stated "4761" [30 C.F.R. 57.4761] presupposes that a fire would originate in the shop and at that point, addressing the standard correctly, means that you have to be able to control that smoke. So the presumption of a fire already existing in the shop, to me, indicates that it's a significant and substantial problem if you are not controlling it." Compare *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1243.

The above citation describes the following violative condition:

The underground limestone mine did not have two or more totally separate escapeways to the surface. The primary escape route was designated in the escape and evacuation plan as the main haulage road from the mine portal to the active mine faces. The secondary escape route, indicated as the paved underground roadway, was located in the warehouse area and did not extend to the face. From a ventilation stand point, the escape routes were not separated. There were no stoppings constructed between the two escape routes for ventilation control.

It was further alleged the described condition violated 30 C.F.R. 57.11050(a). The cited regulation provides as follows:

Section 57.11050 Escapeways and refuges.

(a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

Evidence

Mr. Laufenberg issued this citation.

The area marked in green on Exhibit P-4 is the primary escape route and the escapeways are nothing more than the haul roads.

The two roads are separated by a pillar line. There is a 40-foot open space between the pillars. If there was a toxic gas, it would migrate into both of the escapeways.

Sixteen miners were exposed to the violation and the exposure was continuous. There were always ignition sources present, such as trucks.

It was likely that someone would be injured or killed in an underground fire.

MSHA requires two separate escapeways.

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It was a distance 3,200 feet in which the pillars were separated by the 40-foot openings.

To abate this condition the company constructed ventilation stoppings between the pillars and curtains were hung.

The effectiveness of the abatement was established when a December 1991 fire occurred and the entire mine remained clear of carbon monoxide. This was after the curtains had been installed.

Mr. Laufenberg identified Exhibit R-1 as the company's ventilation plan dated December 2, 1985.

Mr. Laufenberg agreed that it would be obvious to anyone entering the mine that there was no ventilation barrier between the pillars and he did not know why he had not previously cited the company. He did not see it.

Mr. Laufenberg agreed MSHA has no jurisdiction to inspect in the area where the fans are located inside the warehouse. This particular area is under OSHA's jurisdiction.

Jerry Fuller agreed with Mr. Laufenberg that a violation of the regulation occurred.

He indicated the regulation requires that damage to one escapeway does not affect the other. In this case, if a fire occurred, you could not use the escapeways to get out and it would be like driving through a black cloud.

Mr. Fuller believed this violation was S&S. The object of the regulation is to provide two separate escapeways and, in effect, the openings between the pillars resulted in only one escapeway.

In order to complete the ventilation survey, it would be necessary for Mr. Fuller to look at the fans. If permission was required, he would get it; however, he did not know who had granted permission to inspect the warehouse, which is under OSHA jurisdiction.

Mr. Fuller acknowledged that, after four inspections a year (for a total of 56 inspections), he was unable to explain why MSHA had not detected the lack of proper ventilation and the lack of fire doors in the shop area.

DISCUSSION AND FURTHER FINDINGS

The uncontroverted evidence establishes that the "escapeways" were simply two paved haul-roads separated by a pillar line. Since a 40-foot open space separate each pillars any toxic gas would migrate into both the "escapeways." (See Ex. P-4). As

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a result there were not "two or more escapeways" as required by 57.11050.

SIGNIFICANT AND SUBSTANTIAL

The case law framework for S&S allegations are set forth in connection with the previous citation. However, in connection with this citation, no expert testimony supports paragraph 3 of the Mathies formulation. Specifically, Mr. Laufenberg did not testify as to any S&S allegations concerning the escapeways. Mr. Fuller, a ventilation expert, hedged his opinion that the escapeway violation was S&S, based "on his ventilation survey." (Tr. 118; Ex. P-5). The ventilation survey and the testimony does not support paragraph 3 of the Mathies formulation.

The S&S allegations should be stricken as to Citation No. 3907227.

AMERICOLD'S CONTENTIONS

Americold's arguments address a number of issues: the operator urges the Commission to consider MSHA's failure to detect that no ventilation barriers existed between the primary and secondary escape routes for many years.

Further, the company was assured no citations would be issued as a result of MSHA's inspecting the warehouse area. (Mr. Laufenberg denies he entered into such an agreement.)

Americold's arguments basically embody the legal doctrine of estoppel.

It is clear that the mine is subject to inspection as required by the Mine Act, and likewise a penalty is required to be assessed for any violation. There is no support from a purely equitable standpoint for Americold's arguments that the Inspector's "no citation" promise, even if true, would bind the Secretary of Labor, and excuse Americold from the requirements of the Act.

In *Secretary of Labor v. King Knob Coal Company, Inc.*, 3 FMSHRC 1417 (1981), the Commission refused to invoke the doctrine of equitable estoppel. It also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty, stating:

The Supreme Court has held that equitable estoppel generally does not apply against the federal government. *Federal Crop Insurance Corp. v. Merrill*, 332

U.S. 380, 383-386 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/UtAh Power doctrine by permitting estoppel against the government in some circumstances. See, for example, *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighted in determining the appropriate penalty.

The Supreme Court of the United States in a recent decision again refused to invoke estoppel against the government and the Court has reversed every lower court decision granting estoppel that it has reviewed. (*Office of Personnel Management v. Richmond*, 110 S.Ct. 2465 (1990), decided June 11, 1990). Insofar as it may be pertinent to this case, the Court held that erroneous oral and written information given by a Government employee to a benefit claimant who relied, to his detriment, on the misinformation cannot estop the Government from denying benefits not otherwise permitted by law.

The Court also stated:

It ignores reality to expect that the Government will be able to "secure perfect performance from its hundreds of thousands of employees scattered throughout the continent." *Hansen v. Harris*, 619 F.2d 942, 954 (CA2 1980) (Friendly, J., dissenting), rev'd sub nom., *Schweitzer v. Hansen*, 450 U.S. 785, 101 S. Ct. 1468, 67 L.Ed.2d 685 (1981). To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

For the foregoing reasons, Americold's defense is REJECTED and the citations herein, as modified, are AFFIRMED.

CIVIL PENALTIES

In determining the amount of penalty to be assessed, Section 110(i) of the Act requires consideration of certain criteria.

In the instant case, Americold's favorable history shows it was assessed 14 violations for the two year-period ending April 1, 1991. (Ex. P-1).

Americold is a small operator with 45,327 annual hours worked in 1990. (Stipulation).

Americold was negligent. It should have known of the MSHA requirements.

The proposed penalties will not affect the company's ability to continue in business. (Stipulation).

The gravity of each violation should be considered as high. A possible fire, the spread of toxic gases, and the lack of two separate escapeways present hazardous conditions to underground miners.

Americold rapidly abated the violations, so it is entitled to statutory good faith. Further, the company, in abating those two citations, demonstrated extreme good faith.

The Judge believes the penalties set for in the order of this decision are appropriate.

For the foregoing reasons, I enter the following:

1. Citation No. 3907226 is AFFIRMED and a civil penalty of \$150 is ASSESSED.
2. Citation No. 3907227 is AFFIRMED and a civil penalty of \$100 is ASSESSED.

John J. Morris
Administrative Law Judge

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