

CCASE:
FMC WYOMING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 8, 1993

FMC WYOMING CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 92-174-RM
	:	Order No. 3634714; 11/27/91
v.	:	
	:	Docket No. WEST 92-175-RM
	:	Order No. 3634718; 11/27/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 92-176-RM
ADMINISTRATION (MSHA),	:	Order No. 3634720; 11/27/91
Respondent	:	
	:	FMC Trona Mine
	:	
	:	Mine I.D. 48-00152
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-464-M
Petitioner	:	A.C. No. 48-00152-05608
	:	
v.	:	Docket No. WEST 92-542-M
	:	A.C. No. 48-00152-05612
FMC WYOMING CORPORATION,	:	
Respondent	:	FMC Trona Mine

DECISION

Appearances: Matthew F. McNulty, Esq., VAN COTT, BAGLEY,
CORNWALL & McCARTHY, Salt Lake City, Utah,
for Contestant/Respondent;

Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner/Respondent.

Before: Judge Morris

These contest and civil penalty proceedings arose under the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et
seq. (the "Act"). In the civil penalty proceedings, the Secre-

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tary seeks to impose civil penalties against FMC Wyoming Corporation ("FMC").

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah.

The parties filed post-trial briefs.

STIPULATION

At the commencement of the hearing, the parties stipulated as follows:

1. FMC Wyoming Corporation ("FMC") is engaged in mining and selling of sodium compounds in the United States, and its mining operations affect interstate commerce.

2. FMC is the owner and operator of FMC Trona Mine, MSHA I.D. No. 48-00152.

3. FMC 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/orders were properly served by duly authorized representatives of the Secretary upon an agent of FMC 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 FMC 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 FMC's ability to continue in business.

8. FMC is a large mine operator with 3,132,680 hours worked in 1991.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to December 9, 1991.

SETTLEMENTS

At the commencement of the hearing, the parties further agreed to settle certain citations:

1. As to Citation No. 3634735 FMC seek to withdraw its contest and pay the proposed penalty of \$100. (Tr. 7).

2. As to Citation No. 3634706 the parties seek to reduce the penalty from \$1000 to \$780. They further noted FMC abated the violative condition, and it was agreed the accompanying non-penalty 104(b) Order should be affirmed. (Tr. 7).

3. As to Citation No. 3904302 FMC moved to withdraw its notice of contest and pay the proposed penalty of \$1800. (Tr. 9).

4. As to Citation No. 3904303 the parties sought to amend the Citation and reduce the penalty for \$206 to \$50. (Tr. 9).

I have reviewed the proposed settlements as stated on the record and I find they are reasonable and in the public interest. They should be approved.

STATEMENT OF THE CASE AND ISSUES

No dispute exists as to the three citations issued under Section 104(a) of the Act. The citations, described hereafter, are supported by the testimony of MSHA Inspector Gerry Ferrin, an electrical specialist. FMC's witness Carl Watson offered no contrary evidence.

The dispute centers on whether the Inspector abused his discretion in failing to extend the time of abatement when he was requested to do so. Further, the proposed penalties are an issue in the case.

Citation No. 3634712 alleges FMC violated 30 C.F.R. 57.20003. (Footnote 1) It reads

1 57.20003 Housekeeping.

At all mining operations--

(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;

(b) The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition.

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A quantity of trona had spilled on the stairway by E11 elevator, sesqui shipping; on the stairway access and on the access to the valves beside the stairway. The passageway and stairway was (sic) was not maintained in a clean and orderly condition. (Ex. G-2).

When FMC failed to abate the violative conditions, the Inspector issued Order No. 3634717 under Section 104(b) of the Act. (Ex. G-2).

Citation No. 3634713 alleges FMC violated 30 C.F.R. 57.12032. (Footnote 2) It reads:

The thermostat in the restroom in Sesqui shipping was not provided with a cover over the 110 VAC terminals. The thermostat was about 4.5 feet above floor level. The terminals were somewhat recessed so that contact was unlikely. (Ex. G-3).

When FMC failed to abate the violative conditions, the Inspector issued Order No. 3634718 under Section 104(b) of the Act. (Ex. G-3).

Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable; and

(c) Every floor working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

2 57.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

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Citation No. 3634714 alleges FMC violated 30 C.F.R. 57.20003.(Footnote 3) It reads

In the old sesqui bagging/shop platform, housekeeping had not been performed through- out the entire area. Bags of soda ash had been dropped in walkways, cardboard, paper, rags, and metal materials were strewn about. (Ex. G-4).

When FMC failed to abate the violative conditions, the Inspector issued Order No. 3634720 under Section 104(b) of the Act. (Ex. G-4).

DISCUSSION AND FURTHER FINDINGS

On November 26, 1991, MSHA Inspector Gerry Ferrin issued Ci- tation Nos. 3634712, 3634713, and 3634714. These three Citations were issued under Section 104(a) of the Act. (Gov. Exs. G-2, G-3, and G-4). On November 27, 1991, approximately 24 hours later Inspector Ferrin issued an accompanying 104(b) order for each Citation.

Evidence as to 104(a) Citations

CITATION NO. 3634712

The area involved in this Citation was identified as a pas-sage or travelway. (Tr. 16, 58). Inspector Ferrin considered the area to be in use because he observed packed-down trona as well as footprints in the trona. (Tr. 17). Mr. Watson con- firmed the passageway was in use and access had not been restricted. (Tr. 54, 60, 74).

Inspector Ferrin identified slip, trip, or fall as the hazard. He believed supervisory personnel traveling through the area should have recognized the hazard and taken care of it. (Tr. 16, 18, 59).

The uncontroverted facts establish a violation of 57.20003 and Citation No. 3634712 should be affirmed.

3 Cited, supra fn 1.

Citation No. 3634713

This Citation was issued on November 26, 1991, at approximately 10:23 p.m. Inspector Ferrin indicated the conditions cited presented an electrical shock hazard. (Tr. 24). He further testified as to the absence of any testing or repairs on the thermostat. (Tr. 24). Both management and employees use the restroom. Mr. Ferrin felt someone should have recognized the hazard and corrected it. (Tr. 26).

On the uncontroverted evidence Citation No. 3634713 should be affirmed.

Citation No. 3634714

This Citation was issued on November 26, 1991, at approximately 10:24 p.m. Inspector Ferrin described the area in question as a passageway and mechanic's storage/work areas. A slip, trip, or fall were identified as the hazards.

Mr. Watson indicated that access was not restricted to this area. In addition, it was possible that a mechanic might enter the area. (Tr. 64, 75-76).

Inspector Ferrin thought that someone should have recognized the hazards and taken corrective action. (Tr. 32).

On the uncontroverted evidence, Citation No. 3634714 should be affirmed.

Order Nos. 3634717, 3634718, and 3634720

The above 104(b) orders were issued on November 27, 1991, approximately 23 hours after the above 104(a) citations. Because of the circumstances surrounding the issuance of the orders, as well as the evidence of FMC, all three orders can be discussed together.

It is uncontroverted that FMC failed to abate the original citations.

Section 104(b) of the Act contains the authority for a failure to abate the order. It provides:

- (b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not

been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated.

Inspector Ferrin had originally set the time for abating the 104(a) violations as 4 p.m. on November 27, 1991. When he returned to the cited areas, approximately 23 hours after the initial citations had been issued, he observed that no apparent effort had been made to abate the violations (Tr. 19-20, 27, 32). FMC's Representative Watson verified the failure to abate. (Tr. 67-72).

Mr. Watson agreed the time allowed for abatement by the Inspector was reasonable (Tr. 78). Inspector Ferrin originally set the abatement time for each citation based on past experience and upon conversations with Carl Watson and the miner's representative, both of whom had accompanied him on the inspection. (Tr. 18).

DEFENSES

FMC offered several excuses regarding the failure to abate. These excuses included: the absence of a supervisor or a foreman on the inspection party (Tr. 52); [one foreman had called in sick (Tr. 55)].

FMC inspections had not occurred on the swing shift (Tr. 52); there was no graveyard shift in the cited areas (Tr. 53).

The violations were not of a severe nature (Tr. 70).

Watson stated that he discussed all of the above factors with Inspector Ferrin before the orders were issued (Tr. 70).

Mr. Ferrin testified that he had considered the nature of the violations and degree of danger posed by them (Tr. 41). Among the most important factors was whether the operator had made a reasonable effort to abate the violations. In fact, Mr. Ferrin stated that if a sincere effort has been made to abate a citation, he will extend an abatement period (Tr. 29, 32). In this case, however, the Inspector could find no mitigating circumstances or evidence of any effort made to abate the citations that would allow him to grant an extension (Tr. 23).

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Mr. Ferrin believed that a lack of communication that allows a hazardous condition to continue to exist is not an excuse sufficient to allow an extension (Tr. 22). Opening and maintaining lines of communication is the responsibility of management and the breakdown of a communication line can not serve as an excuse for failing to abate a hazard. Mr. Ferrin also stated that the absence of a foreman on the inspection would not be a legitimate reason for an extension (Tr. 42, 44). Similarly, one foreman calling in sick hardly qualifies as an excuse; production does not stop when one man is absent (Tr. 78).

Carl Watson, a member of management, accompanied Mr. Ferrin on the inspection and was served with the three original Section 104(a) citations (Tr. 56). Mr. Watson then gave the citations to the foreman that was working at the time. The foreman is also a member of management (Tr. 72). Mr. Watson also informed Jack Thorner, his boss, of the citations. Mr. Thorner also is a member of management (Tr. 72).

APPLICABLE CASE LAW

The factors to be considered in determining whether an abatement period should be extended are (1) the degree of danger that any extension would have caused to miners; (2) the diligence of the operator in attempting to meet the time originally set for abatement; and (3) the descriptive effect an extension would have had on operating shifts. Youghioghney and Ohio Coal Company, 8 FMSHRC 330 (March 1986, Maurer, Judge) citing Consolidation Coal Company, Barb 76-143 (1976).

In considering the initial facet, I conclude that the degree of danger caused by an extension of abatement was low. The Secretary does not claim otherwise and the 104(a) citations were not designated as S&S. All three citations indicated that an injury was "unlikely."

In considering the second facet, it appears the operator was not diligent. No effort was made to meet the time originally set for abatement.

In considering the third facet, the record fails to establish that an extension would disrupt the operating shifts.

FMC argues that for at least 15 years MSHA inspections had been performed on the day shift. The instant inspection was the first MSHA "off-shift" inspection.

An inspection during an "off-shift" could disclose safety deficiencies that might not be observed during the day shift. MSHA has considerable discretion in scheduling its inspections.

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I am unwilling to conclude that a shift change in inspections constitutes an abuse of that discretion.

As a further reason in support of its position, FMC asserts its chain of command was broken because no superintendent or foreman was able to participate in the inspection.

I am not persuaded the chain of command had broken down. Carl Watson, a member of management, accompanied the Inspector and was served with the three original citations (Tr. 56). Mr. Watson gave the citations to the foreman who also is a member of management (Tr. 72.) Mr. Watson informed his boss Jack Thorner of the citations (Tr. 72). In sum, the communication lines were well established.

FMC claims an extension should have been granted because of extenuating circumstances citing Old Ben Coal Co., 1 MSHC 1452, 1456 (IBMOA 1976) and United States Steel Corporation, 1 MSHC 1490, 1492 (IBMOA 1976). These cases are not controlling.

In Old Ben the Interior Board held the Judge abused his discretion in vacating a notice of violation merely because it contained an unreasonably short abatement period. This issue is not present in the case at bar. FMC's witness Watson confirmed that the abatement time was the next day. Further, he stated "these people would have had time to abate the citations on the day shift the next day" (Tr. 74).

United States Steel Corporation is not factually similar to the instant case. 1 MSHC at 1491.

For the foregoing reasons, the 104(a) citations and 104(b) failure to abate orders should be affirmed.

CIVIL PENALTIES

The Secretary states that the 104(b) orders should be affirmed with no penalty and further states that the (b) order "enhances" the penalty for the 104(a) citations (Tr. 8). I reject the Secretary's views that the 104(b) orders "enhance" the 104(a) citations. Section 110(i) contains the critical criteria on assessing appropriate civil penalties and no "enhancement" exists in the Mine Act.

Section 110(i) of the Act mandates consideration of six criteria in assessing appropriate civil penalties.

Considering the evidence, it appears that FMC is a large operator with 3,132,680 hours worked in 1991 (Stipulation).

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

FMC's history of previous violations indicated it was assessed 240 violations for the two-year period ending December 9, 1991 (Ex. G-1).

The operator was negligent in that the violative conditions in the two housekeeping violations were open and obvious. In addition, the lack of a cover over 110 VAC terminals was open and obvious.

The evidence establishes to gravity was minimal. The Inspector considered any injury to be "unlikely."

FMC failed to demonstrate any good faith since it did not attempt to achieve prompt abatement of the violations.

Considering the statutory criteria, a penalty assessment of \$100 for each contested violation is appropriate.

For the foregoing reasons, I enter the following:

ORDER

1. WEST 92-542-M:

Citation No. 3904302 and the proposed penalty of \$1,800.00 are AFFIRMED.

Citation No. 3904303 and the amended penalty of \$50.00 are AFFIRMED.

2. WEST 92-464-M

Citation No. 3634706 and the amended penalty of \$780.00 are AFFIRMED.

Order No. 3634707 is AFFIRMED.

Citation No. 3634735 and the proposed penalty of \$100 is AFFIRMED.

Citation No. 3634712 is AFFIRMED and a penalty of \$100.00 is ASSESSED.

Order No. 3634717 is AFFIRMED.

Citation No. 3634713 is AFFIRMED and a penalty of \$100 is ASSESSED.

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Order No. 3634718 is AFFIRMED.

Citation No. 3634714 is AFFIRMED and a penalty of \$100.00 is ASSESSED.

Order No. 3634720 is AFFIRMED.

3. WEST 92-174-RM, WEST 92-175-RM, and WEST 92-176-RM, the contest cases, are DISMISSED.

John J. Morris
Administrative Law Judge

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