

CCASE:
SOL (MSHS) V. RHONE-POULENC
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

February 4, 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-519-M
Petitioner	:	A.C. No. 48-00154-05549
	:	
v.	:	Big Island Mine and
	:	Refinery
RHONE-POULENC OF WYOMING CO.,	:	
Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (1988) ("Mine Act" or "Act"), On October 13, 1993, the Commission remanded the case for further proceedings, consistent with its decision.

Pending herein is the Secretary's motion for summary decision filed pursuant to Commission Rule 67, 29 C.F.R. 2700.67.

In support of the motion, the Secretary relies on the stipulation of the parties filed December 27, 1993, the subject citation incorporated by reference and on the grounds set forth herein.

Respondent did not reply to Secretary's motion for summary decision.

The motion for summary decision states:

1. There is no issue as to jurisdiction in this matter as set forth in the Stipulation. Rhone-Poulence of Wyoming Company ("Rhone-Poulenc") is engaged in the mining and selling of trona in the United States, and its mining operations affect interstate commerce. (Stip. 1). In addition, Rhone-Poulenc is the owner and operator of the Big Island Mine and Refinery, MSHA I.D. No. 48-00154. (Stip. 2). As a mine operator, Rhone-Poulence is subject to the jurisdiction of the Federal Mine Safety and Health

Act of 1977, 30 U.S.C. 801 et seq. ("the Act"), and the Administrative Law Judge has jurisdiction in this matter. (Stip. 3, 4). Finally, the subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein. (Stip. 5).

2. This case arises out of the Respondent's contest of Citation No. 3634635 issued on October 2, 1991, by MSHA Inspector Gerry Ferrin. The subject citation alleged that an electrical foreman Willie Bramwell, employed by the Respondent, received an electrical shock-type injury while performing mechanical work inside an electrical control compartment at the Big Island Mine and Refinery. The electrical foreman failed to lock out or take other effective means to prevent the likelihood of being shocked while performing the mechanical work on the compartment. (Citation No. 3634635). As such, the company's actions through its electrical foreman were alleged to be in violation of 30 C.F.R. 57.12016. (Stip. 7)

3. The condition cited in Citation No. 3634635 was determined by the Inspector to be a significant and substantial violation of the Act as the failure to comply with 30 C.F.R.

57.12016 was deemed to have contributed to a reasonably serious injury that resulted in lost workdays for the affected electrical foreman. (Stip. 8). Thus, given the reasonably serious injury that occurred, the violation was a significant and substantial violation as set forth in Section 104(d) of the Act.

4. MSHA determined that the operator's negligence was high as to the occurrence of this violation. Bramwell was an experienced and well-trained electrical foreman, and as a supervisor, was an agent of the operator as defined in Section 3(e) of the Act. MSHA determined that Bramwell knew or should have known that he violated the Act when he failed to lock out or take other effective means to prevent the likelihood of being shocked while performing the mechanical work on the compartment at the mine. (Stip. 9).

5. Moreover, MSHA determined that the operator's conduct was aggravated and therefore, constituted an unwarrantable failure as set forth in Section 104(d)(1) of the Act. MSHA based its determination of unwarrantability on the following factors:

- 1) the electrical foreman was a supervisor of other employees;
- 2) the electrical foreman was an agent of the operator; and
- 3) the electrical foreman was knowledgeable about MSHA regulations. (Stip 10).

6. MSHA agreed to stipulate to a proposed penalty of \$800 for Citation No. 3634635. (Stip. 11). The proposed penalty will not affect Respondent's ability to continue in business and takes into account the relevant penalty criteria pursuant to 30 C.F.R. Part 100. (Stip. 12). As such, the operator demonstrated good

faith in quickly abating the violation. (Stip. 13). In addition, Rhone-Poulenc is a large mine operator with 1,176,624 hours worked at the controlling company and 994,463 hours worked at the mine. (Stip 14). In the 24 months prior to the inspection, Respondent was inspected a total of 278 days and received 73 assessed violations only 3 of which were significant and substantial and none of which were unwarrantable failures. (Stip. 15). The negligence criteria are discussed above in paragraph 4.

7. For purposes of a summary decision, the "adverse party may not rest upon the mere allegations or denials of his pleadings If the party does not respond, summary decision, if appropriate, shall be entered against him." 29 C.F.R. 2700.67. In the instant matter, Respondent stipulated that it will not challenge the facts as set forth in the attached stipulation. (Stip. 16). As such, given the lack of challenge by the operator, the attached stipulation and the citation establish without a genuine issue of fact, the elements of the violation, the significant and substantial nature of the violation, unwarrantability, and the penalty criteria. Thus, it is appropriate for this case to be decided by summary decision.

8. The procedural history of this case is as follows: On December 28, 1992, Administrative Law Judge John J. Morris issued an Order of Dismissal denying Respondent's Motion to Dismiss under Section 105(a) of the Act, denying the Secretary's motion to accept late filing of Proposal for Penalty, and granting Respondent's Motion to Dismiss on the issue of timeliness of the Proposal for Penalty. On October 13, 1993, the Federal Mine Safety Review Commission (hereinafter the "Commission") issued its Decision vacating the Judge's order dismissing this proceeding and remanding the case to the judge for further proceedings. (Stip. 17).

9. With relation to the Commission's decision of October 13, 1993, the parties expressly reserve the right to appeal the issues raised and decided in the decision, once the remaining merits of the case have been resolved by the issuance of a decision and order by the Administrative Law Judge. A final decision and order on the merits is needed prior to any further appeals on the issue of the timeliness of the Proposal for Penalty. (Stip. 18).

10. The parties have agreed that the Secretary shall not attempt to collect the penalty ordered herein until Respondent's appeal is finally resolved, provided that Respondent timely commences and prosecutes said appeal.

In summary, the Secretary moved, unchallenged by Respondent, for a summary decision in this matter pursuant to 29 C.F.R.

2700.67. Such a decision would resolve all pending issues on the merits of the citation and the penalty and would preserve the

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right of any further appeals on the procedural issue of timeliness of the Proposal for Penalty.

Based on the stipulation of the parties, I enter the following:

ORDER

1. The Secretary's motion for summary decision is GRANTED.
2. Citation No. 3634635 is AFFIRMED.
3. A civil penalty of \$800 is ASSESSED.

John J. Morris
Administrative Law Judge

Distribution:

Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Daniel A. Jensen, Esq., KIMBALL, PARR, WADDOUPS, BROWN & GEE, P.O. Box 11019, Salt Lake City, UT 84147 (Certified Mail)

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