

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 17, 1996

STILLWATER MINING COMPANY : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 95-158-RM
: Citation 4423435; 12/6/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Stillwater Mine
ADMINISTRATION (MSHA) : Mine I.D. No. 24-01490
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 95-352-M
Petitioner, : A.C. No. 24-01490-05572
v. :
:
STILLWATER MINING COMPANY, : Stillwater Mine
Respondent :

DECISION

Appearances: Kristi Floyd, Esq., Office of the
Solicitor, U.S. Department of
Labor, Denver, Colorado; Barbara J.
Renowden, Conference and Litigation
Representative, U.S. Department of
Labor, Mine Safety and Health
Administration, Denver, Colorado,
for the Secretary of Labor;
James J. Gonzalez, Esq., Holland & Hart,
Denver, Colorado; Jeanne M. Bender,
Holland & Hart, Billings, Montana, for
Stillwater Mining Company.

Before: Judge Amchan

Summary of Decision

At issue in this case is a citation alleging that Stillwater Mining Company (Stillwater) violated 30 C.F.R. §57.9310, which requires that persons attempting to free chute hangups be experienced, be familiar with their tasks and the hazards involved, and use the proper tools. A \$220 civil penalty was proposed for this alleged violation. For the reasons stated below, I affirm the citation only with regard to the failure of Respondent's miner to use proper tools and assess a civil penalty of \$50.

Findings of Fact

The accident

On November 23, 1994, an accident occurred at Stillwater's underground platinum mine near Nye, Montana. Two large rocks had lodged in a chute through which ore is dropped into haul trucks. Miners Arlen Cook and Eldron Arthun worked unsuccessfully to free the jam for about ten or fifteen minutes. Then they decided to blast the rocks free with dynamite (Tr. 50-54).

Arthun, a miner with 22 years of experience, told Cook, a miner with only 5 months experience, to open the gate at the bottom of the chute (Tr. 14, 54, 89, Exh. R-11, pp. 6, 22). Then, contrary to Stillwater's safety rules, Arthun climbed into the chute. He manually placed the dynamite near the jam¹. When he climbed out of the chute Arthun noticed that he had lost a brace that he had been wearing on an injured finger (Tr. 54-59, Exh. R-11, pp. 41-43).

Both miners looked for Arthun's brace in the back of a truck parked at the bottom of the chute. Arthun first told Cook to close the gate to the chute (Tr. 56, Exh. R-11, pp. 43-45). Then he changed his mind and told Cook to leave the chute open so he could light the explosive charge (Exh. R-11, pg. 45). Cook either did not hear Arthun, or misunderstood him. He closed the gate without looking at the mouth of the chute. Arthun was standing at the mouth of the chute and was caught by the closing gate. He fractured his pelvis in three places and was off of

¹It is not a violation of Stillwater's safety rules to manually place dynamite in a chute if this can be done without violating other rules, such as the prohibition against entering the chute (Exh. R-1, Rules 21 and 22). This may be the case when the jam is within a couple of feet of the bottom of the chute (Tr. 284-88).

work until August 1995 (Tr. 59-60, 293, Exh. R-11, pp. 48, 71-72).

The MSHA Citation

MSHA Inspector Fran Maulding learned of the accident through a newspaper report. She visited the mine on December 6, 1994, to investigate the accident and issued Citation No. 4423435. The citation describes the violative condition as follows:

An employee was seriously injured when he placed himself inside chute 4460 at 4800 EW with gate up to free chute hang-up. He relied on another employee to shut chute gate when he finished completing his task. For some reason he reentered chute as other employee activated the air cylinder to close chute gate. Chute gate closed on employee causing pelvis injuries. This happened 11-23-94.

According to the citation this condition or event violated 30 C.F.R. §57.9310(b). This regulation provides that:

Persons attempting to free chute hangups shall be experienced and familiar with the task, know the hazards involved, and use the proper tools to free material.

The condition described by the citation is not a violation of the standard. The fact that an accident occurred does not establish a violation of this regulation. There is no allegation that persons attempting to free chute hazards were not experienced or familiar with the task, that they did not know the hazards involved or that they did not use the proper tools. The only suggestion in the citation of a violation of any MSHA requirement is the description of the "Action to Terminate" (Block 18). That section relates that "the company has trained miners of hazards and proper way to handle chute hang-ups."

Did the Secretary allege a violation of the cited standard?

In issuing the citation, Inspector Maulding was primarily concerned with the conduct of Eldon Arthun in standing in front of the mouth of the chute (Tr. 129). While he violated Respondent's safety rules in this regard, a violation of company safety rules does not necessarily establish that a miner is inexperienced, or unfamiliar with his task or the hazards involved. Experienced persons on occasion perform tasks in an unsafe manner, even when they know better, see e.g., Midwest Materials Co., 17 FMSHRC 636 (ALJ April 1995-review pending);

Whayne Supply Co., 17 FMSHRC ____ (ALJ September 1995-review pending).

Use of the proper tools

Although the standard requires the use of proper tools, nothing in the citation indicates that proper tools were not used. Citations are drafted by non-legal personnel and the Commission is liberal in allowing amendments to citations and conforming the pleadings to the evidence. Nevertheless, section 104(a) of the Act requires that a citation describe with particularity the nature of the violation. The purpose of this requirement is to allow the operator to discern what conditions require abatement and adequately prepare for hearing, Cyprus Tonopah Mining, 15 FMSHRC 367, 379 (March 1993).

In the instant case it is a close question as to whether the particularity requirement was satisfied with respect to the use of proper tools. That Respondent violated section 57.9310(b) in failing to use the proper tools was not alleged until the middle of the hearing (Tr. 133-38). While, it is incumbent on the Secretary to articulate its theory of a case sufficiently in advance of trial, I conclude that Respondent was not prejudiced by his failure to do so with regard to the tools issue.

Respondent offered the testimony of the only eyewitnesses to the accident, Cook and Arthun, and foreman Ike Bassett, who has expertise as to the proper tools to be used to free jammed chutes. Their testimony establishes that no tools are required to place an explosive charge if the jam is within the first

couple of feet of the mouth of the chute (Tr. 284-85). If that is the case, the charge can be placed by hand through an opening in the top of the chute gate (Tr. 284-88).

Arthun testified the jam was "right at the mouth of the chute," and "roughly ... six feet" from the mouth of the chute (R-11, pp. 38-40). He also testified that he knew he had made a mistake, that he should have put the explosives on a powder pole and put it in between the jammed boulders (R-11, pg. 40). Cook would also have used a pole to place the explosives (Tr. 55).

From this evidence, I infer that the jam was too far from the mouth of the chute for the explosives to be safely placed by hand. I therefore conclude that Respondent violated §57.9310(b) by virtue of Arthun's failure to use the proper tools in placing the explosive, A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983).

The training of Arlen Cook

The pleadings with respect to Stillwater miners' familiarity with tasks, experience and knowledge of hazards, should also have been amended before trial to describe the alleged violation with sufficient particularity. At hearing, over the objection of Respondent's counsel, the Secretary litigated the theory that the standard was violated because Arlen Cook had not been properly trained and thus did not know the hazards involved in chute pulling.

The first suggestion in the record that Mr. Cook's training was at issue appears in the Secretary's Supplemental Response to the Prehearing Order, dated September 27, 1995 (14 days before the hearing). It states that MSHA witness Robert Koenig would discuss the MSHA certificates of training for Cook and Arthun. At hearing, I concluded that the citation, in describing the abatement measure as training for "miners," was broad enough to alert Respondent that Mr. Cook's training, as well as Mr. Arthun's, might be an issue.

I reiterate this ruling because I conclude Stillwater has not been prejudiced by litigation of the issue as to whether Cook had been adequately trained prior to the accident. It anticipated litigation of this issue by subpoenaing Mr. Cook and also by presenting the testimony of his supervisor, Ike Bassett. Through these witnesses, Stillwater has established that Mr. Cook was sufficiently experienced and familiar with the task of unjamming chutes. He was also knowledgeable of potential

hazards². Thus, Stillwater is not prejudiced because it disproved any violation of the standard with regard to Mr. Cook.

The Secretary did not establish a violation of the cited regulation with regard to Mr. Cook's training.

The Secretary's theory of this case is that Stillwater violated section 57.9310 because the certificates of training for Arlen Cook, MSHA Form 5000-23 (Exhibits R-3 and R-4), do not reflect training in the tasks and hazards of chute pulling prior to the accident. A certificate of training signed by Mr. Cook on June 30, 1994, shortly after he began working for Stillwater, indicates that he received "Newly Employed Inexperienced Miner" training. The certificate does not specify the subjects covered in that training (Exh. R-3).

Another certificate signed by Mr. Cook on December 6, 1994, after the accident, indicates that he received "New Task" training in a number of areas, including chute pulling and chute blasting (Exh. R-4). From this certificate, the Secretary concludes that Cook was not familiar with the tasks and hazards of freeing chute hang-ups on November 23, 1994.

Stillwater has rebutted whatever inference may be drawn from the training certificates. Cook was trained on how to safely free chute jams after about three weeks of employment at Stillwater. This training was given by Stillwater's safety department, his foreman Ike Bassett and his partner, Gary Everhardt, an experienced miner (Tr. 15-29, 41, 49, 89-97, 262-73, 277-78).

Bassett and Everhardt told him to stand by the side of the chute and use a bar to free jams. They also explained that slamming the chute gate or running water on the jam will sometimes free the chute, if this cannot be done with a bar. Cook was also told that as a last resort jams must be freed with explosives. He was taught to place the explosives with a PVC pipe. These instructions are consistent with Stillwater's safety

²Section 48.2(b) defines "experienced miner" to include one who has received the training for a new miner within the preceding 12 months as prescribed in §48.5. I need not reach the issue as to whether an "experienced miner" satisfies the requirements of §57.9310(b), for the record establishes that Cook and Arthun were experienced in the task of freeing chute hang-ups.

rules which Cook was given on June 27, 1994 (Ibid., Exh. R-2)³.

Within a few weeks of Cook's hiring, Bassett and/or Everhardt demonstrated to Cook how to operate the controls for the chute gate and how to load a truck with ore from the chute. They then observed him performing these tasks (Tr. 262-73). Thus, Stillwater has established that Cook was sufficiently experienced, familiar with the tasks of chute pulling and freeing chute hang-ups, and knowledgeable of the hazards involved to satisfy section 57.9310 by November 23, 1994. There is no evidence in the record suggesting that the same was not true for Mr. Arthun⁴.

³Cook was not allowed to do blasting by himself. Stillwater requires that two employees be present when blasting is performed (Tr. 273).

⁴Stillwater may have violated 30 C.F.R. §48.9 with regard to the certificates of training for Mr. Cook, however that is not certain, and the operator was not cited for such a violation. Stillwater's training program for new miners includes "Health & Safety aspects of the task to which the new miner will be assigned (Exh R-9, fourth page)." Thus, it may be true that the certificate of training signed by Cook on June 30, 1994, accurately reflects his training and encompasses the task training which he received.

Moreover, in proposing section 57.9310, MSHA stated that this rule was not intended to duplicate the Part 48 training requirements. The Agency said that specific training was not an element of the proposed rule, BNA Mine Safety and Health Reporter, December 26, 1984 at page 298.

The violation established was "Significant and Substantial"

Citation No. 44223435 was cited as a "Significant and Substantial (S&S)" violation of the Act. The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is as follows:

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

I conclude that the failure to use proper tools in freeing chute jams was "S&S." Given the fact that proper tools were not used at a time when Mr. Arthun was standing in front of the jammed chute, it was reasonably likely that the failure to use proper tools would result in injury. It was also likely that the injury would be serious. Ironically, the scenario of a likely serious injury in this matter was not the accident that occurred. Rather, it was the likelihood that in the normal course of mining operations a miner engaged in such activity would be seriously injured by material suddenly coming out of the chute.

Assessment of a Civil Penalty

With regard to the penalty criteria in section 110(i) of the Act, the parties have stipulated that Respondent demonstrated good faith in abating the alleged violation, that the proposed penalty of \$220 will not affect Respondent's ability to stay in business, and that the mine had 711,691 hours of production in 1993. Nothing in Respondent's history of violations would cause me to either raise or lower the penalty.

The failure to use proper tools, in this case the PVC pipe, is of fairly high gravity due to the relationship with Arthun's decision to enter the chute. However, I assess a civil penalty

of \$50, because Arthun's negligence cannot be imputed to the Respondent for purposes of assessing a civil penalty, Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982).

I find nothing in the record regarding Respondent's supervision, training and discipling of Arthun, who is a rank-and-file miner, that would lead me to the assess a greater penalty. The Commission assesses civil penalties without regard to the penalty proposed by the Secretary. Nevertheless, it strikes me as unjust to assess a higher penalty in this case where the Secretary proposed a \$220 penalty largely on theories it failed to prove.

ORDER

Citation No. 4423435 is affirmed insofar as it alleges a failure of Respondent's miner Eldon Arthun to use proper tools in freeing the chute hang-up of November 23, 1994. It is vacated in all other respects. A \$50 civil penalty is assessed. This penalty shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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