CCASE:
MSHA V. JIM WALTER RESOURCES
DDATE:
19791121
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 21, 1979

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

v. Docket Nos. BARB 77-266-P
BARB 76X465-P

JIM WALTER RESOURCES, INC., and
COWIN AND COMPANY

DECISION

These cases arise under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976) (amended 1977) [1969 Act]. The administrative law judge vacated a notice of violation and dismissed penalty assessment petitions. We granted the Secretary's petition for discretionary review.

On June 9, 1975 an accident occurred in the production shaft at Jim Walter Resources Brookwood No. 4 Mine. Cowin and Company, an independent contractor, was sinking the shaft. One of the tugger ropes broke which was operating a clamshell used in excavation. Over 1,000 feet of wire rope fell, striking and killing a Cowin employee who was working at the shaft bottom.

A notice of violation was issued to Jim Walters by an inspector of the Mining Enforcement Safety Administration (MESA). The notice alleged violation of 30 CFR $77 1903(b) and described the allegedly violative condition or practice as follows:

> The American National Standards Institute "Specifications for the use of wire ropes for mines" Mll.1-1960 was not used as a guide in the use, installation and maint. of wire ropes used for hoisting at the three shafts under construction at

the No. 4 mine.

The notice was terminated after the condition had been abated. On August 2, 1976, MESA filed a petition for assessment of civil penalty pursuant to section 109(c) of the 1969 Act, alleging that Cowin and Company, as statutory agent of Jim Walter Resources, "knowingly authorized, ordered or carried out" a violation of the mandatory safety standards set forth in 30 CFR $77.1903(b). On July 13, 1977, MESA filed a petition for assessment of civil penalty against Jim Walter Resources under section 109(a) of the 1969 Act.

The administrative law judge disposed of the cases on the ground that the notice of violation was not sufficiently specific on its face to satisfy the requirements of section 104(e) of the 1969 Act. 1/ We reverse and remand.

The judge concluded that any notice charging a violation of 30 CFR $77.1903(b) should set out "the specific ANSI standard allegedly violated, as well as the circumstances which led MSHA (MESA) to believe compliance was not being achieved so that an adequate defense can be made." He emphasized that this was particularly true in a civil penalty case filed under section 109(c), where a respondent is charged with a knowing violation.

In holding that the lack of specificity was fatally defective to the notice, the judge relied in part on Armco Steel Corp., 8 IBMA 88, 1977-78 OSHD CCH %22,089 (1977), aff'd on reconsideration, 8 IBMA 245, 1978 OSHD CCH %22,550. In that decision the Interior Board of Mine Operations Appeals (Board) held that section 104(e) of the 1969 Act required each notice and order to contain a specific written description of the pertinent conditions or practices. A withdrawal order in that case was vacated for failing to adequately describe the conditions which allegedly constituted an imminent danger. The Board refused to look beyond the "four corners" of the withdrawal order and held that they could not consider any other written or oral communication of the description concerning the hazardous conditions in determining whether the requirements of section 104(e) had been met. Armco, supra, 8 IBMA 88 at 96; 8 IBMA 245 at 252. Although the judge in Armco had ruled that MESA's failure to meet the requirements of section 104(e) could be treated as a technical defect since the operator had suffered no prejudice as a result of the nonspecificity, the Board reversed this ruling and held that a lack of prejudice was not dispositive of the issue. The Board emphasized that the specificity standards of section 104(e) were also applicable to the requirements of section 107 of the Act. Section 107(b) requires that a copy of any notice or order be mailed immediately to a representative of the miners and state mine officials. Section 107(a) requires that the miners be notified immediately by posting a copy of the notice or order on the mine bulletin board.

1/ Section 104(e) provided in part:

> Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard ....

Returning to the facts before us in the instant case, we hold that even if the notice itself was insufficiently specific, 2/ this defect alone would not render the notice invalid.

The primary reasons compelling the statutory mandate of specificity is for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter. We find that these purposes of section 104(e) have been satisfied here. The operators do not claim any difficulty in being able to identify and thereby abate the allegedly violative condition. Nor does it appear that either Jim Walter or Cowin was deprived of notice sufficient to enable them to defend at hearing. They did not request more specific notice of the alleged violations in prehearing motions, nor did they request a continuance when evidence regarding alleged noncompliance with specific ANSI standards was introduced at the hearing. Instead, they defended on the merits. The operators did not claim prejudice in preparing a defense until the post-hearing brief where the claim appears in a perfunctory footnote.

Although the judge concluded that MESA's failure to cite the specific ANSI standard deprived the respondent of reasonable notice as to the violation charged, his analysis was confined to the "four corners" of the notice as required by Armco. The judge noted that MESA could have easily modified the notice to include the particular ANSI standards involved. The judge further noted that the June 9, 1975, accident report prepared by the same MESA inspector who issued the subject notice of violation,

> included therein a specific reference to an ANSI recommendation pertaining to the minimum ratio of drum or sheave diameter to the rope diameter and a finding that the ratios in use were one-third less than the recommended minimum. [Dec. at p. 36.]

The accident report, which was received by the operators long before the hearing, also notes excessive wear on the wire rope. These two conditions described in the accident report compose the essential elements of the testimony at the hearing regarding alleged non-compliance with ANSI standards. We read the notice of violation in conjunction with the accident report, and conclude that the operators were not prejudiced in preparing their defense. Therefore, any lack of specificity on the face of the notice does not affect its validity.

2/ The Secretary appears to argue that the notice was sufficiently specific because it alleged that the ANSI standards were not used as a guide. 30 CFR $77.1903(b) states that the ANSI standard "shall be used as guide in the use, selection, installation, and maintenance of wire ropes used for hoisting." The judge did not accept the Secretary's argument. Because of our holding today, we find it unnecessary to pass upon this point.

~1830

We believe the notification requirements of section 107 should play little, if any, role in interpreting the minimum standards mandated by section 104(e). The objective of healthful and safe mines may be advanced when miners, their representatives, and state mine officials are fully informed of mine conditions by notices and orders utilizing specific written descriptions of the pertinent conditions or practices. However, an overly restrictive interpretation of section 104(e) will invalidate notices and orders where no prejudice has resulted to the mine operator. Because this will, on balance, hinder rather than promote mine safety and health, we decline to follow the Board's approach in Armco.

We accordingly reverse and remand this case for further proceedings. In so doing we note that while numerous standards and regulations have been promulgated in implementation of the 1969 Act, a civil penalty sanction is authorized under section 109(a) only for a violation of a mandatory standard or other provisions of the Act. In addition to the other issues raised, in remanding we instruct the judge to address the threshold question of whether 30 CFR $77.1903(b) is a mandatory safety standard for which a civil penalty may be assessed or whether the regulation is merely advisory.