

CCASE:

MSHA V. RALPH FOSTER AND SONS

DDATE:

19810512

TTEXT:

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

May 12, 1981

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

v.

Docket No. WEST 79-397-M

RALPH FOSTER AND SONS

DECISION

We directed this case for review to determine whether the administrative law judge erred in vacating a citation after he had found a violation of 30 CFR \$57.15-4. 1/ The citation issued November 3, 1978, listed the mine as Erda CG-27 and stated that two men were drilling at the face without safety glasses or eye protection of any kind. The judge found the violation had occurred but vacated the citation because MSHA failed to prove the mine involved in the violation." Dec. at 3.

In his answer to the Secretary's petition for assessment of civil penalties, Robert Foster, the owner of Ralph Foster and Sons, averred that the Erda CG-27 mine had been operated in 1975, but not since that year. The answer also alleged that, in the mine to which the citation may have referred, the miners were cleaning their glasses at the time of inspection, and did not violate any regulations. At the hearing Foster testified that MSHA, at an unspecified time, sent two inspectors to clear the confusion regarding the mine name and he and the inspectors "agreed that Erda CG-27 must be the mine we called G-3." Tr. 29. He also stated that he thought the inspector was talking about G-3 when referring to the alleged violation. Tr. 32-33. This record clearly indicates that the question of the proper identification of the mine was litigated and the operator knew at which mine the violation occurred. A technical defect in the citation which did not prejudice the operator in presenting his defense, and which, in effect, was cured at the hearing should not prevent a finding of liability. Jim Walter Resources and Cowin and 1/ 30 CFR \$57.15-4 provides:

Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which

could cause injury to unprotected eyes.

~1182

Company, 1 FMSHRC 1827 (1979). See also Old Ben Coal Company, 2 FMSHRC 1187 (1980). We hold that the judge erred in vacating the citation.

Accordingly, the citation is reinstated and the case is remanded for the assessment of a penalty.

~1183

Distribution

Mr. Robert G. Foster

Ralph Foster & Sons

2950 A 1/2 Road

Grand Junction, Colorado 81501

Ann M. Noble, Esq.

Office of the Solicitor

U.S. Department of Labor

1585 Federal Bldg.

1961 Stout Street

Denver, Colorado 80294

Ann Rosenthal, Esq.

Michael McCord, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

Administrative Law Judge John J. Morris

FMSHRC

333 W. Colfax Ave.

Denver, Colorado 80204