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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

DOCKET NO. CENT 81-269-M

v.

OZARK LEAD COMPANY,
RESPONDENT

Appearances:

Robert S. Bass Esq.
Office of Tedrick A. Housh, Jr., Regional Solicitor
United States Department of Labor
Kansas City, Missouri 64106,
For the Petitioner

Gerald T. Carmody Esq.
Bryan, Cave, McPheeters & McRoberts
St. Louis, Missouri,
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Ozark Lead Company (Ozark), with violating Title 30, Code of Federal Regulations, Section 57.3-22(FOOTNOTE 1), a regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

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After notice to the parties a hearing on the merits was held on August 9, 1982 in St. Louis, Missouri.

The parties filed post trial briefs.

Issues

The issues are whether respondent violated the regulation and, if so, what penalty is appropriate.

Admissions

Ozark admits it is a large operator subject to the Act (Tr. 6).

Petitioner's Evidence

William Burich, Gene Cowsert, and Steve Barton testified for the Secretary. The evidence shows the following:

William Burich, an MSHA inspector experienced in mining, inspected the Ozark lead and zinc mine on May 6, 1981 (Burich 11). Ozark was using the Roman Pillar mining method. The area inspected was a working section of the mine which was being mucked out at the time (Burich 11, 13, 18). There were no employees in the heading when the inspection party arrived. The loader operator had left about 30 to 40 minutes before they arrived, (about 10:55 a.m.) (Barton 47, Burich 32).

Since Gene Cowsert, the loader operator, was at lunch the inspector didn't see loader No. 179 under the loose. However, Cowsert had been working under the brow for four hours (Burich 19, 20).

Inspector Burich didn't know if the loose had been present when the loader operator went to lunch. But in the inspector's view, Ozark violated that portion of the regulation requiring proper testing and observation before proceeding. (Burich 21).

Burich was accompanied by Jack Cottrell and Mike Roderman, both management representatives, as well as other persons (Burich 17).

Burich pointed out loose material in the brow of the drift. Roderman and Steve Barton (miner's representative) also saw the loose (Burich 17; Barton 38-39, 45).

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Loose material (sometimes simply referred to as "loose"), is material that is detached from the host rock. It can become unstable to a point where it cannot be supported by the surrounding mass(FOOTNOTE 2) (Burich 13).

The inspector photographed the loose which had a chalky appearance. Cracks usually develop and the chalky appearance occurs with the passage of time. Temperature variations cause this appearance (Burich 14, 15; P2). It is impossible to determine the exact amount of time loose takes to dry out and turn chalky in appearance (Burich 16).

The citation was immediately terminated. Scalers brought down about half a ton of raw rock. In this area it was 18 feet from the ground to the brow (Burich 18).

The loader operator, who had been mucking in the area, stated to the MSHA inspector that he didn't know the loose was there. He further stated that in any event he was working on the opposite side [of the passageway], away from the loose(FOOTNOTE 3) (Burich 24, 25, 29). The mucker operator (Gene Cowsert) had been assigned to work in this area at 7:30 a.m. and he returned from lunch at 11:45 a.m. (Burich 32).

In the inspector's opinion the loose material he observed was in the state of drying out. But he didn't know how long the oxidation process had taken. It had been there more than a couple of minutes. It forms instantaneously and then dries out (Burich 34, 35).

Gene Cowsert, the 179 Caterpillar loader operator, had been assigned to muck out the area that had been blasted in the morning of May 6th (Cowsert 52). He arrived at the muck pile about 8 a.m. and checked the area. He didn't observe any loose material (Cowsert 54).

The operator went to lunch about 10:45 a.m. and returned about 11:30 a.m. The inspection team was then present (Cowsert 56, 57). Cowsert had looked at the area at the start of a shift and two or three times thereafter (Cowsert 59). Cowsert didn't observe any loose. He had been trained by Ozark to examine for loose (Cowsert 59).

Cowsert told Roderman he hadn't seen any loose. Roderman asked Cowsert to confirm that fact in a written statement (Cowsert 57, 58).

Respondent's Evidence

Clifford Cauley, Mike Roderman, and Ronald Thomas (by deposition) testified for Ozark.

Between 8 a.m. and 9 a.m. on the date of the inspection Ronald Thomas, Ozark's general foreman, inspected the area where the loose was discovered by the MSHA inspector (Thomas deposition 8-10). When he had inspected this precise spot earlier in the day there was no loose in the area except up close to the face (Thomas 9). Foreman Thomas and the Ozark drill blast foreman used a 12 volt light attached to their hard hats to make their daily inspections (Thomas 13, 15; Cauley 77). If Thomas sees cracks in the ground he sounds the area. He didn't use a scaling bar or a sounding bar at the time of his early morning inspection on May 6 because the ground looked good to him (Thomas 16). Thomas agrees there was loose present at the time of the inspection (Thomas 16-17, 29).

Cowsert had been assigned in this area before the day of the inspection. He would have traversed the area under the brow in operating his loader (Thomas 17, 19).

Ozark's superintendents inspect the ground daily. Any loose ground is taken down before work is done. The production foreman had instructed Cowsert, the loader operator, to examine and test the back, face and ribs (Thomas 9-11).

The area, an active heading, had been shot four or five hours before the citation was issued (Thomas 9-10, 12). The blast could have caused the loose. Thereafter oxidization by the air could have caused it to become white or the oxidation could have been caused by the heat generated by the exhaust from the front end loader (Cauley 79, 80).

Thomas has seen loose thousands of times, but he couldn't say how long it takes to develop. Heat will cause loose to form (Thomas 24).

Clifford Cauley, Ozark's drill blast foreman, was responsible for this heading (Cauley 69). He inspected this area twice before he was called to the heading where the MSHA inspector and Ozark's safety team observed the loose (Cauley 69-70). Cauley's initial inspection of the area was about 7:45 a.m. and his next inspection was about 10:30 a.m. (Cauley 71).

When he inspected Cauley particularly looked for loose, cracks, or discoloration in the rocks (Cauley 70, 71). He observed no loose on his two early inspections (Cauley 72). Due to stress points and air flow loose has a tendency to form with a greater degree of frequency here than at our place in the heading (Cauley 72, 73).

The loose was present on the third occasion which was at the time of the MSHA inspection (Cauley 71-72).

Loose, an everyday occurrence, can form instantly. Cauley had no opinion as to how long it took the loose in this heading to form (Cauley 73, 74). It can exist before the chalky white coloring causes it to be noticed (Roderman 84).

Cowsert, the loader operator, had been instructed to observe and scale down any loose material. Training classes stress this subject (Cauley 75). According to Cauley, in this particular heading, the miner examined and tested the back face and rib of the working place at the beginning of the working shift and thereafter (Cauley 75).

Mike Roderman, Ozark's safety inspector, saw the loose for which the citation was issued (Roderman 81, 82). The loose was in the process of drying out and changing color (Roderman 82). At the time of the inspection the loose didn't have its characteristic noticeable white color to it. It didn't look like it had dried out over an [extensive] period of time (Roderman 83).

Ozark enforces a policy to discipline a miner for working under loose. Ozark's discipline commences with a verbal reprimand. Then a written reprimand is followed by an additional written reprimand and suspension. Termination can result (Roderman 84, 85).

Roderman was told by Cowsert that he didn't see the loose. When Roderman asked Cowsert for a written statement to that effect the operator initially agreed to do so. Later he changed his mind (Roderman 83, 84).

Discussion

The regulation, Section 57.3-22 imposes multiple requirements. A breakdown of the regulation indicates it imposes the following broad directives:

"Miners are to examine and test the back, face, and rib of the working place at the beginning of each shift and frequently thereafter."

Further, "supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed."

Further, "loose ground shall be taken down or adequately supported before any other work is done."

Finally, "ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary."

The pivotal evidence in the case arises in the testimony of Ozark's loader operator Gene Cowsert. The evidence clearly establishes that Cowsert visually inspected and checked the working place (Cowsert 54, 59, 60, 61, 63-64). But there is no

evidence that Cowsert met the additional requirement of the regulation that he "test" the back, face, and rib.

The regulations themselves do not define "examine" or "test"

57.2. But the ordinary meaning of these words would indicate that to examine is to "inspect closely", whereas "test" is "a critical examination, observation or evaluation" Webster's New Collegiate Dictionary, 1979.

In describing his activities involved in his initial inspection to determine the presence of loose the loader operator stated:

I got off the loader, walked around the muck pile, underneath the brow, and checked in front and behind the brow.

(Transcript at 66).

Further, in the examination of Cowsert, the following question was directed to him:

With respect to this particular heading on that morning, Mr. Cowsert, this regulation states, which is 57.3-22 that miners shall examine and test the back face and rim of their working places at the beginning of each shift and frequently thereafter."

Did you do that?

A. I visually inspected the back. I could not reach the back.

(Transcript at 59-60).

Since the terms "examine" and "test" are used in conjunction they both have a meaning. I consider that "examine" in the regulation means to "look at" and "test" in this factual setting means to sound out the area with a scaling bar or other such device.

Ozark argues that no evidence establishes that work was performed while loose was present.

I agree with Ozark's view of the evidence. No credible evidence establishes that work was performed in the presence of loose. But Ozark should only prevail if the "loose ground shall be taken down" after it is discovered eliminates the necessity of the miner "to examine and test." As previously indicated I believe the regulation imposes multiple and separate obligations.

Further, on this record, it is quite possible that testing the working place might not have revealed any loose. But Cowsert's testimony establishes the reason for the testing requirement. You can look at loose and not see it (Cowsert 67). In fact, while the scalers were barring down the loose after the violative condition was observed, an amount of loose that was not discolored, and could not be seen, also fell from the left side of the 32 foot brow (Barton 41-46, 49).

It accordingly follows that Cowsert, the loader operator, did not comply with those conditions imposed on the "miner" as set forth in the first portion of the regulation. Having failed to do so, a violation is established.

In arriving at the conclusion that a violation occurred, I necessarily reject that portion of the testimony of respondent's witness Cauley that "the miner (Cowsert) examined and tested the back, face and rib of this working place at the beginning of the

working shift and frequently thereafter" (Tr. 75).

I reject the foregoing evidence because Cauley's testimony on this point is somewhat hedged. Further, since he wasn't present at all times he wouldn't have any way of knowing what Cowsert did by way of examining and testing the back, face and rib.

A violation also exists notwithstanding the testimony of mine superintendent Thomas and drill blast foreman Cauley to the effect that they checked for loose on the day the citation was issued. Thomas between 8 a.m. and 9 a.m. (Thomas 8); and Cauley at 7:45 a.m. and 10:30 a.m. (Cauley 71). The obligation of the supervisors arises under the second portion of the regulation.

Ozark contends that the Secretary is attempting to establish strict liability for the existence of loose anywhere in a mine. Ozark focuses this argument because the Secretary claims that a violation exists regardless of whether a miner was in the area. Ozark argues such a position would work an injustice on a prudent, safety conscientious operator.

As hereafter noted, I do not acquiesce in the Secretary's position but I disagree with Ozark's argument. To the contrary I conclude the Secretary in this portion of Section 57.3-22 is merely attempting to require a miner to test for loose, in addition to visually inspecting for it.

Ozark, in its post trial brief, cites several authorities in support of its views. These cases follow:

Ozark Lead Company, CENT 81-102-M, January, 1982 (unpublished): This unreviewed decision is not controlling. The citation before Judge Gary Melick charged "a violation of that part of the mandatory safety standard that provides that loose ground shall be taken down or adequately supported before any other work is done."

In this case the citation states as follows:

There was loose material on the east side of the brow that lead to the 208-583 North Heading. Loader No. 179 had been operating under the loose material. There was sufficient loose involved that could cause serious injuries to persons under it in the event it fell.

In short, Judge Melick's decision is not controlling because the issues raised in the case did not give rise to a violation of the "examine and text" portion of 57.3-22.

Ozark Lead Company, 4 FMSHRC 539 (1982): There is such a paucity of facts in this unreviewed decision that I am unable to determine the relevant rule of law that may be involved.

Pennsylvania Sand Glass Corporation, 1 FMSHRC 1191 (1978): Ozark asserts this case stands for the proposition that the MSHA inspector must personally observe a violation to issue his citation. In this factual situation Ozark apparently would require the inspector to observe a non-event. That is, while observing the miner at work he must further observe that he failed to "test" the working place.

The same point, that is, the "personal observation" issue was raised in Arch Mineral Corporation, 3 FMSHRC 468 (1983). In Arch Mineral respondent also relied on Pennsylvania Glass. The decision in Arch Mineral, applicable here, basically holds that Pennsylvania Glass is not controlling.

In the instant case the MSHA inspector observed chalky white loose. Some (undetermined) time elapsed between when the loose formed and when it was seen by the inspector. These factors combined with the information that this was an active heading. These facts constitute sufficient probative circumstantial evidence to justify the inspector's belief that a violation existed. Section 104(a), now 30 U.S.C. 814(a).

Homestake Mining Company, 2 FMSHRC 2295 (1980) is the only Commission decision that construes 30 C.F.R. 57.3-22. Concerning this decision Ozark declares that the Commission's statement in its decision concerning exposure to hazard is dictum and therefore not persuasive (2 FMSHRC at 152). I agree that the Commission's statement is dictum but I do not agree that it is of no precedential value. In Homestake the Commission was considering the third requirement of 57.3-22, namely, that miners examine a working place for loose ground before commencing work. In this circumstance the Commission ruled that "the presence of loose rock in the working place establishes the violation regardless of whether the miners were actually exposed to the danger exposed by the rock" (2 FMSHRC 157, footnote 7).

The instant case, as previously discussed, involves a failure of the miner to test. I arrive at the same conclusion reached by the Commission: No exposure to the hazard is required. In fact, there need not be a hazard and there would be none if there is no loose. Simply restated, the regulation requires the workplace to be tested.

Asarco, Incorporated, 2 FMSHRC 920 (1980): This case, authored by the writer, proports to establish an exception to the enforcement of 57.3-22. The exception: Miners are not required to expose themselves to an additional hazard of standing on a muck pile to bar down loose and unconsolidated ground, 2 FMSHRC at 924. ASARCO is an unreviewed decision. Assuming ASARCO establishes a permissible defense, Ozark failed to prove the defense. The drawing illustrating the testimony here indicates the loose ground was not in close proximity to the muck pile (Cowsert 53; Exhibit P3).

I note that various unreviewed Judges' decisions have construed 57.3-22. The decisions include Magma Copper Company,

3 FMSHRC 345, 352 (1981); (Carlson, J). Held: No loose existed within the meaning of the regulation because it took fifteen minutes to bring down part of the wall. See also Climax Molybdenum, 2 FMSHRC 3158 (1980); Day Mines, Inc., 2 FMSHRC 1720 (1980); and St. Joe Zinc Company, 1 FMSHRC 1699 (1979).

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Finally, Ozark states that the interpretation urged by the Secretary overlooks the clear language of 57.3-22, namely:

Loose ground shall be taken down or adequately supported before any other work is done.

(Emphasis added)

Ozark insists that the work only proceeded after the loose was scaled down. Therefore, Ozark states it complied with the regulation.

Yes, Ozark complied with one of the requirement of 57.3-22. But Ozark failed to comply with the "test" portion of the regulation.

Two additional matters concern the Secretary's arguments in his post trial brief. He petitions the Commission, based on Homestake to declare that "a violation is established by proving that loose was present in a working area" (Brief at 3).

Such a broad and sweeping interpretation of this multifaceted regulation is not warranted. The Commission recognizes that loose ground is a fact of everyday mining, especially after blasting.

The Secretary's brief further states that the pertinent portion of 57.3-22 in this contest is the portion that reads:

Loose ground shall be taken down or adequately supported before any other work is done.

For the reasons previously indicated I do not find that the above cited portion to be pertinent in this factual setting.

In sum, the citation should be affirmed.

CIVIL PENALTIES

Section 110(i) of the Act [30 U.S.C. 820(i)] provides for the criteria to be considered in assessing a civil penalty.

Neither party urges any position concerning a civil penalty. After reviewing the record and in view of the statutory criteria I deem that the penalty proposed by the Secretary is appropriate.

The Solicitor and Ozark's counsel filed detailed briefs. These have been most helpful in analyzing the record and defining the issues. I have considered these excellent briefs. But to the extent they are inconsistent with this decision, they are rejected.

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Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

Citation 543889 and the proposed civil penalty therefor are affirmed.

John J. Morris
Administrative Law Judge

FOOTNOTES START HERE-

1 The cited regulation provides as follows:

57.3-22 Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

2 A similar definition in an industry dictionary states:

Loose ground. a. Broken, fragmented, or loosely cemented bedrock material that tends to slough from sidewalls into a borehole. Also called broken ground. Compare breccia, b. Long. b. As used by miners, rock that must be barred down to make an underground workplace safe; also fragmented or weak rock in which underground openings cannot be held open unless artificially supported, as with timber sets and lagging. Compare broken ground, b. Long. Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms (1968).

3 A credibility issue arises as to whether the operator knew he was operating his loader under the discolored loose. On this issue I credit Cowsert's testimony. He would know where he operated his loader on this particular day. Further, with 15 years experience, he appears to have a healthy respect for loose (Cowsert 61).