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SOL (MSHA) v. SWEET CITY QUARRIES  
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TTEXT:

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

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

Civil Penalty Proceeding  
Docket No. SE 80-49-M  
A.O. No. 09-00518-05001

SWEET CITY QUARRIES,  
RESPONDENT

Sweet City Quarry & Mill

PRELIMINARY FINDING AND ORDER

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing a civil penalty of \$40 for one alleged violation of mandatory safety standard 30 CFR 56.19-128(a). Respondent contested the citation and a hearing was held on November 25, 1980, in Athens, Georgia. At the conclusion of the hearing the parties were afforded an opportunity to state whether they desired to file any post-hearing proposed findings, conclusions, or briefs. Of particular concern to the court was whether or not petitioner has established a violation of the cited standard by a preponderance of the evidence. Petitioner's counsel stated that he did not believe it necessary to file a brief, but stated that he "would like to also do a little research and if I do come across something, I would like to have the opportunity to offer something" (Tr. 88). Respondent, acting pro se, took the position that petitioner had not established that there were more than six broken wires in any lay as stated in the cited section 30 CFR 56.19-128(a), (Tr. 89).

I previously advised the parties that I would issue a preliminary finding regarding the fact of violation and would then afford them an opportunity to take issue with that finding by filing additional arguments. The critical issue concerns the interpretation to be placed on the regulatory language more than six broken wires in any lay as found in the cited section. Although MSHA Inspector Hubbard testified that he observed eight broken wires in one of the rope lays and 10 in another, the breaks were on outer visible (crown) areas, and he did not determine whether the breaks he observed were in fact the same wire broken more than once, and the damaged portion of the cable was not cut out and

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examined to make this determination. Although Mr. Hubbard permitted the respondent to abate the citation by repositioning the rope on the reel so that the damaged portion was not at the "working end", respondent nonetheless purchased and installed a new rope, at a cost of \$2100 (Tr. 52).

#### Discussion

The section 104(a) citation, No. 099070, served on the respondent on October 23, 1979, by MSHA Inspector Ellis Hubbard, describes the condition or practice which the inspector believed violated section 56.19-128(a) as follows:

There were more than six broken crown wires per lay in several lay of the main fall rope on the shift leg hoist.

The pertinent requirements of section 56.19-128(a) states as follows: "Ropes shall not be used for hoisting when they have: (a) more than six broken wires in any lay;".

The parties are in agreement that the rope in question is a 3/4 inch steel core cable, approximately 1000 to 1200 feet long, and the alleged defective area encompassed an area of some 10 inches long. As for the meaning of the term "lay", The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, 1968 Ed., defines the term "lay" in pertinent part as follows:

The direction, or length, of twist of the wires and strands in a rope. The length of lay of wire rope is the distance parallel to the axis of the rope in which a strand makes one complete turn about the axis of the rope. The length of lay of the strand, similarly, is the distance in which a wire makes one complete turn about the axis of the strand. The pitch or angle of helix of the wires or strands of a rope, usually expressed by ratio of the diameter of the strand or rope to the length required for one complete twist.

The term "wire rope" is defined at pg. 1241 of the Dictionary in pertinent part as follows:

A rope made of twisted strands of wire. A steel wire rope used for winding in shafts and underground haulages. Various constructions of wire rope are designated by the number of strands in the rope and the number of wires in each strand.

During the course of the hearing, respondent conceded that its mining operation was subject to the Act, and the parties stipulated that respondent is a small operator with no prior history of violations (Tr. 4). Petitioner conceded that respondent abated the citation in good faith (Tr. 81), and based on the testimony of record I made tentative findings that assuming the violation were established, I would find that it resulted from ordinary negligence and that on the basis of the circumstances surrounding the condition of the rope in question, I would likely ultimately find that the citation was nonserious (Tr. 83-85). As for the effect of the initially assessed penalty of \$40 on respondent's business, assuming it were affirmed as my penalty in this matter, I cannot conclude that it will adversely affect respondent's ability to remain in business.

#### Fact of Violation

The critical remaining question in this case is whether the record supports the petitioner's assertion that a violation of the cited standard in fact occurred. Based on my review of the testimony of Inspector Hubbard, my preliminary finding is that petitioner has not established a violation, and I invite counsel's attention to the following testimony as set forth at pgs. 68-71 and 79-81 of the trial transcript:

BY MR. SIMMONS:

Q. You say that there were six broken wires in a crown?

A. In a lay.

Q. How did you determine that there were six broken wires? There could have been two wires that was broken three wires. There could have been one wire broken six times. How do you know that there were six of those wires broken in a crown? How can you prove that there were six wires broken in a crown?

A. I'm telling you that I counted eight breaks in one lay and ten breaks in one lay. Okay? You're asking me how do I know that we might not be talking about two or three breaks in the same wire. We could be. But generally speaking, when wire goes, it'll go in lines. Where you find one broken wire and another beside of it, you know that's not the same wire.

Q. We know that's not the same wire. Common sense will tell you that it's not the same wire. But the thing being wrapped around, how do you know it's not the same wire that's broke six times instead of six wires broken in a wrap?

THE WITNESS: There's no way I can definitely say that one of these breaks isn't the same wire broke twice without cutting the rope out and actually taking it apart.

JUDGE KOUTRAS: What if it were six breaks in the same wire?

THE WITNESS: I don't -- I don't know.

BY JUDGE KOUTRAS:

Q. Would that be a violation?

A. That's the way we've interpreted the standard.

Q. Well, if there's six breaks in one wire, more than six breaks in one wire? See, the standard says, "more than six broken wires in any lay." So that means six individual wires. It doesn't say six breaks in one wire.

Mr. Welch, how do you interpret that?

Not only that, I was wondering how the standard writers arrived at six broken wires. Why is that such a magical figure? Why not five?

MR. WELCH: That I can't answer, but it does say "more than six broken wires in any lay" and I think I would have to say my interpretation would be different wires.

JUDGE KOUTRAS: More than six broken wires in any lay, to me, means individual wires.

MR. WELCH: Yes.

JUDGE KOUTRAS: Mr. Hubbard, did you take any notes at the time of the event at all on this thing?

Did you make any sketches or anything? I assume nobody took a picture.

THE WITNESS: I don't have a thing. The only thing I've got in my notes -- the only thing I put in my notes at this time was more or less the same thing the citation says.

JUDGE KOUTRAS: There were more than six broken crown wires per lay in several --

THE WITNESS: Lay of the main rope.

MR. SIMMONS: This is what you say. Do you have any proof that there were six or eight wires broken in that crown?

THE WITNESS: No, but I do nowadays. I take pictures.

JUDGE KOUTRAS: It says "More than six broken wires in any one lay." So that's the troublesome part.

Do you disagree or agree or what? What would be your -- if I were to call for briefs in this case, would you try to convince me that you've preponderated here and that you've established the case by preponderance of the evidence?

MR. WELCH: Yes, sir, I'd try to convince you that we'd done that. I think strictly speaking it's a factual view as to whether or not there were six broken wires in any one lay.

The inspector, according to my understanding of his testimony, did count more than six broken wires in any one lay.

The question as to whether or not they were the same wire is something that the inspector cannot answer.

JUDGE KOUTRAS: The \$64 question is: is it a question that he's called upon to answer before I can affirm the citation? Is that part of the burden of proof?

MR. WELCH: Yes, sir, I --

JUDGE KOUTRAS: I think the answer would probably have to be in the affirmative.

MR. WELCH: Without researching any cases, I'd have to agree with you.

BY MR. WELCH:

Q. When you counted them, where were the broken wires?

A. The broken wires weren't all in the same strand, but still, I can't -- I can't substantiate -- there's only two ways without dissecting the rope that you could determine if it had six broken wires in one spread. One is that the wires were side by side in the same strand or, two, that each one was in a different strand. This could be done without taking the rope apart; otherwise, there'd be no way.

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Q. Do you recall in your counting any broken wires of this particular rope that we're talking about on October 23rd, '79, in Sweet City Quarries when you counted them where the broken wires were?

A. They were in different strands but I can't definitely say that there were six broken wires.

MR. SIMMONS: Sir, I think you ought to dismiss this thing here.

ORDER

In view of the foregoing, the parties are afforded an opportunity, within thirty (30) days from the date of this order, to file any further arguments concerning my preliminary finding in this matter, and upon expiration of this time period, I will proceed to finalize and render a final decision in this matter.

George A. Koutras  
Administrative Law Judge