

CCASE:
MAGMA COPPER V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAGMA COPPER COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEST 94-161-RM
	:	Citation 4332116; 12/6/93
SECRETARY OF LABOR, MINE SAFETY	:	
AND HEALTH ADMINISTRATION,	:	Docket No. WEST 94-175-RM
Respondent	:	Citation 4335790; 12/1/93
	:	
	:	Superior Mine 02-00152

DECISION

Appearances: Mark N. Savit, Esq., Washington, D.C. for Contestant;
Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, CA for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Notices of Contest filed by Magma Copper Company ("Magma" or "Contestant") challenging the issuance by the Secretary ("Respondent") of two citations alleging violations by Contestant of 30 C.F.R.

57.11050(a). Contestant also filed a Motion for Expedite Proceedings. At the initiative of the undersigned, conference calls were held with counsel for both parties on January 5, 7, and 10, 1994. The parties agreed that these cases be consolidated and heard on January 19 and 20, 1994. Subsequent to the hearing, Respondent agreed to extend the time set for abatement of the alleged violative conditions pending a decision in these cases. It also was agreed that Respondent would file a brief by February 4, and Contestant would file its brief by February 11. On January 26, 1994, Respondent filed a statement waiving his right to file a brief.

I. Findings of Fact

Ore was mined at Contestant's Superior Mine, an underground copper mine, between 1905 and 1982. The mine closed in 1982 due to economic conditions and, reopened in the fall of 1990. At that time, the older workings were sealed off, and only those areas used for current production were left open.

The deepest elevation at the mine is at 4100 feet. Initially, this elevation consisted of a 22 foot diameter vertical shaft ("No. 9 shaft") which provided intake air from the surface. Horizontal drifts extended for more than 1500 feet from the No. 9 shaft. In November, 1992 a dam was built to the northeast of the No. 9 shaft blocking off access to the drifts north of the dam.

In addition, presently, a barrier at the south end of the drift, south of the No. 9 shaft, is "impassable to men but not to air" (sic) (Tr. 108). Also, a sign just east of the cave states "do not enter" (Tr. 261).

The area of the drifts at the 4100 elevation that is presently accessible to miners, is only approximately 1/10 of the area of the drifts that were accessible when this elevation was used for exploration (See Exhibit C-3).

In addition to the No. 9 shaft, the following items are located at the 4100 elevation in the area that is presently accessible: a fan to ventilate the loading pocket, a 98 borehole, a slusher to clean under the conveyor belt, electrical switches, a skip tender station, and a sub-station. A service cage which is raised and lowered by way of a surface hoist to transport men and materials from the surface to the 4100 elevation, is located in a passageway within the No. 9 shaft. Also skips are raised through the No. 9 shaft by way of a surface hoist to transport ore from the 4100 elevation to the 500 foot elevation where the ore is dumped and transported out of the mine.

An operator spends approximately 6 hours a day in the accessible portion of the 4100 elevation where materials are loaded on skips, and hoisted up the No. 9 shaft. In addition, water is gathered in the area and pumped up the No. 9 shaft which requires a person to visit the pump station daily, for 15 to 30 minutes. Also, miners enter the area to maintain the ore loading facility, and perform general maintenance. This work averaged 25 hours a month over the last three months. These are the only activities that take place at the 4100 elevation.

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1 The record does not establish when this barrier was installed. According to the uncontradicted testimony of Steven D. Lautenschlaeger, the mine Manager at the mine in question, the sign was in place prior to the date the citation at issue was issued, i.e., December 6, 1993. Also Lautenschlaeger testified that there is a pile of rocks ("cave") in this area making the area not passable. He indicated that the cave was in place when he started to work for Contestant, in January 1992.

Air from the 4100 elevation is not used to ventilate any other area of the mine.

The 3200 elevation was previously used for production. When used for production, drifts extended over 8000 feet to the west and north off of the No. 9 shaft. (See Exhibit C-3). Sometime prior to January 1992, a concrete dam was installed blocking access from the No. 9 shaft to the drifts west of the dam. Also, a bulkhead was installed blocking off access from the No. 9 shaft to the drift east of the bulkhead. In the accessible area that remained, drifts extended less than 1,000 feet (See Exhibit C-3).

Air from the 3200 elevation does not ventilate any other area of the mine.

The accessible area at the 3200 elevation at the date cited contains, in addition to the No. 9 shaft, a shortage shed, two seal dump pockets, a controlled ventilation door, an electrical substation, a refuge chamber, electrical switch equipment, and a small amount of flammable equipment in a semi-mobile storage container.

A chippy hoist operator ("hoister") spends, on a average, at least 8 hours a day in this area. Also, a person enters the area every week to inspect a wheel in the shaft, and every other week to inspect the hoist rope. Maintenance activities averaged, over the last 3 months of 1993, 10 hours per month. Persons do not regularly wait at levels 3200 to change from the chippy hoist to the service cage.

II. DISCUSSION

A. Citations

Both the 3200 elevation and the 4100 elevation have only one escapeway. On December 6, 1993, MSHA inspector, Seibert L. Smith, issued a citation alleging a violation of 30 C.F.R.

57.11050 regarding the 4100 elevation. On December 1, 199
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2 Roderick M. Breland, the MSHA District Manager for the Rocky Mountain District, testified regarding the flow of air at the 4100 elevation, and opined that this elevation is used for ventilation and is the main passageway for air flow. I do not place much weight on his testimony, as he has not been in the area in question since 1976. I accord more weight to the detailed testimony of Lautenschlaeger, as it was based on his personal knowledge.

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MSHA inspector, Ronald S. Goldade, issued a citation alleging a violation of Section 57.11050(a) supra regarding the 3200 elevation.

Section 57.11050(a) supra, as pertinent, provides that a mine shall have two separate escapeway to the surface ". . . from the lowest levels" The parties have stipulated that the issue before me is whether the elevations at issue are "levels" within the purview Section 57.11050 supra, and if so, whether Contestant had adequate notice that these elevations are considered to be "levels."

B. Respondent's Evidence

Roderick M. Breland, an MSHA District Manager whose jurisdiction covers nine states, previously worked as an assistant district manager, and field office supervisor. He has approximately 10 years experience as an MSHA inspector, and also worked as approximately 10 years as a miner for Magma. He stated that based upon his experience he considered both of the elevations at issue to be "levels." However, on cross-examination he conceded that not all areas where maintenance is performed in a mine are on a "level." He also conceded that there are places in a mine that are used to transfer ore ("skip pockets") that are not "levels." He also indicated that neither the location of pumps, nor the presence of an electrical substation, substation, nor the fact that an area is ventilated, are determinative of whether an area is a level.

Siebert L. Smith who has been an inspector since 1978, opined that the 4100 elevation is a "level", as the area consists of drafts that come off the No. 9 shaft, and contains working places, electrical substations, a pump station and a skip pocket conveyor. Also, he based his conclusion upon fact that there was ventilation throughout the area. On cross-examination, he indicated that the skip pocket by itself was not a level, but was part of a level.

Larry James Aubuchon, an MSHA supervisory inspector for the last 10 months had been an MSHA inspector since 1975. He indicated that he considers the 4100 elevation to be a "level" as it is a passageway leading to a work area, and it provides access from the No. 9 shaft. He has never been to the 4100 elevation.

Ronald S. Goldade, has been an MSHA inspector for the last 3 years. He worked for over 24 years as a miner. He opined, based upon his experience as a miner, that the 3200 elevation is "level," as it is a flat excavated area coming off a shaft. He also noted that the area is ventilated, and serves as a passageway, as it is traversed by the hoist operator to go to his work station from the No. 9 shaft.

Contestant's MINE EVACUATION PROCEDURES refers to the 3200 elevation, and the 4100 elevation each as a "level". The bell system, which is posted in the cage that transports miners, lists all elevations including those where nothing is located. The bell system uses the term "level" for each listed elevation, including the 3200 and 4100 elevations.

C. Contestant's Evidence

Frederick D. Owsley, who has been involved in the mining industry for 44 years as a miner, manager, and supervisor, examined the 3200 elevation the week prior to the hearing. He opined that previously it was a "level" but subsequently it had been closed off and its use was changed. He said that "normally" a "level" is comprised of drifts, crosscuts, raises, (Tr. 312-313) and is "normally" a production area, and "is major haulage" (Tr. 313). He said that on a "level" there is usually "major" ventilation because men are working there. (Tr. 312-313).

Owsley also visited the 4100 elevation. He described it as a pump station, and skip loading facility. He indicated that based on his experience at other mines, "... we never referred to that as a level ..." (Tr. 314). He stated that in his experience, it is "common" to have loading pockets below the lowest level. (Tr. 315).

Lautenschlaeger opined that the 3200 and 4100 elevations are not "levels." His opinion was based on the amount of activity at these areas, the extent of the workings, and the absence of any production, breaking, drilling, or blasting of rock. He opined that, in contrast, elevations 500, 3000, 3400, 3500, 3600, 3700, 3800, (Exhibit R-9), are all levels, because the drifts at these elevations are used for production or development, or serve as a secondary escapeway, main haulageway, or primary ventilation conduit. He also noted that each of these elevations extends at least 1,000 feet. He stated that at elevations 3400, 3500, 3600, 3700, and 3800, ore is currently being extracted.

D. Analysis

The term "level" is not defined in the Title 30, of the Code of Federal Regulations. There is no regulatory or legislative history to shed any light on the legislative or regulatory intent regarding the scope to be accorded this term. Accordingly, the inquiry must focus on whether a reasonably prudent person familiar with the mining industry would have considered the cited areas to be "levels." (See, Ideal Cement Co. 12 FMSHRC 2409 (1990)); Cannon Coal Co., 9 FMSHRC 667, 668 (1987); Quinland Coal Co., 9 FMSHRC 1614, 1618 (1987).

A Dictionary of Mining, Mineral and Related Terms (U.S. Dept. of the Interior, 1968) ("DMMRT") is a generally accepted text. The DMMRT defines a "level," as pertinent, as follows:

"A main underground roadway or passage driven along the level course to afford access to the stopes or workings and to provide ventilation and haulageways for the removal of coal or ore. See also level interval. Nelson. b. Mines are customarily worked from shafts through horizontal passages or drifts called levels. These are commonly spaced at regular intervals in depth and are either numbered from the surface in regular order or designated by their actual elevation below the top of a shaft. Lewis p. 21 "

Thus, as defined in the DMMRT, a level serves as a "main" passage, and provides both access to workings, and ventilation and haulage ways.

I accord very little weight to the testimony of Breland, and Aubuchon, regarding the present use of the elevations at issue, as they never saw these areas. I place most weight upon the testimony of Lautenschlaeger due to his personal knowledge of the areas in question. His testimony establishes that on the dates cited, the areas in question at the 3200 and 4100 elevation were no longer providing ventilation and access to the workings or stopes.

The Underground Mining Methods Handbook (Society of Mining Engineers, 1982), ("UMMH") relied on by Respondent's witnesses Breland, Smith, and Goldade, defines "level", as "... a system of horizontal underground workings that are connected to the shaft. A level forms the basis for excavation of the ore above or below." (emphasis added). The underground mining method handbook does not define "workings." In the DMMRT, supra, "workings" is defined, as pertinent, as follows. "b. the system of openings in an mine for the purpose of exploration. Normally, usage tends to restrict the term to the area where coal, ore, or mineral is actually worked." "Work" is defined in the DMMRT supra, as pertinent, as "a. The process of mining coal." On the dates cited the elevations in question were no longer being used as workings, as no exploration or mining of coal was taking place at those elevations. The accessible areas at each elevation at issue had been significantly reduced and only maintenance, service, or loading work was being performed in these areas.

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3 This definition is set forth in an article entitled "Choosing an Underground Mining Method" (UMMH supra, at 88).

Respondent does not have a written policy setting forth the scope to be accorded the term "level", and whether or not that term is to be applied to the cited elevations. In this connection, I take cognizance of the testimony of Lautenschlaeger, that in the numerous inspections Respondent conducted of the elevations at issue since January 1992, these areas were never cited for not having two escapeways, except on April 14, 1992 and April 16, 1992 when the 3200 and 4100 elevations were cited, respectively. However, it was most significant that Lawrence E. Nelson, who is presently an MSHA supervisory inspector, vacated the citation issued on April 16 for the 4100 elevation because he was of opinion that this elevation did not meet the requirements of a "level". He indicated that a "level" pertains to an area of major activity involving mining, haulage, and the delivery of supplies. He indicated that these activities are not present at the 4100 elevation. He also indicated that a "level" should supply ventilation to active areas. He said that the meaning that he accorded the term "level", is consistent with MSHA policy.

Also, significant is the fact that in September 1993, MSHA inspector James E. Eubanks, inspected the 4100 elevation, but did not cite it for not having two escapeways. (Tr. 221-222).

Within the above framework, I conclude that it has not been established that a reasonably prudent person familiar with the mining industry would apply the term "level" to the areas cited in the citations at issue. Hence, inasmuch as it has not been established that the cited areas were "levels", there was no requirement for Contestant to provide two escapeways. Accordingly, Contestant did not violate Section 57.11050(a), as alleged. Therefore, the citations at issue are to be dismissed.
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4 The usage and physical condition of the cited areas, remained the same from January 1992 through December 1993, when cited by Smith and Goldade.

5 Nelson served in this position for 14 years. He previously served as an MSHA inspector for 6 years. In addition, he had worked as an miner for Contestant for 17 years.

6 Nelson also vacated the citation issued on april 14, 1992 for the 3200 elevation, on the ground that he did not believe this elevation met the requirements of a "level". The condition and used of this elevation in April 1992 remained the same through December 1993, when cited in the citation at issue.

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ORDER

It is ORDERED that these cases be dismissed.

Avram Weisberger
Administrative Law Judge
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