

CCASE:
SOL (MSHA) V. B.S.K. MINING
DDATE:
19800429
TTEXT:

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. BARB 79-190-P A/O No. 40-02280-03003F B.S.K. No. 1 Surface Mine
v.	
B.S.K. MINING COMPANY, INC., RESPONDENT	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner Gary N.
Fritts, Esq., Dayton, Tennessee, for Respondent

Before: Judge Cook

I. Procedural History

On December 29, 1978, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act). The petition alleges two violations of provisions of the Code of Federal Regulations as set forth in two notices of violation issued pursuant to section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970) (1969 Coal Act). The Petitioner's certificate of service was filed on January 5, 1979, alleging that a copy of the petition had been mailed to B.S.K. Mining Company, Inc. (Respondent) on January 4, 1979.

On February 28, 1979, the Petitioner filed a motion for an order to show cause as to why the Respondent should not be deemed to have waived its right to a hearing and to contest the proposed penalty and why the proposed order of assessment should not be entered as the final order of the Federal Mine Safety and Health Review Commission (Commission). As grounds therefor the Petitioner stated that the Respondent had failed to file a timely answer to the petition. The requested order to show cause was issued on March 9, 1979, requiring the Respondent to respond within 15 days.

On March 15, 1979, the Respondent filed an answer to the motion for an order to show cause as well as a proposed answer to the petition. In addition, the Respondent filed an affidavit alleging that it had not received a

~999

copy of the petition. A written communication was filed by the Respondent on April 30, 1979, stating that as of April 26, 1979, copies of the documents had been mailed to counsel for the Petitioner.

The Respondent's answer was received for filing by an order dated May 10, 1979. In addition, the order noted that the Petitioner had not filed a certified mail receipt establishing the Respondent's receipt of the petition. The Petitioner was ordered to serve a copy of the petition on the Respondent and to file proof of service in the form of a certified mail receipt, but only in the event that the Petitioner was unable to file a certified mail receipt showing actual service of the December 29, 1978, petition.

On May 14, 1979, the Petitioner filed a written communication stating that counsel for the Respondent had been provided with a copy of the petition and copies of all attachments thereto.

A notice of hearing was issued on August 24, 1979, scheduling the case for hearing on the merits on November 27, 1979, in Chattanooga, Tennessee. The hearing was held as scheduled with representatives of both parties present and participating.

A schedule for the submission of posthearing briefs was agreed upon following the presentation of the evidence. The Respondent filed its posthearing brief on March 13, 1980. The Petitioner did not file any posthearing briefs.

Additionally, Exhibit No. 0-5 was set aside during the hearing for the posthearing filing of a certified copy of the Respondent's 1978 Federal tax return. The Petitioner was accorded time in which to file any objections to the receipt of such exhibit into evidence. On April 11, 1980, the Respondent filed a copy of its 1978 Federal tax return. The Petitioner filed no objections thereto. Accordingly, the tax return, denominated Exhibit 0-5, was received in evidence by an order dated April 29, 1980.

II. Violations Charged

Notice No.	Date	30 C.F.R. Standard
7-6 (1 LRA)	November 2, 1977	77.1700
8-1 (1 LRA)	February 22, 1978	77.404(a)

III. Witnesses and Exhibits

A. Witnesses

Both Petitioner and Respondent called Robert McCann, president of B.S.K. Mining Company, Inc., as a witness. Additionally, the Petitioner called MSHA inspectors Lee Aslinger and Lawrence Spurlock as witnesses.

~1000

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a computer printout compiled by the Office of Assessments listing the history of previous violations for which the Respondent had paid assessments beginning November 2, 1975, and ending November 2, 1977.

M-2 is a copy of Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. 77.1700.

M-3 is a copy of the termination of M-2.

M-4 is a copy of the inspector's statement pertaining to M-2.

M-5 is a copy of Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. 77.1606(c).

M-6 is a copy of the termination of M-5.

M-7 is a copy of the inspector's statement pertaining to M-5.

M-8 is a copy of a subsequent action form modifying M-5 to allege a violation of 30 C.F.R. 77.404(a) instead of 30 C.F.R. 77.1606(c)

2. The Respondent introduced the following exhibits in evidence:

O-1 is a copy of a document prepared by the Alabama Department of Revenue, Motor Vehicle and License Division.

O-2 is a copy of a document styled "Employer's Quarterly Contribution Report, Tennessee Department of Employment Security."

O-3 is a copy of safety rules in effect on October 30, 1977, to be observed by the Respondent's employees.

O-4 is a copy of a document styled "BSK Mining Co., Inc., Statement of Financial Position."

O-5 is a copy of the Respondent's 1978 Federal tax return.

3. J-1 is a drawing prepared by Robert McCann during the hearing.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1969 Coal Act occur, and (2) what amount should be assessed as a penalty if a violation is

found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of

~1001

previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

On November 27, 1979, the parties filed the following stipulations:

The parties, by and through their respective counsel, for the sole purpose of this proceeding, hereby agree to the following stipulations:

I

The Secretary of Labor (Secretary), in the civil penalty proceeding docketed above, filed a Petition for the Assessment of Civil Penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 820(a), hereinafter referred to as the Act, and in accordance with the Interim Procedural Rules of the Federal Mine Safety and Health Review Commission published in Title 29, CFR 2700.24 against respondent for alleged violations of the Act and the regulations issued thereunder (30 CFR Part 77).

II

On March 7, 1979, respondent, B.S.K. Mining Co., Inc., filed its answer to the Secretary's Petition pursuant to Interim Procedural Rules of the Federal Mine Safety and Health Review Commission published in Title 29 CFR 2700.25.

III

Respondent, B.S.K. Mining Co., Inc., is, and at all times hereinafter mentioned was, engaged in the operation of a mine known as the B.S.K. No. 1 Surface Mine located at Pikeville, Bledsoe County, Tennessee.

IV

Respondent, B.S.K. Mining Co., Inc., B.S.K. No. 1 Surface Mine is, and at all times hereinafter mentioned was, subject to the provisions of both the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, et seq. and

~1002

the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq. and the regulations issued under them (30 CFR Part 77).

V

During the period November 2, 1977 through February 22, 1978, respondent's B.S.K. No. 1 Surface Mine was inspected by Inspectors Lee R. Aslinger and Lawrence Spurlock, authorized representatives of the Secretary, pursuant to section 813(a) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 813(a).

B. Respondent's Liability for Violations of Mandatory Safety Standards

On Sunday, October 30, 1977, 17-year-old Jody Lynch sustained a fatal injury at the B.S.K. No. 1 Surface Mine. Federal mine inspectors conducting the ensuing fatal accident investigation believed that the victim was the Respondent's employee (Tr. 35, 48). However, the evidence presented by the Respondent establishes that the victim was never its employee (Tr. 116-117). The initial question presented is whether the Respondent can be properly charged with violations of the mandatory safety standards in connection with Mr. Lynch's death. For the reasons set forth below, I answer this question in the affirmative.

The relationship among three separate business entities, as set forth in the testimony of Mr. Robert McCann, president of B.S.K. Mining Company, Inc., must be considered in resolving the liability issue.

The Respondent held written, recorded leases to the mine property (Tr. 154-155). Both the permit and Mine Safety and Health Administration mine identification number were issued in its name (Tr. 72-75). Howton Coal Company (Howton) mined coal at the subject mine under an oral agreement with the Respondent (Tr. 119, 124-125). Mr. McCann described the terms of this oral agreement as "quite loose" (Tr. 165). Under the agreement as structured, it would not have been feasible to separate Howton out for a separate permit (Tr. 173). Howton was not at liberty to sell the coal it mined to the customer of its choice. Once mined, the coal became the Respondent's to sell (Tr. 164-165). In fact, "ownership" of the coal passed to the Respondent when it was loaded aboard the trucks in the pit area, trucks belonging to unidentified independent trucking companies engaged by the Respondent (Tr. 166-167). Howton was paid whatever the Respondent received for the coal, less the cost of handling, tipping, and "the royalties that were paid for the certain tax." Thus, payments to Howton varied as the markets varied (Tr. 170).

Howton supplied its own mining equipment (Tr. 124-125, 165). The Respondent had no control over the determination as to when Howton started or stopped work, over how much coal Howton produced per day, or over any of Howton's equipment operators.

Additionally, the Respondent had no right to direct Howton's employees in the performance of their tasks (Tr. 140).

~1003

According to Mr. McCann, Howton was "in essence" more responsible for the overall operation of the pit than was the Respondent. He further testified that the Respondent assumed responsibility for marketing and office work (Tr. 167). However, it is significant to note that the Respondent also mined on the property (Tr. 116) and that the oral agreement did not designate a specific area in which Howton was to work (Tr. 163-164). The best available evidence indicates that coal mined by the two companies was stockpiled separately, but in the same general area (Tr. 159).

According to Mr. McCann, Samuel Lynch, Sr., the victim's father, was an outside contractor hired by Howton to perform maintenance work on Howton's equipment (Tr. 117, 125, 168-169). Mr. McCann further testified that to the best of his knowledge the victim worked for Samuel Lynch, Sr. (Tr. 117). In view of the circumstances surrounding the accident, as set forth below, I find that the victim was in his father's employ on October 30, 1977 (See also, Tr. 58-59). No contractual or employment relationship existed between the Mssrs. Lynch and the Respondent (Tr. 117-118).(FOOTNOTE 1)

The foregoing considerations compel the conclusion that Howton's status at the subject mine was that of an independent contractor engaged in the extraction of coal, and that Samuel Lynch, Sr. was an independent contractor performing maintenance work for Howton. The alleged violations arose from activities performed at the B.S.K. No. 1 Surface Mine in the course of the equipment maintenance activities of Samuel Lynch, Sr.

In Republic Steel Corporation, 1 FMSHRC 5, 1979 OSHD par. 23,455 (1979), the Commission held that a mine owner can be held responsible for violations of the 1969 Coal Act created by independent contractors performing work on mine property even though none of the mine owner's employees were exposed to the violative conditions and even though the mine owner could not have prevented the violations. Accordingly, it is found that the Respondent was properly charged with the alleged violations.

C. Occurrence of Violations

MSHA inspectors Lawrence Spurlock and Lee Aslinger participated in an investigation at the B.S.K. No. 1 Surface Mine which began on November 1, 1977 (Tr. 12, 46). The record reveals that Mr. Pete Patterson, an employee of Howton (Tr. 118), was the primary source of their information as relates to the facts surrounding the death of Mr. Jody Lynch. The three individuals present at the mine on the day of the fatality did not testify at the hearing. The findings of fact set forth in the following paragraphs are based largely upon both the out-of-court statements given to the inspectors during the investigation and the testimony of Mr. Robert McCann.

1. Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. 77.1700

Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. 77.1700 (Exh. M-2), alleges in pertinent part that the decedent "was assigned or being allowed to work in an area where hazardous conditions existed and he could not be seen, heard or communicated to in this area." The cited mandatory safety standard provides as follows: "No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard or can be seen."

Jody Lynch arrived at the mine at approximately 10 a.m., October 30, 1977, and helped his father perform some maintenance (Tr. 48, 58-59). The evidence in the record reveals that Jody Lynch was allowed to work alone in the pit area of the B.S.K. No. 1 Surface Mine on the afternoon of October 30, 1977 (Tr. 19, 24, 50). He left the maintenance area in his own pickup truck at approximately 12:45 p.m. in order to change the air filters and oil on one of Howton's D8 bulldozers located in the pit (Tr. 20, 48-49, 117). Three other individuals were present on the mine site, all of whom were working in the maintenance area (Tr. 28, 48-49). (FOOTNOTE 2) Mr. Lynch's body was found in the pit area at approximately 1:50 p.m. pinned between the underside of the pickup truck and the ground (Tr. 22, 42, 49). The vehicle was approximately one-half mile from the maintenance area and was parked on a 10-percent grade (Tr. 13, 24, 50-51).

Mr. Patterson was of the opinion that Mr. Lynch had positioned the truck on the incline in such a manner so as to permit him to crawl underneath it for some purpose. Mr. Patterson believed that the truck apparently rolled back, pulled him out of an offset and pinned him between the truck and the ground (Tr. 42, 50-52).

~1005

According to Inspector Spurlock, the three men in the maintenance area could not have heard Mr. Lynch due to the distance involved, the approximate 50-foot height of the highwall and the fact that "you had to go down a plateau and down a bluff into the pit area" (Tr. 50-51). The testimony of Inspector Aslinger reveals that mounds of dirt would have prevented the men in the maintenance area from seeing Mr. Lynch (Tr. 25).

Based on the foregoing, it is found that Jody Lynch was allowed to work alone in the pit area of the B.S.K. No. 1 Surface Mine.(FOOTNOTE 3) It is further found that he could not communicate with others, could not be heard or could not be seen by the three other men at the mine while working alone in the pit area.

The remaining question is whether the Petitioner has proved that the pit was an area where hazardous conditions existed within the meaning of the mandatory safety standard. For the reasons set forth below, I answer this question in the negative.

The Administrative Procedure Act provides that "[a] sanction may not be imposed * * * except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d). The inspectors' testimony precludes a finding that a hazardous condition has been established by reliable and substantial evidence. Inspector Aslinger initially testified that hazardous conditions were involved throughout the pit area as far as incline of roadways and highwalls (Tr. 13), but contradicted himself on cross-examination by stating that the truck was the only hazardous condition (Tr. 37). During recross-examination, Inspector Spurlock attempted to show that all surface coal mines are inherently hazardous and that the B.S.K. No. 1 Surface Mine was as hazardous as any other surface mine, as set forth in the following testimony:

~1006

Q. There wasn't any type of hazardous conditions which had been existing like coal, dust, or gas, or anything like that?

A. Mr. Fritts, I don't know what you are referring to, but in a coal mine -- In a coal mine, anything can happen. You can slip off a piece of equipment getting down. We have accidents happen like that; or such as a truck run over. Coming into the pit area, there was a steeping incline coming down into the bottom of the pit off the wall. He could have lost control of his vehicle there. He could have. There are many ways you can get injured in a coal mine.

(Tr. 59). However, when pressed, he too took the position that Jody Lynch's pickup truck was the sole hazardous condition existing on October 30, 1977 (Tr. 59-60).

In summary, Inspector Aslinger appears to refer to specific hazards existing in the pit area as relate to roadways and highwalls at one point in his testimony, yet both inspectors affirmatively state that the pickup truck was the sole hazard. As set forth in Part V(C)(2), infra, the Petitioner has failed to prove the existence of the alleged defect as relates to the truck at the time of the accident. Therefore, it cannot be found that either the truck or the pit area presented a hazardous condition within the meaning of 30 C.F.R. 77.1700 when the accident occurred.

Additionally, I cannot accept the proposition that the pit was an area where hazardous conditions existed within the meaning of the regulation merely because it was a pit area. All surface mines present certain common dangers, yet the wording of the regulation is such that its mandate applies only when conditions outside the norm are present. The regulation is designed to assure that an individual working in an area where hazardous conditions exist that would endanger his safety is within sight or hailing distance of others who can render or summon assistance when necessary.

In view of the foregoing, I find that the Petitioner has failed to prove the violation alleged in Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. 77.1700.

2. Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. 77.404(a)

The subject notice states as follows:

The victim's vehicle, a green Chevrolet truck, license number Ala. PPO228, was being used as a haulage pit truck for transportation of lubrication and supplies on the 001 working section, whereby the transmission linkage, an equipment defect affecting safety, had not been corrected before the truck was put into use.

~1007

(Exh. M-5, Tr. 77).(FOOTNOTE 4)

Mandatory safety standard 30 C.F.R. 77.404(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The collective testimony of Inspectors Aslinger and Spurlock asserts that Mr. Patterson told them that he had seen Jody Lynch crawl under the pickup truck on numerous prior occasions to release or unhang the transmission levers (Tr. 15, 49). According to Inspector Spurlock, Mr. Patterson indicated that the problem was associated with having changed from a column shift to a floor shift (Tr. 107). The inspector testified that Mr. Patterson indicated that the transmission levers on the shift column would "hang up," and that Jody Lynch would have to go underneath the truck to release them before he could move the vehicle (Tr. 108-109). The inspector further testified that Mr. Patterson stated that on the day of the accident Jody Lynch had apparently experienced a problem with the transmission levers, had crawled under the truck to disengage them, and that when he disengaged the levers the truck rolled over him and smothered him (Tr. 51-52, 110).

The truck was removed from the mine site subsequent to the accident but prior to the investigation (Tr. 37-38, 52, 55, 81). (FOOTNOTE 5) The inspectors went to a nearby home where the truck was allegedly parked (Tr. 37-38, 55, 104). Inspector Aslinger did not examine the truck (Tr. 37-38), and the evidence reveals that Inspector Spurlock performed only a cursory examination consisting merely of shifting gears with the engine off (Tr. 55). He testified that the gears "worked pretty stiff, but that still does not mean it was not

~1008

jammed" (Tr. 55, 106), and that he found no distinguishing, unsafe conditions (Tr. 104).(FOOTNOTE 6)

I am unable to conclude that the Petitioner has proved the occurrence of the alleged violation by reliable, probative and substantial evidence. Three factors weigh heavily in this determination. First, the theory propounded by the hearsay declarants as to how the accident occurred was not corroborated by a thorough MSHA examination of the truck designed to determine on the basis of reliable, probative evidence whether the alleged transmission linkage problem existed and whether it was responsible for Mr. Lynch's death.

Second, it cannot be stated with certainty that the truck examined by Inspector Spurlock was the truck involved in the fatality. There is no indication that individuals capable of positively identifying the truck accompanied the inspectors to the nearby home, and both inspectors indicated that the dwelling's residents were not at home when the examination was performed (Tr. 38,55). The inspectors never spoke to the decedent's father, an individual who certainly possessed the necessary information (Tr. 38, 105). Furthermore, the testimony of Inspector Aslinger heightens the level of uncertainty. He testified as follows during cross-examination:

Q. Now, this truck, did you examine it?

A. No, sir.

Q. You didn't examine it?

A. The truck had been removed from the mine property immediately after the fatality, and we had learned where it was parked, and we went to see the truck at a neighboring home nearby.

Q. Was the truck there?

A. I think it was.

Q. Okay. Did you examine the truck there?

A. No, I did not myself.

Q. Was anyone with you that did examine the truck?

A. The investigating team did.

(Tr. 37-38) (emphasis added).

~1009

The foregoing passage confirms that an examination was performed on a truck, but the emphasized portion betrays some uncertainty on the inspector's part as to whether the truck actually examined was the one involved in the fatality.

The testimony of Inspector Spurlock indirectly confirms Inspector Aslinger's testimony on this point. It is significant to note that Inspector Spurlock did not affirmatively state that the victim's family actually resided in the dwelling. Instead, he testified that he "went to the place where they was supposed to live" (Tr. 55) (emphasis added).

Third, the inspector opined that the transmission locked when the victim stopped and turned off the engine (Tr. 112). He further testified that "when one of the levers lock up, they split gears, they lock up the whole works," and that the vehicle cannot be moved (Tr. 113). However, the testimony indicates that the victim carefully selected the site on which the truck was parked, a site where the terrain permitted him sufficient space to crawl under the truck (Tr. 42, 111-112). This testimony cannot be characterized as reliable, probative and substantial evidence establishing the violation as charged since it is inconsistent. On the one hand it points to careful selection of a site to correct an existing problem or perform some other undisclosed maintenance or inspection, and on the other hand indicates that the levers malfunctioned the instant the engine stopped. The two accounts contain an unresolvable inconsistency.

It could be argued that the levers malfunctioned every time the vehicle's engine was turned off. This theory could resolve the inconsistency since the victim would have foreseen the necessity of parking in a location providing sufficient space to permit access to the underside of the truck. However, the record contains no evidence of this. The hearsay declarant's statement points to "numerous occasions," but the record contains no indication as to how the hearsay declarant defined the term. (See, e.g., Tr. 17-109.)

In summary, there is no reliable, probative, and substantial evidence as to the actual condition of Jody Lynch's truck on the day of the accident. Accordingly, I conclude that the Petitioner has failed to prove the violation alleged in Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. 77.404(a).

VI. Conclusions of Law

1. B.S.K. Mining Company, Inc., and its No. 1 Surface Mine have been subject to the provisions of the 1969 Coal Act and the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspectors Lee Aslinger and Lawrence Spurlock were duly authorized representatives of the Secretary of Interior

between November 1, 1977, and February 22, 1978.

~1010

4. The Petitioner has failed to prove the violations charged in Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. 77.1700, and Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. 77.404(a).

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The Respondent submitted a posthearing brief. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

IT IS ORDERED that Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. 77.1700 and Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. 77.404(a) be, and hereby are, VACATED.

IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED.

John F. Cook
Administrative Law Judge

~FOOTNOTE 1

The possibility remains that Jody Lynch was a regular employee of Howton. The inspector's possessed information indicating that he had been a drill operator at the mine for approximately 2 months (Tr. 15). The existence of an employer-employee relationship between Howton and Jody Lynch would resolve much of the conflict in the testimony as to his regular employment status. Inferences drawn from Inspector Spurlock's testimony would support such a conclusion since at one point the inspector indicated that Jody Lynch came to the mine to see his father and that his father asked whether he could help perform some maintenance while he was there (Tr. 58-59). The tone of this conversation implies that Jody Lynch visited the mine for a purpose other than equipment maintenance but was persuaded to assist his father. However, it remains clear that at the time of death Jody Lynch was engaged in his father's equipment maintenance activities.

~FOOTNOTE 2

The three individuals were identified as Pete Patterson, an employee of Howton; Burl Wise, a truck driver; and Samuel Lynch, Sr. (Tr. 28, 47-48, 118).

~FOOTNOTE 3

Mr. McCann testified that the fatality occurred on the approach to the topsoil storage area. He described the pit area as several hundred feet south of this location (Tr. 120-121, 125). However, Mr. McCann was not present at the mine on the day of the accident (Tr. 150) and the source of his information was not revealed. Inspector Aslinger, however, testified that Mr. Patterson and a former truck driver pointed out where the victim was found (Tr. 16-17). Additionally, the inspector testified that he had observed indications that oil had been changed in the immediate area where Mr. Lynch's body had been found (Tr. 23). The inspectors' account as to where the accident occurred is deemed the most probative of the two accounts since the record reveals that their information was provided by a man who was at the mine on the day of the fatality and that corroborating evidence was found in the pit area.

~FOOTNOTE 4

The truck mentioned in the notice is a 1964 green Chevrolet pickup truck, Alabama license number PPO228 (Tr. 20, 77). The Respondent read the "O" in the license number set forth in the notice as a "V" and obtained a document from the Alabama Department of Revenue, Motor Vehicle and License Division, showing that Alabama license number PPV228 identified a blue 1967 Ford pickup owned by one W. S. Cooper (Exh. 0-1). Therefore, it cannot be found that Exhibits M-5 and O-1 refer to the same vehicle.

~FOOTNOTE 5

It appears that disturbance of the accident site was a principal reason for the Petitioner's inability to produce reliable, probative and substantial evidence establishing the occurrence of the alleged violations. The Respondent should have been charged with a violation of section 103(e) of the 1969 Coal Act which provides, in part, that "[i]n the event of any accident occurring in a coal mine, the operator shall notify the Secretary [of Interior] thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof." No information has been presented to the undersigned indicating whether such charge was brought and, if so, disposed of prior to the Respondent's request for an evidentiary hearing.

~FOOTNOTE 6

It should also be noted that the inspector appeared to contradict himself while describing the test performed. At one point, he testified that he tried to engage the transmission levers and that "[t]hey weren't rough." (Tr. 55). However, he subsequently indicated that the gears felt rough when he shifted them (Tr. 106).