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SOL (MSHA) V. FRANK BOUGH & SOL (MSHA)
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for smoking a cigarette in an underground mine on October 10, 1978, in violation of 30 C.F.R. 75.1702. On June 29, 1979, MSHA filed a petition for assessment of civil penalties against Peabody Coal Company (hereinafter Peabody) for violation of the same regulation on the same date and for a ventilation violation under 30 C.F.R. 75.316. On January 2, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. 2700.12, because the two cases involve similar issues of law and fact.

A hearing was held in Springfield, Illinois, on February 21, 1980. MSHA inspectors, John D. Stritzel and Mark Bryce testified on behalf of MSHA. Waldo Prasun, a buggy operator; Burt Lahr, the union steward and walkaround; and Frank J. Bough testified on behalf of Bough. Wally Heil, an environmental dust technician; Winston Robinette, a face boss; Irvin Shimkus, Peabody's safety manager; and Bob Hall, Peabody's mine manager testified on behalf of Peabody. Bough submitted his case on a closing argument at the close of the taking of testimony. MSHA and Peabody submitted briefs.

At the outset of the hearing, I approved a proposed settlement between MSHA and Peabody concerning a violation of Peabody's approved ventilation plan. That settlement is set forth later in this decision. The unresolved controversy that required a hearing was whether Bough and Peabody violated 30 C.F.R. 75.1702. MSHA contends that Bough was seen smoking a cigarette. Bough contends that he did not smoke a cigarette. MSHA further charges that Peabody did not have an effective program to insure that persons entering the underground area did not carry smoking materials. Peabody contests that charge.

MOTION TO DISMISS AND APPROVE SETTLEMENT

On January 15, 1980, the Solicitor filed a motion to dismiss and approve settlement of the part of the civil penalty proceeding against Peabody (Docket No. LAKE 79-91-M) which involved a citation for violation of 30 C.F.R. 75.316. Citation No. 264754B was originally assessed by MSHA for \$760 whereas the parties proposed a settlement in the amount of \$600.

This citation arose out of a finding by MSHA that the ventilation for the area in question was inadequate. A reduction in the proposed assessment is submitted by MSHA because the violation was due to an air curtain which had been knocked down. Further investigation showed that Peabody was in the process of rehanging the curtain at the time the citation was issued and, hence, its negligence was overassessed.

Having duly considered the matter, I conclude that the recommended settlement is consistent with the purposes and policy of the Act. The recommended settlement is, therefore, approved.

ISSUES

Whether Bough and Peabody violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 317(c) of the Act, 30 U.S.C. 877(c), and 30 C.F.R. 75.1702 provide

No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

Section 110 of the Act, 30 U.S.C. 820, provides in pertinent part:

(a) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

* * * * *

(g) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than \$250 for each occurrence of such violation.

STIPULATIONS

The parties stipulated the following:

1. The administrative law judge has jurisdiction over this matter.
2. Peabody Coal Company is a large operator.
3. Peabody Coal Company has a better than average record of violations per inspection man day when compared with the rest of the coal industry.
4. Inspectors John D. Stritzel and Mark G. Bryce are duly authorized representatives of the Mine Safety and Health Administration.
5. Frank J. Bough was a miner employed at Peabody Coal Company's Underground Mine No. 10 on October 10, 1978.

SUMMARY OF THE EVIDENCE

John D. Stritzel testified that he has been a federal mine inspector for 9 years. On October 10, 1978, he was conducting a regular mine inspection of the No. 10 Underground Mine of Peabody Coal Company. On the day in question, he had checked on the abatement of two prior citations. He then led the inspection party up to a crosscut between rooms 2 and 3. A buggy behind a loading machine blocked his entry into the crosscut. When the buggy pulled out, he stepped around the corner and saw Frank Bough 15 feet away operating the loading machine with a lighted cigarette in his mouth. Mr. Bough had both hands on the controls of the loading machine and the inspector had a profile view of him. Inspector Stritzel described the cigarette as filter tipped, freshly lighted, and glowing. Inspector Stritzel raised his light and Bough looked at him and did a "double take." The inspector observed Bough with a cigarette in his mouth for approximately 5 seconds. Thereafter, Bough ducked down in the cab and the inspector signaled him to stop the loading machine. Instead, Bough then started tramping the machine back in the direction of the inspector and swinging the tail of the loader back and forth. Approximately 30 to 45 seconds thereafter, Bough stopped the machine and the inspector approached him.

Inspector Stritzel stated that he told Bough that he had seen him smoking and asked where was the cigarette. Bough allegedly replied, "I loaded it out." Inspector Stritzel knew that was false because the buggy had already left the scene before he saw him smoking. The inspector looked around the loader for approximately 5 minutes but did not find a cigarette.

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The loading machine was not moved. Inspector Stritzel was upset, aggravated, and disappointed because he had known Bough for 5 or 6 years on a first name basis. He stated that Bough had been his "good friend." The inspector threw his walking cane down on the ground. He stated, "I didn't want to cite Mr. Bough." For the next 15 minutes, the inspector remained in the crosscut and could smell cigarette smoke for that period of time. There was no ventilation moving in the crosscut because the curtain was not up. The inspector found .5 percent methane on his methane detector and issued an order of withdrawal. This was the first time the inspector ever saw any person smoking in an underground mine. The inspector was later told that Bough had been searched but no smoking materials were found. Bough was not searched in the presence of the inspector.

Inspector Stritzel further testified that at the time of this occurrence, Peabody Coal Company had an approved program for prohibition of smoking underground for Mine No. 10. This approved plan had been adopted by Peabody on April 13, 1970. The plan seemed to be reasonably good but all searches were conducted in the same manner. According to Inspector Stritzel, Peabody only searched lunch boxes and required the miners to remove their caps. Peabody never searched thermos bottles, tobacco pouches, or shoes. Inspector Stritzel had no reason to presume that the program was ineffective until he saw Bough smoking a cigarette. Since he found Bough smoking a cigarette, he had to find that the program was insufficient.

No. 10 Underground is classified as a gassy mine. In the event of an ignition caused by the lighted cigarette, Inspector Stritzel stated that up

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to 10 miners would be exposed to injury. After the inspector issued a citation to Bough and an order of withdrawal to Peabody, Peabody demonstrated reasonable good faith in abatement. Peabody conducted searches on all preshifts at all three portals. Inspector Stritzel testified that, in his opinion, Peabody violated the Act and regulations because it did not insure that miners would not smoke underground.

Mark Bryce was an inspector-trainee at the time. He was accompanying Inspector Stritzel at the time of this occurrence. He did not see Bough smoking a cigarette because he was approximately 30 feet behind Inspector Stritzel at the time of the occurrence. Bough was not in his line of vision. As Bryce approached the crosscut in question, he smelled cigarette smoke. He did not see any cigarette smoke and he smelled no other odor. There was no ventilation in the crosscut in question and a cigarette odor remained throughout the time he was present. Inspector Stritzel was the person closest to Bough at the time of this incident.

Waldo Prasun, a buggy operator, testified on behalf of Bough. He worked with Bough for 10 years. He was the operator of the buggy which had just pulled out of the crosscut before Inspector Stritzel stepped around the corner. Bough was in his line of vision until he pulled out of the crosscut. He estimated that it was 2 or 3 seconds from the time he moved his buggy until Inspector Stritzel stepped around the corner. In response to the question as to whether he had seen Bough smoking a cigarette at that time, Mr. Prasun responded, "if he had it, I didn't know it." He went back into the crosscut while the inspector and Bough had their conversation. He did

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not smell any cigarette smoke. There was a haze of oil smoke and brake band smoke in the crosscut.

Burt Lahr, a union steward and walkaround, also testified for Bough. He was the union walkaround accompanying Inspector Stritzel on the day in question. Bough was not in his line of vision when the inspector allegedly saw him smoking. When Mr. Lahr entered the crosscut, he did not smell cigarette smoke. However, he stated that there was smoke coming off the brake shoes of the loading machine. He described a strong odor of smoke. He stated that there was some air flowing into the crosscut even though the line curtain was down. Mr. Lahr did not recall anyone being searched.

Frank J. Bough testified that he had worked in the Underground 10 Mine for 22 years. He was a loader operator on the day in the question. He testified that while he was operating the loader, he saw Inspector Stritzel signal him to stop. Inspector Stritzel approached him and stated, "I saw you smoking." Bough responded, "You are a damn liar." At that point, Inspector Stritzel threw his cap or cane down on the ground. Bough stated that he did not smoke a cigarette. He smokes Lucky Strike cigarettes and never smoked a filter cigarette in his life. He never refused a search at the mine and no smoking materials were ever found on him. There was poor visibility in the crosscut at the time because the brake discs were smoking. Approximately 30 minutes after this occurrence, he was searched by the mine manager. No smoking materials were found. He never had any problems with Inspector Stritzel and does not know why the inspector would accuse him of smoking.

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Peabody called Wally Heil, an environmental dust technician, as its first witness. Mr. Heil was the Peabody representative on the inspection in question. At the time of the occurrence, he could not see Bough or the inspector. He heard Bough deny that he was smoking. Mr. Heil did not smell anything when he got to the crosscut in question. He stated, "I didn't pay any attention to smells * * *." He stated that if there had been any smoke in the crosscut, it would stay in the entry. The only significant difference between the program which was in effect on October 10, 1978, and the new program subsequently adopted was that Peabody searches more often under the new program.

Irvin Shimkus, has been the safety manager at No. 10 Mine since 1970. He stated that under the plan in effect at the time of this occurrence, Peabody conducted periodic searches. During the search, management would pat the miner's pockets and ask some miners to open their lunch buckets. Periodic safety meetings were held concerning the prohibition on smoking. Bough attended such safety meetings in June and July 1978.

Bob Hall was mine manager of No. 10 Underground on the day in question. He has worked for Peabody for 20 years. On the day in question, Bough told Mr. Hall that he was not smoking. Mr. Hall searched Bough and only found a box of Skoal. Under the plan in effect at the time of this occurrence, Peabody searched miners once a week. Most of the searches were conducted on top but occasionally there was a surprise search conducted on the bottom. In all of the time that Hall has been connected with Peabody, no smoking materials were ever found in any of the searches. However, Hall volunteered

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the information that he had seen people go back to their lockers when they were aware that a search would be conducted. Mr. Hall's pertinent testimony is as follows:

Q. In all the searches that Peabody has conducted at Mine No. 10, underground mine, have you ever found any smoking articles?

A. We have never found any in our search on top or bottom. We have had people go back to their locker before if they seen we had a search program coming up.

* * * * *

Q. When the search would be done on top, would it be your policy, then, to let those people go back to their lockers before they were searched?

A. We don't give them case until they are searched.

(Tr. 201-202).

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, arguments, briefs, and proposed findings of fact and conclusions of law have been considered. The first issue to be resolved is whether Frank Bough smoked a cigarette in an underground mine as alleged by MSHA. While the testimony of Inspector Stritzel and Bough is in direct conflict on this question, there are other facts which are not disputed. They are as follows: (1) At the time Inspector Stritzel alleged that he saw Bough smoking a cigarette, no one else saw or could have seen Bough; (2) no cigarette was found at the site of this occurrence; (3) Bough was searched for smoking materials approximately 30 minutes after the occurrence and no smoking materials were

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found; (4) Bough and Inspector Stritzel knew each other and Bough could supply no motive for Inspector Stritzel's charge against him; (5) in approximately 9 years as a federal mine inspector, Inspector Stritzel had never seen anyone else smoke a cigarette in an underground mine; and (6) Frank Bough knew that smoking in an underground mine was prohibited. Hence, MSHA's allegation against Frank Bough must be resolved by determining the credibility of the testimony of Inspector Stritzel and Frank Bough.

I find that the testimony of Inspector Stritzel was more credible and worthy of belief than the testimony of Frank Bough. This is so for the following reasons: (1) Inspector Stritzel was 15 feet away from Bough at the time of this occurrence and had an unobstructed view; (2) there is no evidence of record which would establish any motive for Inspector Stritzel to make a false charge against Bough--in fact the evidence establishes that they were friends and the inspector did not want to cite Bough; (3) the fact that the cigarette was not found is not significant in light of the inspector's credible testimony that after he signaled Bough to stop his loader, Bough ducked down in the cab, could have dropped the cigarette under the loader, and trammed the loader back and forth for some 30 seconds before stopping it; (4) based upon the demeanor of the witnesses--including their appearance, tone of voice, zeal, and candor--I find that the testimony of Inspector Stritzel was truthful and that the testimony of Frank Bough was not; (5) Bough's assertion that he never smoked filter tip cigarettes is insignificant under the facts herein; and (6) the testimony of Bough was self-serving and unpersuasive.

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I should note here that there was some other conflicting evidence which I did not find to be significant in arriving at the above findings. First, there was a dispute as to whether the area in question contained cigarette smoke, oil smoke, brake band smoke, or no smoke at all immediately after the occurrence. Second, there was a dispute as to whether the ventilation, if any, would have removed the smoke, if any, in the 15 minutes after the occurrence. Third, there was a dispute as to the relative positions of the members of the inspection crew at the time of this occurrence. Suffice it to say that none of these disputes affected the outcome of this matter. Even if all three had been resolved against MSHA, my decision would be the same. The disputed evidence did not affect the credibility of Inspector Stritzel. Hence, this evidence is immaterial and insignificant.

Therefore, I find that MSHA has established by a preponderance of the credible evidence that Frank Bough smoked a cigarette in Peabody Coal Company Underground Mine No. 10 on October 10, 1978, in violation of section 317(c) of the Act and 30 C.F.R. 75.1702. Section 110(g) of the Act provides that "any miner who willfully violates the mandatory safety standard relating to smoking * * * shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than \$250 for each occurrence of such violation." There are no extenuating or mitigating facts in the record of the instant case which would justify the assessment of less than the maximum civil penalty. To the contrary, the life and safety of each member of the crew was placed in jeopardy by this violation in a gassy mine at a place where ventilation was inadequate. Frank Bough knew that smoking was prohibited and, therefore, his violation of the Act and regulation was willful.

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I conclude that a civil penalty of \$250 should be imposed upon Frank Bough for the violation found to have occurred.

The next issue to be resolved is whether Peabody violated the Act or regulation and, if so, the amount of the civil penalty which should be assessed. MSHA asserts that Peabody is liable for the following reasons: (1) The fact that Frank Bough was smoking a cigarette underground in a Peabody mine establishes that Peabody's program did not insure that smoking materials were not carried to the underground area of the mine; and (2) Peabody is chargeable with "deficient enforcement of the anti-smoking program." Peabody alleges that it is not liable because: (1) Bough did not smoke a cigarette underground; and (2) even if Bough did violate 30 C.F.R. 75.1702 by smoking a cigarette underground, Peabody "is not absolutely liable in such a situation and, therefore, also guilty of a violation of 75.1702."

As noted above, the language of section 317(c) of the Act and 30 C.F.R. 75.1702 is identical. The Act and regulation require an operator to institute a program, approve by the Secretary, "to insure that any person entering underground area of the mine does not carry smoking materials, matches, or lighters." (Emphasis supplied.) Hence, Congress has imposed upon the operator the highest possible duty: that of an insurer. The fact that I previously found that Frank Bough was smoking a cigarette establishes that Peabody failed in its role as an insurer and, hence, violated the Act and regulation. While such a finding could alleviate the need for any further discussion of the question of whether Peabody violated the Act or

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regulation, the evidence of record in the instant case also establishes notice to Peabody that its anti-smoking program was ineffective. The manager of the mine in question testified that he had seen miners go back to their lockers when they became aware of the fact that a search would be conducted. Peabody acquiesced in this practice by permitting the miners to return to their lockers before being searched. It is reasonable to infer from this fact that Peabody had notice that miners would carry smoking materials underground but for the fact that they had advance warning of a search. The evidence of record fails to show that Peabody took any action to change the methods or places of its searches in the light of this information. Thus, Peabody not only violated the Act and regulation herein, it was also negligent in failing to institute a program which would insure compliance. Therefore, I agree with MSHA that Peabody violated the Act and regulation because (1) the fact that Frank Bough smoked a cigarette underground establishes that Peabody's program did not insure that smoking materials would not be taken underground and (2) Peabody had notice that its plan did not insure compliance with the Act and regulation but failed to institute a different program.

Section 110(i) of the Act, 30 U.S.C. 820(i), requires consideration of six criteria in the assessment of a civil penalty. As pertinent here, the operator's prior history of 106 violations in the previous 2 years is noted. None of these violations is relevant to the instant case. Peabody is a large operator and the assessment of a civil penalty will not affect its ability to continue in business.

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As noted above, Peabody was negligent in its failure to institute a program which would insure that smoking materials were not carried underground. It had notice that its program in this regard was deficient in that miners who were about to be searched for smoking materials were permitted to return to their lockers prior to such a search. In the light of such notice, Peabody's failure to take additional action to insure compliance with the Act and regulation amounts to ordinary negligence.

The gravity of this violation is severe. Underground 10 Mine is classified as a gassy mine. The violation in question endangered the lives and safety of at least 10 men employed in the section. The lighted cigarette served as a potential ignition source in an area where there was no effective ventilation to remove methane. A serious accident was avoided only because the methane present at that time was less than 5 percent.

Peabody demonstrated good faith compliance upon notification of the violation.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of \$1,500 should be imposed upon Peabody for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that Respondent Frank Bough pay a sum of \$250 within 30 days of the date of this decision as a civil penalty for the violation of section 317(c) of the Act and 30 C.F.R. 75.1702.

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It is FURTHER ORDERED that Peabody pay the sum of \$2,100 within 30 days of the date of this decision for the violation of 30 C.F.R. 75.316, section 317(c) of the Act, and 30 C.F.R. 75.1702.

James A. Laurensen
Judge