

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6230

10 SEP 1980

BETHLEHEM MINES CORPORATION,	:	Contest of Citation
Contestant	:	
v.	:	Docket No. PENN 80-52-R
	:	
SECRETARY OF LABOR,	:	Mine No. 33
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 80-144
Petitioner	:	A.C. No. 36-00840-03040
v.	:	
	:	Mine No. 33
BETHLEHEM MINES CORPORATION,	:	
Respondent	:	

DECISION

Appearances: John M. Gallick, Administrative Assistant, Bethlehem Mines Corporation, Bethlehem, Pennsylvania, for Bethlehem Mines Corporation;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding arises out of the consolidation of a contest of citation and a civil penalty proceeding arising out of that citation. On November 6, 1979, Bethlehem Mines Corporation (hereinafter Bethlehem) filed a notice of contest of a citation issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1) (hereinafter the Act). On February 13, 1980, the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) filed a proposal for assessment of a civil penalty against Bethlehem for violation of 30 C.F.R. § 75.1726(a). On April 30, 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.

A hearing was held in Ebensburg, Pennsylvania, on August 12, 1980. Joseph **Karpinski** testified on behalf of **MSHA**. Paul Rainey, Robert Moore, and Ronald Riley testified on behalf of Bethlehem.

ISSUE-S

The first issue is whether the citation under section 104(d)(1) was properly issued. The second issue is whether Bethlehem 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 104(d)(1) of the Act, 30 **U.S.C. § 814(d)(1)**, provides in pertinent part as follows:

If, upon any inspection of a coal or other mine, an authorized representative of **the Secretary** finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 C.F.R. § 75.1726(a) provides in pertinent part as follows: "Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely."

Section **110(i)** of the Act, 30 U.S.C. § **820(i)**, provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS •

The parties stipulated the following:

1. Bethlehem owns and operates the No. 33 Mine.

2. Bethlehem and the No. 33 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over the parties and subject matter of this case.

4. Bethlehem is a large operator within the meaning of the Act and employs 1,316 employees; the coal production for the No. 33 Mine in 1979 was **1,546,544** and the total corporate production for Bethlehem at that time was **10,424,003**.

5. Bethlehem demonstrated good faith in abatement with normal compliance after the citation was issued.

6. The assessment of a civil penalty in this case will not adversely affect Bethlehem's ability to continue in business.

7. The conditions or practices listed in the citation constituted a violation of 30 C.F.R. § 75.1726(a).

8. Bethlehem Mine No. 33 was assessed for 366 violations in the **24-month** period prior to October 5, 1979. This comes out to a rate of **.25** violations per inspection day or one violation every four inspection days.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. On October 5, 1979, Joseph **Karpinsky**, a duly authorized representative of the Secretary was conducting a regular quarterly inspection of Bethlehem's Mine No. 33 in Cambria County, Pennsylvania.

2. During the course of his inspection, he observed a miner working on the boom of a roof-bolting machine which was -raised 3 feet above ground level and which was not blocked in place.

3. The miner was **attempting** to straighten a post which supported the line cu.-tain.

4. At the time the miner was working on the raised part of the **roof-bolting** machine, the section foreman was in the immediate vicinity of that miner and was assisting the miner in attempting to straighten the post.

5. The section foreman was unfamiliar with 30 C.F.R. § 75.1726(a) which prohibits men from working on or from mobile equipment in a raised position until it has been blocked in place securely.

6. After the inspector informed the section foreman of the above provisions of law, the section foreman directed the miner to get down from the raised portion of the roof-bolting machine and the miner did so.

7. The miner who was working on the raised portion of the roof-bolting machine was exposed to physical injuries in the event of a fall.

8. Bethlehem demonstrated good faith in abatement of this citation with normal compliance after the citation was issued.

9. Bethlehem is a large operator and the assessment of a civil penalty will not affect the operator's ability to continue in business.

10. This mine was assessed for 366 violations in the 24 months preceding this citation.

DISCUSSION

In the instant case, Bethlehem concedes that it violated 30 C.F.R. § 75.1726(a) but contends that its violation did not amount to an **unwarrantable** failure and that the proposed penalty in the amount of \$255 is excessive. In my Findings of Fact, supra, I found that the violation in controversy occurred in the presence of Bethlehem's management, to wit, its section foreman. Bethlehem's defense is based upon the following assertions: (1) the section foreman was unaware of the provisions of the regulation at issue; (2) the section foreman told the **miner** to get off the raised portion of the roof bolter before being cited by the **MSHA** inspector; and (3) it was unlikely that the raised portion of the roof bolter would move.

The term "unwarrantable failure" was defined by the Interior Board of Mine Operations Appeals as follows:

[A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of Indifference or a lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

This definition was approved in the legislative history of the Act. S. Rpt. No. 95-181, 95th **Cong.**, 1st **Sess.** 32 (1977).

The facts of the instant case establish that the violation occurred in the presence of the section foreman and that he took no action to abate this violation until he was made aware of the law by the inspector. The contrary testimony of Bethlehem's witnesses that the foreman told the miner to get off the raised part of the roof-bolting machine before talking to the inspector is rejected because it is less credible than the testimony of the inspector. This conclusion is further supported by the fact that the foreman admitted that he was unaware of the fact that this condition constituted a violation of the regulations. Moreover, the foreman admitted that he never claimed to have told the inspector that he directed the miner to get down before he was advised of the violation. Therefore, under the above principle of law, **it** is apparent that the violation in question was one of unwarrantable failure

because the foreman failed to exercise reasonable care and due diligence to abate this condition. It should also be noted that an operator cannot escape a finding of unwarrantable failure by establishing that its foreman did not know that a condition constituted a violation of law. Operators are chargeable with knowledge of the law-and the test for unwarrantability announced in Zeigler Coal Company, supra, includes the following: "conditions or practices the operator knew or should have known existed * * *" (Emphasis supplied.) This finding of unwarrantable failure implicitly includes a determination that Bethlehem was negligent.

The remaining defenses of Bethlehem go to the gravity of the violation. The only violation charged here is a failure to securely block in place mobile equipment in a raised position. Thus, the only probability of occurrence that is relevant here is the likelihood of injury resulting from some movement of the mobile equipment. I find that only one miner was exposed to injury and the probability of an occurrence was slight.

Based upon the evidence of record and the criteria set forth in section **110(i)** of the Act, I conclude that a civil penalty of \$200 should be imposed **for** the violation found to have occurred.

CONCLUSIONS OF LAW

1. Bethlehem and its No. 33 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction over the parties and subject matter of this case.

3. Bethlehem violated 30 C.F.R. § 75.1726(a) as alleged by MSHA and that violation was caused by the unwarrantable **failure of** Bethlehem to comply with the above regulation because of the following: (A) Bethlehem's section foreman should have known that working on the raised portion of mobile equipment which was not blocked in place securely was a violation of the above regulation; (B) the section foreman was present when the violation occurred and failed to exercise reasonable care and due diligence to abate this violation; and (C) the violation could significantly and substantially **contribute to** the cause and effect of a mine safety and health hazard.

4. Citation No. 0815883 was properly issued and Bethlehem's contest of that citation is denied.

5. Bethlehem is assessed a civil penalty in the amount of \$200 for the violation.

ORDER

THEREFORE, IT IS ORDERED that the contest of citation is DENIED and the citation is AFFIRMED.

IT IS **FURTHER** ORDERED that Bethlehem pay the sum of \$200 within 30 days of the date of this decision for violation of 30 **C.F.R. § 75.1726(a)**.


James A. Laurenson, Judge

Distribution by Certified Mail: .

John **M. Gallick**, Administrative Assistant, Bethlehem **Mines** Corporation,
1875 Martin Tower, Bethlehem, PA 18016

James **H. Swain**, Esq., Office of the Solicitor, U.S. Department of Labor,
3535 Market Street, Room 14480, Philadelphia, PA 19104