FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE. SUITE 400
DENVER. COLORADO 80204

AUG 4 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-20-M
v.	)	MSHA CASE NO. 24-00338-05003 F
THE ANACONDA COMPANY,	)	MINE: Berkeley Pit
Respondent.	)	

DECISION

Appearances:

Ann M. Noble, Esq., Office of the Solicitor, United States Department of Labor, 1961 Stout Street, 1585 Federal Building, Denver, Colorado 80294
For the Petitioner

Edward F. Bartlett, Esq., and Karla M. Gray, Esq.
P.O. Box 689, Butte, Montana 59701
For the Respondent

Before: Judge Virgil E. Vail

I. Procedural Background

The above captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §820(a) [hereinafter referred to as "the Act"].

Pursuant to notice, a hearing on the merits was held at Butte, Montana on September 16, 1980. Respondent called Walter B. Brown and Robert G. Henderson as witnesses. Petitioner did not offer any oral testimony. The parties filed post hearing briefs.

II. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. The Administrative Law Judge has jurisdiction to hear this case.

2. The respondent is a large company.

3. The assessment of a penalty in this case would not affect the respondent's ability to continue in business.

4. The autopsy report is admissible (P's Exhibit 1).

III. Findings of Fact

Based on the evidence, I find that the following facts were established:

1. Citation No. 341641 was issued as a result of a fatal accident which occurred on July 11, 1978.

2. Mr. Charles McNair, who was employed by the respondent at its Berkeley Pit, was fatally injured when he became entangled in a conveyor belt. (P's Exhibit 1).

3. Mr. Robert Henderson, a foreman at the Berkeley Pit when the accident occurred, observed Mr. McNair on the day of the accident when the latter turned in his time card. At that time Mr. Henderson did not observe anything unusual about Mr. McNair nor did he smell any alcohol. (Tr. 19-21).

4. A co-worker of the deceased, Mr. Wal'ter Brown, saw the deceased on the bus used to transport the employees to their work areas. Mr. Brown did not notice anything unusual about Mr. McNair and testified that there was no indication that Mr. McNair had been drinking. (Tr.14-15).

5. There were no witnesses to the fatal accident.

IV. Discussion

Citation No. 341641[1]/ charges the respondent with having violated mandatory safety standard 55.20-l. The standard provides that:

> 55.20-l Mandatory. Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

1/ Citation No. 341641 reads as follows: On July 11, 1978, Charles W. McNair was fatally injured when he became entangled in the troughing rollers of the number 2 conveyor belt. An autopsy of the body of Charles McNair was ordered by the Silver Bow County Coroner's Office. The autopsy report, dated July 13, 1978, and issued by Silver Bow General Laboratory, Continental Drive, Butte, Montana, showed the blood alcohol level on the post mortem sample of blood at a level of 0.12%. Charles McNair was allowed on the job while under the influence of alcohol on July 11, 1978.

The sole issue is whether the respondent violated 55.20-I by permitting the deceased on the job while he was under the influence of alcohol.

The phrase "under the influence," as used in 55.20-1, has not been defined any place within the standards or the Act. However, the petitioner urges application of the State of Montana's statutory blood alcohol level presumption.

The State of Montana, the situs of the accident involved herein, has adopted a standard which states that anyone with a .10% blood alcohol level is presumed to be "under the influence." This statute is contained in Title 61 of the Montana Code Annotated under "Driving Under Influence of Alcohol or Drugs." However, this presumption applies only to criminal prosecutions. MCA § 61-8-401.

I find no authority, nor has the petitioner in this case presented any, to the effect that a presumption found in a criminal statute can be used in an administrative proceeding. To the contrary, the cases appear to hold otherwise. In the case of City of Sioux Falls v. Christensen, 116 N.W. 2d 389, (S. Dak. 1962), the Supreme Court of South Dakota held that,

> Our presumption statute is clearly limited to criminal prosecutions thereunder for the offense of driving a motor vehicle while under the influence of intoxicating liquor . . . Consequently, the presumptions established therein have no application to prosecutions for violations of municipal ordinances. p. 390.

The Supreme Court of Arizona in the case of Mattingly v. Eisenberg, 285 P. 2d 174 (Ariz. 1955) reached a similar result. The court held that the statutory presumption of when a driver is under the influence applied only in criminal prosecutions of persons charged with driving while-under the influence and did not apply to civil cases. See also Patton v. Tubbs 402 P. 2d 355 (Wash. 1965).

If the Montana presumption were to be applied in this case it would place an undue burden on mine operators across the country. Not only would they be forced to search the statute books for definitions that might be found to apply to them in the course of federal administrative hearings, but they would also be subject to the presumptions and definitions contained in state criminal codes.

Furthermore, I cannot believe that Congress intended that we look to state law in order to enforce what was intended to be a uniform piece of legislation. As the United States Supreme Court has held:

> We must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide. Jerome v. U.S., 318 U.S. 101, 104 (1943). See also NLRB v. Natural Gas Utility District, 402 U.S. 600 (1971).

There is no indication in this instance that Congress intended that a state presumption be applied.

At the hearing, counsel for respondent stipulated to the admissibility of the autopsy report (Tr. 4 & 8). Now, however, respondent contends that the results of the chemical blood test are inadmissible; Respondent argues that the admissibility of the autopsy report and that of the chemical analysis are two entirely different matters. I conclude that since the autopsy report, which contains the chemical analysis, was admitted into evidence at the hearing counsel cannot now object to the admission of the blood tests contained in the autopsy report even though he reserved all legal objections.

The only evidence that the deceased miner was "under the influence" is the autopsy report offered by the petitioner, which showed under the heading "Chemical Analysis", that the miner's "Blood alcohol level on the post-mortem sample of blood showed a level of 0.12%." Various states have accepted the premise that blood alcohol levels of amounts less than the above constitute grounds that a driver of a motor vehicle may be presumed to be "under the influence of alcohol or drugs" for criminal prosecution. However, in this case, without additional evidence or proof, the finding of the autopsy report cannot be found to warrant a decision that the miner herein was "under the influence" as provided in the standard.

Medical testimony might have been of value in a case of this type in order to properly interpret the autopsy report. The District of Columbia Court of Appeals in the case of Lister v. England 195 A. 2d 260 (D.C. App. 1963) held that blood analysis results are not even admissible unless introduced by expert testimony. Because, as the court stated, "without benefit of such testimony or resort to the statutory standards the result of the analysis is meaningless." See Also Holt v. England 196 A. 2d 87 (D.C. App. 1963) and City of Sioux Falls v. Christensen, supra.

In that I find that the State of Montana statute relating to the presumption of driving while under the influence does not apply here, and in the absence of that presumption or other evidence to interpret the chemical analysis of the autopsy report, I must conclude that petitioner failed to establish a prima facie case that the miner was "under the influence of alcohol or drugs" at the time of the fatal accident.

There fore, it is hereby ORDERED that Citation 341641 be vacated and the case DISMISSED.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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