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SOL (MSHA) V. ROY GLENN
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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. WEST 80-158-M
v.	MSHA CASE NO. 05-02337-05017 A
ROY GLENN, EMPLOYED BY, AND AGENT OF CLIMAX MOLYBDENUM COMPANY, RESPONDENT	MINE: Climax Mill & Crusher

DECISION

Appearances:

J. Philip Smith, Esq., Office of the Solicitor
United States Department of Labor
4015 Wilson Boulevard, Arlington, Virginia 22203,
For the Petitioner

Edward H. Sherman, Esq., Sherman & Sherman
1130 Capitol Life Center, 16th at Grant Streets
Denver, Colorado 80203,
For the Respondent

Before: Judge John J. Morris

Statement of the Case

The Secretary of Labor of the United States, the individual charged with the statutory duty of enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act) charges Roy Glenn with a violation of Section 110(c) of the Act.

Section 110(c) now codified at 30 U.S.C. 820(c) provides, in part, as follows:

> Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fine, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Secretary alleges that Glenn, as an agent of Climax Molybdenum Company, (Climax), knowingly authorized, ordered, or carried out a violation of the mandatory safety standard set forth in 30 C.F.R. 57.15-5. The relevant portions of this standard are as follows:

> Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling. . .

After notice to the parties, a hearing on the merits was held in Littleton, Colorado. The parties filed post-trial briefs.

Issues

Two preliminary issues raised by the respondent must be addressed before discussing the merits of the case. The first is whether section 110(c) of the Act violates the equal protection clause of the United States Constitution. The second question is whether the violation charged arose only from the actions of John Payne or whether the actions of Ronald Robinson and Chris Martinez are also to be considered.

The merits of the case present three issues for consideration. The threshold issue is whether there was a violation of 30 C.F.R. 57.15-5. If there was, the next question is whether Glenn knowingly authorized, ordered, or carried out such violation. If Glenn is found to have done so, the final issue concerns the assessment of an appropriate penalty.

Applicable Case Law

In Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8 (1981), the Commission held section 110(c) to be constitutional and enunciated the critical elements which constitute a violation of this section. The corporate operator must first be found to have violated the Act. Further, if a person, such as a shift boss, is in a position to protect an employee's safety and health and if he fails to act on the basis of information that gives him knowledge or the reason to know of the existence of a violative condition he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Preliminary Issues

The constitutional issue raised by respondent in his motion to dismiss was decided by the Commission in Kenny Richardson. In applying the rational relationship test, the Commission held that the classification in section 109(c) of the 1969 Coal Act (identical to section 110(c) of the 1977 Act) is rationally related to the purposes of the Act and, therefore, is constitutional.

> The expressed fundamental purpose of the 1969 Coal Act is to "protect the health and safety of the Nation's coal miners." 30 U.S.C. 801 (1976). Section 109(c) is intended to provide one vehicle for accomplishing this purpose by holding corporate agents who commit knowing violations individually liable. We believe that imposing personal liability on corporate agents furthers the overall goal of the Act by providing an additional deterrent to many of those individuals in a position to achieve compliance. Kenny Richardson, supra at 25.

The Commission recognized that much of the reasoning for placing individual liability on corporate agents would also be applicable to agents of non-corporate operators. However, consistent with the rubric enunciated by the U.S. Supreme Court in Williamson v. Lee Optical 348 U.S. 483 (1955) the Commission held that Congress may take one step at a time in remedying the problem of protecting the health and safety of miners. They followed the general rule of law that legislation is to be overturned on the grounds that it denies equal protection of the law only where "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 96-97 (1979).

Section 110(c) has a legitimate purpose in providing a means of encouraging officers, directors and agents of a corporation to actively promote compliance with the mandatory standards. The fact that individuals in comparable positions who are employed by sole proprietors or partnerships are immune from personal liability does not render this section unconstitutional.

Another argument raised by respondent is that the merits of this case involve only the actions of one miner, John Payne, and not the actions of the other two miners who were on the girder at the time of the incident in question. The citation itself reads as follows:

> Three welders were observed working on an oxygen line about 30 feet off of the ground. One of them was observed walking a distance of about 30 feet on a steel girder without a safety line hooked up. Roy Glenn, shift boss, was directing the work from below.

To abate the citation the following action was taken:

> Lift truck was brought in to take the other two welders down in a safe way. The work was completed with the use of the lift truck.

At trial, the MSHA inspector, Richard King, testified that at the time the citation was written his only concern was with regard to the action of Payne (Tr. 58-68). However, a subsequent

investigation revealed that the other two miners, Ronald Robinson and Chris Martinez, got to the area where they were welding in the same manner as Payne (Tr. 25).

The Act provides that "each citation . . . shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation or order alleged to have been violated." 30 U.S.C. 814(a). In construing a similar requirement in the Federal Coal Mine Health and Safety Act of 1969, the predecessor of the present Act, the Commission held that even if a notice is insufficiently specific, that defect alone would not render the notice invalid. Secretary of Labor v. Jim Walter Resources, Inc., 1 MSHC 2233 (1979). The Commission construed the requirement for specificity as follows:

> The primary reasons compelling the statutory mandate of specificity is for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter. Jim Walter Resources, Inc. supra at 2234.

Here, as in the case referred to above, the respondent did not claim any difficulty in being able to identify and thereby abate the allegedly violative condition. Nor did Glenn contend that the notice prevented him from preparing a proper defense. The citation and notice of abatement apprised Glenn of the standard violated, the miners observed by the inspector and that Glenn was directing the work of the miners. For the reasons stated above, I deem the citation to have been sufficient notice of the allegedly violative actions of Robinson and Martinez, as well as Payne.

Findings of Fact

1. On January 5, 1979, Roy Glenn was the shift boss. He had been a supervisor since June 1976. He had been a welder and a Climax employee for 21 years (Tr 259, 288).

2. On the date of this incident Glenn was supervising a crew of ten miners including John Payne, Chris Martinez and Ronald Robinson (Tr. 263, 266).

3. Around noon Glenn instructed Martinez and Robinson to go up on a girder and to prepare to start to weld a valve on an oxygen line (Tr. 228, 267).

4. At the same time Glenn instructed Payne to open and bleed all of the oxygen valves which were three feet from the floor (Tr. 116, 271).

5. After assigning tasks to his crew, Glenn went around the back of the crusher and began checking the valves to make sure they'd been opened. Glenn considered this to be important because he didn't want to cut in on a line while it was under pressure (Tr. 272).

6. The oxygen line Martinez and Robinson were to work on was located next to a girder which was 20 feet above the floor. The girder was 20 1/2 inches wide and 15 feet long with 5-6 inch open spaces along its surface. Below the girder was a concrete floor with heavy equipment and various large objects in the area (Tr. 22-24, 287).

7. There were two ways to reach the area where the welding was to be done. There was a 20 foot extension ladder on the screen floor which was 40-50 feet away on another deck (Tr. 243, 269, 286). An alternative means, was to go up a staircase, get onto the girder and walk across the girder (Tr. 237, 269, 289).

8. Robinson had used the ladder on occasion to get up to the girder (Tr. 243).

9. On January 5, 1979, Robinson and Martinez walked 10-12 feet across the girder to reach the oxygen line (Tr. 230). They had safety belts on while walking on the girder, but the belts weren't hooked onto anything because there was no cable where they could tie off (Tr. 231, 287).

10. There were no handrails alongside of the girder (Tr. 24, 120).

11. Once they reached the oxygen line, Robinson and Martinez tied off their safety lines to an air line (Tr. 242, 252).

12. Glenn did not tell Robinson and Martinez how to get up to the oxygen line. At the time, he did not think about how they were going to get up to the area (Tr. 235, 251, 269, 270, 289).

13. Glenn was familiar with the construction of the girder (Tr. 295).

14. Glenn knew Robinson and Martinez were very experienced in climbing. Additionally, Robinson was a first class welder and Martinez was a first class mechanic. Robinson had worked on Glenn's crew since October 1974 (Tr. 251, 268, 289).

15. Martinez and Robinson had worked on a girder many times prior to the incident in question (Tr. 271).

16. Glenn relied on Martinez and Robinson to complete their assigned task safely (Tr. 263, 269, 270, 295).

17. Glenn had told his crew that morning to take their safety line with them (Tr. 241).

18. Payne also went up onto the girder to see if he could help Robinson and Martinez. He did not use his safety belt (Tr. 119, 131). Glenn did not instruct or authorize him to go up on the girder (Tr. 119, 131, 133, 273-276, 281).

19. Payne got halfway across the girder when he saw Glenn

waving at him with a flashlight and indicating to him to come down. Glenn waved him down "because [he] didn't need him up there." (Tr. 133, 134, 280).

20. In the 21 years Glenn had been employed by Climax he hadn't had any lost time accidents involving himself or his crew (Tr. 283, 285).

21. Glenn gave routine instructions in safety precautions to his workers. He conducted many "mini-safety meetings" on the spot when a particular job was to be done. He'd tell the miners of the hazards and problems they might come up against (Tr. 195, 270).

22. Due to the construction and location of the girder, there was a danger that a miner walking on the girder could fall (Tr. 22-24, 287).

Corporate Violation

Respondent correctly contends that prior to the determination of the agent's liability it must be found that the corporation violated the Act. The Commission, in Kenny Richardson, supra, held that due process does not require a determination of the mine operator's violation in a proceeding separate from or prior to a proceeding involving the agent. "The operator's violation is merely an element of proof in the Secretary's case against the agent." Richardson, supra, at 10-11.

In the present case, it is undisputed that Payne, Robinson and Martinez walked across the girder without the use of a safety belt (Tr. 119, 231, 287). It is also uncontroverted that there was a danger of falling from the girder which was 20 1/2 inches wide and was located 20 feet above a concrete floor (Tr. 22-24, 287). There is, therefore, no question that Payne, Robinson and Martinez failed to comply with 30 CFR 57.15-5 which requires safety belts to be used when there is a danger of falling.

A mine operator is to be held liable for any violation of the Act that occurs at the mine regardless of fault. Sec. of Labor v El Paso Rock Quarries 2 FMSHRC 1132 (1981). I, therefore, conclude for the purpose of this proceeding that Climax Molybdenum violated 30 CFR 57.15-5.

Contentions of the Parties

The Secretary contends that Glenn, acting as an agent for Climax, authorized Martinez and Robinson to walk across the girder without the benefit of safety belts in violation of 30 C.F.R. 57.15-5. Petitioner's position is based on the following scenario: Glenn was a shift boss for Climax. He supervised a crew of ten miners which included Martinez, Robinson and Payne. Glenn was aware of the standard's requirement that safety belts be worn where there's a danger of falling. He was also familiar with the construction of the girder. He told Robinson and Martinez to work on the oxygen line. Glenn knew one way to reach the line was to walk across the girder, and he knew that in doing so a miner could not use a safety belt. Glenn failed to instruct the miners to use another means of getting to the line which would have been safer and in compliance with the Act.

In his post-trial brief, the Secretary admits that Glenn did not authorize Payne to go up onto the girder. Payne did so voluntarily without the knowledge of Glenn. The actions of Payne, therefore, are not a violation of which Glenn had actual knowledge, nor could he have had knowledge of such a violation.

Glenn maintains that he was not an agent in a position to have prevented the violation. In the alternative, he contends that if he is considered to have been an agent, he did not authorize the violation.

Glenn's argument that he was not an agent is premised on the allegation that Glenn's position at the mine was not within the scope of the Act's definition of an agent, 30 U.S.C. 802 (e).(FOOTNOTE 1) He was not responsible for the operation of all or part of the mine or the supervision of miners. Rather, Glenn contends that he had only limited supervision over the job to be done. He assigned tasks to members of his crew but did not have the power or control over them as an officer or director would. Specifically, if he'd been notified of a violation he wouldn't have had the power to correct it. Such authority belonged only to an officer or director of the corporation.

Respondent bases his alternative position on the defense that he couldn't have foreseen the violative actions of Robinson and Martinez. Glenn had instructed them that morning on safety and told them to take their safety belts. He did not tell Martinez and Robinson how to get to the area where they were to weld and did not know how they got onto the girder. He simply relied on Robinson's and Martinez's experience as a first class welder and a first class mechanic, respectively, to perform their assigned tasks safely. The two miners could have reached the area safely by using a ladder.

It was not Glenn's practice to give detailed instructions to such experienced miners. As he put it, "I don't tell a doctor how to treat me." (Tr. 269). However, Glenn maintains that he was conscientious about safety as evidenced by the fact that in the twenty-one years he worked for Climax neither he nor his crew had had any lost time accidents. Essentially, Glenn contends that a supervisor should not be held to be an absolute insurer of the conduct of others over whom he had no control.

Discussion

On January 5, 1979, Glenn, in his capacity as a shift boss, was an agent of Climax. He was responsible for the supervision of ten miners on his crew. His duties included the instruction of the miners as to safety and their assignment to certain tasks. (Tr. 270, 297). This indicates that he did more than merely supervise the job to be done. He had some control over the actions of the miners themselves which brought him within the scope of the Act's definition of an "agent". I accordingly deny Glenn's contention that he was not the agent of Climax.

Glenn's liability under section 110(c) for the actions of Robinson and Martinez turns on whether he knew or had reason to know of the violation and whether he had the authority to prevent the violation. There is no evidence to support MSHA's allegation that Glenn himself carried out the violation or directly ordered the two miners to walk across the girder without the benefit of a safety belt.

Glenn's secondary argument concerns his view that he did not know of the violation. The evidence, however, supports MSHA's position that Glenn had reason to know that Robinson and Martinez might walk across the girder without the use of a safety belt and that there was a danger that they could fall. Glenn testified that he was familiar with the construction of the girder. He knew there were no handrails or a cable attached to the girder and, therefore, safety belts could not be used while walking across. Glenn stated that there were two ways the miners could have reached the oxygen line. They could have used a ladder which was on another deck or they could have walked across the girder. These facts establish that Glenn had sufficient information to give him reason to know of a possible violative condition, namely, that Martinez and Robinson could walk across the girder without the aid of safety belts.

The difficult issue to decide in this case is whether Glenn "authorized" the violation. It is undisputed that he did not tell the miners to walk across the girder. He did not see them on the girder until they were sitting down and had tied off their safety belts to the oxygen line. Glenn never gave any thought to how Martinez and Robinson would get to the area. At the time, he was concerned about the danger of cutting into a line which was still under pressure and he was following Payne and Gilbert Martinez (not to be confused with Chris Martinez) to make sure the lines were bled properly. Glenn relied on Robinson and Martinez with their experience and expertise to complete their assigned tasks in a safe manner.

The credible evidence also establishes that Glenn did not consider it to be unsafe for Robinson and Martinez to walk across the girder without using a safety belt because they were very experienced in their job. Glenn testified at the hearing: "I am sure if these two men felt any danger whatsoever they would have done something else" (Tr. 295). Additionally, when he saw Payne on the girder he waved him down because he didn't need him up there and not because he believed it was unsafe for him to be walking across the girder.

As discussed earlier there is no question that there was a risk of falling for any miner who walked across the girder without a safety belt. There was no room for judgment by any miner as to whether this danger existed. Glenn had the authority to instruct his crew on the safe means of completing a job. To this extent he had control over the actions of Robinson and Martinez and, therefore, could have prevented the violation.

Contrary to the Secretary's contentions, the record does not support a finding that Glenn presumed Robinson and Martinez would walk across the girder. Glen's testimony on this issue is ambiguous. However, because walking across the girder was at least as likely a means of getting to the oxygen line as using the ladder, I find that Glenn had a duty to instruct the miners to use the ladder. Based on the above facts, I find that Glenn indirectly authorized the violation by failing to caution Robinson and Martinez on the danger of walking on the girder and the need to use the ladder.

The circumstances of this case differ from that in Kenny Richardson because here the violative condition did not exist at the time Glenn had a duty to act. In Richardson, the respondent violated the Act by failing to remove from service equipment in an unsafe condition. However, it is consistent with the remedial nature of the Act to impose a duty on agents to prevent violations which they have reason to know are likely to occur as well as to abate existing violative conditions. Often those with the same supervisory capacity as Glenn are the only members of management that have sufficient direct contact with the miners to actually ensure compliance with the safety and health standards. The primary purpose of the Act is to urge all members of management to do everything within their power to protect the health and safety of miners. Glenn's testimony evidenced an attitude that is contrary to this purpose. Although he is to be commended for an excellent safety record, his policy in this instance of allowing the miners to evaluate the risks of the job and determine when precautions are to be taken creates an atmosphere itself which is conducive to the occurrence of falling-type accidents.

Assessment of a Penalty

The Secretary proposes that a penalty of $500.00 be assessed against Glenn. Petitioner bases this on the allegation that Glenn was grossly negligent in allowing the violation to occur. I disagree with MSHA's determination of the degree of negligence attributable to Glenn.

"Gross negligence" is defined in 30 C.F.R. 100.3(d)(3) as causing the violative condition or practice by the exercise of a reckless disregard of mandatory standards or the reckless or deliberate failure to correct an unsafe condition or practice known to exist. Glenn did not actually know that Robinson and Martinez walked across the girder. He had previously instructed them on the need to wear safety belts and routinely discussed safety matters with his crew. His policy as to these experienced and highly skilled miners was to allow them to evaluate the dangers involved in a particular job, and he relied on them to take appropriate actions to protect themselves. Although this policy was not, under the circumstances in this case, the best means of protecting the miners, it is not when coupled with the routine safety meetings, indicative of a reckless disregard of the standards.

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Another factor to be considered is the good faith efforts of Glenn in quickly abating the condition. He immediately had Robinson and Martinez safely removed from the girder. After considering all the criteria required to be examined in the assessment of a penalty, I deem a penalty of $40.00 to be appropriate.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following:

1. The citation is affirmed.

2. A penalty of $40 is assessed.

3. Respondent is ordered to pay said $40 within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

1 (e) "agent" means any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.