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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. WEVA 81-11 A.C. No. 46-05653-03004
v.	
CLAY KITTANNING COAL CO., INC., RESPONDENT	Gail Mine

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner
William Ray, Summersville, West Virginia, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," in which the Secretary has proposed penalties of $2,000 against the Clay Kittanning Coal Co., Inc., (Clay Kittanning) for four violations of mandatory standards. Clay Kittanning does not deny the violations, but maintains that an independent contractor was solely responsible for those violations and that therefore it is not liable for any civil penalties under the Act. Accordingly, the general issue in this case is whether Clay Kittanning is responsible in any way for the admitted violations set forth in the petition for assessment of civil penalty and, if so, what are the appropriate civil penalties to be assessed for those violations. Evidentiary hearings were held in this case in Charleston, West Virginia.

Liability of Mine Owner

Clay Kittanning is admittedly the owner of the Gail Mine at which the orders and citation at bar were issued. William Ray, President and spokesman for Clay Kittanning insists, however, that the company was not at all responsible for the cited violations because, at the time of the inspection, the Gail Mine was being operated by an independent contractor, William White, who was doing business as the Palma Coal Company.

Even assuming, arguendo, that Mr. Ray's allegations were correct, it is now the clearly established law that mine owners may be held responsible without fault for independent contractor violations under the Act. Section 3(d) of the Act; Cyprus Industrial Mineral Company v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981; Republic Steel v. Interior Board of Mine Operations, 581 F.2d 868 (D.C. Cir. 1978); Bituminous Coal Operator's Association v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977). The Secretary's decision to proceed against an owner for such violations is, however, subject to review for impermissible motives. Secretary v. Phillips Uranium Corporation, 4 FMSHRC --- (April 27, 1982). Administrative efficiency or convenience is apparently an impermissible motive regardless of the results achieved by the Secretary's action. Phillips Uranium, supra. Since the Phillips decision was rendered subsequent to the hearings in this case specific inquiry was not made at those hearings into the Secretary's initial motivation for proceeding solely against the mine owner herein. Evidence exists, however, from which the Secretary's motives may be inferred.

At the time of the inspection here at issue, February 7, 1980, the Secretary was following an interim policy of proceeding only against owner-operators for violations of the Act. Phillips Uranium, supra. Subsequently, on July 1, 1980, the Secretary published his final rules establishing guidelines for holding independent contractors as well as owners responsible for the safety and health requirements of the law. 45 Fed. Reg. 44494. Even assuming, arguendo, that the Secretary's motives were impermissible when the citation and orders at bar were issued under his interim policy, it is apparent in this case that the Secretary later sought to correct any such deficiencies by attempting to apply his new guidelines.

In an obvious good faith effort to apply those guidelines to the case at bar the Secretary sought through formal discovery procedures under Commission Rules 55 and 57, 29 C.F.R. 2700.55 and 2700.57 to ascertain the proper entity or entities against whom enforcement action should be pursued. Accordingly, on March 27, 1981, the Secretary served upon Clay Kittanning a request for production of "any or all contracts between the owner/Respondent, Clay Kittanning Coal Co., Inc., and William White concerning the functions, duties and responsibilities of William White at the Gail Mine prior to February 27, 1980," and served written interrogatories relating to the responsibilities for operation of the Gail Mine. Clay Kittanning did not respond to either discovery request and the Secretary thereafter on June 17, 1981, filed a motion for sanctions against Clay Kittanning for this failure to reply.

In response to that motion, the undersigned issued an order to Clay Kittanning to show cause providing in part as follows:

> * * * Respondent, Clay Kittanning Coal Company, Inc., is ordered to answer the said interrogatories and to produce the documents requested by Petitioner within 15 days or show good reason for not doing so. Otherwise,

the undersigned will take appropriate sanctions. Such sanctions may include issuing an

order refusing to allow Respondent to support defenses relating to the requested information, prohibiting the introduction of related evidence at any hearing in this case, and placing Respondent in default and ordering immediate and full payment of MSHA's proposed penalty. Rule 37, Federal Rules of Civil Procedure.

Respondent failed to reply to the show cause order and on August 6, 1981, the undersigned issued pursuant to Federal Rule 37(b)(2)(A), an Order That Facts Be Taken As Established. That Order provided that the following facts be taken as established: (1) that Respondent is the operator of the Gail Mine, within the meaning of section 3(d) of the Federal Mine Safety and Health Act of 1977, and (2) that Respondent is the party solely responsible for the conditions and equipment cited for violations of the Act or regulations in the above captioned proceeding." (FOOTNOTE 1)

Under the circumstances it is clear that the Secretary had acted reasonably and prudently in his efforts to ascertain the responsible party or parties but was thwarted in these efforts by the failure of the mine owner to comply with lawful discovery requests and orders of the Administrative Law Judge. (FOOTNOTE 2) Clearly there was no abuse of the Secretary's discretion here. This case is accordingly distinguishable from Phillips Uranium. Since Clay Kittanning does not deny the existence of any of the violations the sole issue remaining for determination is the amount of civil penalty for which Clay Kittanning is responsible.

The Amount of Penalty

Citation No. 650520 alleges a violation of the standard at 30 C.F.R. 75.703 and reads as follows:

> No frame ground was provided for the roof bolting machine in that the frame ground conductor was doubled back and taped to the cable and was not connected to the return conductor at the 250 volt direct current feeder line. This condition was listed in the book for examination of the electric face equipment on 1/30/80 and was dated and initialed by Ed McClure, superintendent and certified electrician at this mine. This machine was parked in No. 3 entry and the mine floor contained water from 0 to 4 inches deep.

As previously noted, the existence of the cited conditions is not disputed. Moreover, the uncontradicted testimony of MSHA inspector Willis is that if one of the power conductors had been damaged and the damaged portion of the cable had touched a metal part of the machine, the machine frame would become energized thereby subjecting the machine operator to electrical shock. The hazard was amplified by the existence of water and wet conditions on the mine floor. Under the circumstances, I find that a serious hazard from electrical shock in fact existed as cited and was "significant and substantial." See Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981).

I further find that Clay Kittanning was grossly negligent in permitting the condition to exist. The fact that the frame ground had been doubled back and taped to the cable, requiring some affirmative act, is clear evidence of an intentional violation. Moreover, it is uncontradicted that an entry in the inspection book for the cited machine, on January 30, 1980, some 8 days prior to the discovery of the condition by Inspector Willis, showed that even as of that date, it had not been frame grounded. The violation herein was abated timely.

Order No. 650421 also alleges a violation of the standard at 30 C.F.R. 75.703 and reads as follows:

> The cutting machine was not provided with a frame ground in that the frame ground was doubled back and taped to the cable and was not connected to the return feeder line of the 250 volt direct current power system. This condition was listed in the book for the examination of electric face equipment at this mine and was dated and initialed by Ed McClure, superintendent and certified electrician at this mine. The cutting machine was located in No. 3 entry. The mine floor in this entry was wet and water was 0 to 4 inches deep.

The existence of the cited condition is not disputed nor is the testimony of Inspector Willis that the negligence and the extent of the hazard was the

same as in the citation previously discussed. Accordingly, I find the same degree of negligence and hazard existing here. The condition was apparently properly abated on the following day. The violation was also "significant and substantial" under the National Gypsum test.

Order No. 650426 alleges a violation of the standard at 30 C.F.R. 75.601 and reads as follows:

> A suitable circuit breaker or other device approved by the Secretary was not provided for the trailing cables applying power 250 volts direct current to the roof bolting and cutting machines at this mine. The cables were connected directly to the 500 MCM DC feeder lines.

According to the undisputed testimony of Inspector Willis, the trailing cable was not protected its entire length. Willis found that insulation had been removed from the trailing cable and the cable was clamped directly to the 500 MCM feeder line without intervening fuses or a circuit breaker. He pointed out that in the absence of short circuit protection for the trailing cable, there was indeed a hazard of fire or, if the insulation melted to expose the cable, of shock or electrocution. Willis observed that the operator did not have on the premises sufficient equipment to correct the cited conditions. Superintendent McClure, who was also the only certified electrician at the mine, acknowledged the deficiencies and admitted that he did not have a fuse, circuit breaker, or other overload device available at the mine to correct the deficiencies.

Under the circumstances, I find that the cited condition was a serious hazard to the miners and, because it required an affirmative act to create, was the result of gross negligence. The violation was accordingly "significant and substantial." One of the cited conditions was corrected by the following day when a 125 amp dual element fuse was furnished for the cutting machine. A 90 amp duel element fuse was not provided for the roof bolting machine until later and the violation relating thereto was not abated until February 14, 1980.

Order No. 650428 alleges a violation of the standard at 30 C.F.R. 77.701 and reads as follows:

> The metal frame of the battery charger located near No. 1 entry on the surface was not frame grounded in that the grounding conductor was connected to the grounding medium.

The order was subsequently modified to read as follows: "Order of Withdrawal No. 6540428 is modified to state that the grounding conductor was not connected to the grounding medium for the 240 volt system." The uncontradicted testimony of Inspector Willis is that such a condition would present a shock hazard if the battery charger were to develop a short circuit and energize the frame of the battery charger. The cables leading into the charger were located only a foot off the ground in an area

commonly used by

miners. I find that the condition accordingly presented a risk of serious injury from electrical shock. The violation was accordingly "significant and substantial." Inasmuch as the condition required an affirmative act to create, I find that it was the result of gross negligence.

In determining the appropriate penalties for the admitted violations, I have considered the relationship of the mine superintendent for the independent contractor with the mine owner. Both before and after the violations here cited that same individual, Ed McClure, had also acted as mine superintendent for the mine owner and at relevant times was also an official of the corporate mine owner. Since that same person was also the only certified electrician at the Gail Mine and since each of the violation's in this case was clearly caused by affirmative action to electrical equipment or electrical cables it is apparent that the negligence for the violations may be directly attributed to the corporate mine owner, i.e., Clay Kittanning. Secretary v. Ace Drilling Coal Company, Inc., 2 FMSHRC 790 (April 1980). In determining the amount of penalty I have also considered that the mine owner was small in size and had no history of violations. Under the circumstances I find that the following penalties are appropriate: Citation No. 650520-$600; Order No. 650421-$600; Order No. 650426-$600 Order No. 650428-$600.

ORDER

Clay Kittanning Coal Company, Incorporated is ordered to pay penalties of $2,400 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

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~FOOTNOTE_ONE

Inasmuch as Mr. Ray contended at subsequent hearings that the Secretary already knew the answers to the questions asked in the interrogatories, and that it was therefore unfair to bar him from presenting evidence at hearing on the question of the proper entity or entities to be held responsible for the violations I allowed evidence at hearing concerning that issue. The evidence did not demonstrate, however, that the Secretary had sufficient information before initiating discovery from which he could have determined these issues with any degree of certainty. Accordingly, the "Order That Facts Be Taken As Established" issued August 6, 1981, is dispositive of the issue of liability for the violations. It is also noted that although given ample opportunity to do so, Mr. Ray never did provide complete information concerning the relationship between employees, officials and shareholders of Clay Kittanning and the employees and owners of Palma Coal Company, the purported independent contractor. It was disclosed at hearing, however, that the mine superintendent and certified electrician for the independent contractor was also an official of the corporate mine owner.

~FOOTNOTE_TWO

It was also disclosed at hearing that the owner's relationship with the independent contractor herein was terminated shortly after the citation and orders at bar were issued and that Mr. Ray did not then know where the contractor could be located.