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SOL (MSHA) V. WADE KEMP
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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 Proceedings Docket No. CENT 81-186-M Docket No. CENT 81-187-M Docket No. CENT 81-188-M Docket No. CENT 81-189-M
v.	
WADE KEMP III, WILLIAM KURE, RUSSELL COLLINS, VIRGIL KELLY, EUGENE WEIGENSTEIN, DONALD DARRELL GOODMAN, RESPONDENTS	Docket No. CENT 81-190-M Docket No. CENT 81-191-M Annapolis Quarry and Mill

DECISION

The captioned matters came on for a consolidated hearing before the trial judge in St. Louis, Missouri on July 13 through 16, 1982. Respondents were charged, as agents, with violating section 110(c) of the Act by knowingly authorizing, ordering, or carrying out the corporate mine operator's violation of the mandatory safety standard set forth in 30 C.F.R. 56.9-2. The standard cited requires that equipment defects affecting safety be corrected before the equipment is used. The gravamen of the charge was that the individual respondents with knowledge that the braking system on a large haulage truck was defective authorized or ordered miners to operate the truck on a haulage road with several steep grades thereby endangering their lives. The corporate operator, GAF Corporation, had previously paid a modest civil penalty for the violation pursuant to section 110(a) of the Act.

On the third day of the hearing, Thursday, July 15, 1982, counsel for the Secretary moved to dismiss with prejudice the charges against respondents Kemp, Kure, Weigenstein and Goodman on the ground there was insufficient evidence to show they authorized or ordered use of the Euclid truck in question with knowledge of the alleged defective braking system. This motion was granted (Tr. 605).

Thereafter, the trial judge denied a motion to dismiss for failure to make a prima facie case against the other two respondents and they proceeded to present their defense-in-chief. After both parties rested, on Friday, July 16, 1982 counsel for the last two respondents moved to dismiss the charges against them on the ground that the Secretary failed

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to establish their complicity in the violation charged by a preponderance of the reliable, probative and substantial evidence in the record considered as a whole. Counsel for the Secretary opposed this motion. After considering the arguments of counsel, together with their proposed findings and conclusions, the trial judge entered a tentative bench decision in which he found that because the Secretary had failed to prove either the violation charged or respondents' knowing participation therein the charges should be dismissed.

On September 20, 1982, counsel for the Secretary filed a motion to join respondents' motion to dismiss at the close of the evidence stating:

"After reviewing the hearing transcript, particularly the testimony given by Respondents' witness, Eugene Weigenstein, (hearing transcript, pp. 814-924), Petitioner agrees that there is insufficient evidence to show that Respondents knowingly authorized, ordered or carried out the corporate mine operator's violation of 30 C.F.R. 56.9-2. Accordingly, Petitioner now joins in Respondents' motion to dismiss on this particular ground. In the alternative, Petitioner independently moves to dismiss the Petitions against Respondents on said ground."

Counsel for respondents advised of his concurrence in the Secretary's motion on September 24, 1982.

The premises considered, it is ORDERED that the parties joint motion to dismiss the charges against respondents Kelly and Collins be, and hereby is, GRANTED and the captioned petitions be DISMISSED AS TO ALL RESPONDENTS WITH PREJUDICE.

Joseph B. Kennedy
Administrative Law Judge