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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. PENN 82-133 A.C. No. 36-00807-03110
v.	Renton Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

This is a petition for the assessment of a civil penalty for a violation of 30 C.F.R. 75.1702.

The parties have filed motions for summary decision together with supporting affidavits and briefs. Since there is no genuine issue of material fact and judgment can be rendered as a matter of law, summary decision is appropriate. 29 C.F.R. 2700.64(b).

30 C.F.R. 75.1702 and 75.1702-1 provide as follows:

> 75.1702 Smoking; prohibition.
>
> No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.
>
> 75.1702-1 Smoking programs.
>
> Programs required under 75.1702 shall be submitted to the Coal Mine Safety District Manager for approval on or before May 30, 1970.

Citation No. 1143766, dated January 5, 1982, cites a violation of 75.1702 as follows

> The mines [sic] program for the searching of smoking articles was not being followed in that the week of December 21 to 25 the "A" and "C" crews were not reportedly examined, and the week of December 27 to January 1 the "C" crew was not reportedly examined. All crews are to be systematically searched weekly.

In his sworn affidavit the operator's superintendent admits that the facts described in the "Condition or Practice" are true. He further advises that the operator's program for searching miners for smoking materials involves one search per week for each crew.

The parties agree that the issue presented for resolution is whether this violation is significant and substantial.

In National Gypsum Company, 3 FMSHRC 822 (1981), the Commission considered at length what would constitute a violation which "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." The Commission held that a violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. 3 FMSHRC at 825. In addition, the Commission expressed its understanding that the word "hazard" denoted a measure of danger to safety or health, and that a violation significantly and substantially contributed to the cause and effect of a hazard if the violation could be a major cause of danger to safety or health. 3 FMSHRC at 827.

The operator's position that the violation is not significant and substantial relies upon the facts that during the two week period involved work was not performed every day and that on the shifts in question all of the miners did not work. The superintendent's affidavit states in part:

> 4. For the period December 21 through December 25, the Renton Mine worked a total of three days, during which period the "A" and "C" crews were not searched for smoking materials. During that period, of the normally scheduled workforce on the "A" crew approximately twenty-five percent of the miners did not work. During that period, of the normally scheduled workforce on the "C" crew approximately one-third of the miners did not work;
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> 5. For the period December 27 through January 1, the Renton Mine worked a total of five days, during which period the "C" crew was not searched for smoking materials. During that period, of the normally scheduled workforce on the "C" crew approximately twenty-eight percent of the miners did not work[.]

The superintendent's affidavit further reports that searches for smoking materials involve a pat-down of the miner and an inquiry to him whether or not he has such materials in his lunch pail.

After careful consideration I do not find the circumstances as described by the superintendent and as interpreted by operator's counsel persuasive on the issue of "significant and substantial." Moreover the factors relied upon by the operator are greatly outweighed by the fact this mine is extremely gassy. The affidavit of the MSHA sub-district office manager recites in part that:

> 4. Renton Mine is a particularly gassy mine that, due to its liberation of high quantities of methane, is subject to statutorily-mandated spot inspections under 103(i) of the Act. Specifically, between the inception of the 1977 Mine Safety and Health Act and July 1, 1982, Renton Mine liberated between 500,000 and 999,999 cubic feet of methane every 24 hours. As such, it was subject to spot inspections under 103(i) every ten working days at irregular intervals. Beginning July 1, 1982, Renton Mine was determined to be liberating quantities of methane

in excess of 1 million cubic feet per 24 hours and is accordingly now subject to spot inspections every five working days under 103(i).

It is clear from the affidavit that in this mine a methane liberation can occur at any time and at any place. Under such circumstances, the fact that the work crews which were not examined were two-thirds or three-fourths of their total personnel strength does not render the violation insignificant and insubstantial. Nor does the fact that full weeks were not worked or that only a limited period of time was involved make any difference. In a mine like this every moment is fraught with peril from a methane explosion. As some of the exhibits submitted by the Solicitor demonstrate, smoking and smoking materials underground may cause or contribute to a mine explosion. Where so much methane can be liberated at any time the great danger created or contributed to by this violation, is ever-present. Under such circumstances there exists the reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature.

The operator argues that the violation is not significant and substantial because the search is a mere pat-down and an inquiry to the miner regarding his lunch pail whereas a daily strip search would be necessary to eliminate the possibility of miners taking smoking materials into the mine. The operator's approach appears based upon the faulty premise that because the operator cannot do everything, it really is not important for it to do anything. Such a rationale would all but nullify the mandatory standard and its underlying purpose. I am persuaded by the Solicitor that searches such as should have been performed here have a deterrent effect. I agree with her assertion that without the required inspections, miners may either inadvertently or purposefully carry smoking materials underground. The operator inconsistently points to the deterrent effect its own work rules and Pennsylvania law would have upon a miner who is found taking smoking materials underground but apparently would accord no such effect to Federal law.

The operator argues that the circumstances peculiar to this mine should be determinative, not what has happened at other mines. I agree. That is why I decide this case on the basis of the factor peculiar to this mine which

eclipses all other considerations, i.e., its extremely gassy nature. The fact that this mine liberates so much methane renders continuously crucial the deterrent effect of the search for smoking materials.

In light of the foregoing, I conclude that the violation was significant and substantial.

Finally, the operator alleges that the proposed penalty of $210 is excessive. Whether a cited violation is significant and substantial is irrelevant to the determination of the appropriate penalty amount to be assessed. Penalty proceedings before the Commission are de novo and the amount of the penalty to be assessed is based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. As already pointed out, the violation was serious. I find the operator was guilty of ordinary negligence. The mine is large, assessment of the penalty will not affect the operator's ability to continue in business and there was good faith abatement. Based on the record there is no history of prior violations of this standard. After consideration of all the statutory factors, I conclude the proposed penalty is appropriate.

It is ORDERED that the operator pay $210 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge