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SOL (MSHA) V. CALVIN BLACK ENTERPRISES
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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
v.	Docket NO. WEST 80-6-M A.C. No. 42-00784-05001 Docket No. WEST 80-81-M A.C. No. 42-00550-05001 R Docket No. WEST 80-82-M A.C. No. 42-00784-05002 R
CALVIN BLACK ENTERPRISES, RESPONDENT	Blue Lizard and Markey Mines

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor U. S. Department of Labor, Denver, Colorado for Petitioner Calvin Black, Blanding, Utah, for Respondent

Before: Judge Vail

PROCEDURAL HISTORY

In these cases, petitioner seeks to have citations affirmed and civil penalties assessed against respondent Calvin Black Enterprises. Respondent is charged with mine safety violations, and refusal to allow unrestricted MSHA mine inspections. Pursuant to agreement by the parties, the cases were consolidated for hearing and decision. Upon notice to the parties, a hearing on the merits was held on February 9, 1982 in Salt Lake City, Utah under the provisions of the Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). Subsequent to the hearing, the parties filed letter memoranda.

ISSUES

1) Was respondent properly charged with safety violations in the Markey Mine, and if so, what civil penalties are appropriate?

2) Were representatives of the Secretary unlawfully barred by respondent from conducting an inspection of respondent's Blue Lizard and Markey Mines, and if so, what civil penalties should be assessed?

Docket No. WEST 80-6-M

Citation Nos. 336808 and 336809 were issued on May 17, 1979, when MSHA inspector Ronald Beason visited respondent's Markey uranium mine near

Blanding, Utah. During the inspection, Beason noted employees of an independent contractor (Sanders Exploration Co.) working underground in conditions allegedly violating mandatory safety standards promulgated under the Act.

Citation No. 336808 charges respondent with violation of mandatory safety standard 30 C.F.R. 57.15-30 which provides as follows:

> A 1-hour self-rescue device approved by the Mine Safety and Health Administration shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition.

Beason testified that at the time of his inspection, he observed a geologist and two helpers (all employees of Sanders Exploration Co.) working underground in a return air area without self-rescue devices. The geologist had been issued a self-rescuer, but left it in a jeep approximately 750 feet away. His two helpers had not been issued self-rescuers, nor had they been instructed in the use and need for such devices (Tr. 36, 37, 56). Inspector Beason testified that self-rescuers filter contaminated air, and in the event of a fire, smoke and fumes could overcome employees not equipped with these devices (Tr. 20).

Citation No. 336809 charges respondent with failure to provide adequate escape routes before allowing use of a gasoline-powered jeep underground in the mine. Petitioner contends that such a situation violates mandatory safety standard 30 C.F.R. 57.4-52, which provides as follows:

> Gasoline shall not be stored underground, but may be used only to power internal combustion engines in non-gassy mines that have multiple horizontal or inclined roadways from the surface large enough to accommodate vehicular traffic. Roadways and other openings shall not be supported or lined with combustible material. All roadways and other openings shall be connected with another opening every 100 feet by a passage large enough to accommodate any vehicle in the mine.

Beason testified that during his mine inspection he observed the geologist and his crew using a jeep approximately 3,000 to 4,000 feet underground, in the fresh air side of a drift. Mine supervisory personnel informed him that the jeep's engine was gasoline-powered. The mine did not have cross-cuts every 100 feet. Such cross-cuts, Beason contends, are necessary to allow workers to bypass an area in the event of fire or air contamination (including that caused by gasoline engine exhaust) (Tr. 40-42).

While respondent does not specifically deny the alleged violations, the citations are contested on several other grounds. First, the geologist and his crew are said to be employees not of

the mine, but of an independent

contractor. In addition, respondent claims that on the day of the inspection, the geologists and two helpers arrived at the mine and began working before mine personnel could supervise their activities. Accordingly, respondent suggests that it should not be held responsible for the workers' failure to comply with safety standards. Secondly, respondent's owner maintains that he knows of no fires having ever occurred in uranium mines, and contends that the safety violations are insignificant (Tr. 105). Furthermore, he characterizes the citations in general as being "nit-picky," and suggests that the safety violations were issued by MSHA in an attempt to create a confrontational situation, and set an example in the community (Tr. 106, 112).

I find that respondent's arguments are without merit. It is well established that an owner-operator of a mine can be held responsible without fault for a violation of the Act committed by an independent contractor. In reviewing the Secretary's decision to proceed against an operator for a contractor's violation, the Commission must determine if such choice was made for reasons consistent with the purposes and policies of the Act. Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), aff'd., No. 79-2367 (D.C. Cir. (January 6, 1981); Cyprus Industrial Minerals Company, 3 FMSHRC 1 (January 1981), aff'd, 664 F. 2d 1116 (6th Cir. 1981); Phillips Uranium Corp., 4 FMSHRC 549 (April 1982). Part of such a determination includes an evaluation of the degree of control retained by an operator, and whether the operator's miners are exposed to the hazard.

In this case, the independent contractor was hired by the respondent to conduct geological surveys in an operating mine. The activities involved workers untrained in mine safety, and extended over the period of one year (Tr. 105). Safety violations occurring during the course of such activities endangered not only the employees of the independent contractor, but also employees of the mine. It was therefore the operator's duty to monitor and control the independent contractor's workers and their activities as they affected general mine safety considerations. Accordingly, I find that respondent is liable for the safety violations at issue.

Furthermore, I reject respondent's contention that the citations should be dismissed because they involved "insignificant" safety violations, and represented improper motives on the part of MSHA. The fact that respondent knows of no accidents in uranium mines caused by the safety violations involved in this case does not excuse his non-compliance with mandatory safety regulations. Nor does the evidence show that the inspector had other than proper motives in issuing citations for violations of mandatory safety regulations in this case. I therefore conclude that respondent should be held responsible for violation of the Act's safety standards, and that citation Nos. 336808 and 336809 were properly issued.

Docket Nos. WEST 80-81-M and 80-82-M.

Citation Nos. 336695 and 336696 were issued for respondent's

alleged refusal to allow entry by representatives of the Secretary into the Blue Lizard and Markey Mines for the purpose of conducting mine inspections. Respondent is charged with violating section 103(a) of the Act, which

requires that underground mines be inspected at least four times a year, and provides MSHA inspectors with the right of entry to, upon, or through any mine. Advance notice of an inspection is not required.

Ronald Beason (MSHA inspector) and Benjamin Johnson (special investigator for MSHA) testified that on July 2, 1979 they arrived at respondent's Blue Lizard Mine for the purpose of conducting a safety inspection. Johnson had been instructed to accompany Beason following a telephone call from Calvin Black (owner of the Blue Lizard and Markey Mines) to the MSHA area office made shortly after the Markey Mine inspection of May 17, 1979, which resulted in the issuance of two safety violation citations. During the call, Black allegedly stated that he did not intend to allow any further inspections of his mine properties (Tr. 76).

Beason testified that upon arrival at the Blue Lizard Mine, two of respondent's representatives informed Beason and Johnson that they were trespassing, and denied them entry into the mine. The mine representatives claimed that they had neither the authority nor the permission of the owner, Calvin Black, to allow such entry. In addition, they produced a notice issued by Black, stating that no person was to be permitted on the property without specific written permission from the owner. Beason and Johnson were then asked by mine personnel to fill out a form. Although the inspectors orally provided the requested information, they refused to sign the form.(FOOTNOTE 1) Following further heated discussion, during which the mine representatives were read applicable portions of Section 103(a) of the Act and informed of MSHA's legal right to inspect, Beason and Johnson abandoned their attempt to gain entry to the mine. They had not been specifically informed that they would be prevented from conducting an inspection, but due to the hostile and emotional confrontation, believed that they would be physically restrained from doing so (Tr. 59, 83). Accordingly, citation and withdrawal order No. 336695 was issued.

A second citation No. 336696, with associated withdrawal order, was issued on the same day at the Markey Mine. A similar confrontation and denial of entry allegedly prevented Beason and Johnson from conducting an inspection of that mine (Tr. 28-30, 79).

Respondent, on the other hand, claims that Beason and Johnson were not prevented from conducting an investigation. Instead, under the express orders of respondent's owner, they were given notice that they were trespassing, as anyone else entering the mine property without permission would be (Tr. 108). Such notice, respondent contends, was necessary due to general liability concerns and because the owner "didn't want the MSHA inspectors to

go there without notice and without permission" (Tr. 106, 107). However, respondent's owner testified that mine personnel were given specific instructions not to use force in preventing "trespassers" from entering the mine properties (Tr. 108). Respondent further denies informing MSHA by telephone that inspections subsequent to the one at the Markey Mine would not be allowed. Rather, respondent maintains that the call was made merely to give notice to MSHA of the owner's intent to see an attorney and take appropriate action against people (both MSHA inspectors and others) entering his property without permission (Tr. 107).

Despite respondent's claims that Beason and Johnson were not expressly prohibited from conducting mine inspections, I find that the mine personnel (acting under the owner's express instructions) effectively prevented access to the mines by demanding that notice and permission precede entry onto respondent's property. A mandatory inspection, as provided in section 103(a) of the Act, was therefore obstructed.

Section 103(a) of the Act requires no advance notice before an inspection. Furthermore, although the language of the Act makes no reference to obtaining search warrants or owner permission prior to a mine inspection, courts have recognized a Congressional intent to provide an absolute right of entry to conduct legitimate inspections of mines covered by the Act, without need for a search warrant. Such a mine inspection program has been justified as necessary to protect miners from unusually severe occupational health and safety hazards. Marshall v. Nolichuckey Sand Co., Inc., 606 F. 2d 693 (6th Cir. 1979). In addition, warrantless inspections have been held by the United States Supreme Court to satisfy the constitutional constraints of the Fourth Amendment, since the certainty and regularity of the Act's inspection program provide an adequate substitute to a warrant. Donovan v. Dewey, 452 U.S. 594, 101 S.Ct. 2534 (1981). Failure of an operator to permit an inspection has been held by the Commission to be a violation of the Act, for which a penalty must be imposed. Waukesha Lime and Stone Company, 3 FMSHRC 1702 (July 1981).

In accord with the Act and the above cases, a MSHA inspector's right to inspect a mine is not dependent upon first obtaining permission of entry from an owner. Furthermore, an owner's denial of entry without such permission may reasonably be interpreted as obstructing the exercise of mandatory mine inspections under the Act. Upon encountering such denial of access to a mine, a MSHA inspector need not test his or her need to force entry to conduct an inspection. Upon a careful review of the evidence in this case, I find that respondent's owner required his permission for entry to the Blue Lizard and Markey Mines, and therefore effectively prevented a lawful, warrantless inspection of the premises by representatives of the Secretary. Beason and Johnson identified themselves and their purpose at the mines, and yet were notified by mine personnel that their presence, without permission granted by the mine owner, constituted a trespass (Tr. 13, 29, 94). The mine personnel's

statements were authorized by the mine owner, and reflected the owner's admitted desire to prevent MSHA inspectors from entering the property without notice and permission (Tr. 107).

Since the provisions of section 103(a) of the Act and case law do not require notice and permission to precede an inspection, I conclude that Beason and Johnson were effectively denied free and ready access to respondent's mines. The MSHA inspectors were not required to force entry to conduct a mine inspection. Therefore, Beason rightly issued citations based upon respondent's failure to provide unconstrained entry to the mines for the purpose of conducting an inspection mandated by the Act. Accordingly, citation Nos. 336695 and 336696 are affirmed.

PENALTIES

Upon determining that the four citations described above were properly issued, the next issue is determining the appropriate civil penalties to be assessed for each violation. Section 110(i) of the Act sets forth six criteria to be considered in determining the amount of civil penalty:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The Secretary's proposed civil penalties for each of respondent's violations are as follows:

Citation No.	Violation Charged	Amount
336808	30 C.F.R. 57.15-30	$ 8.00
336809	30 C.F.R. 57.4-52	10.00
336695	30 U.S.C. 813(a)	100.00
336696	30 U.S.C. 813(a)	100.00

Mine History, Size, Financial Status.

At the hearing, no evidence of previous violations was introduced. Eight miners were employed at the Markey Mine, while three worked at the Blue Lizard Mine (Tr. 99, 100). Respondent's owner, Calvin Black, stipulated that payment of the proposed penalties would not impair the company's ability to continue in business (Tr. 45).

Negligence.

Respondent's failure to comply with regulatory requirements involving self-rescuing devices and the operation of gasoline-powered engines underground constitutes ordinary negligence. Under the Act, the mine operator is required to be on the alert for, and correct, conditions representing hazards to the health and safety of people working in the mine. Under the facts of this case, respondent failed to exercise reasonable care in ensuring that all workers in his mine (including employees of

an independent contractor) complied with mandatory regulatory requirements.

On the other hand, respondent's violation of section 103(a) of the Act was intentional and thus the equivalent of gross negligence. Following an inspection of the Markey Mine, which resulted in the issuance of citations termed by respondent's personnel as "nit-picky and asinine" (Tr. 56, 111), respondent enforced a policy designed to prevent further inspections without notice or permission, and denied free mine entry for MSHA inspections. I find that such factors support petitioner's request that the associated proposed penalties be increased.

Gravity

The gravity involved in respondent's violation of mandatory safety standards is moderate. Only two workers were not equipped with self-rescuing devices, and their use of a gasoline-powered jeep would end with the completion of their temporary surveying assignment. In contrast, I conclude that respondent's violation of section 103(a) of the Act was serious. Respondent's desire to restrict MSHA inspections, and its disdainful attitude toward citations that had already been issued, indicates disregard for the Act and the enforcement of its provisions. Again, such factors indicate that the associated proposed penalties should properly be increased.

Good Faith.

While respondent demonstrated good faith in rapidly abating the conditions violating mandatory safety standards, such good faith was not shown in the situation involving respondent's refusal to admit MSHA inspectors without notice or permission. Upon issuance of citations and withdrawal orders, respondent ignored the withdrawal orders and continued mine operations (Tr. 26, 32, 79). Respondent's attempt to introduce into evidence a document in which the inspector's "signature" had been filled in by mine personnel seems to indicate a further lack of good faith.

CONCLUSION

Accordingly, based upon the testimony introduced at the hearing and the contentions of the parties, and considering the criteria of section 110(i) of the Act, I conclude that the proposed penalties for respondent's violation of the mandatory safety standards stated in Citation Nos. 336808 and 336809 are appropriate and should be affirmed.

The Secretary originally proposed penalties of $200 each for citation Nos. 336695 and 336696. That amount was subsequently reduced to $100 each by a compliance officer following the operator's assertion that there was a personality conflict involved in the issuance of the citations (Tr. 110). Based upon a careful review of all the evidence of record in this case, I am persuaded that the penalty of $100 each for these two citations is too low.

The credible evidence of record shows that respondent deliberately attempted to prevent MSHA inspections conducted

without notice by requiring owner permission prior to entry onto mine property. I find that respondent's

representatives, in their continued demands for such permission, attempted to discourage and intimidate the MSHA inspectors. I accept as most credible the inspectors' testimony that they believed the mine inspections could not be conducted without continued altercation and the possibility of encountering physical restraint. In addition, respondent's continuation of mining operations following issuance of withdrawal orders reinforces my conclusion that respondent deliberately disregarded MSHA's authority in this matter. Accordingly, I find the penalty as originally assessed at $200 for each violation to be fair under the circumstances. My determination to assess penalties in this case is consistent with Commission decisions, stating that the assessment of penalties during penalty proceedings involves a de novo determination based upon the criteria of section 110(i) of the Act, and information developed in the course of the adjudicatory proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983); Eastover Mining Company, _____ FMSHRC _____ (July 1983) (ALJ).

I therefore assess the following penalties for respondent's violation of a provision of the Act, and its mandatory safety standards:

Citation No.	Amount
336808	$ 8.00
336809	10.00
336695	200.00
336696	200.00
Total:	$418.00

ORDER

WHEREFORE IT IS ORDERED that citations Nos. 336808, 336809, 336695 and 336697 are affirmed and respondent shall pay the above-assessed penalties totaling $418.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

FOOTNOTE START HERE-

1 At the hearing, however, respondent admitted that Beason's "signature" had been added to the form by the mine personnel (Tr. 63-65).