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SOL (MSHA) V. BELCHER MINE
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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. SE 84-4-M A.C. No. 08-00729-05502
v.	
BELCHER MINE, INC., RESPONDENT	Belcher Mine

DECISION

Appearances: K.S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Mr. Warren C. Hunt, President, Belcher Mine, Inc., Aripeka, Florida, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing in St. Petersburg, Florida on Thursday, February 16, 1984. The proposal for penalty was based on a closure order that charged the gantry rig supporting the conveyor belt on an aggregate crusher was in imminent danger of collapse. (See PX-3 attached.) The penalty proposed was $750.

The Unvarnished Facts

On the evening of Monday, August 1, 1983, an MSHA inspector, Alonzo Weaver, was present at the Belcher Mine for the purpose of making an illumination inspection. While he was waiting for darkness, he observed a bulldozer being used to position and reposition a Pettibone Universal crusher that was operating a dragline to extract and crush gravel from a pit located on the edge of the Gulf of Mexico. He particularly noticed that the dozer had a bad clutch so that whenever it accelerated to push against the crusher's draw bar it would buck and jerk causing the tall gantry rig on the crusher and conveyor belt to sway and vibrate. The inspector apparently called these circumstances to the attention of Mr. Miles, the operator's foreman. Miles asked the inspector to accompany him to the crusher. There the inspector observed that the two six-inch steel channels that supported the gantry rig were anchored through a pinion

but that the "eyes" had rusted through to the point that they provided little or no support for the gantry and the five to eight ton conveyor belt. (See PX-4 attached.)

The inspector immediately recognized the hazard this condition presented to both the crusher operator who worked immediately under and around the gantry and the dozer operator who drove the dozer around and under the conveyor belt. The inspector asked the foreman what he knew about the condition and the foreman told him the broken and fractured anchor had been in that condition for a week or more. Miles also said he felt the condition was so hazardous he was afraid to go near it. When the inspector asked Miles why the operator was not using the spare crusher, Miles said it was "down" and that he had been told to use the Universal to keep up with demand for aggregate production.

Miles asked the inspector to treat their conversation in confidence as he feared for his job if the operator found out that he had reported the violation. The inspector told him he would be protected and then issued an imminent danger closure order.

At the closeout conference a few days later the superintendent, Bob King, argued the condition was of recent origin and that in any event it was not hazardous because the dozer operator was protected by roll bars. The inspector did not agree but in the administration's "spirit of cooperation" reduced the gravity by limiting the finding of exposure to one miner, and the seriousness to lost workdays or restricted duty instead of death or a disabling injury as required by a finding of imminent danger.(FOOTNOTE 1)

The Tarnished Hearing

At the hearing, the inspector changed his mind and testified the condition could have resulted in death or a disabling injury to either the crusher or dozer operators. Pursuant to departmental policy, however, the inspector repeatedly evaded my questions about what Miles said about the hazardous condition. Weaver finally testified that "all

Miles said was that he would shut the crusher down and contact Mr. King. That was all he said. I don't recall whether he said anything about how long it had been there." This was not true. The solicitor made no attempt to correct the false testimony.

On cross examination, the operator, who was not represented by counsel, succeeded in establishing that the inspector had in all probability examined the crusher in question about two weeks earlier but had not cited the condition he found on August 1. Just before the noon break, the operator also announced he would produce two witnesses, Miles, the foreman, and Bob King, the superintendent who would testify that the inspector was wrong in stating that "in his opinion" the condition had existed for several weeks.

To clarify confusion over how many crushers were at the site, the trial judge directed the solicitor to furnish the operator and the judge with copies of the inspector's contemporaneous notes. The inspector had represented that these notes would disclose the serial numbers for three crushers, not two, as claimed by the operator. As it turned out, the notes of the earlier inspection on July 14 were not available--counsel said they were in Birmingham, Alabama. Consequently, the solicitor copied and furnished only the notes of the August 1, 1983 inspection together with the inspector's "Willful Violation Review" memorandum.

At the time the solicitor offered to furnish the August 1 notes he knew Mr. Miles was to be a witness for the operator on the issues of gravity and prior knowledge. He also knew that Mr. Weaver's notes stated that "an employee" of the operator told him on August 1 that the condition on the anchor had "Been that way for a week or more"; that the employee was "Scared to get near it"; and that the only employee the inspector had talked to on August 1 about the anchor was Mr. Miles. But again the solicitor made no attempt to correct the inspector's false testimony.

When the hearing resumed after the noon break, the trial judge asked Mr. Weaver who the employee referred to in his notes was. The inspector and the solicitor simultaneously "objected" to the question one on the ground it was "hearsay" and the other invoking the "informer privilege." When both the solicitor and the inspector admitted the "employee" referred to was in the courtroom and had been identified as one of the two individuals who would testify on behalf of the operator the objections were overruled.

In elaboration of his position, the solicitor indicated that it is the Secretary's policy to assert the informer privilege even if that results in suppressing evidence relevant and material to the gravity of the charge and to the credibility of an operator's defense. I found this the most bizarre twist on the policy of "cooperative enforcement" yet encountered. I have many times noted the commonality of interest between the so-called prosecution and defense in these cases but never before realized the informer privilege was being used to suppress evidence necessary to a fair determination of the degree of culpability of an operator.

I find it hard to accept that the solicitor is so legally obtuse and ethically confused as to believe a grant of confidentiality to an informer takes precedence over a witness's solemn oath to tell the truth. Or that the informer privilege justifies palming off perjured testimony in an adjudicatory proceeding.

I make these observations and findings because I am disturbed, as I believe the Commission will be disturbed, to learn of the extremes to which the solicitor may go in turning a deaf ear to false and misleading testimony. It may be that in the eyes of the solicitor there is no conflict between "cooperative enforcement" and "vigorous enforcement." It may also be that "cooperation pays higher dividends than confrontation" but when the "dividend" is death or a disabling injury the law demands an honest accounting. Cutting corners with the truth through a cynical assertion of the informer privilege is sharp practice. If countenanced through some misguided plea to "live and let live" miners will instead die and public confidence in the fair administration of justice will be sharply diminished. I urge the solicitor to abandon the view that "truth is a lie that hasn't been found out."

It is hornbook law that the informer privilege may not be used to suppress evidence if it appears either from evidence in the case or otherwise that an informer may be able to give testimony necessary to a fair determination of the guilt or innocence of a party. The interest in protection against reprisal never outweighs the public interest in a full and true disclosure of the facts in a Commission proceeding. Section 105(c) provides specific protection against any attempt by an operator to retaliate against an informer witness.

The solicitor knew or should have known of the procedures available under the law to bring his perceived dilemma

to the in camera attention of the trial judge. The issue was not novel and the method for its resolution is clearly set forth in Supreme Court Standard 510(c)(2) to the Federal Rules of Evidence. The solicitor can hardly claim ignorance of the law as a defense to his abusive use of the informer privilege.

For these reasons I must condemn in the strongest terms possible the subornation that occurred and serve warning that if it happens again I shall feel compelled to refer the matter to the Commission and the criminal division for such disciplinary action as they deem appropriate.

The Operator's Rectitude

Whatever the ethical astigmatism of the prosecution, respondent's president, Mr. Warren C. Hunt, quickly ascertained that Mr. Miles was trying to carry water on both shoulders. Whereupon he withdrew his defense, declined to present his witnesses and agreed to settle the matter for the full amount of the penalty proposed. Upon motion duly made, an order approving settlement was entered from the bench.

The premises considered, therefore, it is ORDERED that the decision to approve settlement be, and hereby is, CONFIMRED and the matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

1 Inspectors are so torn between their sworn duty to enforce the law and the administration's policy of "cooperative enforcement" that it is well neigh impossible for them to reconcile their findings of violation with their attempts to trivialize gravity and culpability. Too often the law's policy of deterrence has been undermined by the administration's policy of appeasement.

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Attachment
TABLE