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SOL (MSHA) V. ELK MINES
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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. WEST 84-21-M A.C. No. 05-03890-05501
v.	Mackey No. 444 Mine
ELK CREEK GOLD MINES CO., RESPONDENT	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Lowell E. Jarratt, President, Elk Creek Gold Mines Co., Lakewood, Colorado, pro se, for Respondent.

Before: Judge Carlson

GENERAL STATEMENT

This case arose out of the inspection of an underground gold and silver mine near Black Hawk, Colorado, owned by Elk Creek Gold Mines Co. (Elk Creek). A hearing on the merits was held on May 23, 1984 in Denver, Colorado under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act). The Secretary seeks civil penalties for four alleged violations of standards promulgated under the Act.

The parties waived the filing of post-hearing briefs.

ISSUES

The essential questions to be decided are:

(1) Whether respondent operator was responsible under the Act for any or all of the violations alleged, or whether the liability, if any, lay with an independent contractor.

(2) To the extent that respondent may have been responsible, whether the alleged violations occurred, and, if so, what civil penalties are appropriate.

REVIEW AND DISCUSSION OF THE EVIDENCE

Background

On September 22 and 23, 1983, Inspector Arnold P. Kerber, the Secretary's sole witness, visited the site of the Mackey No. 444 Mine, where this case arose. The evidence shows that a report from a State of Colorado mine inspector prompted the Mackey's federal inspection. It further shows that at the time of inspection the mine, closed for many years, was being reopened by Elk Creek Gold Mines Co., the respondent. This small corporation had been formed to take over the Mackey and restore production. Mr. Lowell E. Jarratt, respondent's only witness at the hearing, is president of the company and general manager of the mine.

On the date of Kerber's inspection, shaft driving was the only activity at the site. (The original shaft had collapsed many years before.)

Kerber's four citations involved respondent's failure to register the mine as required by the Secretary's standards; failure to post warning signs near the explosives magazine; failure to post warnings near a fuel tank, and a failure to provide a berm at the edge of a dump site.

The Contractor Defense

It is undisputed that Elk Creek had entered into a written agreement with a Ted Anderson to drive the new 300 foot shaft (respondent's exhibit 1). Signed on June 10, 1983, the contract provided that Anderson would provide the miners, pay them, and provide certain tools and personal equipment to be used by them.

No one disputes that the fuel tank and explosive magazine were owned by Elk Creek, as was the small front-end loader used to remove muck from the shaft.

On the two successive days of his inspection, Inspector Kerber observed two miners blasting in the shaft and removing muck with Elk Creek's front-end loader. These men told Kerber that neither was in charge, but that both were working for Ted Anderson. Kerber saw these men dumping muck over an embankment, the edge of which was not protected by a berm.

The other men were seen by the inspector at various times attempting to start a scoop tram. Both identified themselves as Elk Creek shareholders.

At the time of the inspection, Ted Anderson was not at the mine site. Mr. Jarratt acknowledged at the hearing that Anderson was in Florida during most of the shaft driving operation, and that Elk Creek was greatly displeased with Anderson's performance on the contract.

With respect to the magazine, fuel tank, and the berm citations, Elk Creek contends that the full responsibility for compliance lay with Anderson as an independent contractor. As Mr. Jarratt put it: "I wasn't watching those things because it was his [Anderson's] responsibility, so I'm asking that these charges be dismissed." (Transcript at 35.)

The relationship between Elk Creek and Anderson had the earmarks of an agreement between an owner and an independent contractor. The Act is enforceable against mine "operators." By definition, independent contractors are "operators," 30 U.S.C. 802(d). The Secretary of Labor has promulgated a regulation which provides guidelines to his inspectors as to when to cite the owner-operator, when to cite an independent contractor, or when to cite both. 30 C.F.R. 45, Appendix A. The guidelines are lengthy, but generally give weight to such matters as which party contributed to the creation of a violation, whose employees are exposed to the hazards flowing from a violative condition, and who had control over the conditions that needed abatement. In Phillips Uranium Corporation, 4 FMSHRC 549 (1982), the Commission majority took the position that citations issued against owners may be dismissed where the Secretary's decision to proceed against the owner, rather than a contractor, was not consistent with the purposes and policies of the Act. The Act, according to the majority, mandates that contractors who created violative conditions and who are in the best position to eliminate the attendant hazards and to prevent their recurrence, should be the subject of the Secretary's enforcement efforts.

In the present case it is clear that the duty to post warning signs at the powder magazines was that of the owner, Elk Creek. It owned the magazine and supplied the powder. Moreover, the two shareholders working outside the portal were plainly "miners" under the broad definitions of the Act, and must be considered Elk Creek's employees since they were not Anderson's. An explosion of the magazine would have endangered them as well as Anderson's two miners at the site. For these reasons, the citation was properly issued to Elk Creek.

Liability for failure to post proper warning signs at the fuel storage area would likewise fall upon Elk Creek, as owner of the tank. A party to a venture who agrees to provide a facility for use of a contractor must surely comply with any regulations pertaining to warning signs or placards required for safe use of the facility. Here, too, Elk Creek was the proper recipient of the citation.

As to the berm citation, only shaft workers paid by Anderson were apparently involved in dumping muck down the unprotected embankment. The alleged violation was unrelated to the condition of the machine or machines furnished by Elk Creek. Whether the berm should be furnished by Elk Creek or its contractor is at least arguable. In this case, however, the evidence showed that Anderson, the contractor, had virtually abandoned his responsibility in managing or supervising the shaft operation. Rather plainly, this included safety aspects of the project. Neither of the two Anderson men had any supervisory authority, and the blasting and mucking were proceeding willy-nilly, with no apparent direction from anyone. Elk Creek knew of this unfortunate state of affairs, and although displeased, permitted it to continue. The owner-operator has overall responsibility for safety compliance, and may not divest itself of that responsibility by engaging a contractor who fails to exert any effort toward safety. When it became clear, as it did before the inspection, that Anderson was not at the site and that no one else was exerting any true authority over shaft operations, the full safety responsibility reverted to Elk Creek. No other result is consistent with the intent of the Act. The berm citation was properly issued to Elk Creek.

Violations

We now turn to a consideration of whether the violations occurred.

Citation 2098576 - The Magazine

During his inspection, Mr. Kerber noted that Elk Creek's magazine, which contained explosives, had no warning signs indicating that it was a magazine. This testimony was not disputed. He cited the company with a violation of the standard published at 30 C.F.R. 57.6-20(i), which provides that magazines shall be:

> [p]osted with suitable danger signs so located that a bullet passing through the face of the sign will not strike the magazine.

The violation is established.

Citation 2098578 - The Fuel Area

According to Inspector Kerber, a fuel storage area with a large tank and several fuel barrels displayed no warning signs against smoking or open flames. This area was used to refuel vehicles at the mine, he testified. This evidence, too, was undisputed by Elk Creek. The inspector cited the company for a violation of 30 C.F.R. 57.4-2. That standard provides:

> Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.

That motor fuels offer an explosion hazard is beyond cavil. The violation is established.

Citation 2098579 - The Berm

Inspector Kerber watched as one of the miners driving the new shaft steered a small, diesel powered front-end loader to the brink of a steep bank to dump muck from the bucket. The drop, he testified, was about 100 feet. No berm (protective ridge) or other barrier had been built at the edge of the bank to protect vehicles from slipping over. The bucket of the loader extended past the edge during dumping. Should the vehicle go over the edge, Kerber believed, the driver could suffer fatal injuries. He therefore cited Elk Creek with a violation of 30 C.F.R. 57.9-54. That standard provides:

> Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

The truth of the inspector's testimony was uncontested. The violation is established.

Citation 2099781 - Notification of Legal Identity

The Secretary's regulation published at 30 C.F.R. 41.11 requires that all mine operators file written notification of their "legal identity" with the district manager for the Mine Safety and Health Administration in the district where the mine is located. The notice must be filed within 30 days of the opening of a new mine and, for a corporate operator, must provide extensive information.

The inspector found no record of a filing by Elk Creek, and therefore issued a citation for a failure to register under the regulation.

Elk Creek acknowledges that it failed to file a formal notification. It defends, however, on the basis that Mr. Jarratt personally visited the MSHA district manager on or about June 10, 1983 to inquire about requirements under the Act. The manager provided certain materials to him, but at no time mentioned the notification requirement.

Although Mr. Jarratt's visit to the manager's office demonstrated an admirable desire to comply with the government rules, it cannot serve as the basis for an outright dismissal of the citation. There is no evidence that the manager deliberately misled Jarratt. The requirement of the notification rule is absolute, and constitutes an essential element of the entire enforcement scheme under the Act.

Additionally, the evidence indicates that more than 30 days had elapsed since work at the mine site had begun. Arrangements for the reopening had begun in June, and by the time of the inspector's visit the shaft had progressed some 230 feet with only a two-man crew working.

The violation is established. Elk Creek's manifest good faith is a favorable factor to be weighed in assessing penalty.

Significant and Substantial Charge

The Secretary classified the violation involving the lack of a berm at the edge of the dump area as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as one where ". . . there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

The evidence presented in this case shows that the Secretary's classification was correct. The absence of a berm or similar barrier at the brink of the embankment created a realistic possibility that a miscalculation or moment of inadvertance could cause a front-end loader to go over the edge while dumping muck. Were that to happen, the equipment operator could quite clearly suffer serious injury or even death, since the unrebutted testimony showed that the bank was too steep for brakes to hold the vehicle, and the fall could be as far as 100 feet. The violation described in citation 2098579 was "significant and substantial."

Penalties

The Secretary seeks a civil penalty of $20.00 for each of the violations in this case, except for the berm violation, for which $54.00 is proposed. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to continue in business, and the gravity of the violation itself.

Virtually all these factors weigh heavily in Elk Creek's favor. The operation is quite small. Management's belief that its contractor bore the responsibility for most of the areas in which the violations arose, though in error, was held in obvious good faith. For that reason I consider the level of negligence relatively low. The record showed that the company achieved prompt abatement of all infractions. The mine had no history of prior violations. Only the violation involving the lack of a berm presents any appreciable degree of gravity.

I must note, though, that the Secretary obviously considered these mitigating factors since the penalties proposed are conservative. Also, there is no evidence that the imposition of these modest penalties would interfere with Elk Creek's ability to continue in business.

Having weighed the evidence, I must hold that $20.00 is the appropriate penalty for the failure to post warning signs at the magazine (citation 2098576), and that $20.00 is likewise appropriate for the lack of warning signs in the fueling area (citation 2098578). Because of the greater gravity of the berm violation, (citation 2098579), the proposed penalty of $54.00 is appropriate.

Owing to the exemplary efforts made by Elk Creek to learn of the government's requirements upon reopening a mine, only the most minimal penalty is warranted for the failure to file a formal notification. I conclude that a sum of $5.00 is warranted.

CONCLUSIONS OF LAW

Upon the entire record, and in conformity with the factual findings embodied in the narrative portion of this decision, it is concluded:

(1) That the Commission has jurisdiction to decide the matter.

(2) That respondent Elk Creek was the proper recipient of the citations issued by the Secretary.

(3) That Elk Creek violated the standard published at 30 C.F.R. 57.6-20(i) as charged in citation 2098576, and that $20.00 is the appropriate penalty for the violation.

(4) That Elk Creek violated the standard published at 30 C.F.R. 57.4-2 as charged in citation 2098578, and that $20.00 is an appropriate penalty for the violation.

(5) That Elk Creek violated the standard published at 30 C.F.R. 57.9-54 as charged in citation 2098579; that the violation was "significant and substantial"; and that $54.00 is the appropriate penalty for the violation.

(6) That Elk Creek violated the rule published at 30 C.F.R. 41.11 as charged in citation 2099781, and that $5.00 is an appropriate penalty for the violation.

ORDER

Accordingly, the four citations in this case are ORDERED affirmed, and Elk Creek is ORDERED to pay a total civil penalty of $99.00 within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge