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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

v.

JAMES L. MERCHEN,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 81-58-M  
A.C. No. 39-00055-05042 A

Homestake Mine

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
Robert A. Amundson, Esq., Amundson & Fuller,  
Lead, South Dakota,  
for Respondent.

Before: Judge Morris

The Secretary of Labor of the United States, the individual charged with the statutory duty of enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), charges James L. Merchen with violating Section 110(c) of the Act.

Section 110(c), now codified at 30 U.S.C. 820(c), provides, in part, as follows:

Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fine, and imprisonment that may be imposed upon a person under subsections (a) and (d).

After notice to the parties a hearing on the merits was held in Lead, South Dakota on September 28, 1983.

The parties filed post trial briefs.

## Issues

The issues are whether respondent violated the Act, and, if so, what penalty is appropriate.

## Stipulations

The parties stipulated that Homestake Mining Company was cited for violating 30 C.F.R. 57.6-107. (FOOTNOTE 1) Further, Homestake Mining Company did not contest the citation and paid the penalty. In addition, it was agreed that this case arises from the same incident (Transcript at page 48).

## Summary of the Evidence

MSHA witnesses included William Donely, Rick Tinnell, Dallas Tinnell, Wayne Lundstrom and Richard Fischer.

MSHA's evidence shows that Homestake Mining Company, a corporation, mines gold that is shipped in interstate commerce (Tr. 7, 8; Exhibit P1).

On the day shift of January 24, 1980 miners had drilled 25 holes to a depth of 10 feet in a drift round. The following shift included miners Rick Tinnell and his partner, Ward Sperry. Tinnell and Sperry drilled 10 to 12 more holes and blasted the round. When they inspected at the face they saw two misfired holes (Tr. 15; P3).

Rick Tinnell discussed the misfires with James Merchen, his supervisor, who was serving as the acting boss of the night shift. Merchen told them to fire the holes. At the end of the shift Sperry didn't explode the misfires because he could not locate any powder (Tr. 8, 116). Tinnell was unsuccessful in reblasting and washing out the explosives (Tr. 41, 66-67). The day shift was advised of the condition (Tr. 16).

When the miners returned the next night they found the day shift had drilled two holes, cut a "V", and blasted. But the misfires remained (Tr. 16). Merchen suggested Tinnell and Sperry bar out the misfires (Tr. 16).

Merchen further told the miners to drill two holes parallel to the misfired holes. He pointed to the area where he wanted the holes drilled. The area was four to six inches from the misfired holes (Tr. 17, 38). Tinnell and Sperry both thought

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that drilling this close was unsafe. They discussed it with Merchen. Tinnell suggested the use of a remote drill but Merchen refused to use this procedure (Tr. 18, 39, 40).

Rick Tinnell had never been instructed to drill that close to misfired holes. He felt it was dangerous because the steel could wander and hit the cap (Tr. 75, 77).

Following Merchen's instructions Tinnell drilled two holes approximately 2 1/2 feet deep. The holes were loaded and shot. This eliminated the misfired holes (Tr. 17, 18).

At the end of the shift Tinnell and Sperry filled out their time slips for 4 hours at the contract rate and 4 hours at the day's pay rate (Tr. 62). The miners refused Merchen's request to change the time slips to 8 hours contract rate (Tr. 62).

Dallas Tinnell, father of Rick Tinnell and the president of the local union, expressed the view that drilling even 12 inches from misfired holes can be dangerous. When collaring a hole the new drill could jump and go into the previous hole (Tr. 86, 87).

Homestake Mining Company's rules in its safety book suggest precautions to be taken when miners drill into misfired holes (Tr. 88-92; Exhibit P7).

Richard Fischer, MSHA's expert, stated it was a violation of 30 C.F.R. 57.6-107 to drill within 12 inches of two misfired holes (Tr. 100-107; P9). A definite danger of intersecting the prior holes existed. Merchen should also have used a manifold (Tr. 108, 111). A fatality could result if the one and a half pounds of explosives were ignited (Tr. 112).

Respondent's witnesses were James Merchen, Audrey Merchen and Joel Waterland.

On January 24, 1980 James Merchen was the relief shift boss supervising 15 miners (Tr. 124).

Merchen saw the misfires in the center of the round (Tr. 126). He told Sperry to blast them but the following day the two holes remained (Tr. 127). Unsuccessful efforts to remove the misfires included plastering, blasting, and washing them. Also the prior shift had cut a "V" in an effort to remove the misfires.

Merchen told Tinnell and Sperry to drill two holes 10 to 12 inches on either side of the misfires (Tr. 128, 129). The men were instructed to drill parallel to the misfires. Merchen had used this method before. Tinnell and Sperry suggested drilling

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the misfires from the manifold. Merchen denied there was any discussion with Tinnell or Sperry to the effect that Merchen's proposal was dangerous (Tr. 129-131, 138).

At the end of the shift a heated discussion took place between Merchen, Tinnell and Sperry about the pay for the shift. The miners refused to change their daily reports. A grievance was later filed over this issue (Tr. 133, 134). There was no discussion about blasting the misfires when the three men argued over the daily reports (Tr. 134).

Merchen was aware of MSHA's regulations. He didn't knowingly tell the miners to violate them (Tr. 137).

Merchen, financially "poor", now earns approximately \$10 per hour from Homestake Mining Company. He has a partnership in the farm but it is "in the red" (Tr. 135, 136, 146).

Audrey Merchen, respondent's sister-in-law, indicated that at one time after this incident Ricky Tinnell said he "got at Merchen" (Tr. 163, 165).

Joel Waterland, an expert witness for respondent and a Homestake employee, indicated that Merchen did all he could under the circumstances. The wires had been checked and the cap was found to be dead. The miners were unsuccessful in washing out the misfire, in plaster blasting it, in "V" cutting it (Tr. 147, 151-153, 158). In Waterland's opinion no violation of the regulations occurred. If you drill straight into the face two feet from a misfire the wall will not break when it is exploded (Tr. 151-153, 156).

#### Discussion

The Commission has ruled that the proper legal inquiry for the purpose of determining corporate agent liability under Section 110(c) is whether the corporate agent "knew or had reason to know" of the violative condition. *Secretary v. Kenny Richardson*, 3 FMSHRC 8, 16 (January, 1981), *aff'd*, 689 F.2d 623 (6th Cir.1982), *cert. denied*, 77 L.Ed.2d (1983). There the Commission held:

If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

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For the reasons hereafter noted I credit the Secretary's evidence on the credibility issues in the case.

The facts here establish that Merchen was the acting shift boss. The two misfires were brought to his attention. He then "directed" Tinnell and Sperry, relatively inexperienced miners, to drill parallel to the misfires. By his own admission the drilling was to be within 10 to 12 inches to each side of the misfires (Tr. 128, 129).

The regulation, 30 C.F.R. 57.6-107, prohibits drilling where there is a "danger of intersecting a charged or misfired hole." The danger is especially present here because of the shattered area behind the face. Merchen relies on his instruction to the miners to drill parallel to the holes. But since the previous shift had drilled 25 of the 35 or 37 holes Merchen would have no way of knowing the angle of any of the holes drilled by the previous shift.

Merchen knew of MSHA's regulation and there was a clear danger that Tinnell and Sperry could intersect the misfired holes.

A conflict exists in the testimony of MSHA's expert, Richard Fischer, and respondent's witness Joel Waterland. I credit Fischer's testimony. He has a greater degree of expertise than Waterland (Tr. 102, Exhibit P9). In addition, Homestake's safety rules support Fischer's testimony. The rules have the following relevant directives concerning "Drilling":

1. Ground must be closely examined before drilling to prevent drilling into a "misfired hole" (a hole with all or part of its explosive charge left in it) which might explode and kill the driller and nearby workmen.

A "missed hole" found in a working place should be handled as follows:

- (a) If possible put in a new primer and blast the hole before proceeding with any other work unless it can be blasted at the end of the shift.
- (b) If this cannot be done, wash the explosive out of the hole with a stream of water.
- (c) If neither of the above procedures is possible nor practical, mark the hole plainly with chalk or crayon and advise your boss of its location. Work may then proceed under the following restrictions:
  - (i) In stopes, do not drill within five feet of the "missed hole."
  - (ii) In drifts, crosscuts, or raises, consult your boss about how to handle the hole. If it is practical, he may tell you to blast out the hole by drill

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ing and blasting another hole at an angle to it. In such a case, the collar of the new hole should be at least two feet from the collar of the "missed hole." The hole should be collared manually, then drilled out by a drill with an automatic feed. Then the driller will retire from the face and turn the drill off from the airline valve located at the hose connection to the air pipeline, or from a valve still further back in the airline if the pipeline end is too close to the face.

Emphasis added, Exhibit P7, pages 71-72.

The most restrictive circumstances in Homestake's safety rules require drilling at least two feet from the misfired holes. Merchen directed the drilling, by his own admission, at a point 10 to 12 inches from the misfires (Tr. 128, 129).

In his post trial brief respondent raises several issues. He initially asserts MSHA, with this inexplicit regulation, must prove the holes were drilled in a location where there was a danger of intersecting a charged or misfired hole.

The Secretary's expert witness establishes this evidence. He indicated that drilling within 12 inches is hazardous (Tr. 107). It was hard to determine how much the drill might wander but the danger is definite, in part, due to the underlying fracture (Tr. 108).

Respondent's post trial brief further asserts that this case is a classic example of a shotgun approach to "get even" with a supervisor on the part of a miner and his father's union (Brief, page 14). I am not persuaded by this argument. There is such a paucity of evidence on the issue that it would be totally speculative to rest a decision on that facet of the case. Further, I do not find there was such motivation on the part of Rick Tinnell and Sperry. If there was such a motivation it would surely have been mentioned when the three men had a "heated argument" about the pay for the shift.

A good portion of respondent's brief must be denominated as an assertion that 30 C.F.R. 57.6-107 is unconstitutionally vague.

I agree this standard is not detailed but the Commission has previously observed, in a similar context, that "many standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances.'" Alabama By-Products Corp., 4 FMSHRC 2128, at 2129 (1982). The Commission has measured similar regulations against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to

