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SOL (MSHA) V. RUFUS BALDWIN
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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. VA 84-43
A.O. No. 44-03868-03520-A

v.

CC & P Coal Co. No. 1 Mine

RUFUS BALDWIN,
RESPONDENT

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. 820(c), seeking a civil penalty assessment of \$500. More particularly, it is alleged that on October 20, 1982, the respondent, acting as an agent of the corporate mine operator, CC and P Coal Company, within the meaning and scope of Sections 3(e) and 110(c) of the Act, knowingly authorized, ordered or carried out the corporate mine operator's violation of 30 C.F.R. 75.511, as stated in Section 104(d)(1) Citation No. 2071403. Said Citation, as modified, states as follows:

Electric work was performed on the 220 volt control circuit on the Lee Norse 245 continuous mining machine without opening and locking out the disconnecting device. A fatal machinery accident occurred.

On October 27, 1983, the CC and P Coal Company paid a civil penalty assessment of \$2,000 for the foregoing violation (Petitioner's Exhibit No. 9).

The respondent herein contested the violation and the proposed civil penalty assessment. Therefore, pursuant to notice, a hearing was convened in Falls Church, Virginia, on December 10, 1985, and while the petitioner appeared, the respondent did not. In spite of the respondent's failure to appear, the hearing on the merits proceeded without him. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived his opportunity to be further heard in this matter.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95164, 30 U.S.C. 801 et seq.
2. Commission Rules of Procedure, 29 C.F.R. 2700.1 et seq.

ISSUES

The issues presented in this case are whether the petitioner has established a violation of Section 30 C.F.R. 75.511 and that this respondent as an agent of CC and P Coal Company, knowingly authorized, ordered or carried out that violation; and if so, the appropriate civil penalty that should be assessed.

PETITIONER'S CASE

Petitioner introduced the following exhibits that were received in evidence in this proceeding:

1. A copy of Control Order No. 2003745 dated October 20, 1982.
2. A copy of the Legal Identity Report for No. 1 Mine, CC and P Coal Company, dated June 2, 1982.
3. A copy of a letter dated November 5, 1982, from CC and P to MSHA establishing interstate commerce.
4. A copy of the Section 104(a) Citation No. 2071403, issued on October 21, 1982.
5. A copy of the modification of Citation No. 2071403 to a 104(d)(1) citation, dated October 27, 1982.

6. A copy of the abatement of Citation No. 2071403 dated October 27, 1982.
7. A copy of a Memorandum of Record to the District Manager from Roy D. Davidson concerning the fatal accident of October 20, 1982.
8. A copy of the Report of Investigation concerning the fatal accident of October 20, 1982, co-authored by Dorsey C. Owens and Roy D. Davidson.
9. A copy of the Decision Approving Settlement in the case styled Secretary of Labor, Mine Safety and Health Administration (MSHA) v. CC and P Coal Company, 5 FMSHRC 1938 (1983).
10. A computer printout certified by the Office of Assessments of the Mine Safety and Health Administration, showing that the civil penalties, assessed by the ALJ in Exhibit No. 9, supra, were paid by the corporate operator, CC and P Coal Co.

Mr. Roy D. Davidson appeared and testified on behalf of the petitioner. He is an electrical engineer employed by MSHA in Northern Virginia and as such has been involved in coal mine accident investigations for some ten (10) years. He investigated the fatal accident which is the subject of this case and co-authored the final version of the Report of Investigation (Petitioner's Exhibit No. 8).

The substance of his testimony was that Mr. Baldwin, respondent herein, was performing some electrical work on the start-stop switches that control the ripper heads, conveyor chain and pump motor of the continuous miner at the time the fatal accident occurred. This was a low-voltage circuit and Baldwin was performing this work without opening and locking-out the disconnecting device. In Mr. Davidson's opinion it was Baldwin's responsibility to see to it that the disconnecting device was open and locked out per 30 C.F.R. 75.511. He also believes that this is common knowledge in the mining industry and therefore that Baldwin knew it was required and also knew there was power on the machine just prior to the accident.

At the time of the accident, Baldwin was employed at CC and P Coal Company as a section foreman and also a certified electrician and the electrician of the section. The accident victim, Orville Terry Cooper, worked for Baldwin on his crew.

The disconnecting device was located at the power center, approximately 250 feet away from the continuous mining machine. The effect of opening up and locking out the disconnecting device is that it provides positive assurance that the power has been removed from the continuous mining machine.

Mr. Davidson reconstructed the accident on the record as follows: On the morning of October 20, 1982, at approximately 8:00 A.M., the section crew with Mr. Baldwin as the section foreman entered the mine. They arrived on the section at approximately 8:30 A.M. This particular Lee Norse continuous mining machine had had electrical problems for several months with the ripper heads, conveyor belt and pump motor coming on inadvertently. It also had had intermittent problems with stopping the ripper heads. Baldwin knew of this and was directly involved with these problems. On the day of the accident, the previous shift had already worked on the continuous miner all night, and the ripper heads had been raised into an upper position and were supported by wooden blocks. The morning of the accident, Baldwin removed a control panel on the mining machine to work on the methane monitor and he assigned Tim Elswick, the scoop operator, to go to the power center and "kill the main power supply." After correcting the problem with the methane monitor, Baldwin put the control panel back and replaced the cover on the main control panel in the operator's deck. After work on the methane monitor system was completed, electric power was restored at the power center. Immediately prior to the accident, Baldwin was preparing to install some insulating paper behind the start-stop switches to prevent the switches from contacting the inside of the switch control panel and becoming shorted across. Terry Rose, working with and for Baldwin, raised the ripper heads to remove the wooden blocks and then let the ripper heads come down to the floor. This fact in and of itself would indicate to all, including Baldwin, that there was power on the machine. It had been turned back on. Prior to commencing work on the switches, Baldwin had assigned three (3) of his men, including the victim, Cooper, to tighten the ripper chain while he and Rose worked on the start-stop switches. They were so engaged when at approximately 9:30 A.M. as Baldwin was removing the switch from its mounting location, the rippers suddenly started, catching Cooper, who was bending over the rippers assisting in tightening the ripper chain adjustment bolt, and fatally injuring him.

FINDINGS AND CONCLUSIONS

RESPONDENT'S FAILURE TO APPEAR AT THE HEARING

The record in this case reflects numerous attempts to establish contact by mail or telephone with Mr. Baldwin on

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the part of both myself and counsel for the petitioner, Mr. Smith. He has never contacted either myself or Mr. Smith to indicate his desires or his position with regard to the issues in this case. The only communication from him in this record is an undated "Answer" that states that he does not disagree with the violation, only with the gravity of the violation and recites that he cannot afford to pay \$500.

On the morning of the hearing (December 10, 1985), which was "noticed" on October 17, 1985, Mrs. Baldwin called Mr. Smith to explain that her husband would not be at the hearing that morning because his car was broken down in Alabama, where he now works. She was unable to provide a telephone number to call Mr. Baldwin, either at home or at work.

Under the circumstances in this record, which include at least three attempts (all unsuccessful) to communicate with Mr. Baldwin subsequent to his belatedly filing an "Answer," I conclude and find that he has waived his right to be heard further in this matter and that he is in default.

Although Commission Rule 29 C.F.R. 2700.63 calls for the issuance of a Show Cause Order before a party is defaulted, given the facts of this case where the respondent has repeatedly failed to respond or otherwise communicate with me or counsel for petitioner, I conclude that the issuance of such an order would be a futile gesture.

FACT OF VIOLATION

I conclude and find that the petitioner has established a violation of 30 C.F.R. 75.511 by a preponderance of the evidence. Respondent himself, by his "Answer" does not "disagree" with the facts of the violation. In any event, the evidence is undisputed that electrical work was being performed by Baldwin on a low voltage circuit without opening and locking out the disconnecting device.

Negligence

Mr. Davidson testified that it is common knowledge in the coal mining industry that when you perform electrical work on a piece of machinery, you must open and lock out the disconnecting device. It was Mr. Baldwin's responsibility to do this. He knew there was power on the machine. He knew the machine had a history of electrical difficulties. Yet he assigned three of the men on his crew to work on the ripper chain, which required them to place themselves in close proximity to the rippers while he performed electrical work on the start-stop switches for the rippers. I conclude and find that this constitutes an extremely high degree of negligence.

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Gravity

I find that this violation was extremely serious. It was the direct cause of a fatality.

History of Prior Violations

Counsel for petitioner has stated and I find that Mr. Baldwin, personally, has no history of prior violations.

Section 110(c) Criteria

The undisputed evidence in this case establishes without any question that Mr. Baldwin, the individual respondent herein, was the agent of CC and P Coal Company and as such did personally and knowingly authorize, order and carry out the violation of 75.511 cited in this instance.

Civil Penalty Assessment

The violation in this case was assessed by MSHA at \$500. This was amended at the hearing to \$1,000 by counsel for petitioner. I fully concur that \$1,000 would be a reasonable penalty for the egregious violation in this case. However, because of the default nature of the proceeding and because it is reasonable to assume that Mr. Baldwin reasonably expected his penalty would be limited to the maximum of which he had notice, and taking into account the requirements of Section 110(i) of the Act, I conclude that a civil penalty assessment of \$500 will adequately serve the public interest.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$500 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this case is dismissed.

Roy J. Maurer
Administrative Law Judge