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MSHA V. KENNETH MIRACLE
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | CIVIL PENALTY PROCEEDING<br>Docket No. LAKE 88-44<br>A. C. No. 11-00598-03638-A |
| v. | |
| KENNETH B. MIRACLE, Respondent | Peabody Coal Company<br>Eagle No. 2 Mine |

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner; David S. Hemenway, Esq., Senior Counsel, Peabody Holding Company, Inc., St. Louis, Missouri, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq., the "Act", charging that "on or about May 28, 1986, Respondent, acting as an agent of the corporate mine operator within the meaning and scope of sections 3(e) and 110(c) of the Act, knowingly authorized, ordered, or carried out, said operator's violation of 30 C.F.R. $ 75.200."

Section 110(c) provides as relevant hereto that "[w]henever a corporate operator violates a mandatory health or safety standard ... any ... agent of such corporation who knowingly authorized, ordered, or carried out such violation ... shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections (a) and (d).

Since in this case it is alleged that the Respondent, Kenneth B. Miracle, committed the violation as an agent of the corporate operator, proof of this allegation would be sufficient to also prove that the corporate operator violated the cited regulation. The citation under which the corporate operator was charged alleges as follows:

> The assistant superintendent, K. Miracle, was observed to have come through an area of unsupported roof where a roof fall had occurred. The area of unsupported roof was about 4 to 5 feet wide and 8 to 10 feet between permanent roof supports. The area was located in the first cross cut outby the tail of the first section of the second main west belt conveyor.

The Secretary maintains that the cited practice constituted a violation of that part of the regulatory standard at 30 C.F.R. $ 75.200 that provides "no person shall proceed beyond the last permanent support unless adequate temporary support is provided, or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners" (Tr. 8).

Motion to Dismiss

In a Motion to Dismiss filed with his Answer, Respondent Miracle states six grounds for dismissal, namely:

1. Respondent has not been served with a duly authorized and issued citation or order as required under section 104 of the Act.

2. The petition cites no material or relevant citation or order issued against Respondent as required by 29 C.F.R. $ 2700.27.

3. Respondent has been denied due process in that he has been deprived of the right to contest a citation or order as provided in section 105(a) of the Act and 29 C.F.R Sections 2900.20 et. seq.

4. Petitioner has violated its own regulations in proposing to assess a civil penalty without having first reviewed the citation or order as provided in 30 C.F.R. $ 100.2.

5. The citation/order attached to said petition was fully disposed of in a civil penalty action brought against the operator and petitioner is estopped to seek additional penalties.

6. Petitioner is guilty of laches in seeking a civil penalty in this cause in that an unreasonable length of time has elapsed and Respondent has materially changed his position.

Mr. Miracle cites no legal authority for his proposition that a respondent in a proceeding under section 110(c) of the Act must be served with a citation pursuant to section 104 of the Act. Indeed the provisions of section 104(a) of the Act specifically limit the issuance of citations to "an operator of a coal or

other mine". See also Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8 (1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. denied 461 U.S. 928 (1983). The contention is without merit.

Respondent Miracle alleges, secondly, that the Petition for Civil Penalty in this case "cites no material or relevant citation or order issued against [him] as required by 29 C.F.R. 2700.27". The short answer is that Commission Rule 27, 29 C.F.R $ 2700.27 is limited by its own terms to proposed assessments of civil penalties against mine operators. There is no similar requirement for cases under section 110(c) of the Act. This contention is therefore also without merit. I note however that, in any @vent, the Respondent herein was served with a copy of the citation issued to the mine operator and which provided the basis for the proceedings against him under section 110(c) of the Act.

Respondent claims, thirdly, that he was denied due process "in that he has been deprived of the right to contest a citation or order as provided in section 105(a) of the Act and 29 C.F.R. $ 2900.20 et seq." Section 105(a) of the Act is again however specifically limited to citations or orders issued to the mine operator and not to individuals in proceedings under section 110(c) of the Act. In any event the Respondent has had, contrary to his allegation, the opportunity in these proceedings to contest the underlying violation charged in the citation against the mine operator. See Richardson, supra. 3 FMSHRC 8 at p.10.

Respondent maintains, fourthly, that "Petitioner has violated its own regulations in proposing to assess a civil penalty without having first reviewed the citation or order as provided in 30 C.F.R. $ 100.2." Respondent has failed to prove as a factual matter that the Secretary did not indeed perform a review pursuant to her own regulations under 30 C.F.R. $ 100. Indeed the Secretary denies the allegation. In any event Respondent cites no authority for the proposition that the Secretary must first review a case under section 110(c) of the Act pursuant to those regulations before initiating an action before this independent Commission. Indeed I do not find that it is a statutory precondition to the instant proceedings.

Respondent maintains, fifthly, that "the citation/order attached to said Petition was fully disposed of in a civil penalty action brought against the operator and Petitioner is estopped to seek additional penalties". It is not disputed that Peabody Coal Company, the corporate mine operator, has already paid a civil penalty for the violation of 30 C.F.R. $ 75.200 cited in Order/Citation No. 2819724. However the Commission has held that these separate proceedings against the corporate agent under section 110(c) of the Act are not foreclosed by the

separate action against the corporate operator. Richarson, supra., 3 FMSHRC at 10-11.

Finally Respondent alleges that "Petitioner is guilty of laches in seeking a civil penalty in this cause and that an unreasonable length of time has elapsed and Respondent has materially changed his position". Respondent has failed to support this allegation with any evidence that he has "materially changed his position" as a result of any alleged delay in bringing the instant action. In any event the Federal Government is not affected by the doctrine of laches when enforcing a public right. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977). Under the circumstances the Motion to Dismiss is denied.

The Merits

Wolfgang Kaak, an inspector for the Federal Mine Safety and Health Administration (MSHA) was conducting a spot inspection of the Peabody Coal Company Eagle No. 2 Mine on the morning of May 28, 1986, when he learned of a rock fall at the tail piece of the 1 South Belt. Unable to obtain a clear view from the west side of the fall because of obstruction from the fall material, Kaak viewed the area from the east side of the fall through a mandoor. Kaak observed material still "dribbling down" from the roof, observed that the rib on the left side was ragged and loose and that the fall area came to within one or two feet of the rib. Kaak also saw that a roof bolt remained in the brow and that there were cracks in the cross-cut on the far side. (See Exhibit R-2). Kaak also observed that the distance between the remaining roof bolts was 13 feet 3 inches in the area of the roof fall. The roof control plan required bolts at 5 foot centers beginning 5 feet from the ribs.

Later, while standing 50 feet to the east of the mandoor (at point D on Exhibit R-2), Kaak saw what appeared to be a caplight emerge from the mandoor. It turned out to be the Respondent, Mr. Miracle. Miracle admitted that he had passed from the south cross-cut through to the east belt. Kaak asked: "Kenny was that area bolted?" and Miracle purportedly responded "yes it was". Later at a meeting in the mine superintendent's office Kaak asked Miracle: "did you go through that area of unsupported roof?", and Miracle allegedly replied "Yes, I hugged the ribline and thought I was in a safe position".

Miracle also admitted at hearing that he had proceeded that morning through the general area of the rock fall but had "hugged the left rib from point B to A" (Exhibit R-2). Miracle explained that he first listened to determine that the top was not working and then proceeded into the subject area on his stomach. He then turned over on his side to look back at the south brow to examine

the crack to determine the length of roof bolt needed to go through the brow. Miracle testified that as he passed through the area he also checked the east brow. The roof in that location was only about 3 feet high because of the debris and it took less than 3 minutes to pass through. Miracle testified that he felt he was protected by the adjacent rib and that the roof support was in fact the rib itself. He further described the area between the rib and the edge of the rock fall as some 2 feet to 3 feet and the actual distance traversed was about 8 feet along this rib. Miracle claims that it was necessary for him to proceed out in the rock fall area as the only way to determine the length of bolts to place in the brow to enable work to resume. Miracle claims that when asked by Kaak if he had come through the unsupported fall area he responded, "no, I came along the rib line". Miracle testified that it was not unsafe for him to travel that route but conceded that he would "not probably" have sent someone else into the area.

There is no dispute in this case that the Respondent was, as assistant mine superintendent, an agent of the corporate mine operator. The issue is whether he knowingly carried out a violation of the mandatory standard cited in this case, i.e. 30 C.F.R. $ 75.202. In this regard I place significant weight on Inspector Kaak's testimony that in response to his question at the meeting in the mine superintendent's office shortly after the issuance of the citation: "did you go through that area of unsupported roof?"; Miracle responded "yes, but I hugged the ribline and thought I was in a safe position". Although in testimony at hearing Miracle essentially denied making that statement, it is apparent that by the date of hearing he had ample opportunity to reflect upon and change the damaging aspects of that prior statement. He also had opportunity to call others present at that meeting as corroborating witnesses at hearing but failed to do so. Under the circumstances I find Inspector Kaak's testimony as to Miracle's admission to be fully credible. This admission in itself is sufficient to prove that Miracle violated the cited standard and that he did so "knowingly".

I also note in this case that Miracle testified that he would "not probably" have sent any other mine personnel into the rock fall area he traversed. Accordingly it may reasonably be inferred from this testimony that Miracle, as a reasonably prudent person familiar with the mining industry and protective purposes of the standard, would not have sent anyone into the subject area because it was not safe for the reason that it was not properly supported within the meaning of section 75.200. See Secretary of Labor v. Canon Coal Co., 9 FMSHRC 667 (1987). This evidence also supports the reasonable inference that Miracle, "knowingly" violated the standard.

In light of Inspector Kaak's testimony that the roof was still "working", with rock material dribbling down from the area of the rock fall and that the adjacent rib was ragged, loose and with cracks, it is readily apparent that the violation was of the highest gravity. This finding is corroborated by Miracle's acknowledgment that he would not have sent anyone else though this area.

In assessing a civil penalty in this case I have considered the evidence that other Peabody supervisory personnel, who were the subject of Federal criminal indictments for similar violations at the same mine, had been placed on a probationary-type status through a pretrial diversion agreement. I nevertheless believe that a civil penalty is appropriate in this case because of the flagrant nature of this violation and in the presence of other miners. The Respondent thereby demonstrated a contemptuous disregard for a significant safety regulation and set an improper example for his subordinates. Moreover by placing himself in a dangerous position in an area of unsupported roof, Miracle was creating a potentially serious hazard not only to himself but to others who might be called upon to rescue him in the event of a further roof fall.

Under the circumstances I find that a civil penalty of $200 is appropriate.

## ORDER

Kenneth B. Miracle is hereby directed to pay a civil penalty of $200 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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