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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

CIVIL PENALTY PROCEEDING  
Docket No. SE 89-10  
A.C. No. 40-02611-03569-A

v.

No. 2 Mine

JUNIOR PHILLIPS, EMPLOYED BY  
SCARAB ENERGY CORPORATION,  
RESPONDENT

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor  
U.S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
Junior L. Phillips, Clinton, Tennessee, pro se.

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 Junior Phillips as an agent of a corporate mine operator with knowingly authorizing, ordering, or carrying out the corporate mine operator's violation of a mandatory safety standard under 30 C.F.R. 1725(a).

The alleged corporate mine operator, Scarab Energy Corporation (Scarab), was charged with a violation of the mandatory safety standard at 30 C.F.R. 1725(a) under Citation No. 2789152. The citation alleged as follows:

The 488 S&S Scoop (approval No. 2G-2831-5, Serial No. 4481951) was not maintained in safe operating condition in that the 128-volt motor leads and the control cables were run over the top of the scoop, and at the center section on the scoop the bearing-retaining nut and retaining ring were missing allowing the center section to move up and down. The brakes on the scoop were not in operative condition. This condition was one of the factors that contributed to the issuance of Imminent Danger

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Order No. 2789161 on 6/15/87. Therefore no abatement time was set. (Defective for one month.)

The cited standard provides that "mobile and stationery machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Section 110(c) of the Act 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, failure, or refusal shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsection (a) and (d).

The evidence set forth by the Secretary at hearing is essentially undisputed. The Secretary's evidence establishes that Scarab was indeed a corporate mine operator and that Junior Phillips at the time of the alleged violation on June 11, 1987, was an agent of that corporate mine operator. The undisputed evidence further shows that on June 11, 1987, at about 5:15 a.m., shuttle car operator William K. Disney was killed as he was driving a mantrip scoop under an overcast. The work crew had entered the mine at about 4:45 a.m. that day under the supervision of foreman Kenneth Jackson. They traveled on a flat bed rail car to the end of the track then boarded the subject scoop operated by Disney for transportation to the working section. As the scoop traveled under the belt overcast in the No. 2 entry of the 001 section, a powered lead placed on top of the scoop was pinched against an "I" beam supporting the overcast. Disney reversed the scoop and traveled about two feet backward when his head was crushed against a second "I" beam.

According to the undisputed testimony of MSHA Special Investigator Lawrence Layne, Disney's death was caused in part by the defective condition of the scoop. In particular Layne noted that the absence of bushings, retainer rings and nuts on the pin connecting the two sections of the scoop allowed the center section to flex 4 to 5 inches. Because of this flexing the scoop was unable to pass under the protruding "I" beam. It was then necessary for Disney to reverse the scoop thereby causing his head to be crushed against another "I" beam. This deficiency in the scoop was clearly an unsafe condition, a violation of the cited standard and of high gravity as evidenced by the resulting fatality.

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The evidence is also undisputed that at the time of the fatality Junior Phillips was second-in-command at the subject No. 2 Mine and had served in that capacity during the time that the scoop had been operating in an unsafe condition. Phillips was also the direct supervisor of foreman Jackson and served under mine superintendent Sherman Carroll. According to MSHA Inspector Don McDaniel either Phillips or Carroll had informed him that parts had been ordered for the repair of the center section of the subject scoop more than a month before the accident.

Alvin Goad was working as a roof bolter operator at the time of the accident. He testified that the defective conditions in the cited scoop had been "general knowledge" at the mine. He opined that Phillips in particular was aware of the defective condition of the scoop. He also confirmed that Phillips was acting in a supervisory capacity at the time of the accident. The undisputed statement of general laborer William Gouge further corroborates the evidence that the center section of the scoop had been defective long before the accident. Gouge stated that he told Phillips concerning the condition of the scoop about six months before the accident.

Within this framework of undisputed evidence it is clear that Phillips knew of the defective condition of the cited scoop at least a month before the fatal accident and failed to have this scoop removed from service. It is therefore clear that he was grossly negligent in his duties as an agent of the mine operator. In this regard I have not disregarded the testimony of Scarab owner Terry Reaves, that Carroll was superintendent of the No. 2 mine at the time of the fatality and that Phillips was the "number two man" serving under Carroll at that time. Clearly Phillips was in a position in which, knowing of the defective condition of the scoop, he had the authority and responsibility to have the scoop removed from service until it was in safe working condition.

In assessing a civil penalty in this case I have also considered other relevant criteria under section 110(i) of the Act. Mr. Phillips declined to present any evidence concerning his financial condition or ability to pay a civil penalty in this proceeding. The Secretary acknowledges that there is no history that Mr. Phillips has previously been subject to proceedings under section 110(c) of the Act. Under the circumstances I find that the Secretary's proposed penalty of \$2,000 is appropriate.

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ORDER

Mr. Junior L. Phillips is directed to pay a civil penalty of \$2,000 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge  
(703) 756-6261