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KENT COAL MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

KENT COAL MINING COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. PENN 89-99-R Order No. 2894113; 2/7/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 89-100-R Citation No. 2894114; 2/7/89
	Docket No. PENN 89-101-R Order No. 2894115; 2/7/89
	Docket No. PENN 89-102-R Order No. 2894116; 2/7/89
	Docket No. PENN 89-103-R Order No. 2894117; 2/7/89
	Docket No. PENN 89-104-R Citation No. 2894118; 2/7/89
	Docket No. PENN 89-105-R Order No. 2894119; 2/7/89
	Docket No. PENN 89-106-R Citation No. 2894120; 2/7/89
	KENT No. 55 Mine
	Mine ID 36-07756
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 89-183 A.C. No. 36-07756-03507
v.	Kent No. 55
KENT COAL MINING COMPANY, RESPONDENT	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant/ Respondent;
Paul D. Inglesby, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

In these consolidated proceedings, Kent Coal Mining Company (KENT) is challenging the legality of four orders issued pursuant to section 104(g)(1) of the Federal Mine Safety and Health Act of 1977 (the Act) and the four section 104(a) citations issued in conjunction with those orders. The four order/citation sets apply to, in turn, Roger A. Young, Kimball Rearick, John A. Radomsky and Gary Lancashire. They were all issued by MSHA Inspector John Kopsic on February 7, 1989, because of the alleged failure of the contestant mine operator to provide hazard training pursuant to 30 C.F.R. 48.31(a) for the four abovenamed employees of the independent drilling and blasting services contractor.

A representative order (Order No. 2894113) reads as follows:

> Roger A. Young, driller, SS No. 197-42-6883, an employee of an independent contract driller at the 001 pit is hereby declared a hazard to himself and others and is to be immediately withdrawn from mine property until he receives the training required under Part 48.31(a) 30 C.F.R. The driller was observed working at the 001 pit and was not given hazard training before commencing work activities. The driller did have his training required under Part 48.28(a) 30 C.F.R.
>
> A 104(a) Citation (No. 2894114) has been issued in conjunction with this order.

Its related citation (Citation No. 2894114) reads as follows:

> An employee of an independent contract driller was observed working at the 001 pit without first being given hazard training under Part 48.31(a) 30 C.F.R. for this particular mine site by the foreman or person designated to give hazard training.

A 104(g)(1) Order (No. 2894113) has been issued in conjunction with this citation.

The other orders and citations are substantially the same for the other three employees involved.

STIPULATIONS

The parties stipulated as follows:

1. Kent Mine No. 55 is owned and operated by the Kent Coal Mining Company and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (Tr. 6-7).

2. The Administrative Law Judge has jurisdiction over these proceedings (Tr. 7).

3. The subject citations and orders were properly served by a duly authorized representative of the Secretary of Labor on an agent at the Kent Coal Company on the dates and places stated therein and may be admitted into evidence for the purpose of establishing due issuance but not for the truth of the matters asserted therein (Tr. 7).

4. Kent demonstrated good faith in the abatement of the citations and orders (Tr. 7).

5. The assessment of a civil penalty in the proceedings will not affect the Kent Coal Company's ability to continue business (Tr. 7).

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the fact that, (A) the annual production tonnage of Kent's parent and all its subsidiaries is 9,386,168; and (B) Kent Coal Company Mine Number 55's annual production tonnage is 30,440 (Tr. 7).

Applicable Regulations

48.22 Definitions

For the purposes of this Subpart B-

> (a)(1) "Miner" means, for purposes of 48.23 through 48.30 of this Subpart B, any person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker

contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works at the mine on a continuing, even if irregular, basis. Short-term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under 48.26 (Training of newly employed experienced miners) of this Subpart B, may in lieu of subsequent training under that section for each new employment, receive training under 48.31 (Hazard training) of this Subpart B. This definition does not include:

(i) Construction workers and shaft and slope workers under Subpart C of this part 48;

(ii) Supervisory personnel subject to MSHA approved state certification requirements; and

(iii) Any person covered under paragraph (a)(2) of this section.

(2) Miner means, for purposes of section 48.31 (Hazard training) of this Subpart B, any person working in a surface mine or surface areas of an underground mine excluding persons covered under paragraph (a)(1) of this section and Subpart C of this part and supervisory personnel subject to MSHA approved state certification requirements. This definition includes any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine.

48.31 Hazard Training

(a) Operators shall provide to those miners, as defined in section 48.22(a)(2) (Definition of miner) of this Subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:

(1) Hazard recognition and avoidance;

(2) Emergency and evacuation procedures;

(3) Health and safety standards, safety rules and safe working procedures

(4) Self-rescue and respiratory devices; and,

(5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

(b) Miners shall receive the instruction required by this section at least once every 12 months.

DISCUSSION AND FINDINGS

On February 7, 1989, Inspector Kopsic performed a regular AAA inspection at the Kent No. 55 Mine, a surface coal mine. During this inspection, he observed four contractor's employees working on a drill bench at the site. Claron Explosives, Inc., had four employees working on the site that day, two drillers and two driller helpers.

The inspector talked to all four employees and learned that they had not specifically received "hazard training" for the Kent No. 55 mine site prior to commencing their duties at that site, although he was satisfied that they had their comprehensive annual refresher training from their employer.

The particular hazard that he had in mind at the time was that there was no berm along the elevated roadway which was approximately 40-50 feet high. In the inspector's opinion, this lack of a berm along with Kent's failure to notify the drillers of this missing berm, posed a hazard to them as they operated their drilling equipment back and forth across the bench. However, to the extent that it is relevant here, the fact that there was no berm along the elevated roadway was just as obvious to these four experienced miners as it was to the inspector.

Subsequent to the issuance of the orders/citations herein, abatement was accomplished when Kent's shift foreman, Mr. Marafka, told them where other equipment was working on the site, where they were going to be working, the location of communications, the need to wear their hard hats and safety-toed shoes and to stay away from the edge of the drill bench until the bulldozer got the berm up. This training took approximately 15 minutes to accomplish and Inspector Kopsic was satisfied that the training required by 30 C.F.R. 48.31(a) had now been accomplished.

Hazard training under 30 C.F.R. 48.31(a) is an absolute requirement for those miners defined in 30 C.F.R. 48.22(a)(2) and is an optional method of compliance with the training regulations for each new employment for those short-term, specialized contract workers, such as drillers and blasters, who

are engaged in the extraction and production process and who have initially received training under Section 48.26 (Training of newly employed experienced miners). For miners otherwise defined in Section 48.22(a)(1), the hazard training is not required.

Section 48.22(a) is an extremely subjective standard with which to measure who is required to have hazard training, but the idea is to distinguish between those miners who are more or less permanent employees who would be likely to be aware of any hazardous conditions at a particular mine and those employees who only infrequently come into contact with a particular mine, and thus, presumably, could be caught unaware of its latent dangers.

The four individuals involved in this case have differing levels of experience at the Kent No. 55 mine site. Roger Young and Kimball Rearick have done most of the drilling that has been done at the Kent No. 55 site in the last five years. For the year prior to the alleged violations, they averaged 3 or 4 days a week drilling at the Kent No. 55 mine. For all intents and purposes, they were permanent employees, as described by Mr. Marafka. Messrs. Lancashire and Radomsky, on the other hand, only drilled at the No. 55 site once prior to this incident, although they had worked for Kent on an occasional basis at other surface mines over the previous three year period. With regard to the instant occurrence, these two employees first arrived on the site the day prior to the MSHA inspection and continued to drill on the site for the following 3-4 weeks. Arguably, therefore, they could and should be characterized as "short-term, specialized contract workers, such as drillers and blasters".

Using the above dichotomy only the latter two drillers, Lancashire and Radomsky, would need the "hazard training" specifically referred to in 30 C.F.R. 48.31(a); while the other two drillers working right beside them, Young and Rearick, would only require the annual refresher training. I note here parenthetically that the annual refresher training for all four of these drillers, given under 30 C.F.R. 48.28(a) by their own employer was the same training for each of them.

It seems logical to me that all four should have the same type and quantum of safety training since they were working together, exposed to the same extent to the same hazards of mining. I don't believe the Secretary disagrees with this, since she believes they all four require the "hazard training" specifically given under section 48.31(a). However, the Secretary arrives at this all-encompassing requirement by defining the drillers as either "short-term service workers who were contracted by the operator" or "short-term specialized contract workers who were engaged in the extraction process."

(The emphasis on the short-term is my own). While this definition could most likely be made to stick to Lancashire and Radomsky, it is clearly inapplicable to Young and Rearick. They are more akin to "service workers contracted by the operator to work at the mine for frequent or extended periods", and thus are not required to be given "hazard training" under 30 C.F.R. 48.31(a).

By strict adherence to the language of section 48.22, we have the anomalous situation where four men performing similar job functions in the same setting, within several feet of each other, require training under different sections of the training regulations. The saving feature from a logical standpoint seems to be that the same information is required to be imparted to everyone, albeit under different guises.

As I indicated on the record at the conclusion of the hearing in this matter, I do not believe that the particular training that was ultimately given to abate the citations and orders in this case imparted any significant, new information to the four drillers. The training Mr. Marafka gave that morning, had in fact, already been given in the form of annual refresher training from their employer under section 48.28(a). This annual training covered the same types of hazards and procedures addressed by the "hazard" training that the drillers received from Mr. Marafka to abate the alleged violations.

In Mr. Marafka's own words (Tr. 80-81):

> I basically just gave them a verbal talk on job training. I discussed the high wall and how to get in and get out, communications. They have their own communications in their vehicle, and basically be safe and be aware of other equipment.

He went on to state that there was nothing unique about this site and that what he had to say about the high wall, the other equipment operating in the vicinity of the bench and the condition of the bench itself either wasn't any different than what he would have said about any other high wall operation or was obvious to all experienced observers, including the four employees we are concerned with herein.

Mr. Petrunyak, the Vice President and General Manager of Claron Explosives, Inc. also testified. If his testimony is to be believed, and I see no reason not to credit it fully, he personally had previously given each of the four drillers all the training that was subsequently given them again by Mr. Marafka to abate the orders/citations, only he had given it in much more depth.

Accordingly, I find that, unbeknownst to Inspector Kopsic, the four miners at issue herein, had already received the required training from their employer under section 48.28(a). They are not then required to repeat this generalized training under the heading of "hazard training" pursuant to section 48.31(a), even if they are the type of miners required to be trained under that section. For additional "hazard training" over and above the required comprehensive annual refresher training for experienced miners to have any meaning, there must be something new and meaningful to tell them. A search of the record in this case demonstrates that there was not. Mr. Marafka it seems was just going through the motions of abatement here to satisfy the inspector, abate the orders and get the men back to work. He gave no new information to these men who had been performing these drilling services at this site and others substantially like it on a daily basis for at least several years.

In view of the foregoing findings and conclusions, I conclude and find that the preponderance of the evidence adduced in this case establishes that whether or not the four named employees were subject to the hazard training requirements of the cited section 48.31(a), and clearly, Young and Rearick, at least, were not, they had in fact previously received such training as part and parcel of their annual refresher training under Section 48.28(a). Therefore, I conclude that the violations charged in the orders/citations did not occur and they must be vacated.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

Order Nos. 2894113, 2894115, 2894117, and 2894119 and Citation Nos. 2894114, 2894116, 2894118, and 2894120 ARE VACATED, and no penalty may be assessed.

Roy J. Maurer
Administrative Law Judge