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SOL (MSHA) V. R S & W COAL
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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. PENN 89-139
A.C. No. 36-01818-03524

v.

R S & W Drift

R S & W COAL COMPANY, INC.,
RESPONDENT

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Randy Rothermel, R S & W Coal Company, Inc.,
Klingerstown, Pennsylvania, Pro se, for the
Respondent.

Before: Judge Koutras

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(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of \$300, for an alleged violation of mandatory training standard 30 C.F.R. 48.5(a). Respondent filed a timely answer and contest, and a hearing was held in Reading, Pennsylvania. The parties waived the filing of posthearing briefs, and I have considered their oral arguments made on the record during the course of the hearing in this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the violation was "significant and substantial" (S&S), and (3) the appropriate civil penalty to be assessed for the violation,

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taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated that the respondent is a small coal mine operator employing eight miners, and that its annual production is 3,300 tons. They also agreed that payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business (Tr. 4).

Discussion

The contested section 104(a) S&S Citation No. 2677716, served on the respondent on November 15, 1988, cites an alleged violation of mandatory training standard 30 C.F.R. 48.5(a), and the cited condition or practice is described as follows:

Darin Schwartz, determined to be a new miner, was observed working in the skidmore rock tunnel underground portion of the mine. A discussion with Mr. Schwartz revealed that he had received little of the required 40 hours of new miner training.

The company's approved training plan dated 12-18-87 states "32 hours of new miner training will be given at the Schuylkill County Mine Safety Training Center and all 40 hours of training will be completed before new employee is assigned work duties underground." This citation is issued in conjunction with 104(g)(1) Order No. 2677715 for violation of 114 of the Act.

In conjunction with the citation, the inspector also issued a section 104(g)(1) "S&S" Order No. 2677715, on November 15, 1988, withdrawing the cited untrained miner from the mine. The order states as follows:

Darin Schwartz, observed performing laborer duties in the skidmore rock tunnel in the underground portion of the mine has not received the requisite safety training as stipulated in section 115 of the Act. Mr. Schwartz has been determined to be a new miner hired by this company 11-15-88, who has received little or none of the required 40 hours of new miner training. In the absence of such training, Darin Schwartz, laborer, is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training.

A citation (No. 2677716) for violation of 30 C.F.R. 48.5(a), has been issued in conjunction with this order.

Petitioner's Testimony and Evidence

MSHA Inspector Dennis L. Myers testified that he inspected the respondent's mine on November 15, 1988, and was accompanied by Mr. Randy Rothermel, the foreman. Mr. Rothermel informed him that miner Walter Wehry was working underground. After proceeding underground to the working section, Mr. Myers found that miner Darren Schwartz was working with Mr. Wehry loading coal into a buggy. Mr. Schwartz informed Mr. Myers that this was his first day on the job underground and that he had worked for 1 week at another contract mine operation. Mr. Schwartz also informed Mr. Myers that he had received no training (Tr. 13-16).

Mr. Myers stated that he asked Mr. Schwartz if he knew what a "three piece set" was, and he replied that he did not. Mr. Myers explained that this was one of the methods of roof control which may be used at the respondent's mine and that it is a subject usually covered in the 40-hour training given to new miners. Mr. Myers confirmed that he also asked Mr. Schwartz about the mine roof control and ventilation plans, and that he had no knowledge of the plans (Tr. 17-18).

Mr. Myers stated that Mr. Rothermel was present while he questioned Mr. Schwartz and stated that he was training Mr. Schwartz. Mr. Myers then informed Mr. Rothermel that he could not train Mr. Schwartz because he was not listed as a trainer or instructor in the respondent's training plan. Mr. Rothermel informed Mr. Myers that he was a trainer at a previous mining operation and Mr. Myers informed Mr. Rothermel that Mr. Schwartz would have to be withdrawn from the mine because he had not been trained (Tr. 19).

Mr. Myers stated that Mr. Rothermel telephoned MSHA's district supervisor for education and training, Charles Moore, from his office and inquired as to why he was not listed as an instructor. Mr. Myers stated that he informed Mr. Moore that

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pursuant to the respondent's training plan new miners had to be trained at the Schuylkill County Vo-Tech facility, and that the approved training instructor was Mr. Richard Rothermel, Randy's brother, and the respondent's president and foreman. Mr. Myers confirmed that Richard Rothermel was listed on the MSHA ID form which he reviewed, but that Randy Rothermel was not. After speaking with Mr. Moore, Mr. Myers issued the citation and withdrawal order and served them on Randy Rothermel (Tr. 22).

Mr. Myers stated that he discussed the respondent's training plan with Mr. Rothermel and advised him to have it updated and that he could request technical assistance from MSHA. Mr. Myers stated that he had no knowledge that the respondent had ever requested prior assistance from MSHA regarding the training plan. He confirmed that Mr. Schwartz left the property and that when he next returned to the mine on December 6, 1988, Mr. Schwartz was not there (Tr. 22).

Mr. Myers confirmed that he cited a violation of section 48.5(a), because he considered Mr. Schwartz to be a new miner, and he determined through his conversation with Mr. Schwartz and Mr. Rothermel that Mr. Schwartz was an untrained inexperienced miner (Tr. 23).

Mr. Myers stated that the violation was significant and substantial because there was a very good possibility that an inexperienced miner working underground would be exposed to an injury to himself and other miners (Tr. 24). Mr. Myers confirmed that he made a finding of "high negligence" because Mr. Rothermel had previously served as a training instructor and knew that as a new employee Mr. Schwartz could not go underground without any training. Mr. Myers found no mitigating circumstances, and he believed that the respondent could have made other arrangements to train Mr. Schwartz and should have contacted MSHA to assist him before the citation and order were issued (Tr. 24).

Mr. Myers identified a copy of the respondent's approved training plan which lists Richard Rothermel as the approved instructor, and he confirmed that the plan was in effect at the time the citation and order were issued, and that Randy Rothermel produced the plan for his review (Tr. 25, exhibit P-10). Mr. Myers confirmed that he has never seen a 1985 training plan which was identified as exhibit P-7 (Tr. 26). Mr. Myers confirmed that Mr. Schwartz was withdrawn from the mine because he had not received 40 hours of new miner training before he was assigned work duties (Tr. 26).

On cross-examination, Mr. Myers explained why he believed Mr. Schwartz was exposed to mine hazards while working underground without the benefit of training (Tr. 27-29). Mr. Myers confirmed that the respondent submitted another training plan to MSHA's district office in Wilkes-Barre approximately a week or

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2-weeks prior to the hearing in this case, but that he was not familiar with the specifics of that plan (Tr. 32). Mr. Myers identified some MSHA training materials produced by Mr. Rothermel, and Mr. Rothermel pointed out that the information reflects that on-the-job training "is best" (Tr. 34).

Mr. Myers confirmed that Richard Rothermel was not at the mine on November 15, 1988, and that Randy Rothermel said nothing about Richard being involved in any training for Mr. Schwartz. Mr. Myers stated that Randy Rothermel simply informed him that he was training Mr. Schwartz "on the job" (Tr. 42). Randy Rothermel did not indicate that Mr. Wehry was training Mr. Schwartz (Tr. 43).

Mr. Myers confirmed that assuming that he was qualified to administer training, Randy Rothermel could administer the training. However, the applicable approved mine training plan only listed Richard Rothermel as the qualified training instructor (Tr. 44). Mr. Myers confirmed that he found no MSHA training form 5023 for Mr. Schwartz, and that this form is required to be filled out by Vo-tech showing the dates of the training and the training which was administered and received by the miner (Tr. 47).

Mr. Myers conceded that Mr. Schwartz may have received some on-the-job training during the time he was underground on the day of the inspection, but that he was required to have a full 8 hours of training on-the-job and 32 hours of additional training prior to performing any work underground and that this is specified in the respondent's training plan (Tr. 48-50).

MSHA Supervisory Inspector Dean W. Updegrave confirmed that he is Inspector Myers' supervisor, and after reviewing the citation and order issued by Mr. Myers, he agreed that they were properly issued (Tr. 61). Mr. Updegrave stated that approximately 3 days after the citation and order were issued, Randy Rothermel came to his office and informed him that he could train Mr. Schwartz because he was listed as an approved training instructor on the mine training plan. Mr. Updegrave stated that he then reviewed his file and a copy of the training plan with Mr. Rothermel and informed him that his name did not appear on the plan as a trainer. Mr. Rothermel then stated "well, it was on, somebody took it off" (Tr. 62).

Mr. Updegrave stated that he informed Mr. Rothermel that Mr. Schwartz would have to have 32 hours of classroom training time and 8 hours "introduction to the work environment" before he was assigned a job (Tr. 62). Mr. Rothermel then requested that the training plan be changed. Mr. Updegrave then reviewed the mine legal identity report and found that Randy Rothermel was not listed as one of the mine partners, and that only Richard Rothermel and Mr. Wehry were listed as partners. Randy Rothermel

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then informed Mr. Updegrave that he was a partner, and Mr. Updegrave gave him blank copies of the legal identify form and advised him to file them in order to have him listed as a partner. He also advised Mr. Rothermel to request a change in the training plan if he so desired (Tr. 63).

Mr. Updegrave stated that prior to the inspection by Mr. Myers, Richard Rothermel visited his office to discuss the mine training plan. Richard requested that Randy Rothermel's name be deleted from the plan because he was not a qualified instructor. Richard Rothermel informed Mr. Updegrave that he did not have the facilities at the mine to train new employees and opted to have them trained at the Vo-tech school for the 32 hours of classroom training. The new plan was accordingly changed and approved by MSHA, and it listed Richard Rothermel as the approved trainer, and it provided that 32 hours of training would be conducted at the Vo-tech school (Tr. 65-66; exhibits P-10, P-8, and P-9). Mr. Updegrave identified exhibit P-11 as a copy of a letter dated December 18, 1987, advising the respondent that the new training plan had been approved (Tr. 68). He also identified a copy of a letter from Richard Rothermel submitting information concerning the revision and addendum to his approved training plan (Tr. 68-70, exhibit P-12). Mr. Updegrave confirmed that Randy Rothermel was not involved in these modifications and revisions of the mine training plan (Tr. 71).

Mr. Updegrave confirmed that the respondent filed a new training plan with MSHA's Pottsville office approximately a week prior to the hearing and Richard Rothermel informed him that he did not want Randy Rothermel to be included in the plan as a training instructor. Mr. Updegrave also confirmed that he has not received any new mine legal identity forms from Randy Rothermel (Tr. 71).

Mr. Updegrave confirmed that pursuant to the respondent's prior 1985 training plan, all of the 40-hour new miner training could be done at the mine site (Tr. 91).

Respondent's Testimony and Evidence

Darren Schwartz testified that prior to the day of the inspection by Mr. Myers, he worked at another mine for a week. He confirmed that the day of the inspection was his first day of work at the respondent's mine. He stated that he had shoveled coal underground for 4 hours before the inspector came underground, and that he had shoveled 25 scoops of coal. He confirmed that Mr. Rothermel pointed out several safety things to him when he first went underground (Tr. 94-96).

Mr. Schwartz stated after he came to the surface, Mr. Myers would not permit him to do any surface work until he was trained at the Vo-tech school. He confirmed that he completed his

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surface training on May 25, 1989, and his underground training on July 28, 1989 (Tr. 100).

Randy Rothermel testified that at the time of the inspection he was not aware of the 1987 training plan and was only familiar with the one he filled out in 1985. He stated that the 1985 plan permitted him to train newly employed miners, and that the pending plan revision would allow him to do this again. Mr. Rothermel could not explain why he was not aware of the 1987 plan (Tr. 107). He explained that he works one shift and his brother Richard works another shift, and that the mine plans are continuously being changed and that he has "a drawer full of them" (Tr. 108).

On cross-examination, Mr. Rothermel stated that the mine was working two shifts in 1985 and 1987, and that the mail was received at a company office away from the mine site. He stated that his brother works the third shift from 10 p.m. to 5:00 a.m. and comes to the mine 6 days a week, and that he works the first shift from 7:00 a.m. to 2:00 p.m. (Tr. 111). He stated that he lives 3 or 4 miles from his brother, and that they spoke to each other "all the time away from the mine." He stated that his brother never told him that he had changed the mine legal identity information, and he believed that he did so because a share of the mine was sold to his brother in 1987 or 1988. Mr. Rothermel confirmed that he has always owned a share of the mine (Tr. 112).

Mr. Rothermel confirmed that he took Mr. Schwartz underground, explained some things to him, and that he was in the company of one of the other mine partners. He did not believe that Mr. Schwartz was performing any work duties, and that he was only shoveling coal (Tr. 115-116). He asserted that he intended to train Mr. Schwartz that day, and that he had been underground for 4-hours prior to the inspector's arrival, and if the inspector had not arrived he would have trained Mr. Schwartz for the remainder of the day (Tr. 119). He conceded that he was not with Mr. Schwartz all of the time, but spent 2 hours with him underground before leaving to conduct other business (Tr. 119-120). However, he communicated with Mr. Schwartz over the intercom (Tr. 121).

Mr. Updegrave was recalled and he confirmed that in the event Vo-tech cannot train a newly employed miner at any given time, the respondent could have contacted MSHA's district manager for a waiver to permit him to allow one of MSHA's training specialists to conduct the training. He also indicated that the Vo-tech facility has an evening training program to allow miners to timely complete their training (Tr. 123).

Mr. Updegrave confirmed that the Vo-tech training is scheduled when there are 10 or more persons to be trained, but there

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are times when only two people are in class. He again confirmed that Richard Rothermel informed him that he did not have the time to train miners at the mine and since he wanted to send them to Vo-tech, he submitted a change for his plan (Tr. 124). Mr. Updegrave explained the newly submitted training plan by Richard Rothermel (Tr. 126-130).

Findings and Conclusions

Fact of Violation

The respondent in this case is charged with a violation of the training requirements found in 30 C.F.R. 48.5(a), because of its failure to provide training for newly employed miner Darren Schwartz, as required by section 48.5(a) and the respondent's approved mine training plan. Section 48.5(a), requires that each new miner receive no less than 40 hours of training before he is assigned to any work duties, and approximately 8 hours of this training is required to be given at the mine site.

Mr. Randy Rothermel agreed that MSHA's training regulations require a new miner to receive no less than 40 hours of training before he is assigned to any work duties (Tr. 31). However, he took the position that MSHA's training materials which were recently given to him reflect that on-the-job training is the "best" method for training miners, and that pursuant to his plan, training may be given "on site" and that it is not necessary that it be given at the local county Vo-tech facility (Tr. 35).

MSHA's counsel pointed out that pursuant to the respondent's applicable training plan, Richard Rothermel may administer part of the new-miner training, and that Vo-tech is an alternative source for administering the training. He further pointed out that all training must be administered by a qualified instructor and that the plan provisions list where the training is to be administered for each of the subjects covered by the plan (Tr. 36-40). He confirmed that pursuant to the plan, certain portions of the training may be done at the mine by a qualified instructor and certain portions may be done at the Vo-tech facility (Tr. 41).

Mr. Rothermel asserted that he had no knowledge of the training plan relied on by Mr. Myers prior to the inspection, and that he was only familiar with the prior 1985 plan which lists him as an instructor (Tr. 51). Mr. Rothermel and the inspector confirmed that the applicable plan was found in an envelope in a desk drawer in the mine office with various other papers, including the mine ventilation and roof-control plans and that "it took us a little bit to find them" (Tr. 29).

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Mr. Rothermel stated that he did not want to train new miners at the Vo-tech school, and that if the new plan is approved, miners will be trained at the mine (Tr. 77-78, 89). He took the position that even though Mr. Schwartz was underground, "he was shoveling coal and I don't consider that work" (Tr. 79-80). He also took the position that Mr. Schwartz was receiving training at the time he was found underground by Inspector Myers (Tr. 81). He also expressed concern that the training administered at the Vo-tech facility is not given at all times, and that newly employed miners must wait for months before they are hired in order to be trained.

The evidence adduced in this case clearly establishes that the cited miner in the employ of the respondent at the time of the inspection in question was a newly employed inexperienced miner who had not received the requisite training pursuant to the respondent's MSHA approved training plan. The respondent's suggestion that the cited miner was not performing any work underground at the time he was found by the inspector is rejected. The evidence establishes that the untrained miner was shoveling and loading coal, and his own testimony attests to the fact that he had been underground for approximately 4 hours shoveling and loading coal. Under the circumstances, I conclude and find that the petitioner has established a violation by a clear preponderance of all of the credible and probative evidence in this case, and the contested citation IS AFFIRMED. I also conclude and find that the withdrawal of the untrained miner was proper in the circumstances.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the

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violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghioghenny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Myers' based his "S&S" finding on his belief that an inexperienced and untrained miner working underground would be exposed to an injury to himself and to other miners and that mining is a very hazardous occupation (Tr. 23-24). He explained that during the time he was underground, Mr. Schwartz would have been in a confined area with coal cars moving back and forth, and in the event of a derailment "he could very well get hurt" if he were struck by one of the cars. Although Mr. Myers indicated that Mr. Schwartz was "off to the side" of the coal chute while loading coal, he stated that when he was shoveling and cleaning up the coal he was directly under the coal chute, and that the coal buggies moved back and forth while they were being loaded. In the event one of the chute poles broke loose, the coal could have rolled out and over the chute board and caught Mr. Schwartz.

Mr. Rothermel contended that he intended to train Mr. Schwartz underground on the day of the inspection, and although Mr. Schwartz was underground for 4 hours before he was found by the inspector, Mr. Rothermel conceded that he was only with him for 2 hours underground. Mr. Rothermel also indicated that he "explained some things" to Mr. Schwartz while he was underground with him, and that Mr. Schwartz was in the company of one of the mine partners. However, there is no evidence that the partner was training Mr. Schwartz, nor is there any evidence that

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Mr. Schwartz was doing anything other than shoveling and loading the coal.

Mr. Schwartz confirmed that he was shoveling coal that had run out over the coal buggy. He confirmed that Mr. Rothermel pointed out to him that he should keep "his arms and legs inside" while going inside the mine, showed him where the escape route was, and pointed out the mine intercom to him (Tr. 95-96). Although Mr. Schwartz indicated that he had worked at another mine operation for a week prior to his first day of employment with the respondent, there is no evidence or information of record as to the extent of his work at the other facility, nor is there any evidence as to whether the hazards presented at previous place of employment were similar or different from those presented at the respondent's underground mine.

I conclude and find that Inspector Myers' credible and un rebutted testimony supports a reasonable conclusion that as an untrained, inexperienced miner, Mr. Schwartz's presence in the respondent's underground mine without the benefit of the required training exposed to him a reasonable likelihood of serious injury. Under the circumstances, I conclude and find that the inspector's "S&S" finding was reasonable and proper in the circumstances, and IT IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small mine operator and that the civil penalty assessment for the violation will not affect the respondent's ability to continue in business. I adopt these stipulations as my findings and conclusions with respect to these issues.

History of Prior Violations

Exhibit P-14, a computer print-out concerning the respondent's history of assessed violations, reflects that the respondent paid \$144 in civil penalty assessments for four violations issued during the period from November 15, 1986 through November 14, 1988. All of the violations were section 104(a) citations, and the respondent was not previously cited for any training violations. I conclude and find that the respondent has a good compliance record and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

Good Faith Compliance

Mr. Schwartz was immediately removed from the mine and left the property after the citation and order were issued. The inspector terminated the citation after he returned to the mine

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and determined that Mr. Schwartz was no longer employed by the respondent. Absent any evidence to the contrary, I conclude and find that the violation was abated in good faith.

Gravity

In view of my "S&S" findings and conclusions, I conclude and find that the failure by the respondent to train Mr. Schwartz before putting him to work underground constituted a serious violation of the cited standard.

Negligence

Inspector Myers based his "high negligence" finding on the fact that Mr. Randy Rothermel had previously served as a training instructor and should have known that as a newly employed miner, Mr. Schwartz could not go underground prior to receiving the training required by the respondent's approved training plan which was in effect at the time of the inspection. The inspector believed that Mr. Rothermel should have attempted to contact MSHA for assistance, or made other arrangements to train Mr. Schwartz prior to the issuance of the citation and order.

Although I am convinced that Mr. Rothermel was aware of the training requirements, it seems obvious to me from the record in this that there is a serious lack of communication between the Rothermel brothers with respect to their own training programs and plans, as well as their respective authority with regard to the operation of the mine. MSHA's supervisory Inspector Updegrave, who was in contact with Richard Rothermel concerning certain proposed revisions to the training plan, confirmed that Randy Rothermel was not a party to those discussions. Randy Rothermel was apparently oblivious to the fact that his brother had deleted his name as the approved training instructor, and had not included his name as one of the mine operators in MSHA's mine identification papers.

Although I find it difficult to believe that Mr. Randy Rothermel was totally oblivious to the fact that the 1985 mine training plan had been revised and replaced by a new plan which was approved in December, 1987, the testimony of Inspector Myers indicating that the new plan was in an envelope in a desk drawer in the mine office, and that it took some time to find it, and Inspector Updegrave's testimony that the MSHA letter informing the respondent of the new plan was addressed to Richard Rothermel, and that Randy Rothermel was not involved in the changes made in the new plan, lends some credence to Randy Rothermel's plea of ignorance of the new plan. However, given the fact that both Rothermel brothers apparently have an ownership interest in the mine and are equally accountable for the violation, I cannot conclude that the respondent may be absolved from any negligence for the violation. Further, upon review of

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the 1985 and 1987 training plans in question, I find that the only substantial change is the designation of Richard Rothermel, rather than Randy Rothermel, as the approved and qualified training instructor. Both plans require 40 hours of training for new miners with less than 1 year experience during the previous 3 years, and I conclude and find that the respondent knew, or had reason to know, that Mr. Schwartz had to be completely trained before he was allowed to work underground. I reject Randy Rothermel's belated and self-serving explanation that he was training Mr. Schwartz on the very day that the inspector found him underground. Under the circumstances, I conclude and find that the inspector's "high negligence" finding was not unreasonable, and IT IS AFFIRMED.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment of \$300 for the violation which has been affirmed is reasonable and appropriate, and IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$300 for the violation in question. Payment shall be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge