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SOL (MSHA) V. KENT COAL MINING
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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 89-205
A.C. No. 36-07756-03508

v.

Kent No. 55 Mine

KENT COAL MINING COMPANY,
RESPONDENT

DECISION

Appearances: Evert Van Wijk, Esq., U.S. Department of Labor,
Office of the Solicitor, Philadelphia,
Pennsylvania, for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Kent Coal Mining Company (Kent) with a violation of the mandatory standard found at 30 C.F.R. 48.26(a) and proposing a civil penalty of \$1,000 for that violation. The general issue before me is whether Kent violated the cited standard and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Pursuant to notice, a hearing on the merits was held in this matter on January 18, 1990, in Pittsburgh, Pennsylvania. A post-hearing brief was filed by the respondent on March 2, 1990, and the Secretary waived its right to file post-hearing argument by letter dated March 7, 1990. I have considered the entire record of proceedings and the contentions of the parties in making the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. That Kent Mine Number 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.

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2. The Administrative Law Judge has jurisdiction over these proceedings.

3. Citation No. 2894017 and Order No. 2894016 were properly served by a duly authorized representative of the Secretary of Labor on an agent at the Kent Coal Mining Company and may be admitted into evidence for the purpose of establishing due issuance but not for the truth of the matters asserted therein.

4. Kent Coal Mining Company demonstrated good faith in the abatement of the Citation and Order.

5. The assessment of a civil penalty in the proceeding will not affect the Kent Coal Mining Company's ability to continue business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the fact that Kent Coal Mining Company No. 55's annual production is 30,440 tons and the annual production of it and its affiliated companies which are also subsidiaries of the Rochester and Pittsburgh Coal Company is 9,386,168 tons.

7. Fred Albright, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 12, 1980. Prior to becoming an employee of Kent, Mr. Albright had been, since April 12, 1978, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation No. 2894017 on March 10, 1989, he had last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 28, 1988. His job classification was that of dragline oiler.

8. Ronald Boltz, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Boltz had been, since September 5, 1972, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 21, 1988. His job classification was that of a highlift operator.

9. William C. Guntrum, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on April 27, 1982. Prior to becoming an employee of Kent, Mr. Guntrum had been, since September 5, 1972, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received

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annual refresher training pursuant to 30 C.F.R. 48.28 on October 16, 1988. His job classification was that of a dozer operator.

10. Charles D. James, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. James had been, since April 9, 1973, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 21, 1988. His job classification was that of a dozer operator.

11. Charles R. James, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. James had been, since May 21, 1974, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 28, 1988. His job classification was that of a highlift operator.

12. Ronald G. Peiffer, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Peiffer had been, since May 24, 1972, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 28, 1988. His job classification was that of a dragline operator.

13. David A. Scholl, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Scholl had been, since April 12, 1978, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 21, 1988. His job classification was that of a truck operator.

14. James W. Tarr, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Tarr had been, since April 3, 1978 an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received

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annual refresher training pursuant to 30 C.F.R. 48.28 on October 21, 1988. His job classification was that of a truck operator.

15. Gilbert Woodley, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Woodley had been, since June 13, 1974, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 21, 1988. His job classification was that of a dozer operator.

16. Daniel R. Dunlap, Jr., who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 19, 1980. Prior to becoming an employee of Kent, Mr. Dunlap had been, since June 4, 1979, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 21, 1988. His job classification was that of a mechanic.

17. W. R. Shondelmeyer, Jr., who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 12, 1980. Prior to becoming an employee of Kent, Mr. Shondelmeyer had been, since April 17, 1978, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 28, 1988. His job classification was that of a fuel truck operator.

18. Kevin J. Bugghey, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 14, 1982. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 28, 1988. His job classification was that of a serviceman.

19. Galen L. Smith, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Smith had been, since May 22, 1972, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to C.F.R. 48.28 on October 21, 1988. His job classification was that of a highwall miner operator.

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20. Carl A. Smith, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Smith had been, since December 29, 1970, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 28, 1988. His job classification was that of a highwall miner operator.

21. Samuel T. Peace, Jr., who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on September 27, 1979. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 21, 1988. His job classification was that of a serviceman.

22. John E. Valkosky, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on December 3, 1979. Prior to becoming an employee of Kent, Mr. Valkosky had been, since April 19, 1974, an employee of a predecessor surface coal mining company which was acquired by Kent. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 28, 1988. His job classification was that of a fork lift operator.

23. Herman M. Blakley, who was referred to in Citation No. 2894017, became an employee of the Kent Coal Mining Company on May 21, 1984. Prior to the issuance of the Citation, he last received annual refresher training pursuant to 30 C.F.R. 48.28 on October 20, 1988. His job classification was that of a shift foreman.

24. At the time of the issuance of Citation No. 2894017, Edward F. Nett, Jr., who was referred to in Citation No. 2894017, was an employee of Metec, Inc., a contractor at the Kent No. 55 Mine. Prior to the issuance of the Citation, he last received his annual refresher training, pursuant to 30 C.F.R. 48.28, on October 21, 1988.

25. At the time of the issuance of Citation No. 2894017, Vince Henderson, who was referred to in Citation No. 2894017, was an employee of Metec, Inc., a contractor at the Kent No. 55 Mine. Prior to the issuance of the Citation, he last received his annual refresher training, pursuant to 30 C.F.R. 48.28, on October 21, 1988.

26. At the time of the issuance of Citation No. 2894017, Paul Gilbert, who was referred to in Citation No. 2894017, was an

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employee of Metec, Inc., a contractor at the Kent No. 55 Mine. Prior to the issuance of the Citation, he last received his annual refresher training, pursuant to 30 C.F.R. 48.28, on October 28, 1988.

27. At the time of the issuance of Citation No. 2894017, Randall K. Oslonian, who was referred to in Citation No. 2894017, was an employee of Metec, Inc., a contractor at the Kent No. 55 Mine. Prior to the issuance of the Citation, he last received his annual refresher training, pursuant to 30 C.F.R. 48.28, on February 6, 1989.

28. Prior to being assigned to the Kent No. 55 site, the miners who were referred to by name in the Citation had previously worked at other mine sites operated by Kent but having different MSHA identification numbers. They did not receive newly experienced miner training pursuant to 30 C.F.R. 48.26(a) related specifically to this particular mine site prior to commencing work at the Kent No. 55 mine site.

29. The miners referred to by name in the Citation were, as of the date of the Citation, experienced miners as defined in 30 C.F.R. 48.22(b).

DISCUSSION AND FINDINGS

Citation No. 2894017, issued on March 10, 1989, charges a violation of the mandatory standard found at 30 C.F.R. 48.26(a) and alleges:

The following employees of Kent No. 55 mine, Ronald Boltz, Bill Guntrum, David Scholl, Kevin Buggiey, Dan Dunlap, James Tarr, Bill Shondelmeyer, Fred Albright, Sam Peace, Gilbert Woodley, Edward Nett, Jr., Randall Oslonian, Galen Smith, Vince Henderson, Paul Gilbert, John Valkosky, Charles James, Carl Smith, Ronald Peiffer, Charles James and Herman Blakley were working at the 001 pit without first being given training under 48.26(a) 30 C.F.R. The employees were transferred to this mine approximately three weeks ago and have had annual training under ID No. 36-02854 but, no such training was provided for this mine site. A 1045/order (No. 2894016) has been issued in conjunction with this citation.

At the hearing and on the record, the above citation was amended to allege a non-S&S violation and also to delete the name of Herman Blakley, who was a supervisor at the mine. It is MSHA policy that supervisors are not required to undergo the training requirements of Part 48.

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That amendment left twenty miners named in the citation. All are experienced miners. Sixteen of them are Kent employees of relatively long standing. Most have been with Kent for over ten years. The other four named miners are employees of Metec, Inc., a contractor hired by Kent to assist in the operation of the highwall mining machine leased from Metec. These four miners had worked at Kent locations for approximately one year. They had most recently been assigned to the Brick Church site along with the majority of the Kent employees cited herein.

Kent operates a number of relatively small surface mining sites under various MSHA ID numbers. In early 1989, February or March, Kent began to move some of its mining equipment and miners from its Iselin 10 and Brick Church sites to its Kent No. 55 site. The MSHA ID number for this site (No. 55) had previously been assigned to another site approximately 2000 feet away known as the Kent No. 56 Mine.

The miners at the Kent No. 55 site were operating the same equipment that they operated at the sites where they had previously been assigned and performing the same sort of tasks. The Brick Church and Iselin 10 sites were similar to the Kent No. 55 site. All had highwalls; the ground control plans and communications set-ups were similar, and the safety procedures were the same. Furthermore, they worked for the same Kent supervisory personnel that they had worked for at the previous mine sites.

When a miner was assigned to a new work location, he would receive instructions from his supervisor as to his duties when he arrived at the site, but he was not formally given the newly employed experienced miner training set out in 30 C.F.R. 48.26(a).

Inspector Kopsic based the citation he issued on an unwritten MSHA policy which mandates newly employed experienced miner training whenever a miner transfers from one mine site to another if the MSHA mine identification numbers are different. The critical feature of this policy is the mine identification number. If the mine site has a different ID number than the mine site where the miner was previously assigned to work, even if for the same employer, this triggers a requirement for newly employed experienced miner training. This is the case even if the two mines are right next to each other. On the other hand, an operator can have as many different mines as he wants under the same ID number, miles apart from each other, as long as all the mines are in the same county and inspected out of the same MSHA field office. In the latter case, the employer is free to

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transfer his workers to and among his various sites without concerning himself with the newly employed experienced miner training.

Kent's position in this case is that the twenty miners at issue here are not newly employed experienced miners required to be trained under 30 C.F.R. 48.26(a) because they did not change employers when they changed job sites. "Newly employed" is not specifically defined in the regulations and Kent urges that a commonly accepted definition of the term be used. That is, that a "newly employed" person is a "newly hired" person, not an employee who merely shifts his worksite, but does not change his employer.

As between the two interpretations, Kent's is clearly the more reasonable. It gives effect to the usual meaning of the words "newly employed". Moreover, the Secretary's interpretation as implemented by its unwritten policy, creates a distinction based solely on mine ID numbers which is arbitrary at best. Using that interpretation, if the three Kent surface mine sites mentioned herein were located in the same county in Pennsylvania and were inspected out of the same MSHA field office, and if the operator requested it, they could be assigned the same Mine ID number and no section 48.26(a) training would be required in this instance. However, in this situation, the operator requested a different ID number for this particular site, and the training is therefore required. This policy/interpretation lacks any rational basis in my opinion.

Therefore, I find that the Secretary's policy in this case is not entitled to deference. To begin with, it just doesn't make any common sense as a practical matter. If a miner can be transferred by his employer from one job site to another, ten or fifteen miles away, and be required to undergo section 48.26(a) training depending only on whether or not his employer put the same mine ID number on the second worksite, that is nonsense. It also has nothing to do with being newly employed. Secondly, the "policy" is unwritten. It is not included in the 1988 Program Policy Manual which purports to contain all MSHA policies concerning training and retraining of miners under Part 48. Accordingly, even assuming this interpretation of the standard or "policy" exists, there apparently was no notice of it to the public or more specifically to the mine operators.

In *Secretary v. Garden Creek Pocahontas Co.*, 11 FMSHRC 2148 (1989), the Commission addressed a particular interpretation of the Secretary that was not contained within the plain language of the standard in the following language:

A regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required.

11 FMSHRC at 2152.

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In this case, the interpretation of "newly employed experienced miner" espoused by the Secretary, fails to provide any reasonable notice of the conduct required and, for that reason also should be rejected.

The miners involved in this case were all experienced miners and they all had current annual refresher training under 30 C.F.R. Part 48. I conclude that this is all that Part 48 requires given the facts of this case. No violation of 30 C.F.R. 48.26(a) existed because none of these miners was a newly employed miner by virtue of the fact that his employer moved him from Iselin 10 or Brick Church to Kent No. 55. Nothing concerning their employment status changed as a result of this transfer.

ORDER

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

Citation No. 2894017 IS VACATED, and no penalty may be assessed.

Roy J. Maurer
Administrative Law Judge