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SOL (MSHA) v. ROBERT ZIEGLER
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

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

v.

ROBERT ZIEGLER, EMPLOYED BY
ALAMOSA MINING, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 90-201
A.C. No. 46-07527-03515 A

Sparky No. 2 Mine

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor
U.S. Department of Labor, Arlington, Virginia
for the Petitioner;
Forrest H. Roles, Esq., Smith, Heenan and Althen,
Charleston, West Virginia 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. et seq., the "Act." (Footnote 1) The Secretary charges herein that Robert Ziegler, as an agent of a corporate mine operator, namely Alamosa Mining, Inc., (Alamosa) knowingly authorized, ordered, or carried out a violation of the mandatory safety standard at 30 C.F.R. 75.303(a), by the corporate operator as alleged in Order No. 3334178.

Order No. 3334178 reads in relevant part as follows:

Management failed to enter (3) obvious violations on the main belt haulage system in the mine examiner's book kept on the surface on 08-21-89. The belt was examined by a certified fire boss representing mine management. These conditions was [sic] known or should have been known. (a proper preshift examination was not made)

The cited standard, 30 C.F.R. 75.303(a), reads as follows:

Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coals is carried shall be examined after each coalproducing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the

purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Ziegler argues in his post hearing brief that certain testimony of an MSHA inspector regarding the absence of entries in the mine examiner book (also known as the fire boss book) was inadmissible as contrary to the "Best Evidence Rule" as incorporated in Rule 1002, Federal Rules of Evidence. Commission Rule 60(a), 29 C.F.R. 2700.60(a), governs the admissibility of evidence in Commission proceedings however and that rule states that "[r]elevant evidence that is not unduly repetitious or cumulative is admissible". There is no dispute that the challenged testimony consisted of relevant evidence and that it was neither repetitious nor cumulative. Accordingly it was properly admitted at trial. It is noted moreover that Federal Rule 1002 is not in any event applicable to testimony that books, or records have been examined and found not to contain any reference to a designated matter. 11 Moore's Federal Practice 1002.01-.02.

Ziegler also argues in his brief that the evidence does not support the charges that the corporate operator was named "Alamosa Mining, Inc." as alleged in the Amended Petition. To the contrary however, the Legal Identity Report (Exhibit G-1), required to be filed by the mine operator, clearly shows the identity of the operator to be "Alamosa Mining, Inc." The proof therefore is clearly sufficient to support the allegations.

The undisputed evidence of record also establishes the existence of the cited violation. Jerry Sumpter, an inspector for the Federal Mine Safety and Health Administration, testified without contradiction that he was inspecting the Sparky No. 2 Mine on August 21, 1989, when he observed the existence of what he deemed to be "obvious" violations of mandatory standards that had not been reported before the shift at issue in the mine examiner's book for preshift examinations.

More specifically Sumpter testified that he arrived at the subject mine at about 7:00 a.m. and, observed that the belt was

running but the miners had not yet proceeded underground. He examined the mine examiner's books between 7:00 and 8:00 a.m., and found that Ziegler, who was the mine superintendent, had countersigned the examiner's book for this oncoming shift but no conditions were reported on the page corresponding to that particular date and shift.

The miners proceeded underground at around 8:00 a.m. and Sumpter followed shortly thereafter. As Sumpter was travelling along the belt haulage line with Ziegler he observed "very black" coal spillage on the structure and along the side some 24 inches wide, 2 to 4 inches deep and extending for about 1,700 feet. He also observed coal dust lying on top of rock dust over a linear distance of 600 feet.

Sumpter also found a violation of Alamosa's ventilation system and methane dust control plan under the mandatory standard at 30 C.F.R. 75.316. In particular, Sumpter noted that at the tail piece the check curtain was torn down and lying on the tight side of the belt haulage allowing air coming up the belt haulage to be directed toward the working faces where miners were then inby working.

Finally Sumpter testified concerning the existence of what he deemed to be a violation of the standard at 30 C.F.R. 75.1100-2(b) in that a 200 foot section of waterline was not provided for the section tail piece along the belt haulage system and the water was turned off at the main water line valve.

It is undisputed that the violative coal dust conditions had existed for a week and, that the box curtain had been down and that the water line had been absent since the last move of the tail piece. Sumpter testified that Ziegler admitted that he was aware that the water line was too short and that he did not have the manpower to move it. Sumpter examined the book entries through the preceding August 19, and found no reports of any of the three violative conditions. He also found that Ziegler had signed the books as mine examiner. Sumpter further noted that there were no initials, dates and times of preshift examinations found underground as required by the cited standard. In this regard Ziegler stated that he "must have forgotten" to do this.

According to Alamosa President Harry Cooke, Jr., Ziegler was superintendent of the subject mine around the period August 21, 1989, and had complete responsibility for its operations. Ziegler also had the authority to keep necessary supplies and, if Cooke was not present, Ziegler had the authority to order necessary supplies.

Mr. Ziegler testified in defense that he had been a supervisor in various mining operations for about 25 years and during that time only one person suffered any lost-time injury

while working under his supervision. Ziegler also testified that his wife had recently died of cancer and that he owed approximately \$8,000 in hospital bills as a result of his wife's illness. He testified that he owns his home, a 1979 car, a 1979 truck and no other significant property. He also testified that he was not employed and had last worked in June 1990. Ziegler further testified that a "doctor's office" found that he had "black lung".

The evidence in this case clearly supports the charges that the Respondent, Robert Ziegler, indeed was an agent of a corporate mine operator and that he knowingly carried out a violation a mandatory safety standard (i.e. the standard at 30 C.F.R. 75.303(a)) by signing the preshift examiner's book on August 21, 1989, while knowing of the existence of at least one violative condition required to have been reported (i.e. the insufficient water line) and by failing to report conditions that were so obvious that he should have known of their existence and should therefore have reported such other conditions, i.e. excessive coal dust and the downed curtain.

The Commission defined the term "knowingly," in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

"Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.
3 FMSHRC 16.

The facts of this case clearly meet this definition. The violation was also serious in that by failing to report such conditions, the miners were permitted to work in the presence of at least three distinct hazardous conditions any one of which, according to the undisputed evidence, could have led to reasonably serious injuries. The evidence suggests that Ziegler demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. There is no evidence that he has been charged with any previous violations under

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section 110(c) of the Act.

The remaining criteria under section 110(i) of the Act i.e. the size of the business of the operator charged and "the effect on the operator's ability to continue in business" are of questionable relevance to these proceedings under section 110(c). However I find that the ability of the individual Respondent under section 110(c) to pay a civil penalty may appropriately be considered in determining the amount of the penalty. In this case it is indeed undisputed that the Respondent is unemployed and has been unemployed since June 1990, that he has significant debts from the recent hospitalization of his now deceased wife and that his significant assets appear to be limited to his house and two 1979 vehicles. Under the circumstances I find that a civil penalty of \$100 is appropriate.

ORDER

Robert Ziegler is directed to pay a civil penalty of \$100 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

1. Section 110(c) of the Act reads as follows:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (1) or section 105(c), 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).