

CCASE:
SOL (MSHA) V. GARRATT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

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

v.

GARRATT COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 91-27-M
A.C. No. 02-02497-05502

Lake Juniper

Docket No. WEST 91-170-M
A.C. No. 02-02497-05503

Lake Juniper (Portable)

DECISION

Appearances: Jan M. Coplick, Esq., Office of the Solicitor, U.S.
Department of Labor, San Francisco, California,
for Petitioner;
Mr. Richard L. Neal, Owner, GARRATT COMPANY, King-
man, Arizona,
pro se.

Before: Judge Morris

These cases are civil penalty proceedings initiated by
Petitioner against Respondent pursuant to the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. 801, et seq. (the "Act"). The
civil penalties sought here are for violations of the Act as well
as violations of mandatory regulations promulgated pursuant to
the Act.

A hearing on the merits was held in Kingman, Arizona, on
April 21, 1992. The parties filed post-trial briefs.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, reliable,
and probative evidence establishes the following Findings of
Fact:

FINDINGS OF FACT

1. COVY LUMPKINS, JR., now retired, was a federal mine
inspector for 14 years. (Tr. 12-14).

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2. Mr. Lumpkins is an individual experienced in mining. (Tr. 14).

3. Mr. Lumpkins' initial inspection of the Garrett Company was a C.A.V. complimentary assistance visit. (Tr. 16).

4. In this visit to the site, Mr. Lumpkins explained the regulations to Mr. Neal.

5. Mr. Neal's property has a double gate. There was no buzzer, guard, or guard shack at the entrance.

6. Since the gate was unlocked, Mr. Lumpkins drove in to the plant.

7. Mr. Lumpkins keeps first aid material as well as safety equipment in the car. (Tr. 20).

8. If there is no guard, the inspector will usually go directly to the mine or safety office. (Tr. 20).

9. Mr. Neal's company did not have a guard or a safety office. (Tr. 20).

10. Subsequently, on his first regular inspection no citations were issued. Mr. Neal was very cooperative and he was in the process of correcting the violations previously noted at the time of the C.A.V. inspection. (Tr. 21).

11. The first regular MSHA inspection was in January 1990. (Tr. 23).

12. Mr. Lumpkins testified he would not walk under any conveyor belts if that would create a hazardous situation. (Tr. 24).

13. It was at the first inspection when the Inspector moved his car at Mr. Neal's request. After the request, he parked opposite the cleanout pit. (Tr. 25, 26).

14. The place where he parked was out of the way of the machinery. (Tr. 25). Mr. Lumpkins parked where Mr. Neal designated and he doesn't recall Mr. Neal's correcting him after that. (Tr. 25, 63).

15. In the course of the inspections, Mr. Neal never again complained concerning the place where the Inspector parked his car. (Tr. 26).

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16. In April 1990, the second regular MSHA inspection resulted in the issuance of three citations. (Tr. 26, 27).

Citation No. 3600335

17. Citation No. 3600335(FOOTNOTE 1) was issued when the Inspector observed the electric power cables were not properly bushed and connected at the switch station. (Tr. 28).

18. The Inspector testified as to gravity, likelihood of an accident, and severity of any injury (Tr. 28-30) and the operator's negligence.

19. The Inspector considered it a non-S&S violation. The cables themselves were well insulated. (Tr. 28, 29).

DISCUSSION

I agree, as Mr. Neal's brief states, that this condition was abated before the plant was operated. However, the Inspector's uncontroverted testimony establishes a violation. Abatement of a violative condition does not excuse the original violation.

Citation No. 3600335 should be affirmed.

20. Citation 3600336 (FOOTNOTE 2) was issued when the Inspector observed there was no cover for the junction box on an electric motor. The junction box was 8 or 10 feet off the ground. (Tr. 31, 57). If a person was servicing the motor, he could contact the box. (Tr. 57).

DISCUSSION

The uncontroverted testimony of Inspector Lumpkins establishes the operator violated the regulation. Mr. Neal did not testify, but in his post-trial brief he states that no one saw the cover fall off the electrical box.

Assuming there was evidence to support this view, it cannot prevail as a defense. It is well established that the Mine Act imposes liability without fault. See *Asarco, Inc. - Northwestern Mining v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989 at 1197-1198); 8 FMSHRC 1632 (1986), *Western Fuels Utah, Inc. v. FMSHRC*, 870 F.2d 711 (D.C. Cir. 1989).

21. A similar sort of penalty rating on the same basis as discussed in the prior citation would result in a low civil penalty. (Tr. 31).

Citation No. 3600336 should be affirmed.

Citation No. 3600339

22. Citation No. 3600339 (FOOTNOTE 3) was issued when the Inspector found the automatic reverse alarm was not working on the operator's front-end loader. (Tr. 32). Mr. Neal stated the buzzer had been working the morning of the inspection. (Tr. 60).

23. The failure to have an alarm on the vehicle could result in someone being killed or injured when the vehicle backs up. (Tr. 32).

24. The Inspector's penalty factors would result in a low penalty. (Tr. 33).

25. Until this point in time, Mr. Neal's and Inspector Lumpkins' relationship was fairly cordial; Mr. Neal never expressed any concern that the Inspector was creating a safety hazard. (Tr. 33).

DISCUSSION

Mr. Neal did not testify in these proceedings and his statement that he was unaware of the failure of the signal is contained in his post-trial brief. Even so, as previously stated, an operator's failure to know of a violative condition does not relieve him of liability under the Mine Act.

Citation No. 3600339 should be affirmed.

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Citation No. 3600491

26. Citation No. 3600491(FOOTNOTE 4) was issued on May 22, 1990, when Inspector Lumpkins conducted a follow-up type inspection on the operator's property. (Tr. 38).

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27. Mr. Lumpkins found the prior violations had been corrected. (Tr. 35).

28. Mr. Campa, Mr. Neal's employee, did not express any concern that the Inspector was violating any safety rules or creating any safety hazards. (Tr. 35).

29. Mr. Neal appeared at the job site and "jumped into the middle" of the Inspector. Mr. Neal said the Inspector was trespassing and that he had no business on the property. (Tr. 35, 36).

30. The Inspector tried to explain the right of entry to Mr. Neal. He further tried to show him his photo identification. (Tr. 36).

31. The identification shows that Mr. Lumpkins is the authorized representative of the Secretary of Labor. (Tr. 37).

32. After their confrontation, Mr. Lumpkins stood by his car until the deputy sheriff arrived. Upon his arrival the Inspector showed him his I.D. and Section 103(a) of the Mine Act. (Tr. 37, 38).

33. Sergeant Hayes of the sheriff's office arrived. He said it was necessary for the parties to appear before the Justice of the Peace in Kingman, Arizona. (Tr. 40).

34. Mr. Lumpkins identified a document shown as a "Summons" and a "Criminal Complaint." Also attached was "A Motion to Dismiss for Lack of Evidence." These documents were served by mail on Mr. Lumpkins. (Tr. 44, Ex. P-1).

35. Mr. Neal did most of the talking at the site. He claimed the Inspector was trespassing and that he had no right to be on the operator's property. (Tr. 40).

36. The Judge in Kingman wanted Mr. Neal and the Inspector to resolve their differences privately, but Mr. Neal refused. (Tr. 41).

37. The Court bailiffs finally advised Mr. Lumpkins that he was free to leave the Court facilities.

38. The following day, Mr. Lumpkins communicated with his supervisor at the MSHA office in Phoenix. (Tr. 46).

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39. The Sheriff's department set up a procedure to assist the Inspector in serving a denial of entry Citation on Mr. Neal. (Tr. 49).

40. Sergeant Hayes accompanied Mr. Lumpkins when he returned to Mr. Neal's property. (Tr. 49).

41. The Inspector parked his automobile in the area where Sergeant Hayes parked. (Tr. 50).

42. The Citation on May 24 was for a denial of entry that occurred on May 22. (Tr. 50).

43. Mr. Neal did not comply and in the 30 minutes given to him to abate, he remarked to Sergeant Hayes that he was afraid Mr. Lumpkins was going to hurt himself, but no other comments were made why he had refused entry. (Tr. 53).

44. After the 30-minute period expired, Deputy Hayes handed the denial of entry citation to Mr. Neal because he refused to accept it from Mr. Lumpkins. (Tr. 54).

45. Mr. Lumpkins recalled that Mr. Neal told him the safety policy of the plant was not to get within 25 feet of operating belts. However, Mr. Lumpkins doesn't recall Mr. Neal's shutting down at any time when the Inspector came on the property. (Tr. 63).

46. The plant was shut down for repair or servicing when Mr. Lumpkins inspected. It seemed like it was normally shut down when the Inspector entered the property. (Tr. 63).

47. An MSHA inspector is not supposed to jeopardize himself during an inspection. (Tr. 63). If he did so, the plant safety manager could notify Mr. Lumpkins' supervisor. (Tr. 64).

48. Garratt Company is a small operation, a simple screening plant with three belts. (Tr. 66).

49. Jack Sepulveda, an MSHA federal mine inspector, was Mr. Lumpkins' acting supervisor. (Tr. 71). Mr. Lumpkins accompanied Mr. Sepulveda on the Wesapi Mining property. (Tr. 71).

50. A business card submitted in evidence indicates William C. Vanderwall is an Arizona State Mine Inspector. (Tr. 74; Ex. R-1).

51. Larry Nelson is Mr. Lumpkins' supervisor. David Park is MSHA's District Manager. (Tr. 75).

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52. Mr. Neal told Mr. Lumpkins that he didn't object to the plant's being inspected but the Inspector would have to get Mr. Neal's permission before entering the property. (Tr. 80). Mr. Lumpkins said he could not accept such an arrangement. (Tr. 79, 80).

53. In the Inspector's opinion, signing in at a mine gate is not a pre-condition of entry. (Tr. 80, 81).

54. Other mining operations have designated parking areas. (Tr. 82).

55. Mr. Lumpkins recalled Officer Hayes' saying that Mr. Neal had rescinded his position of criminal trespass and that Mr. Lumpkins could inspect the plant. (Tr. 83). Mr. Lumpkins nevertheless wrote the restraint of entry because Mr. Neal required prior notice of any inspection. (Tr. 83, 84).

56. In July, after the previously discussed inspections, Mr. Lumpkins and Jack Sepulveda made a non-inspection visit to Mr. Neal's property. At that time Mr. Neal again stated Mr. Lumpkins could not come on the property unless his conditions stated earlier were met. (Tr. 87, 89).

57. The conditions sought to be imposed by Mr. Neal were that the Inspector be accompanied by a Deputy Sheriff, that Mr. Neal be notified in advance, and that he consent to the entry. (Tr. 90).

58. LEE DURWOOD HAYES, as an employee of the Mojave County Sheriff's office, accompanied Mr. Lumpkins to Mr. Neal's small screening plant. (Tr. 93, 94).

59. Sergeant Hayes didn't understand that Mr. Neal had a civil action against Mr. Lumpkins. (Tr. 94).

60. Sergeant Hayes emphasized he was on the Garrett property only to "keep the peace." (Tr. 94).

61. Mr. Neal claimed the Inspector and the Sergeant were guilty of criminal trespass. However, he did not prevent the two men from walking around the property. (Tr. 95).

62. Mr. Neal stated that the local Kingman, Arizona, Judge should rule on whether Mr. Lumpkins had the right to enter the property. (Tr. 95, 96).

63. Sergeant Hayes heard Mr. Neal explain to Mr. Lumpkins that he wasn't restraining him and he was free to inspect the

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plant. However, it seemed to Sergeant Hayes that the whole problem was that Mr. Lumpkins was to get permission from Mr. Neal to enter the property. (Tr. 96).

64. Sergeant Hayes recalled that Mr. Neal told Mr. Lumpkins he could go ahead and conduct an inspection. (Tr. 97).

65. Sergeant Hayes did not recall any physical restraints or conditions put on Mr. Lumpkins. (Tr. 98).

66. During the 30-minute abatement period, the parties involved stood by the police car. (Tr. 99).

67. Sergeant Hayes saw no physical or verbal abuse while he was on the site. (Tr. 99).

68. Sergeant Hayes described Mr. Neal as adamant that Mr. Lumpkins was trespassing. He kept insisting he had to return to the gate and get Mr. Neal's permission. (Tr. 100-101).

69. Mr. Neal told Sergeant Hayes that Mr. Lumpkins was a safety hazard and that he had parked his car in an improper place. (Tr. 103).

70. Sergeant Hayes identified an audiotape as well as a transcription of his statement to the Secretary's counsel. (Tr. 104-107; Ex. P-2, P-2-A). The Judge reviewed the tape [Ex. P-2(a)] and, while there are frequent background noises, the transcription (Ex. P-2) is reasonably accurate.

71. Sergeant Hayes believed the proper course of action was for Mr. Neal to file a complaint with the Arizona Court. (Tr. 115-116).

72. The declaration of Jack Sepulveda was received in evidence by agreement of the parties.

On July 19, 1990, Mr. Sepulveda inspected the Wesapi Portable Mine which is located on the property of Mr. Neal. Mr. Neal advised Mr. Sepulveda that Mr. Lumpkins could not inspect the mine unless he was accompanied by a deputy sheriff. His reason was that he was afraid Mr. Lumpkins might be injured. If he walked under a conveyor belt, rocks could fall on him. [Tr. 121; Ex. P-3, P-3(a)]

DISCUSSION

Mr. Neal in his post-trial brief, initially asserts that Mr. Lumpkins knew the company's parking and safety rules; nevertheless, he failed to follow them. Specifically, Mr. Neal cites

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the transcript at page 75, lines 10-12, as well as the testimony of witnesses Campa, Riccardi, and Hanson.

The portion of the transcript apparently relied on by Mr. Neal reads:

Q. Did Larry Nelson ever discuss the fact that you may have been parking your vehicle in a hazardous position and entering under dangerous belts?

A. No. The only thing I remember is the parking business, and you told me where you wanted me to park, and that's where I parked. And--

Q. Okay, but Larry Nelson never discussed any of that with you, right?

A. Offhand I can't remember. He could have, but I, I don't recall.

(Tr. 75, lines 7-16).

I am aware of the testimony of Mr. Neal's witnesses.

SHANE CAMPA, a loader operator, testified he observed Mr. Lumpkins park behind the loader. (Tr. 147, 149). Further, more than once he saw Mr. Lumpkin walk under the feeder belt. (Tr. 150).

RICHARD S. RICCARDI, a loader and screening plant operator, on one occasion observed Mr. Lumpkins park his car in the line of travel of the loader. Further, on one occasion he observed Mr. Lumpkins walk under the No. 1 feeder belt which carries heavy rock material. (Tr. 131).

LLEWELLYN HENRY HANSON, experienced in the operation of heavy equipment, discussed with Jack Sepulveda that the Inspector was parking his vehicle in a hazardous location. Further, he could be struck by rocks when walking under the conveyor belts. (Tr. 166).

Inspector Lumpkins also stated he was nearing retirement and was concerned he would lose his job. (Tr. 167, 170).

The principal focus of Mr. Neal's evidence and arguments are directed at the activities of Inspector Lumpkins. However, that evidence and arguments are not relevant to the denial of entry Citation.

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The right of entry is provided by the Mine Act itself. Section 103(a) alleged in the Citation to have been violated here by the operator in its pertinent part provides:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines . . . In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided . . . [and the authorized representatives] shall have a right of entry to, upon, or through any . . . mine.

The U.S. Supreme Court, in construing the Mine Act, has explicitly recognized the fundamental importance of the right of entry provisions, as discussed in the case of *Donovan v. Dewey*, 452 U.S. 593, 69 L.Ed.2d 262 (1981)). In *Dewey*, the Supreme Court stated that:

. . . Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

See also *Tracey & Partners, et al.*, 11 FMSHRC 1457 (August 1989), wherein the Commission held that Section 103(a) of the Mine Act confers on MSHA a broad right of entry to mines for the purposes of inspection and investigation. (11 FMSHRC at 1461).

Mr. Neal, in his brief, states that at no time did he stop the Inspector from entering the property and performing his inspection. If the evidence supports Mr. Neal, the Citation should be vacated.

The issuance of a criminal trespass charge on the complaint of Mr. Neal against the MSHA Inspector constituted, as a matter of law, a restraint of the Inspector from entering the mine property. (See Ex. P-1). It is further uncontroverted that Mr. Neal's restraint conditions were that the Inspector be accompanied by the deputy sheriff, that Mr. Neal be advised in advance, and that he consent to the entry. (Tr. 90).

Mr. Neal also insisted that the Inspector return to the plant entrance and request his permission to conduct an inspection. In effect, Mr. Neal claims he is entitled to prior notice of the Inspector's visit. However, such prior notice would run directly contrary to Section 103(a), which specifically states that "no advance notice of an inspection shall be provided to any person. . . ."

FURTHER DISCUSSION

It was also claimed at the hearing that an inspection of the "Wesapi" Mine (apparently located on Mr. Neal's property) was more stringent than the instant inspection. However, Mr. Neal did not raise this issue in his brief and the evidence (Ex. P-4) shows the "Wesapi" inspection was at least equally as stringent as the inspection in contest.

For the foregoing reasons, Citation No. 3600491 should be affirmed.

CIVIL PENALTIES

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Mine Act.

The evidence establishes that Respondent is a small operator and the penalties contained in the order of this decision are appropriate in relation to the company's size.

The record does not present any information concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I find the payment of penalties will not cause the Respondent to discontinue in business. Buffalo Mining Co., 2 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 226 (1973).

The operator was negligent in that the first three violative conditions were open and obvious. The company was further negligent as to the 103(a) Citation, inasmuch as it should have known of the Inspector's right of entry.

There was no evidence showing any adverse prior violations.

I agree with the Inspector's evaluation that the gravity as to the first three violations was low. However, the right of entry is a Keystone to the Mine Act. Accordingly, I consider the denial of that right to present a situation of high gravity.

The operator showed statutory good faith in abating the four Citations.

On balance, I believe the penalties assessed in the order of this decision are appropriate.

Accordingly, I enter the following:

ORDER

1. Citation No. 3600335 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

2. Citation No. 3600336 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

3. Citation No. 3600339 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

4. Citation No. 3600491 is AFFIRMED and a civil penalty of \$250 is ASSESSED.

John J. Morris
Administrative Law Judge

FOOTNOTES START HERE-:

1. This Citation alleges Respondent violated 30 C.F.R. 56.12008. The regulation provides as follows:

56.12008 Insulation and fittings for power-wires and cables.

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

2. This Citation alleges Respondent violated 30 C.F.R. 56.12032 which provides as follows

56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and Junction boxes shall be kept in place at all times except during testing or repairs.

3. This Citation alleges 30 C.F.R. 56.14132(a) which provides as follows:

56.14132 Horns and backup alarms.

(a) Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

4. This Citation alleges Respondent violated Section 103(a) of the Mine Act which provides as follows:

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

Sec. 103. (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.