CCASE:
MSHA V. DAVIS SHOULDERS
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-17
	:	A.C. No. 15-13920-03720-A
v.	:	Pyro No. 9 Wheatcroft
DAVIS A. SHOULDERS EMPLOYED BY PYRO MINING CO., Respondent	:	

DECISION

Appearances: Steve D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Flem Gordon, Esq., P.S.C., Madisonville, Kentucky, for Respondent.

Before: Judge Barbour

This civil penalty proceeding was initiated by the Secretary of Labor ("Secretary") against Davis A. Shoulders pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.(the "Act").(Footnote 1) The Secretary charges, inter alia, that at all times relevant to this matter, Shoulders was employed by Pyro Mining Company ("Pyro") as the chief electrician at Pyro No. 9 Wheatcroft Mine and that on October 26, 1990, he was acting as an agent of corporate operator Pyro when he knowingly authorized, ordered or carried out a violation of 30 C.F.R. 75.512, a violation for which Pyro was cited.

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1 Section 110(c) of the Act states:

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 (a) 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 subsections (a) and (d).

30 U.S.C. 820(c)

The Secretary proposes that a civil penalty of $1,000 be assessed against Shoulders for the knowing violation. Shoulders generally denies the Secretary's allegations.

Following the filing of the petition, the Secretary moved to stay the matter, asserting that an ongoing criminal investigation of Pyro and several employees at the mine by the U.S. Department of Justice warranted deferring the civil penalty proceeding until the Department determined whether to bring criminal charges against any individual involved in the civil penalty proceeding. Shoulders did not oppose a stay, and the Secretary's motion was granted. Subsequently, the stay was dissolved upon the Secretary's assertion that the investigation no longer overlapped with conditions at issue in the civil penalty proceeding, and the matter was scheduled to be heard on December 1, 1992, in Nashville, Tennessee.

Counsel for Shoulders then moved for summary judgement, asserting as uncontroverted fact that on October 26, 1990, Pyro was not a corporate entity but was instead a partnership. Counsel attached to the motion a copy of a Statement of Assumed Name filed on January 27, 1982, with the Secretary of State of the Commonwealth of Kentucky. The document states that W. K. Y. Mining (Pyro) Inc., and Costain Mining (Pyro) Inc., exist as a general partnership in the State of Illinois and intend to conduct and transact business in Kentucky under the assumed name of Pyro Mining Company. Because Section 110(c) subjects only corporate agents to lability, counsel for Shoulders moved that the case be dismissed. Motion for Summary Decision 1-3.

The Secretary opposes the motion. Counsel for the Secretary contends that while Section 110(c) contemplates liability only for agents of "corporate operators," Shoulders is not entitled to summary judgement since Shoulders "was employed by a corporate operator on the date the alleged violation occurred." Br. in Op. to Resp's. Mot. for Sum. Judg't. 2. The essence of the Secretary's position is that:

> Pyro Mining Company is the product of two corporations, W. K. Y Mining (Pyro) Inc., and Costain Mining (Pyro) Inc., that apparently formed a "general partnership." Thus, the issue is not whether an employee of a non-corporate entity can be subject to 110(c) liability, but whether a corporation can exonerate its agents from the responsibility that Congress intended then to shoulder simply by entering into partnership with another corporation. Affirming this proposition would create a result completely contrary to [the] language and the spirit of

> the Act. . . . Agents of an entity created and controlled by two or more corporations are agents of a "corporate operator."

Id. 3.

REQUIREMENTS FOR SUMMARY DECISION

Commission Rule 64(b) is clear. 29 C.F.R. 2700.64(b). It states that, "A motion for summary decision shall be granted only if the entire record, including the pleading, depositions, answers to interrogatories, admissions, and affidavits shows:
(1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law."(Footnote 2) Id. As the Commission has pointed out, summary decision is an extraordinary procedure and must be entered with care, for it has the potential, if erroneously invoked, of denying a litigant the right to be heard. Thus, it may only be entered when there is no genuine dispute as to material facts and when the party in whose favor it is entered is entitled to summary decision as a matter of law. Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981). Here, the burden is on Shoulders, as the moving party, to establish his right to summary decision, and I conclude that Shoulders has met that burden.

RATIONALE

The language of Section 110(c) is unambiguous in imposing liability upon "corporate operators" and upon "any director, officer, or agent of such corporation" (emphasis added). The Secretary does not dispute that Pyro is a general partnership composed of two corporations.(Footnote 3) However, the Secretary's position

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2 Commission Rule 64(a) provides that a motion for summary decision may be filed "at any time after commencement of a proceeding and before scheduling of a hearing on the merits". 29 C.F.R. 2700.64(a). Although, Shoulders' motion was filed out of time in that a hearing had been scheduled prior to its submission, for the reasons stated in this decision it would make a little sense to proceed with the scheduled hearing.

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3 Indeed, there is no factual dispute in this case. The parties have stipulated as follows:

(1) Pyro Mining Company was a general partnership composed of two corporations, W. K. Y. Mining (Pyro), Inc. and Costain Mining (Pyro), Inc.;

(2) Pyro Mining Company was a general partnership pursuant to the laws of the State of Illinois;

(3) Pyro Mining Company was recognized and authorized to do business in the Commonwealth of Kentucky as a general partnership;

is that Pyro, as a partnership entity composed of two corporations, has a "corporate nature" and that Shoulders was thus the employee of a "corporate operator." Id. 5 In short, the Secretary argues that because Pyro's business arrangement is much closer to that of a traditional corporation than to that of

3(...continued)
(4) Pyro Mining Company was not incorporated in any jurisdiction;

(5) The Uniform Partnership Act had been adopted in both the State of Illinois and the Commonwealth of Kentucky;

(6) Pyro Mining Company was authorized to do business as a general partnership in the Commonwealth of Kentucky and operated in good standing within the Commonwealth;

(7) W. K. Y. Mining (Pyro), Inc., had its primary corporate offices at 653 South Hebron Avenue, Evansville, Indiana;

(8) Costain Mining (Pyro), Inc., had its principal corporate offices at 653 South Hebron Avenue, Evansville, Indiana;

(9) Pyro Mining Company operated the Pyro No. 9 Wheatcroft Mine, Mine I.D. No. 15-13920;

(10) Respondent, Davis A. Shoulders, was an employee of Pyro Mining Company, a general partnership;

(11) The year in which the violation was issued, the Pyro No. 9 Wheatcroft Mine produced approximately 2,651,687 tons of coal per year;

(12) The year in which the violation was issued, approximately 350 employees were employed at the Pyro No. 9 Wheatcroft Mine;

(13) Respondent, Davis Shoulders, worked at the Pyro No. 9 Wheatcroft Mine;

(14) On October 29, 1990, Mr. Curtis Harte, MSHA Inspector and authorized representative of the Secretary of Labor, issued a Section 104(d)(2) order pursuant to the Federal Mine Safety Health Act of 1977 and the order issued is Number 3551162;

(15) The order charged that Pyro Mining Company violated Section 30 C.F.R. 75.512, an alleged electrical hazardous condition;

(16) On July 10, 1991, and after an investigation, the Mine Safety & Health Administration assessed a $1,000 penalty against Respondent Davis Shoulders, alleging that Respondent was an agent of a corporate operator, that he knew or should have known of the violative condition cited in Order No. 3551162, and pursuant to Section 110(c) of the Act, he would be held personally liable for the violation cited in Order No. 3551162;

(17) The notice of contest was timely and properly filed by Respondent; this tribunal has jurisdiction over the named parties and subject matter.

Stipulations 1-2.

a traditional partnership, Pyro should be considered a defacto corporation for the purpose of this proceeding. I reject this view.

The language of Section 110(c) of the Act restates Section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(c)(1976), and is designed to reach decision makers responsible for the illegal acts of corporate operators. Congress, in choosing to make corporate directors, officers and agents legally responsible for violations of the Act, purposefully distinguished between those working for and/or acting on behalf of corporate operators and those similarly situated working for and/or on behalf of non-corporate operators; e.g. for partnerships or sole proprietorships. This distinction has been upheld by the courts and by this Commission. Richardson v. Secretary of Labor, 689 F.2d. 632 (6th Cir. 1982), off'g Secretary v. Kenny Richardson, 3 FMSHRC 8 (January 1981). Moreover, it is a distinction based upon a generally accepted concept of business organization that recognizes the corporation as a legal creation of the state with powers derived from the state and applicable law.

While the Secretary notes that at common law a corporation, generally, was not permitted to form a partnership with another corporation, she fails to acknowledge that "in most jurisdictions, the power to participate in a partnership is recognized by statute or granted in corporate charters." 18 B. Am Jur 2d, Corporation 2117 (1985); Partnership Act 2.6. Certainly, when the Mine Act was enacted, it was not unheard of for a partnership to be composed of corporate partners, and in limiting individual liability for knowing violations to directors, officers and agents of corporations, I assume Congress meant exactly what it stated. In my view, the judges of this Commission are not authorized to decide that the directors, officers and agents of a non-corporate business entity acting as an operator may be held liable under Section 110(c) because the entity embodies and/or exercises various corporate attributes. Not only would such a decisional approach run counter to the specific wording of Section 110(c), it would invite legal uncertainty by premising liability upon whether an organization was sufficiently "corporate-like" in nature to be considered for Mine Act purposes a "corporate operator."

The Secretary points out, and I fully recognize, that by subjecting directors, officers and agents of corporations to personal liability, Congress was attempting to create an added incentive for compliance, since corporations might pass off their monetary penalties as the cost of doing business. See Richardson, 689 F.2d at 632-633, (6th Cir. 1982) Cowin and Company v. FMSHRC, 612 F.2d 838, 840 (4th Cir. 1979). The Secretary may well be right in asserting that excusing personal liability in the circumstances of this case has the potential for creating a

loophole in the operator's incentive to comply with the Act and its regulations. However, I agree with Commission Administrative Law Judge Gary Melick, who after entertaining similar arguments from the Secretary, stated:

> The Secretary, in essence would have me amend Section 110(c) to hold liable agents, not only of corporate operators, but also agents of partnerships, composed of two corporations. An administrative law judge is certainly not in a position to make such an amendment and . . . [is] certainly bound by the plain, clear and unambiguous language of the statute.

Paul Shirel, employed by Pyro Mining Co., 14 FMSHRC ____, Docket No. KENT 92-73, etc. (November 17, 1992) (ALJ Melick) slip op.3. As Judge Melick cogently pointed out, it is Congress that has chosen to base personal liability upon a corporate distinction, and it is Congress that should decide whether amendment of the provision is warranted in light of these and similar circumstances. Id. Accordingly, and for the foregoing reasons, this proceeding is DISMISSED.(Footnote 4)

David F. Barbour
Administrative Law Judge
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4 In opposing Shoulder's Motion for Summary Judgement, counsel for the Secretary also argued that if the Secretary's pleadings failed to allege sufficiently the presence of a corporation, the Secretary should be allowed to amend her petition to include W. K. Y. Mining (Pyro) Inc., and Costain Mining (Pyro) Inc., as entities that operated the mine in which Shoulder's worked. Br. in Op. to Resp's. Mot. for Sum. Judg't 10 N.8. In effect, the Secretary's pleadings would then allege that Shoulders was an agent of either of the two corporations. However, in a letter dated November 30, 1992, Counsel for the Secretary, in effect, withdrew this request.