

CCASE:
SOL (MSHA) V. PRABHU DESHETTY
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-549
Petitioner : A.C. No. 15-02706-03753-A
v. :
 : Hamilton No. 2 Mine
PRABHU DESHETTY, employed by :
ISLAND CREEK COAL COMPANY, :
Respondent :

DECISION

Appearances: Gretchen M. Lucken, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Petitioner;
Timothy M. Biddle, Esq. and J. Michael Klise,
Esq., Crowell and Moring, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalties 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. 801, et seq., the "Act," charging Prabhu Deshetty as an agent of a corporate mine operator, i.e. Island Creek Coal Company (Island Creek), with knowingly authorizing, ordering, or carrying out a violation by that mine operator of the mandatory standard at 30 C.F.R. 75.400 as alleged in Order No. 3549013.(Footnote 1

1 Section 110(c) provides 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 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 (b)."

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Order No. 3549013, issued at 9:30 a.m. on January 15, 1991, alleges as follows:

Loose fine coal, coal dust and float coal dust was permitted to accumulate in dangrous [sic] amounts under and along the #1 Unit MMU 003 panel belt conveyor for a distance of approximately eight hundred feet. The fine coal and coal dust ranged in depth from four inches to thirty six inches very black in color and dry, three damaged or frozen belt rollers was [sic] flaged [sic] along the belt conveyor. The belt examiners record book has the conditions recorded from 1-7-91 to 1-14-91 no corrective actions where [sic] shown in record book. Rock-dust layers in the 36" coal dust where examined showed it had been rockdusted over top of coal dust at least two times.

The cited standard, 30 C.F.R. 75.400, provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Prabhu Deshetty, as mine manager of the Island Creek Hamilton No. 2 Mine, does not dispute that he was an agent of the cited corporate mine operator, but denies that there was a violation as charged and maintains that even assuming there was a violation, he did not knowingly authorize, order, or carry out such a violation.

I find, however, from the credible testimony of experienced Mine Safety and Health Administration (MSHA) Inspector Harold Gamblin alone, that the violation has been proven as charged. I further find that Inspector Gamblin's testimony is corroborated in significant respects by the testimony of Respondent's witnesses. Indeed, Deshetty himself acknowledged that when he proceeded underground on January 15, 1991, shortly after the order at bar was issued and presumably during the abatement cleanup, he observed a pile of coal dust some eight inches to twelve inches in height as it was being cleaned behind the head drive. Deshetty also acknowledged that he thereafter walked the length of the beltline and observed other areas with coal spillage up to ten inches deep. He further acknowledged that it took 16 miners nearly two hours to clean the cited area.

While admitting the existence of these loose coal and coal dust deposits in the cited areas, including those depicted in the photograph in evidence as Exhibit R-3,

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Deshetty maintained only that these did not constitute a hazard. While not denying the existence of the cited 36-inch pile of coal dust Deshetty denied at hearing that even this was an illegal accumulation based on his stated belief that only coal dust which is touching a frictional area would be illegal.

Stan Bealmear, a shift foreman who was training for the Island Creek safety department at the time the order was issued, accompanied Inspector Gamblin on the No. 1 Unit and acknowledged that this pile of coal dust at the takeup of the drive of the No. 1 belt was measured by Gamblin at about twelve inches by thirty-six inches. He further acknowledged that this thirty-six inch deposit would probably have taken a couple of shifts to have developed. This corroborates Gamblin's discovery of several layers of rock dust in this coal deposit and his conclusion that this deposit had therefore developed over an extended period of time. While Bealmear also stated that he did not see any rollers operating in coal dust, he acknowledged that as a result of the withdrawal order issued in this case they replaced three defective rollers.

Shuttle car driver James Hill, testifying on behalf of the Respondent, also acknowledged the existence of a pile of coal behind the header which he estimated to have been about three feet high by three feet long. Island Creek Belt Inspectors Henry Grisham and Garry Hatfield both testified that even the coal dust piles along the cited belt line and appearing in Respondent's photographs (Exhibit R-1 through R-9) constituted accumulations that should have been cleaned up. These photographs were taken by Island Creek after the order had been issued and the cleanup had commenced. The photographs admittedly did not even depict the worst deposits present along the belt line.

Within this framework of evidence it is clear that significant loose coal and coal dust accumulations existed along the No. 1 beltline in violation of the standard at 30 C.F.R. 75.400. In reaching this conclusion I have not disregarded the testimony of Respondent's witnesses that much of the accumulated material was wet and, in particular, the thirty-six inch accumulation was wet from water sprays at that location. Even assuming, arguendo, that this was true, the Commission has observed in Black Diamond Coal Co., 7 FMSHRC 1117 (1985) that such coal dust accumulations nevertheless present a serious hazard and are in violation of the cited standard in light of the fact that accumulations may be quickly dried.

The remaining issue to be decided is whether Mr. Deshetty "knowingly authorized, ordered or carried out" any of the violative conditions. The Commission defined the term "knowingly," as used in the statutory predecessor to Section 110(c), in *Kenny Richardson v. Secretary of Labor*, 3 FMSHRC 8 (1981), aff'd 669 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.

In this case there is no dispute that Deshetty, as mine manager of the Hamilton No. 2 Mine during the latter part of 1990 through the date of the violation here at issue, was in a position of responsibility for the safety of the mine, including the maintenance of the No. 1 beltline free of illegal accumulations of coal dust, float coal dust and other combustible materials. Furthermore, Deshetty was placed on specific notice of problems regarding combustible accumulations at this mine by a particularly large number of recent violations of the mandatory standard at issue herein (See Government Exhibit No. 1).

Indeed, the evidence shows that in the year preceding the instant order, there were 45 violations of this standard at the mine. It is therefore clear, and should have been clear to Deshetty as mine manager, that long before, and at the time, the order herein was issued, the Hamilton No. 2 Mine had a serious problem with repeated violations for the accumulation of combustible materials. Deshetty admitted that he knew of these prior violations and had personally reviewed all of the corresponding citations with the MSHA inspectors. Inspector Gamblin confirmed that he had previously discussed such citations with, and had recently warned Deshetty that his mine had been issued too many violations for the accumulation of combustible materials.

More particularly, Deshetty had reason to know of the existence of coal dust accumulations along the cited belt-line before the instant order was issued at 9:30 a.m. on January 15, 1991, by the recent preceding reports of his belt examiners citing the need to clean the No. 1 Unit beltline (See Government Exhibit No. 3). Significantly, there were insufficient corresponding entries in the reports from which it could be determined that these conditions had been corrected. Deshetty admittedly countersigned these reports while conceding that he did not know whether the conditions had been corrected and acknowledged there was no way to ascertain from the belt examiner's reports whether any cleaning or other corrective action had been taken. (Footnote 2)

More particularly, however, in determining whether Deshetty knowingly committed the cited violation, I need focus on only one of the specific accumulations charged, i.e. a 36-inch accumulation of fine coal and coal dust outby the takeup at the belt drive. Inspector Gamblin observed that this accumulation contained at least two layers of rock dust. Based on this undisputed evidence Gamblin concluded that this accumulation had existed for two or three weeks. Foreman Stanley Bealmear also concluded from this evidence that this accumulation had existed for an extended period of time -- at least two or three shifts.

In concluding that Deshetty, at 9:30 a.m., on May 15, 1991, had reason to know of this long standing accumulation one need only to refer to the repeated entries in preceding belt examination reports expressing the need for cleaning along the No. 1 Unit belt and stating that the belt was "dirty." It is inconsequential for purposes of establishing notice that these entries may not have specifically identified this same 36-inch deposit. It is reasonable to infer from these repeated entries, without corresponding notations of corrective action, that Deshetty, who countersigned the reports, had reason to know of this accumulation which had, according to the credible evidence, existed for up to three weeks before it was cited by Inspector Gamblin.

Under the circumstances I find that the Secretary has sustained her burden of proving that Deshetty had reason to know of the violation charged in Order No. 3540913. Inspector Gamblin's ability to observe and his motivation are unchallenged. I therefore accord great weight to his testimony that several belt rollers were actually in contact with some of the coal

2 The belt examiner's reports do reflect some corrective action taken in response to some reported hazardous conditions, but these entries are not relevant to the accumulation at issue.

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dust accumulations. Under the circumstances the violation was of high gravity. Based on my findings herein that Deshetty had reason to know of the violative condition I also find that he was highly negligent. There is no evidence that Deshetty has any prior violations under the Act. Under the circumstances I find that the Secretary's proposed penalty of \$1,500 is appropriate.

ORDER

Prabhu Deshetty is directed to pay a civil penalty of \$1,500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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