

CCASE:
SOL (MSHA) V. C&B MINING
DDATE:
19930525
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 92-531
Petitioner : A.C. No. 36-07813-03553
:
v. : No. 2 Vein Slope Mine
:
C&B MINING COMPANY, :
Respondent :
:

DECISION

Appearances: Anita Eve-Wright, Esq., Office of the Solicitor
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Gary Lorenz, Representative of Operator, Shamokin,
Pennsylvania, for the Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this civil penalty proceeding initiated by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), pursuant to Sections 105(a) and 110(i) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 815(a), 820(i), the Secretary seeks the assessment of a civil penalty against C&B Mining Company ("C&B") for C&B's alleged violation of Section 103(a) of the Act, 30 U.S.C. 813(a). (Footnote 1)

The Secretary asserts that on January 28, 1992, MSHA inspector Dennis Myers was denied entry to C&B's No. 2 Vein Slope Mine by Glenn Parks, the mine's hoisting engineer. According to the Secretary, Parks was acting on the orders of Gary Lorenz, an owner of C&B. The Secretary asserts that because Myers was at the mine to conduct an inspection pursuant to Section 103(i), 30 U.S.C. 813(i), of the Act, C&B violated section 103(a) when

1

Section 103(a) authorizes MSHA inspectors to conduct frequent investigations and inspections of the nation's mines, to determine, among other things, whether an imminent danger exists and whether there is compliance with applicable mandatory health and safety standards promulgated pursuant to the Act. To accomplish these purposes MSHA is authorized "to make inspections of each mine in its entirety at least four times a year."

it denied him entry.(Footnote 2) The Secretary proposes a civil penalty of one-thousand dollars (\$1,000) be assessed for the alleged violation.

Lorenz, on behalf of C&B, contests the proposed penalty. A hearing was conducted in Williamsport, Pennsylvania, at which Anita Eve-Wright represented the Secretary and Myers and James Schoffstall, Myers' supervisor, testified for the Secretary. Lorenz represented C&B and testified for the company. At the close of the hearing the parties orally summarized their positions.

THE SECRETARY'S WITNESSES

Myers stated that he first inspected the No. 2 Vein Slope Mine -- a small anthracite mine -- in October 1991. Tr.12. The inspection in October was the beginning of the regular quarterly inspection required by Section 103(a) of the Act. According to Myers, in January 1992, coal was being extracted at the mine in the vicinity of uncharted, abandoned workings. In order to make certain that C&B personnel were drilling ahead and into the coal they intended to mine, so as to give themselves warning if they were approaching the old workings, MSHA put the mine on a section 103(i) "spot inspection" basis. Under the spot inspection program Myers was required to conduct unscheduled weekly inspections at the mine. Tr. 12-13. Myers explained that the inspections were needed because in the anthracite coal fields water or contaminated air frequently collects in old workings and if there is an unintended breakthrough into the old workings a rapid and potentially deadly inundation of water or release of contaminated air can occur into the active workings of the mine.

On January 24, 1992, Myers went to the mine to conduct one of the required weekly inspections. Myers stated that he arrived at approximately 8:45 a.m. He met Parker and told Parker he was there "for a weekly hazard inspection." Tr. 13. Myers testified that while he was changing his clothing to go underground, Parker told Myers that Lorenz had said "to run [Myers] off if [he] showed up." Id. In the meantime, the miners had come out of the mine to eat, and Lorenz, who was there, spoke with Myers about why the mine had been placed on a spot inspection schedule. Lorenz then left the mine, telling Myers that he had a personal problem at home. Id.

2

Section 103(i) provides that if MSHA finds that there exists in a coal mine some "especially hazardous condition" that is not gas related, it shall provide a minimum of one spot inspection of all parts of the mine every five working days at irregular intervals. Section 103(a) provides the right of entry that allows MSHA's inspectors to accomplish this purpose.

Myers testified that after Lorenz left, Parker took a truck of coal to the stockpile. When he failed to return, another C&B employee went to find out what was wrong. Myers was told that the truck had developed a mechanical problem and that the mine would have to close at the end of the day. Myers and the miners left the mine. Tr. 13-14.

After leaving, Myers stated that he went to the MSHA field office in Shamokin, Pennsylvania, and told his supervisor, Schoffstall, what had happened. Tr. 14. Schoffstall instructed Myers to return to the mine the next working day (Monday, January 27, 1992) and to again try to conduct an inspection. Tr. 14-15.

Myers returned as directed. Upon arriving at the mine he met Lorenz and Lorenz's brother, Cal Lorenz. Tr. 15. (Myers stated that Cal Lorenz is the foreman at the mine.) Lorenz told Myers that Schoffstall had told him "to think it over about letting [Myers] inspect," that he had done so and that he had decided Myers could not inspect the mine. Id. Lorenz stated that "[t]he Federal could inspect but [Myers] couldn't inspect." Id. Myers understood Lorenz to mean that any MSHA inspector other than himself could conduct an inspection but that he could not.

Also, Lorenz indicated to Myers that he did not like Myers' attitude. Myers asked Lorenz what was wrong with his attitude but Lorenz did not reply. Id. (Footnote 3) Myers advised the brothers that he would leave so they could "think it over" but if they continued to refuse to let him inspect the mine he would have to issue to C&B a citation for "denial of entry." Tr. 16. Myers then telephoned Schoffstall and recounted the situation. He told Schoffstall that he would return the following day and would try to conduct the inspection. Tr. 17.

Myers came back the next morning. He met Parker at the hoist building and Parker reiterated that Lorenz had instructed him not to let Myers into the mine. Tr. 18. In that case, Myers responded, he would issue to C&B a citation for denying him entry, and that the violation was a significant and substantial ("S&S") contribution to a mine safety or health hazard. He also stated he would ask that the violation be specially assessed. (Footnote 4)

3

In addition, Myers stated that Cal Lorenz told him C&B had begun retreat mining and therefore spot inspections were not longer necessary. Tr. 16. Myers agreed that if, in fact, C&B was retreat mining, inspections conducted pursuant to section 103(i) no longer would have been required. Tr. 18.

4

The Secretary's regulations for the determination of penalty by special assessment are set forth at 30 C.F.R., Part 100. Section 100.5(d) provides that when a violation has been issued for a failure to permit an

Myers issued the citation and returned to the MSHA office where he discussed the situation with Schoffstall. Schoffstall sent Myers back to the mine and instructed MSHA inspector Paul Sargent to accompany him. Once back, Myers asked Parker if he could conduct the inspection? Parker said "no," and Myers issued to C&B an order of withdrawal pursuant to Section 104(b) of the Act, 30 U.S.C. 814(b), for failing to abate the violation of section 103(a).^(Footnote 5) Myers and Sargent then met Cal Lorenz who told Myers that Sargent could inspect but that Myers could not. Tr. 19-20.

Myers and Sargent returned to the MSHA office. Later in the day Lorenz came to the office and, according to Myers, confronted him. Myers described what happened:

Lorenz came stalking into the office in a very aggressive manner, walked over to me, started pointing his finger and telling me I would not dictate to him . . . anymore. That was his property, that was his mine, he would say who would go in and who wouldn't . . He was putting no trespassing signs up and I was to be nowhere around.

Tr. 20-21. Schoffstall intervened and called Lorenz into his office. After a "behind closed doors" conference, Schoffstall asked Myers to join them. Myers testified that he asked Lorenz what he had done to cause Lorenz to object to his presence at the mine. Myers maintained that Lorenz would not respond except to ask Schoffstall why C&B could not be assigned another inspector?^(Footnote 6) When Schoffstall explained why he could not appoint another inspector for the mine, Lorenz left the office. Tr. 21.

4 (CONT....

inspector to perform an inspection or investigation, MSHA will review the violation to determine whether a special assessment is appropriate.

5

Section 104(b) states in relevant part that if an inspector finds that the violation described in a citation has not been abated and that the operator should not be given further time to abate, the inspector shall promptly issue an order requiring the withdrawal of miners and prohibiting their reentry until the inspector determines the violation has been abated.

6

During cross-examination Lorenz asked Myers if he recalled coming to a garage owned by Lorenz on January 26 and confronting Lorenz about an alleged failure of C&B to comply with a mandatory standard? Lorenz asked if Myers remembered pointing a finger at him and telling him in a loud voice that if C&B did not comply, Myers would shut down the mine? Myers responded he recalled coming to the garage shortly after Christmas but did not recall pointing a finger at Lorenz or "carrying on" and he denied that he had told Lorenz to fix the condition or he would "write it." Tr. 30-31.

Myers testified that the following day (January 29) Lorenz called Schoffstall and told him that Myers could inspect. Myers went to the mine and conducted the inspection. When he came out of the mine he discussed with Cal Lorenz and C&B's miners "the type of pillarizing method they could use, the ventilation they needed and . . . safe mining practices in pillarizing." Tr. 22. As a result of the inspection Myers determined that C&B had begun retreat mining and that section 103(i) spot inspections were no longer needed. Therefore, the mine was taken off a spot inspection schedule. Id.

Myers testified that he found the violation to be S&S because without inspecting the mine MSHA could not determine if C&B was drilling ahead as it advanced toward the old workings. Without drilling there was no way to know for certain if C&B's mining process would cut into the old workings and whether those old workings contained water or contaminated air. If they did, he believed there was a very real danger to C&B's underground miners of at least permanently disabling injuries.

Tr. 22-23, 24.

Myers also stated he believed the denial of entry to have been caused by C&B's reckless disregard of the law. He noted that he had explained to Lorenz why he was there to inspect and that Lorenz, who was fully aware of the consequences of refusing to let him into the mine, nonetheless persisted in his refusal. Tr. 24.

Schoffstall was the next witness to testify. He confirmed that he had first assigned Myers to inspect the mine as part of the regular quarterly inspection during October 1991. Tr. 41. In December, when the mine map showed the mine to be within 200 feet of old, abandoned workings, MSHA placed the mine on a section 103(i) inspection program. Id.

Schoffstall explained in detail the dangers posed by old, abandoned workings -- the dangers of a sudden and unexpected inundating or contamination. He recalled the Porter Tunnel disaster of 1979 when 9 miners were killed by a sudden mine flood and he indicated that another life had been lost similarly in the early 1980's. He termed the need for advance drilling "one of [MSHA's] top priorities" in the anthracite region. Tr 42. According to Schoffstall, C&B was placed on an section 103(i) inspection schedule "to see that the drilling program was carried out." Tr. 43.

In addition, Schoffstall gave his version of the events of January. He confirmed that on January 24, 1992, Myers told him about being barred from inspecting the mine and Schoffstall told Myers to go back on the 27th. Schoffstall added that on January 24, 1992, Lorenz had called and stated that he would permit another inspector to enter the mine but that he would not

allow Myers in. Tr. 44. Schoffstall testified he told Lorenz that he should reconsider, that a denial of entry was a very serious matter and that no mine operator had ever won a denial of entry case. Id.

Schoffstall also stated that this was not his only conversation with Lorenz on the subject, that on January 27, 1992, and after Myers had returned to the office, Lorenz again called Schoffstall and requested another inspector be assigned to the mine. Lorenz told Schoffstall that he had a verbal disagreement with Myers at Lorenz's garage. Schoffstall responded that he did not feel a change was warranted and he warned Lorenz again about the serious nature of a denial of entry. Tr. 45.

In addition, Schoffstall testified that following the issuance of the order of withdrawal Lorenz came to the MSHA office and confronted Myers. Schoffstall described Lorenz as "worked up" and Schoffstall stated that after Lorenz calmed down he told Lorenz to go home and reconsider, that the quickest way to solve the problem was to let Myers in. Tr. 46-47. The following morning, Lorenz called Schoffstall and told him Myers could conduct the inspection. Tr. 47.

Schoffstall testified that he went to the mine with Myers and accompanied him during the inspection. When Lorenz was able to show that the mine was not being advanced any longer, Schoffstall recommended to the MSHA district manager that the mine be taken off the section 103(i) spot inspection schedule, which was done. Tr. 47.

Schoffstall stated that he had reviewed Myers' findings after Myers issued the citation and order and that he agreed the violation was S&S. He echoed Myers' concerns regarding possible inundation of water or contaminated air should C&B's miners have cut into old workings. Id., Tr. 57. He also agreed with Myers that the violation was due to C&B's reckless disregard of the requirements of the Act. Tr. 48-49.

Under questioning by Lorenz, Schoffstall related that during October 1991 and January 1992, Lorenz frequently called him and asked that a different inspector be assigned to the mine.

Tr. 50. Schoffstall stated that he recalled Lorenz asserting that he "didn't like [Myers'] attitude[,]" that he "didn't like the way he inspected[,]" and that Lorenz had asked for a different inspector "right from the first day." Id. Schoffstall agreed C&B had no problems with any other of MSHA's inspectors and he described C&B as a "very cooperative" and safe operator. Tr. 50-51.

With regard to his refusal to change inspectors, Schoffstall was of the opinion that MSHA could not allow an operator to dictate who would or would not inspect and that while there might be instances where he and the MSHA district manager would find cause to change an inspector, he did not believe there had been any reason to change in this instance. Tr. 53-54.

C&B'S WITNESSES

Lorenz explained that he is one of two partners who own C&B, the other being Cynthia Lorenz, his sister-in-law. Tr. 7-8. Regarding his relationship with Myers, Lorenz stated that he had a conflict with Myers from the first time Myers was at the mine, but he denied that C&B was trying to dictate to MSHA who would be allowed to inspect the mine. Rather, he was trying to impress upon MSHA the fact that a change of inspectors was truly needed. Tr. 59-60.

With respect to the danger to miners presented by the alleged violation, he indicated that when the citation and order were issued mining was no longer advancing. The coal had narrowed to a 17 inch seam and the company had only 100 feet to go before it reached the limit of its coal lease. For these reasons, the company had started retreat mining. Therefore, there was no hazard. Tr. 60.

DISCUSSION AND FINDINGS

THE VIOLATION

The right of entry is clearly set forth in the Mine Act. Section 103(a) of the Act provides that "for the purpose of making any inspection or investigation under this [Act] " MSHA inspector's "shall have a right of entry to, upon or through any coal . . . mine." As the Commission has noted, the right is broad, and while the Commission has also stated that the right is not without limits, the record does not suggest, nor does C&B argue, that Myers was acting outside the bounds of statutory authority on January 28, 1992, when he sought to inspect the mine. Tracy & Partners, et al., 11 FMSHRC 1457, 1461 (August 1989).

In Tracy & Partners a majority of the Commission concluded that while all inspections of mines under section 103 are conducted pursuant to the basic authority of section 103(a), when MSHA attempts to conduct a spot inspection pursuant to section 103(i), the spot inspection must be valid in the first instance

under section 103(i) itself. 11 FMSHRC at 1464.(Footnote 7) Section 103(i) provides for spot inspections whenever the Secretary "finds . . . that . . . [a] hazardous condition exists" other than excessive liberation of methane or other explosive gases or an explosion or ignition of methane or other gases within the previous five years. Here, Myers and Schoffstall testified without contradiction of the hazards associated with cutting into old, abandoned workings. Without entering the mine and inspecting, MSHA did not know and could not tell whether C&B's miners were being protected from those hazards by drilling ahead. Nor, as Lorenz agreed, was there any way for MSHA to know, aside from taking Lorenz's word, that the mine was no longer being advanced and that retreat mining had started. Tr.61.

Obviously, MSHA cannot be expected to carry out its enforcement responsibilities by relying solely on the representations of those subject to the Act's mandates, if it could there would be no need for inspections. I therefore find that on January 28, 1992, MSHA properly concluded that "a hazardous condition exist[ed]" at the mine and that the spot inspection it sought to conduct was valid in the first instance under section 103(i).

This being the case, when Myers requested entry on January 28, 1992, C&B was legally bound to admit him and I conclude that in refusing him admission C&B violated section 103(a) as charged.

Nor can C&B's willingness to permit entry to any inspector other than Myers in any sense lessen its liability. The Act provides that authorized representatives of the Secretary shall make frequent inspections and leaves enforcement in the Secretary's hands. It does not provide for inspections by authorized representatives of the Secretary as approved by the operator, and clearly the power to designate inspectors must be MSHA's if the Act is to be effectively enforced.(Footnote 8)

7

I, of course, am bound by the reasoning of the majority, but for another view on the statutory basis for a valid spot inspection see the dissent of Commissioners Backley and Lastowka. 11 FMSHRC at 1466-70.

8

This is not to say that situations warranting the removal of an inspector upon the complaint of an operator may never arise. On the contrary, Schoffstall indicated such circumstances can exist. Tr. 53-54. Rather, it is simply to recognize that the final decision is first, last and always MSHA's, not the operator's.

S&S VIOLATION

Following the hearing I requested a written statement of position from the parties regarding the following question:

Can a violation of Section 103(a) of the Mine Act be a S&S violation?

In requesting the statement I took note of the fact that the wording of Section 104(d) of the Act, 30 U.S.C. 814(d), appears to restrict an inspector's S&S finding to "a violation of any mandatory health or safety standard" (emphasis added). C&B's representative did not respond. However, counsel for the Secretary stated in part:

[P]lease be advised that the Secretary . . . submits that a finding that a violation of Section 103(a) . . . need not be based on the additional finding that the violation was a [S&S] contribution to a mine safety hazard. Whereas the gravity associated with the violation of a mandatory safety or health standard is determined to be [S&S], it must be determined whether the gravity involved in a violations of Section 103(a) of the Act is serious.

Letter from Anita Eve-Wright (February 1, 1993).

I conclude from this that the Secretary is dropping his allegations regarding the S&S nature of the violation at issue, and I will therefore order the Secretary to vacate the inspector's S&S finding.

CIVIL PENALTY CRITERIA

In assessing a civil penalty for the violation of section 103(a), I must consider the statutory civil penalty criteria contained in Section 110(i) of the Act.

GRAVITY

This was a very serious violation. The right of an inspector selected by MSHA to enter a mine to conduct an inspection or investigation is a keystone for the Act's structure of enforcement. As I have already observed, if an operator can selectively bar entry to an inspector, effective enforcement will be severely compromised.

It matters not for purposes of assessing the gravity of the violation that at the time Myers was denied permission to enter there was no need to drill ahead because mining was retreating. The violation for which C&B is charged is a denial of entry not a failure to practice a particular mining technique.

NEGLIGENCE

Myers' and Schoffstall's testimony that Lorenz was advised that a refusal to admit Myers would be a violation of the Act, was not refuted. While Lorenz may have believed that in offering to accept any inspector other than Myers he was within his rights as an operator, he was mistaken and in ordering Myers' barred from the mine, Lorenz acted at his company's peril. I conclude that C&B was highly negligent in allowing the violation to exist.

HISTORY OF PREVIOUS VIOLATIONS

The company's history of previous violations is negligible and counsel for the Secretary stated that there is no record of any prior violation of section 103(a). Tr. 9.

SIZE

Myers stated that C&B employs 4 miners as well as hoist engineer Parks and foreman Cal Lorenz. Although he did not know the tonnage of anthracite coal produced annually by the company, he was of the opinion that C&B is a small operator, and I so find. Tr. 36-37.

ABILITY TO CONTINUE IN BUSINESS

The record does not contain any information regarding C&B's financial condition, and Lorenz did not contend that the amount of any penalty assessed would adversely affect C&B's ability to continue in business. Therefore, I find that it will not.

CIVIL PENALTY

While I have found that the violation of section 103(a) was very serious and that C&B was highly negligent, I nonetheless conclude that this violation is an aberration in an otherwise enviable record of compliance. I particularly note Schoffstall's testimony that aside from the problems involving Myers, he found C&B to be very cooperative and I also note Schoffstall's affirmative response when Lorenz asked if he considered the mine to be very safe. Tr. 51-52. This overall positive attitude toward compliance is also witnessed by C&B's negligible history of previous violations.

~927

Considering these factor's, and in light of the other civil penalty criteria, I conclude that the one-thousand dollar (\$1,000) civil penalty proposed by the Secretary is excessive. Instead, I assess a civil penalty of five-hundred dollars (\$500.) It should go without saying that any repeat violations of section 103(a) that come before me may be subject to substantially higher penalties.

In assessing a civil penalty lower than that proposed by the Secretary I am in no way implying criticism of Myers. From what appears in this record it is apparent that he is a conscientious inspector who with diligence and great patience attempted to carry out the duties required of him.

ORDER

Citation No. 3080842 is affirmed. Within thirty (30) days of the date of this decision C&B IS ORDERED to pay a civil penalty of five-hundred dollars (\$500) for the violation of section 103(a) found herein. In addition, the Secretary IS ORDERED to modify Citation No. 3080841 and Order No. 3080842 by deleting the S&S designations.

David F. Barbour
Administrative Law Judge
(703) 756-5232

Distribution:

Anita D. Eve-Wright, Esq., Office of the Solicitor,
U.S. Department of Labor, 3535 Market Street, 14480-Gateway Building,
Philadelphia, PA 19104 (Certified Mail)

Mr. Gary L. Lorenz, RD #2, Box 861, Shamokin, PA 17872 (Certified Mail)

\epy