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SOL (MSHA) V. D.L. GIACOMO (WYOMING FUEL)
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July 19, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-100
Petitioner : A.C. No. 05-02820-03605 A
:
v. : Golden Eagle Mine
:
DONALD L. GIACOMO, employed :
by WYOMING FUEL COMPANY, :
Respondent :
:
UNITED MINE WORKERS OF :
AMERICA, LOCAL 9856, :
DISTRICT 15, :
Intervenor :

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;

William C. Erwin, Esq., ERWIN & DAVIDSON, P.C.,
Raton, New Mexico,
for Respondent;

Mike J. Romero, United Mine Workers of America,
Local 9856, District 15, Trinidad, Colorado,
for Intervenor.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Donald L. Giacomo, an employee of Wyoming Fuel Company ("WFC"), with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act").

Order No. 3240616 was issued on May 14, 1990, under Section 104 (d)(1) of the Act. The order was issued as a result of activities that had taken place the evening of May 10, 1990, and continued into the morning hours of May 11, 1990.

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The Order states:

Persons were required by management to operate equipment that was not maintained in safe operation condition, in that based on statements received from both labor and management, the Joy continuous miner in NW 010-0 Headgate was being operated on the 05-11-90 a.m. shift by the following methods[:]

The remote control would not function to raise the miner head while mining coal. A man was placed in the cab to operate this function while the miner was being operated by remote control. This practice was dangerous due to two persons subject to being on opposite sides of the operating machine and accidental error. Also dangerous due to the fact that neither person had complete control at all times. Both the shift foreman and safety manager were present and had instructed the crew to proceed by this method. This is unwarranted action.

The regulation allegedly violated provides as follows:

75.1725 Machinery and equipment; operation and maintenance.

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

As a threshold matter Respondent contends 75.1725(a) is unconstitutionally vague.

The cited regulation is broadly worded; it requires all machinery and equipment to be maintained in a safe operating conditions. The Commission in *Ideal Cement Company*, 11 FMSHRC 2409.2416 (November 1990) stated that in interpreting and applying broad-worded standards, the appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing *Canon Coal Co.*, 7 FMSHRC 6676, 668 (April 1987), *Quinland Coal, Inc.*, 1614, 1617-1618 (September 1987).

On the basis of the evidence presented in this case, a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the Joy miner should be equipped with a functioning solenoid. The non-functioning solenoid prevented the remote control operator from operating the cutter heads. (Tr. 46). The general mine foreman recognized the problem and he gave specific instructions not to operate the Joy miner with a man in the cab "due to

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safety reasons." (Tr. 113). The manufacturer of the Joy miner in a service bulletin issued after the fact (September 24, 1991), also recognized the hazard here. (Ex. G-8). The manufacturer stated as follows:

D. OPERATION FROM WITHIN THE MACHINE

Many continuous miners have both remote control and on-board controls (i.e., inside the operator's platform). While it may be possible to operate a continuous miner which has on board controls from inside the operator's platform using the remote station, Joy strongly recommends against this practice. Instead, if the machine is to be operated from inside the operator's platform, the remote control should be discontinued or de-energized, and the on-board controls utilized. Of course, when on-board controls are utilized they must be used in a manner consistent with applicable government regulations, e.g., the operator must be under a supported roof.

Respondent contends two expert witnesses testified the method of on-board/remote operations was a safe procedure. Contrary to Respondent's view, I credit the statements of the actual Joy operators. Garcia, Shannon, and Wakefield were threatened with loss of their jobs and they settled for a conference with the mine foreman and Mr. Giacomo, the safety director. Respondent's claim of vagueness is DENIED.

There is ample evidence the operator, WFC, knew the Joy 12 continuous miner was unsafe due to a malfunctioning solenoid and a non-functioning deadman switch. Proof of WFC's knowledge was clearly indicated when Mr. Steve Salazar, the general miner foreman, gave explicit instructions at the beginning of the shift not to operate the Joy Miner from inside the cab. (Tr. 46, 73, 103, 113).

However, the pivotal issue is not WFC's knowledge and liability but rather the employee's liability under Section 110(c) of the Act. The relevant portion of the Act provides as follows:

(c) 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).

The Commission interpreted the term "knowingly" in Section 110(c) 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. 92 F. Supp. at 780. We believe this interpretation is consistent with both the statutory language and the remedial nature 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.

Secretary v. Richardson, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983); Roy Glenn, 6 FMSHRC 1583 (1984); Warren Steen Construction, et al., 14 FMSHRC 1125 (July 1992).

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 and the additional findings of fact in the Discussion below:

FINDINGS OF FACT

1. On May 10, 1990, prior to the beginning of the shift, Mr. Steve Salazar, the general mine foreman, gave a direct order that the Joy 12 Miner was not to be operated from inside the cab. For safety reasons, the miner had to be run with the remote control. (Tr. 46, 73, 113).

2. On the following shift, Messrs. Jim Sterns (face boss) and Wayne Shipe (maintenance) directed miners John Garcia, Eddie Shannon, and David Wakefield to operate the Joy 12 in a three-way effort. Garcia was to be in the cab, Shannon was on the remote control and Wakefield was to handle the trailing cable. (Tr. 25, 58, 72, 102).

3. Shannon, the remote control operator, was unable to both lower and raise the cutter heads with the remote control due to a malfunctioning solenoid. As a result, Garcia was to raise the cutter heads from inside the cab. (Tr. 46).

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4. In addition, the deadman function had not been operating properly for approximately two weeks. The deadman is a safety feature. When the pedal is depressed, the continuous miner will tram and continue forward. (Tr. 45, 46).

5. Garcia, a mechanic, when inside the cab of the Joy Miner was to operate the raising of the cutter heads. Garcia had never mined coal before this shift. In addition, he had no task training on the machine. (Tr. 24, 25, 29).

6. Shannon, the continuous miner operator, was placed outside the miner to operate all other functions (except raising the cutter head) by remote control. (Tr. 24, 27).

7. Garcia, Shannon, and Wakefield felt this was unsafe. However, when threatened with the loss of their jobs, they did it "under protest." They further requested that they be permitted to talk to Mr. Pagnotta (superintendent on the graveyard production shift) and Mr. Giacomo (safety manager). (Tr. 68-79, 87-88).

Discussion and Further Findings

Mr. Donald Giacomo is the safety manager referred to in Order No. 3240616. Further, he is personally charged with knowingly authorizing, ordering, or carrying out an action that caused the cited violation.

I agree with Mr. Giacomo that to prove a violation of Section 110(c) of the 1977 Act, the Secretary must prove that the corporate operator committed a violation of the Act. This factor has been established. In fact, in the instant case, much of the evidence related to the corporate operator but only a minimal amount of this evidence was imputed to Respondent Giacomo.

The Secretary must further prove that Giacomo was an agent of the operator. This facet was established inasmuch as Mr. Giacomo indicated he was the WFC safety manager for the Golden Eagle Mine. (Tr. 183).

Finally, in a 110(c) case, the Secretary must prove the corporate agent knowingly authorized the action. The meaning given to the term "knowingly" has been described above.

The previous seven findings of fact establish the operator's violation but such facts are not necessarily imputed to Mr. Giacomo. However, Mr. Giacomo's testimony establishes a violation of 110(c). Specifically, he should have known the miner was defective and unsafe because the remote control would not raise the cutter heads. The transcript of Mr. Giacomo's testimony reads:

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Q. Did you have any discussion with David Pagnotta during that drive?
[to the working section]

A. Yes, I did.

Well, I asked him what the problem was. He said some of the men at the northwest headgate section had a problem with the miner, with the way they were instructed to run the miner.

I said, "What was that?" He said, "Well, the function on the head was not working; whereas, they placed the mechanic in the cab solely to lift the head back up once he was signaled by the operator." (Tr. 190).

* * * * *

I said [to David Wakefield], "How are things going?" He said, "All right." I said, "What's the problem, Dave?" The first words out of his mouth was, "We were told not to operate this machine from inside the cab."

And I said, "Well, what's the problem?" And he said, "Well, that's it. We were told not to operate this machine from inside the cab." I then proceeded to say, "Dave, you should understand why that was." He didn't acknowledge me.

I said, "The reason for you being told to operate that way was simply to get everybody to work together to train--to know how to operate the new miners when they come in." That was the main purpose for them being told to operate it from the remote control position.

Q. Did you have any further conversation with Mr. Wakefield?

A. As I was talking to Mr. Wakefield, Dave Pagnotta was a few steps behind me. As he approached my side, I noticed that--he noticed that Ed Shannon was on the opposite side of the miner, in complete disarray of what he had first told me what his positioning was supposed to be. (Tr. 192).

* * * * *

I said [to John Garcia], "Well, what's the real problem with the machine?" Why are they doing this? The function in the head would not sheer down with the remote control. And I said, "Well, were you instructed by someone where and how to communicate with each other?" He said, "I was."

Q. You said, "Sheer down," is that--

A. Well, the remote operator was sheered down, but it was his instruction to raise the head back up with signals by the operator.

Q. Okay. Go ahead. What conversation did you have then with Garcia?

A. Well, I asked him what function wasn't working. He told me it was the raising back of the head. And then I said, "Well,"--I said, "Well, what's the problem?" He said, "Well, we were

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instructed not to operate this way, not by sitting in the cab."
(Tr. 195).

* * * * *

Q. But on May 11th, '90, the machine was being operated with both the remote and the manual controls because the miner was malfunctioning and the remote wouldn't work to raise the cutter heads; isn't that correct?

A. No, it's not [according to Mr. Giacomo]. The machine was being run by the remote position and only the head was being raised by the man being instructed what to do.

Q. Okay. So only the cutter head was being operated by the man.

A. Yes.

Q. That's the reason he was inside the cab

A. Right.

Q. Because that was malfunctioning on the machine?

A. Yes. (Tr. 201).

* * * * *

Q. But you were aware on May 11th that the remote control did not function to raise the cutter heads?

A. When Mr. Pagnotta picked me up and told me. (Tr. 205).

* * * * *

Q. But you did state on direct that Mr. Garcia told you that he had been instructed not to operate the miner from inside the cab.

A. Yes.

Q. He told you that a couple times, like.

A. Yes, I believe it was.

Q. And he also told you that the remote wouldn't raise the cutter head?

A. Correct. (Tr. 206-207).

I agree that in the conversations between Messrs. Garcia, Shannon, Wakefield, and Pagnotta, no one expressed his concerns to Mr. Giacomo in terms of safety. Further, they did not use words such as "safety," "safety complaint," or feeling "unsafe [while] being inside the cab."

However, there are no magic words to require action under 75.1725. If equipment is unsafe, it "shall be removed from service immediately."

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Given the circumstances here, Mr. Giacomo should have known an unsafe condition existed. Mr. Giacomo knew the cutting head was not responding to the remote controls so Mr. Garcia was operating the head from inside the cab. The remote control operator and Garcia were signaling each other with lights. In short, two men were operating the miner with two different sets of controls. This was a dangerous method of mining as well as a violation of the regulation.

In addition, Mr. Giacomo, admits he has never seen a Joy miner being operated by the remote and manually at the same time. (Tr. 300).

In failing to remove the equipment from service, Mr. Giacomo violated the regulation and the Act. (Footnote 1)

In his post-trial brief, Mr. Giacomo extensively attacks the credibility of the Secretary's witnesses, particularly Garcia, Shannon, and Wakefield. I find these witnesses basically support the Secretary's position.

The petition herein should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

The order here was designated as "Significant and Substantial."

A violation is properly designated as being of an S&S nature "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

1 There was no evidence that Mr. Giacomo knew or should have known that the deadman's switch was malfunctioning on the continuous miner.

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6 FMSHRC at 3-4. See also, *Austin Power Co. v. Secretary*, 861 F.2d 99, 104-105 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

In this case, I credit the testimony of witness Roland Phelps. He identified the hazard as two miners operating the Joy Miner by remote and manual controls. This results in neither man being in full control. Someone could be seriously injured or killed. (Tr. 111, 112).

It is apparent there was an underlying violation of 30 C.F.R. 75.1725(a). Further, there was a strong measure of danger that contributed to the violation. In addition, it is reasonably likely the hazard will result in an injury. Finally, the injury could be a fatality or a serious injury. (Tr. 123-137). (See Ex. G-7, a fatality involving a miner being crushed against a rib by a continuous miner at the Golden Eagle Mine).

UNWARRANTABLE FAILURE

The special finding of unwarrantable failure, as set forth in Section 104(d) of the Mine Act, 30 U.S.C. 814(d), may be made by authorized Secretarial representatives in issuing citations and withdrawal orders pursuant to Section 104. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), and *Youghioghney & Ohio Coal Company*, 9 FMSHRC 2007, 2010 (December 1987) the Commission defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery examined the meaning of unwarrantable failure and referred to it in such terms as "indifference," "willful intent," "serious lack of reasonable care," and "knowing violation," 9 FMSHRC at 2003; *Peabody Coal Co.*, 14 FMSHRC 1261 (August 1992).

In the instant case, I conclude the Order was properly designated as unwarrantable. Inspector Phelps regarded the Order as having high negligence. Mr. Salazar had given specific instructions not to engage in the practice. (Tr. 127). Mr. Giacomo was advised of Mr. Salazar's Order when he arrived in the section. Mr. Giacomo was also advised of the condition of the miner when he arrived in the section.

In favor of Mr. Giacomo is the fact that he was primarily involved in the positioning of Shannon and Wakefield in the section.

However, I agree with Mr. Phelps designation of this order as unwarrantable.

CIVIL PENALTY

At the commencement of the hearing, the Secretary moved to amend the amount of the assessed penalty from \$900 to \$700, the same amount charged against Mr. Pagnotta.

Section 110(i) of the Act mandates consideration of certain criteria in assessing appropriate civil penalties.

Mr. Giacomo is an individual and the size of the business, and the effect on the operator's ability to continue in business are not relevant in this case.

There is no evidence that Mr. Giacomo was cited for any previous violations.

However, Mr. Giacomo was negligent inasmuch as the relevant facts were made known to him. The gravity of this violation is high since miners Shannon and Wakefield could easily have been placed in a hazardous position.

The violative condition was abated.

The Secretary reduced this penalty to \$700 and I concur that such a penalty is appropriate.

For the above reasons, I enter the following:

ORDER

Order No. 3240616 is AFFIRMED and a civil penalty of \$700 is ASSESSED.

John J. Morris
Administrative Law Judge

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