

CCASE:  
SOL (MSHA) V. LARRY IRVIN  
DDATE:  
19940216  
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. KENT 93-467
Petitioner	:	A.C. No. 15-17202-03508M
v.	:	
	:	Dulcimer # 7 Mine
	:	
LARRY D. IRVIN	:	
EMPLOYED BY	:	
NEW HORIZONS COAL, INC.,	:	
Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,  
U. S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
Sidney B. Douglass, Esq., Harlan, Kentucky,  
for Respondent.

Before: Judge Amchan

Statement of the Case

On January 26, 1993, Adron Wilson conducted an MSHA inspection of the Dulcimer # 7 Mine in Harlan county, Kentucky (Tr. 9, Exh. G-1). This mine was operated by the Great Western Coal Company, which has since changed its name to New Horizons Coal, Inc. (Tr. 8-9) . During the inspection, Wilson, accompanied by Stanley Sturgill, Great Western's walkaround representative, was walking from one section of the mine to another when he saw miner Larry D. Irvin (Tr. 12 - 13, 17, 22, 36-37. 67 - 69, 101-106).

According to Inspector Wilson, his cap light was shining directly on Mr. Irvin's face (Tr. 15). He observed a lighted cigarette hanging from Irvin's mouth and he saw and smelled cigarette smoke (Tr. 13, 15, 153). The inspector testified at the hearing that Irvin quickly moved away from him, removed his hard hat and made a motion which led Wilson to believe he was putting out a cigarette in the hard hat (Tr. 17).

Wilson turned to Sturgill and asked him if he saw a miner smoking (Tr. 67); Sturgill said he had not. Wilson and Sturgill walked somewhere between 25 to 70 feet to the location at which

~364

Wilson had observed Mr. Irvin (Tr. 13, 66, 70).(Footnote 1) At this location, Sturgill saw and smelled cigarette smoke (Tr. 67 - 68, 157, 164).

Almost immediately, Mr. Irvin's foreman, Danny Bruce, appeared on the scene (Tr. 46). At Mr. Wilson's request, he searched Mr. Irvin and his partner, roof bolt machine operator Douglas Howard. Mr. Bruce had the two men take off their hard hats, pull their pants legs out of their boots and turn all their pockets inside out. Mr. Sturgill searched their lunch buckets (Tr. 38, 41, 106 - 107, 140 - 142). Bruce and Sturgill found no cigarettes, matches or any other smoking materials (Tr. 18 - 19, 140 - 142). No cigarette butt or other physical evidence that any employee had been smoking was found by inspector Wilson (Tr. 17). The inspector also found no physical evidence that Mr. Irvin had extinguished a cigarette inside his hard hat (Tr. 47 - 50)

On January 28, 1993, Inspector Wilson served upon Mr. Irvin Citation No. 4241505 alleging that Irvin violated section 317 of the Mine Safety and Health Act, 30 U.S.C. 877(c) (Exh. G-3). That provision, which is also found at 30 C.F.R. 75.1702, provides that: "No person shall smoke, carry smoking materials, matches or lighters underground..."

Section 110(g) of the Act, 30 U.S.C. 820(g), provides that any miner who willfully violates the standard prohibiting smoking shall be subject to a maximum penalty of \$250 for each occurrence. MSHA proposed the maximum \$250 penalty for the violation alleged in Citation No. 4241505.

The allegation of willful conduct on the part of Mr. Irvin is based upon a lecture given by Wilson at the beginning of his inspection to all the employees at Dulcimer # 7 mine (Tr. 19-22). Due to a fatal mine accident in Norton, Virginia a month and half before the inspection, Mr. Wilson was making a special point of advising miners about the dangers of smoking underground (Tr. 32 - 34).(Footnote 2)

Mr. Wilson concludes that Mr. Irvin was present at his lecture because he asked Great Western management if any employees were not present (Tr. 21 - 22). He was not advised that Mr. Irvin was not in attendance. As there is no evidence

---

<sup>1</sup>Wilson was about 25 feet closer to Mr. Irvin than was Sturgill (Tr. 66 - 67).

---

<sup>2</sup>Approximately 9 miners died in the explosion at the South Mountain mine in early December, 1992. MSHA believes the explosion was caused by someone smoking underground (Tr. 167).

~365

indicating that Mr. Irvin was absent, I conclude that he was present when Mr. Wilson lectured miners about the dangers of smoking underground prior to January 26, 1993.

Mr. Irvin categorically denies that he was smoking when approached by Inspector Wilson on January 26, 1993, or that he had any smoking materials (Tr. 111-112, 107). He contends that just prior to seeing Mr. Wilson, his partner's roof bolt machine was stuck. He also states that the roof bolter's wheels spun for five to ten minutes in an attempt to get free, thereby creating a lot of smoke (Tr. 101 - 102). When observed by Mr. Wilson, Irvin contends he was assisting his partner with the roof bolt machine. He rushed around a corner to prevent part of the roof bolter from dragging on the floor (Tr. 101-106).

Respondent denies that he removed his hard hat until asked to by Mr. Bruce when he was searched (Tr. 108). He also stated that he was using smokeless tobacco, some of which he had in his jaw when searched (Tr. 116-117). Mr. Bruce states he found a can of smokeless tobacco on Mr. Irvin and that Irvin did have some in his mouth (Tr. 140 - 141).

Mr. Irvin's account is supported by the testimony of his partner, Douglas Howard, who stated he was in a position to see if Mr. Irvin was smoking and that he was not smoking (Tr. 126). Mr. Howard also explains the presence of smoke by reference to the spinning of the roof bolter's tires or the possibility of the machine's cable having passed through some rock dust (Tr. 126-127). Syllice McDaniel, who was working near Respondent on January 26, 1993, also testified that the roof bolter produced a lot of smoke, and that he did not smell cigarette smoke (Tr. 136-137).

#### Discussion

The instant case is one which must be decided simply by determining whose testimony is more credible, Mr. Wilson's or Mr. Irvin's. Mr. Irvin testified under oath that he was not smoking and his testimony is supported by that of Mr. Howard and the fact that immediately after being observed by Mr. Wilson absolutely no physical evidence was found that indicated Irvin was smoking or possessed smoking materials.

On the other hand, there is nothing to suggest that Mr. Wilson had any reason to accuse Mr. Irvin with smoking underground if he was not doing so. That, however, does not rule out the possibility that Mr. Wilson did not see what he thinks he saw. On balance, I credit the testimony of Mr. Wilson and find that Mr. Irvin had a lighted cigarette in his mouth when Mr. Wilson observed him. It is the corroborative testimony of Mr. Sturgill that persuades me that Mr. Wilson's testimony is more credible than that of Mr. Irvin.

Mr. Sturgill had no reason to testify that he smelled cigarette smoke if he did not. I do not believe it is likely that Sturgill confused smoke from the roof bolter's wheels with that from a cigarette. Crediting Mr. Sturgill's testimony logically leads me to the conclusion that somebody was smoking at the time and place that Mr. Wilson saw Mr. Irvin. There is nothing in this record to suggest that, if anyone was smoking, that the person could have been anyone other than Mr. Irvin. Therefore, I credit the testimony of Wilson and Sturgill and conclude that Mr. Irvin was smoking underground in violation of the Act.

The fact that an almost immediate search of Mr. Irvin and his belongings yielded no evidence of his having smoked or even having smoking materials is troubling. While Mr. Wilson and Mr. Sturgill explained how Mr. Irvin could easily have disposed of the cigarette (Tr. 18, 36 - 37, 161), one would expect that a pack of cigarettes or other smoking materials would have been found.

Nevertheless, the standard of proof to be applied in this case is whether the Secretary has established a violation of the Act by the preponderance of the evidence *Kenny Richardson* 3 FMSHRC 8, 12 n. 7 (January 1981). This means that the Secretary's evidence, when weighed against that opposing it, must have more convincing force that it is more likely that Mr. Irvin was smoking than it is that he was not *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1204 n. 3 (D.D.C. 1990). I conclude that on this record that it was more likely that Mr. Irvin was smoking underground when observed by Inspector Wilson on January 26, 1993, than it is that he was not smoking. (Footnote 3)

---

3Reported cases involving citations issued to miners for smoking underground are extremely rare. I do note, however, that one is remarkably similar to the instant case *MSHA v. Frank J. Bough*, employed by Peabody Coal Company, 2 FMSHRC 1331 (ALJ June 1980). In that case, the inspector saw a miner smoking but could find no physical evidence to support his observations afterwards. As in the instant case, a second inspector also reported smelling cigarette smoke, although he didn't observe the cited employee smoking. The citation was affirmed by the Commission's judge and apparently became a final order.

In deciding this case, I give no weight to the fact that Mr. Irvin's employer conducted an investigation in which it concluded that he was smoking (Tr. 69 - 70, 81 - 87). Mr. Irvin was terminated from his employment as a result of that investigation. However, this record does not indicate the basis on which the company reached its conclusions, or what procedural protections were provided to Mr. Irvin.

Willfulness

To violate section 317(c) of the Act, the Secretary must show, not only that a miner was smoking underground, but that he did so willfully. To establish a willful violation of the no smoking requirement, the Secretary must establish that Mr. Irvin knew he was violating the law when he smoked underground, or that he was indifferent to either the legality of his actions, or the safety of his fellow miners and himself. *Empire-Detroit Steel v. OSHRC*, 579 F. 2d 378, 384-86 (6th Cir. 1975).

I find that the Secretary has established a willful violation. The preponderance of the evidence establishes that Mr. Irvin attended a lecture given by Inspector Wilson in which Wilson discussed the dangers of smoking underground and that Irvin smoked underground soon after attending that lecture (Tr. 20-22). I find such conduct constitutes indifference to the requirements of law and indifference to the safety of himself and his fellow miners.

Given the notice provided to Mr. Irvin regarding the potentially catastrophic consequences of smoking underground, I assess the maximum \$250 penalty provided for in section 110(g) of the Act.

ORDER

Citation No. 4241505 is affirmed and a \$250 penalty is assessed. Respondent is hereby ordered to pay the assessed penalty within 30 days of this decision.

Arthur J. Amchan  
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., 4th Floor, Arlington, VA 22203  
(Certified Mail)

Sidney B. Douglass, Esq., P. O. Box 839, Harlan, KY 40831  
(Certified Mail)

/jff