

CCASE:
SOL (MSHA) V. HICKORY COAL
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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. PENN 93-86
Petitioner : A. C. No. 36-07783-03528
v. :
: Slope No. 1
HICKORY COAL COMPANY, :
Respondent :

DECISION

Appearances: Pedro P. Forment, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary;
William Kutsey, Hickory Coal Company, Pine Grove,
Pennsylvania, for Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of
civil penalty filed by the Secretary of Labor (Secretary),
pursuant to section 105(d) of the Federal Mine Safety and Health
Act of 1977, 30 U. S. C. 801, et seq., the "Mine Act" or "Act,"
charging Hickory Coal Company (Hickory) with three violations of
the mandatory standards and seeking civil penalties of \$112 for
those violations. Pursuant to notice, the case was heard in
Easton, Pennsylvania, on April 21, 1994.

The three citations at bar, Citation Nos. 3079885, 3079890,
and 3079891, were all issued by Inspector Howard J. Smith of the
Mine Safety and Health Administration (MSHA) as a result of his
inspection at Hickory's Slope No. 1 on August 28, 1991.

Citation No. 3079885, issued pursuant to section 104(a) of
the Mine Act, alleges a "significant and substantial" violation
of 30 C.F.R. 75.1401 and charges that:

The hoist indicator, located on the hoist was
not operational. A miner was being hoisted at the
time this was observed. An accurate and reliable
indicator of the position of the gunboat shall be
provided.

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Citation No. 3079890, issued pursuant to section 104(a) of the Act, alleges a "significant and substantial" violation of 30 C.F.R. 75.1402 and charges that:

The operator has failed to provide two effective methods of signaling between the No. 7 West Slant and the hoist room. The operator has provided a bell system and needs to provide one which shall be a telephone or speaking tube.

Citation No. 3079891, also issued pursuant to section 104(a) of the Mine Act, alleges a violation of 30 C.F.R. 75.303(a) and charges that:

The results of the pre-shift examinations were not recorded as required. The last entry was 4-23-91.

Inspector Smith testified that when he arrived in the hoist house on the day in question, Mr. Kutsey was underground working. He spoke with a Mr. Deeter, who identified himself as the hoisting engineer. After some discussion about how to contact Mr. Kutsey, it was decided to shut the compressor off as a signal and Mr. Kutsey would then know to come out of the mine.

While Mr. Kutsey was in the process of coming out, the inspector checked the hoist indicator, that indicates the position of the gunboat in the slope. It was not working. The indicator is supposed to indicate the position of the gunboat in the slope, whether it is being raised or lowered. The hoist indicator moves along a graph to show exactly where the gunboat is in the slope. Apparently, the hoisting engineer was using a mark on the cable for some sort of guidance, but the inspector testified that this is not an approved method of indicating where the mine gunboat might be because it only shows the position of the gunboat in the slope while that mark is visible. There was some evidence that there was a mark on the cable for the top of the slope and another to mark the bottom of the slope where Mr. Kutsey would be working.

The operator also had a pull cord and a horn arrangement that could be used for signalling. For instance, if Mr. Kutsey was underground and he wanted the gunboat to be raised or lowered he could give whatever prearranged signal to the hoisting engineer to raise or lower the gunboat. This is an approved signalling method, but it does not satisfy the requirement for a hoist indicator contained in 30 C.F.R. 75.1401.

While I find this violation of the cited standard to be proven, I do not believe that the Secretary has carried his burden of proof with respect to the "significant and substantial" special finding because the markings on the cable at least provided sufficient information as to the whereabouts of the

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gunboat near the top and bottom of the slope, which are the two most critical locations and, accordingly, it will be deleted. Mathies Coal Co., 6 FMSHRC 1,3-4 (January 1984).

It is also a significant factor in this case that this is a very small mining operation and the owner/operator, Mr. Kutsey, is the only miner who goes underground. His only other employee or two remain on the surface at all times.

I also conclude that based on the evidence contained in this record, respondent's negligence was "ordinary" or "moderate" and an appropriate penalty for the violation is \$20.

While waiting for Mr. Kutsey to come out of the mine, Inspector Smith checked the pre-shift examiner's book and found the last entry to be 4/23/91. Clearly, this is a violation of the cited standard as Mr. Kutsey was operating the mine on the date of the inspection and had operated the mine between April 23 and August 28, 1991. Based on the record evidence, I conclude that it is a properly issued non "S&S" citation, due to the operator's ordinary negligence and the Secretary's proposed assessment of \$20 is appropriate.

The inspector also determined that day that the operator had failed to provide two effective means of signalling between the Seven West Slant and the hoist room. He further explained that Mr. Kutsey has a bell system and a phone system, but on the day in question the phone was located at the Six West Slant while Mr. Kutsey was working at the Seven West Slant. Essentially, the violation is that he only had one system available at No. 7. He could either have moved the existing phone at No. 6 to No. 7, or he could have installed another phone at No. 7. The standard and the record are clear that the phone system was required to be installed and available where the miner was working. Again, the violation is clear cut, but I conclude that it has not been established that the violation was "significant and substantial," since at least one usable system of communications was in working order, i.e., the bell system. See, Mathies, supra. Once again, I also find the respondent's negligence to be "ordinary" or "moderate" and will assess a civil penalty of \$20.

ORDER

In view of the above, IT IS ORDERED that:

1. Citation No. 3079891 IS AFFIRMED.
2. Citation Nos. 3079885 and 3079890 ARE MODIFIED by deleting the "significant and substantial" designations.

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3. Respondent shall pay a total civil penalty of \$60 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

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