

CCASE:
MADISON BRANCH V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MADISON BRANCH MANAGEMENT	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 93-218-R
v.	:	Order No. 3976643: 3/1/93
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 93-219-R
MINE SAFETY AND HEALTH	:	Citation 3976644; 3/1/93
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. WEVA 93-220-R
	:	Citation 3976647; 3/4/93
	:	
	:	Job. No. 3
	:	Mine ID 46-05815
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 93-373
Petitioner	:	A.C. No. 46-05815-03520
v.	:	
	:	Madison Branch Job No. 3
MADISON BRANCH MANAGEMENT,	:	
Respondent	:	Docket No. WEVA 93-412
	:	A.C. No. 46-05815-03521
	:	
	:	Job No. 3
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 03-415
Petitioner	:	A.C. No. 46-05815-03501HWZ
	:	
PROTECTIVE SECURITY SERVICES	:	Job No. 3
Respondent	:	

ORDER DENYING JOINT MOTION FOR SUMMARY DECISION
AND
AMENDED NOTICE OF HEARING

The above proceedings concern the carbon monoxide intoxication death of Allen Garrett, a night watchman employed by Protective Security Services at Madison Branch Management's Job No. 3 mine site. A central question in this case is whether the respondents have adequately removed the risk of carbon monoxide poisoning of security personnel who continue to use stationary

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vehicles for prolonged periods of time with no alternative means of warmth and shelter. The ". . . Secretary's position [is] that requiring security guards to have access only to their vehicles [with the engine running] for shelter is not inherently dangerous. Rather, [the Secretary asserts] it is the condition of the vehicle . . . that leads to a specific hazard." The Secretary's Second Amended Motion to Approve Settlements, p. 5.

Investigating authorities determined that Allen Garrett fell asleep in his vehicle and was asphyxiated on March 1, 1993, between 12:48 a.m., when the last entry in his log book was made, and 6:10 a.m., when he was found unconscious in his vehicle. At the time Garrett was discovered, his vehicle was parked in the coal-haulage roadway with the engine running, the dome light on and the heater running on high. At the time of this incident, the weather had been cold with a temperature of approximately 25 degrees fahrenheit, and, it had been snowing. MSHA's investigation revealed Garrett's vehicle had one large crack at the exhaust manifold located near the firewall and large cracks on the exhaust pipe on each side of the muffler.

It is undisputed that Garrett remained in his stationary vehicle for warmth and shelter during his 8 hour shift. In this regard, Madison Branch Management has stated ". . . there are no structures on the site of its Job No. 3 which can be accessed by security personnel to provide warmth and shelter. (Respondent's Joint Response, p. 7). Madison Branch Management has also stated that ". . . security personnel did continue to use their vehicles for shelter and heat during the winter after March 1, 1993 . . ." Id.

As a result of Garrett's fatality, the Mine Safety and Health Administration (MSHA) issued citations to both Madison Branch Management and Protective Security Services for an alleged violation of section 77.404(a), 30 C.F.R. 77.404(a). This mandatory safety standard requires, in pertinent part, that mobile equipment must be maintained in safe operating condition.

In addition, MSHA issued a citation to Madison Branch Management for an alleged violation of section 48.31(a), 30 C.F.R. 48.31(a). This mandatory safety standard requires that hazard training must be provided to all miners. Section 48.31(a) requires hazard training to include instruction on "hazard recognition and avoidance" and "safety rules and safe working procedures."

On June 8, 1994, I issued a combined Order Denying Motions for Approval of Settlements, Prehearing Order and Notice of Hearing in these matters. The Order noted the issue before me is the appropriateness of the proposed civil penalties and that the Commission is not bound by the Secretary's proposed assessments. See Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd

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Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147, 1153 (7th Cir. 1984). In establishing the proper penalty amounts, the Order further noted that the statutory mandate in section 110(i) of the Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 820(i), as well as established case precedent, requires the Commission to consider the statutory penalty criteria including the gravity of the violation and the ". . . demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. 820(i). The Commission's oversight responsibility with respect to the penalty criteria in the Act cannot be circumvented by the Secretary's acquiescence to abatement actions that do not remove the hazard contributed to by the violative conduct. (FOOTNOTE 1) Whether the subject hazard of carbon monoxide poisoning has been ameliorated is an issue to be determined through the fact finding process. See Dolese Brothers Company, 16 FMSHRC 689, 695 (April 1994). A discussion of the Commission's jurisdictional basis for resolution of this question is addressed in my June 8, 1994, Order and is incorporated by reference herein.

My June 8, 1994, Order set this matter for hearing in the vicinity of Charleston, West Virginia. The Order specified that the issue to be resolved at the hearing is whether the hazard has been alleviated by the proposed abatement actions and whether these actions constitute good faith efforts to achieve rapid compliance. These actions include the reported vehicle inspection program at 90 day intervals by Protective Security Services and warnings to employees not to keep vehicle windows tightly closed to avoid carbon monoxide poisoning.

The June 8 Order requested the Secretary, as the proponent of settlement terms that include the aforementioned abatement efforts, to call Chief Medical Examiner Irvin Sofer, a minimum of two qualified safety and health experts employed by the Occupational Safety and Health Administration (OSHA), and a licensed automobile mechanic familiar with the maintenance and repair of automotive exhaust systems, as witnesses to address the propriety of the proposed abatement efforts.

To facilitate discovery, the June 8 Order required the parties to exchange witness lists on or before July 19, 1994. The Secretary's Witness List was filed pursuant to the Order. In
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1 The Secretary's reliance on Wyoming Fuel Co., 14 FMSHRC, 1282, 1289 (August 1992), for the proposition that terminated citations and orders cannot be modified to direct further abatement is misplaced. The Commission's statutory obligation to evaluate the Section 110(i) penalty criteria to determine the appropriate assessment, including the question of good faith efforts to achieve rapid compliance, is not altered by MSHA's termination of the underlying citation.

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the Secretary's filing, counsel stated "[t]he Secretary does not intend to call those witnesses identified by the Administrative Law Judge in the June 8, 1994, Prehearing Order and Notice of Hearing." With regard to the scheduled hearing, counsel stated:

Nevertheless, there remain no genuine issues of material fact in this matter. Consequently, summary judgment is appropriate. 29 C.F.R. 2700.67. The parties will be filing a joint motion for summary judgment which will clearly indicate, through stipulations, that there are no genuine issues of material fact. The Secretary does not intend to offer any evidence beyond that stipulated to in the parties's joint motion for summary judgment (emphasis added).

I am construing the above statement as a joint motion for summary decision which IS HEREBY DENIED. The motion is denied in accordance with Commission Rule 67 because of the following unresolved issues of material fact:

1. The nature of carbon monoxide intoxication and the correlation between the level of toxicity and the period of exposure;

2. Given the characteristics of carbon monoxide, whether the risk of carbon monoxide intoxication to individuals who seek warmth and shelter in stationary vehicles for extended periods of time can be effectively alleviated by the methods proposed by the respondents;

3. Whether remaining in a stationary vehicle for prolonged periods with the engine and heater running is a "recognized hazard" that is prohibited by section 5((a)(1) or Section 5(a)(2) of the Occupational Safety and Health Act of 1970, 20 U.S.C. 654(a)(1) and 5(a)(2);

4. The qualifications of the individual assigned by Protective Security Services to inspect employee vehicle exhaust systems and the methods of such inspection; and

5. The requisite qualifications, equipment and procedures necessary for performing an adequate vehicle exhaust system inspection.

The parties are advised that Dr. Irvin Sofer, Chief Medical Examiner of the West Virginia Department of Health and Human Services will be called upon by the court as an expert witness. Dr. Sofer's testimony will include his expert opinions with regard to the hazards associated with carbon monoxide poisoning

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as well as testimony concerning any pertinent articles or publications he has written.(FOOTNOTE 2)

The Secretary is advised that the failure to call OSHA safety and health experts, who are employees under the supervision and control of the Secretary, may result in an adverse inference that their testimony concerning the OSHA "recognized hazard" question in issue 3 above would be detrimental to the Secretary's position with respect to the abatement question. NLRB v. Laredo Coca-Cola Bottling Co., 613 F.2d 1338 (5th Cir. 1980); NLRB v. Dorn's Transportation Co., 405 F.2d 706 (2nd Cir. 1969) (cases permitting an adverse inference concerning missing witnesses' statements or motivations).

Accordingly, these matters will proceed to hearing on September 22, 1994, in Charleston, West Virginia, as scheduled. The hearing location will be specified in a subsequent order. The parties may stipulate on the record at trial as to matters that are not in dispute provided that the stipulations do not relate to conclusions of law with respect to the Section 110(i) penalty criteria.

Jerold Feldman
Administrative Law Judge
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2 Dr. Sofer performed the autopsy on Allen Garrett. In view of the Secretary's disinclination to call Dr. Sofer, on July 21, 1994, I telephoned Dr. Sofer to determine if he was available to testify in this matter and to ascertain his area of expertise. Dr. Sofer stated that he is familiar with carbon monoxide poisoning and that he has written on the subject. Dr. Sofer expressed a willingness to testify as a court expert witness.