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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-155 A. C. No. 46-07678-03548-A
v.	:	
	:	Barbara Lynn No. 4
DAVID REED Formerly Employed by GOLD RIVER MINING COMPANY, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-156 A. C. No. 46-07678-03549-A
v.	:	
	:	Barbara Lynn No. 4
JOHN MILLER Formerly Employed by GOLD RIVER MINING COMPANY, INC., Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-172 A. C. No. 46-07678-03550-A
v.	:	
	:	Barbara Lynn No. 4
DONALD SALTSGAVER Formerly Employed by GOLD RIVER MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Edward H. Fitch, IV, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
David G. Reed, Beckley, West Virginia and
Donald R. Saltsgaver, Cedar Grove, West Virginia, Pro Se, for Respondents.

Before: Judge Hodgdon

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These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against David Reed, John Miller and David Saltsgaver, all formerly employed by Gold River Mining Company, Inc., pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The petitions allege that each of the named respondents knowingly authorized, ordered or carried out, as an agent of Gold River, a violation of Section 75.220, 30 C.F.R. 75.220, of the Secretary's Regulations. For the reasons se forth below, I find that the Respondents did not knowingly violate the regulation.

A hearing was held in these cases on August 3, 1994, in Summersville, West Virginia. Mine Safety and Health Administration (MSHA) inspectors Michael S. Hess and Charlie M. Meadows testified for the Secretary. Herbert McKinney, Martin Copley and David G. Reed testified on behalf of the Respondents.(Footnote 1)

BACKGROUND

On July 1, 1992, Inspector Hess began a AAA (quarterly) inspection of Gold River's Barbara Lynn No. 4 Mine. On observing eleven entries which had loose mud and rock at their faces, he concluded that Gold River's roof control plan had been violated and issued Citation No. 3731550 to the company alleging a violation of Section 75.220 of the Regulations. (Pet. Ex. 1.) The citation stated:

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1 John C. Miller failed to appear at the hearing. On August 5, 1994, an Order to Show Cause was issued to Mr. Miller ordering him to show cause why a default decision should not be issued against him. He responded to the order on August 9. His response was accepted, and on August 25 an order was issued sending Mr. Miller a copy of the hearing transcript and offering the Secretary and him an opportunity to request a further hearing and submit additional evidence. On September 1, Mr. Miller filed a letter stating that he did not have any additional evidence to submit. On September 8, counsel for the Secretary submitted Petitioner's Exhibit 9, Memorandum of Interview of John Miller on May 11, 1993. No objection has been made to this exhibit and it is admitted into evidence.

> The roof control plan was not being complied with on the 001 section. Mining was performed in 9 entries within 150 feet of outcrop or highwall without having supplemental support limiting the roadway width to 16 feet. The outcrop was cut in too [sic], some of this area was pillared and mud and rock was [sic] present in the working faces. Cracks was [sic] present along the pillared area and the roof sounded drummy when tested in faces.

On July 7, 1992, the citation was modified to add:

> Management showed reckless disregard for the health and safety for the miners in that after mining in one place to the highwall or outcrop and observing mud and rock in the face, mining continued. The operator knew that this condition existed then willfully mined eight other face and two pillar splits in this area without setting additional roof support. The approved map shows the highwall line. This condition is highly likely to cause death because of the hazardous roof conditions while mining near the outcrop or highwall without additional roof support added.

Gold River paid the $3,000.00 civil penalty assessed it for this violation in MSHA case No. 46-07678-03531 on January 19, 1993. (Tr. 17.)

During May 1993, Charlie Meadows, an MSHA Special Investigator conducted a special investigation to determine whether cases should be brought against Reed, the mine's Superintendent/General Foreman, and Saltsgaver and Miller, section foremen, under Section 110(c) of the Act, 30 U.S.C. 820(c), for having knowingly violated the regulation. H concluded that they should. (Tr. 72.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 110(c) of the Act provides, in pertinent part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsection[ ] (a) . . . .

Consequently, to prevail in his cases against the corporate agents, the Secretary must prove (1) that a violation of a mandatory health or safety standard occurred, and (2) that the corporate agents "knowingly authorized, ordered, or carried out" the violation. I conclude that the Secretary has failed to prove either circumstance.

Violation of a Mandatory Health or Safety Standard

Section 75.220(a)(1), 30 C.F.R. 75.220(a)(1), requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager . . . ." The roof control plan for the Barbara Lynn No. 4 Mine, which was in effect on July 1, 1992, was approved by the district manager on December 19, 1991. (Pet. Ex. 3.) The plan states that:

> [r]oof bolts shall not be used as the sole means of roof support when underground workings approach and/or mining is being done within 150 feet of the outcrop or highwall. Supplemental support shall consist of at least one row of posts on 4-foot spacing, maintained up to the loading machine operator, limiting roadway widths to 16 feet.

(Pet. Ex. 3, p. 4.)

Obviously, to show that the roof control plan was not being followed with respect to this provision, it must be shown that mining was being done within 150 feet of an outcrop(Footnote 2) or highwall.(Footnote 3) The evidence in this case does not support finding that there was either a highwall or an outcrop within 150 of where the mining in question was done.

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2 An "outcrop" is defined as "[t]he part of a rock formation that appears at the surface of the ground" or "[c]oal which appears at or near the surface; the intersection of a coal seam with the surface." However, "[i]t does not necessarily imply the visible presentation of the mineral on the surface of the earth, but includes those deposits that are so near to the surface as to be found easily by digging." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 778 (1968).

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3 A "highwall" is "[t]he unexcavated face of exposed overburden and coal or ore in an opencast mine or the face or bank on the uphill side of a contour strip mine excavation." Id. at 543.

The citation modification states that "the approved map shows the highwall line." However, none of the maps offered into evidence, (Pet. Ex. 5, Resp. Exs. A and E), show a highwall line. There is an indication on one of the maps that some areas had been strip mined, but the areas are not near the location of the alleged violation. (Resp. Ex. E.)

As is apparent from the citation, the inspector was not positive as to whether this violation involved a highwall or an outcrop. He was no more specific in his testimony and never stated what exactly had been cut into. The closest he came was to imply that it was a highwall since the area looked reclaimed rather than natural because of the loose rock, mud and dirt. (Tr. 22.)

Inspector Meadows clearly believed that a highwall had been mined into. Thus, he stated "the area to the right side of where you have entry No. 4, that whole area has been stripped," (Tr. 82), "Ray Charles could see that that area had been stripped," (Tr. 107), and "I've took [sic] pictures of it, too, David, and the pictures I've got plainly show it's been strip mined" (Tr. 108).

On the other hand, Mr. McKinney, who had been an MSHA inspector at the time of the violation, but had retired about four months prior to the hearing, testified (referring to Resp. Ex. C) that "that area looks like there must have been spoil put in there, for whatever reason. I couldn't say it had been stripped, but there's spoil put in there - - it looks like there's been spoil put in there and it was resealed. . . ." (Tr. 129.)

Mr. McKinney further testified, on cross examination, as follows:

> Q. Do you know the area around the Barbara Lynn No. 4 Mine?
>
> A. I'm well acquainted with it.
>
> Q. Has that area been strip mined to your knowledge?
>
> A. There's been a lot of mining activities took in there. There's been several mines faced up there, and for whatever reason, they didn't make a go of it. And

> as far as saying that it had been stripped, I guess the most disturbance that has taken place around the Barbara Lynn Mine is when they cut that haulageway through that mountain up there to get to that preparation plant to make a shorter haulway to the coal, but as far as knowing that there's a whole lot of stripping going on up there, I'm not certain. I'm not a surface inspector, and I had no reason to be in the areas that was [sic] surfaced [sic] mined.

(Tr. 142.)

Mr. Copley, also a retired MSHA inspector who had been active at the time of the violation, when asked whether, when he viewed the faces of the eleven entries, it looked like a highwall had been run into, responded:

> I couldn't tell. It was in the dirt, and I couldn't say it was a highwall. I don't know if there was ever a highwall there for sure, because there were four mines faced up in that area, and when we went in there to do the initial roof control plans for all four mines, there was no strip mine activity in there, and I couldn't tell. There's four mines and a cleaning plant had been put in there and there was a lot of dirt disturbed, and I don't know if it was all disturbed for that, or if there had been strip activity in the area. I don't know; I never saw it.

(Tr. 148.)

This evidence is simply insufficient to establish the existence of a highwall. There is nothing on the mine maps to indicate the possibility that a highwall was present; in fact, there is nothing on the maps to indicate that strip mining occurred in that area. No one testified that strip mining had occurred in that area, even though several of the witnesses were well acquainted with the area. The testimony as to what the area looked like proves only that the area appeared to have been reclaimed. Indeed, the strongest inference that can be made from that evidence is that the area was reclaimed to build the haulage road. Consequently, I conclude that the evidence does not show that the Respondents mined within 150 feet of a "highwall."

Nor does the evidence establish that they mined within 150 of an "outcrop." All of the maps show an outcrop line, although it is clearest on page one of Pet. Ex. 5 and on Resp. Ex. A. However, the undisputed testimony is that based on this line the mining was over 150 feet from the outcrop. (Tr. 157, 173.)

The Secretary's case appears to be based on the assumption that since dirt, rocks and mud were mined into, the Respondents had to have mined into either a highwall or an outcrop. There is no direct evidence which establishes that what was mined into was an outcrop. There is surmise that perhaps the outcrop line on the map was improperly marked, but nothing to show that it was. Furthermore, there is no explanation at all as to why the outcrop line on the map, which had been shown to be correctly marked up until the day in question, was suddenly out of place.

In Halfway, Inc., 8 FMSHRC 8 (January 1986) the Commission affirmed a decision which found that Halfway had violated its roof control plan by mining within 150 of an outcrop without supplemental roof support. The inspector determined that a violation had occurred by examining the mine map which "showed that mining operations had advanced within 150 of the outcrop" and then going into the mine and observing that only roof bolts were supporting the roof. Id. at 9.

If the Secretary is not going to rely on the mine map, as he did in Halfway, to show where the outcrop is, then he must have some other means of proving where the outcrop is. This is particularly true in a situation where his case is based on an assumption that the mine map is wrong. In this case he has presented nothing other than the nature of the material cut into. His supposition that this established an outcrop is entitled to no more weight than the miners conjecture that what they had mined into was a "washout." (Tr. 160-61, 176.) In fact, based on the testimony about washouts throughout the hearing and the depiction of washouts on the maps, the Respondents' evidence is the more persuasive. Accordingly, I conclude that the Secretary has failed to prove that the Respondents mined within 150 of an outcrop.

The Secretary has not proved that the Respondents mined within 150 feet of either a outcrop or a highwall. Accordingly, it has not been established that the roof control plan was not followed and that Section 75.220 was violated. Since the violation has not been established, the Respondents cannot be found to have knowingly authorized, ordered or carried it out.

Knowingly Authorized, Ordered, or Carried Out

Furthermore, even if the violation had been proved, the evidence does not support a finding that Reed knowingly ordered that it be committed or that Saltsgaver and Miller knowingly carried it out. The Commission set out the test for determining

whether a corporate agent acted "knowingly" in Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 623 (6th Cir. 1982), cert. denied, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983) when it stated:

> If a person in a position to protect 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.

In Roy Glenn, 6 FMSHRC 1583 (July 1984), the Commission expanded the test to cover a situation where the violation does not exist at the time of the agent's failure to act, but occurs after the failure. It said:

> Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted 'knowingly', in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps.

Id. at 1586. The Commission has further explained "that a 'knowing' violation under section 110(c) involves aggravated conduct, not ordinary negligence." BethEnergy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992)(citation omitted).

In this case, the Respondents neither failed to act, nor had reason to know that a violation had occurred, or would occur. Reed testified that he had begun his vacation when he received a telephone call from Saltsgaver advising him that the miners had "hit rock" and asking Reed what they should do.

Reed looked at his mine map, determined that the mining was taking place more than 150 feet from the outcrop marked on the map, had Saltsgaver check the certified map in the mine office to see if anything was marked on it that was not on his map and, on hearing that there was not, told Saltsgaver to continue mining. He told Saltsgaver that they did not need to start using posts because they were "not within the required area." (Tr. 173.)

Reed further instructed Saltsgaver "to consult with his roof control men and make sure that the bolts were anchoring, that the area was safe . . . ." (Tr. 157.) Reed also advised him "that if he seen [sic] any roof or rib failure, to cease mining

immediately." (Tr. 173.) Reed then called Miller, section foreman on the shift after Saltsgaver's, prior to the beginning of his shift, and told him "to continue mining; any sign of roof or rib support failure to cease mining at once; if not, continue mining till we skirted it all the way around." (Tr. 173.)

It is clear from this evidence that the Respondents did not cut eleven entries to the dirt without checking to find out what was happening. The first time that dirt was hit, Saltsgaver called Reed, advised him what had happened and asked him how to proceed. Reed looked at the mine map, came to the not unreasonable conclusion that they were not within 150 feet of the outcrop, so that what had been hit must have been a "washout", and instructed his foremen to keep cutting to the dirt until they had skirted the area, as had been done when other "washouts" were encountered.

This is certainly not aggravated conduct.(Footnote 4) The Respondents acted under a reasonable, good faith belief that they were dealing with a "washout." Wyoming Fuel Company/Basin Resources, Inc., 16 FMSHRC 1618, 1630 (August 1994). They did not fail to act when the problem was first encountered. Cf. Prabhu Deshetty, 16 FMSHRC 1046 (May 1994)(Deshetty failed to address an ongoing problem when he had actual knowledge of it). Moreover, Reed acted to protect the safety of his men with his instructions to check the roof support and to cease mining if there was any sign of roof or rib failure. Cf. Michael W. Brunson, 10 FMSHRC 594, 600 (May 1988)(managerial directions not to use a loader if the brakes were inadequate in conjunction with ambiguous knowledge on the part of the agent did not provide a basis for a knowing violation).

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I am somewhat troubled by the indications in Saltsgaver's Memorandum of Interview, (Pet. Ex. 8), that he knew that they were supposed to use timbers and so advised Reed, who told him to keep cutting, and by the statement that Reed told him to cover up the violation. If true this would be extremely aggravated conduct. However, I give this evidence no weight because it is not a direct statement, but rather a summary of the interview by the investigator and, thus, is hearsay filtered through the recollection of the investigator; it is not consistent with the Memoranda of Interview of Reed and Miller, (Pet. Exs. 7 and 9), and the evidence presented at the hearing, including the fact that there was no evidence that anything was covered up; and, the Memorandum itself evidences a bias on Saltsgaver's part against Reed in that he believed Reed wanted him to quit so that Reed could hire one of his buddies.

ORDER

I conclude that the evidence does not establish that the Respondents mined within 150 feet of an outcrop or highwall, and that, even if it did, it does not prove that they knowingly ordered or carried out the violation. Accordingly, it is ORDERED that the petitions for assessment of civil penalty filed against David Reed, John Miller and Donald Saltsgaver are DISMISSED.

T. Todd Hodgdon
Administrative Law Judge

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