FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 31, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2002-86-M
Petitioner	:	A. C. No. 01-01401-04392 A
v.	:	
	:	
WILLIAM EUGENE AVERETTE, employed by	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	No. 7 Mine

DECISION

Appearances: Keith E. Bell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
William L. Campbell, Jr., Esq., & David M. Smith, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994) the "Act" charging William E. Averette, as an agent of corporate mine operator Jim Walter Resources, Inc., (JWR) with "knowingly authorizing, ordering, or carrying out" a violation on July 11, 2000, of the mandatory standard at 30 C.F.R. § 75.400. The general issue before me is whether Mr. Averette, indeed, knowingly authorized, ordered or carried out the noted violation and, if so, what is the appropriate civil penalty to be assessed considering the relevant criteria under Section 110(i) of the Act.

Section 110(c) provides that whenever a corporate operator violates a mandatory health or safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew, or had reason to know, of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1982), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord, Freeman United Coal Mining Co., v. FMSHRC,* 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish Section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992), citing *United States v. International Minerals & Chem. Corp.,* 402 U.S. 558, 563 (1971). An individual acts knowingly when he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3

FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.,* 14 FMSHRC 1232, 1245 (August 1992).

It is undisputed that, during relevant times, Mr. Averette was an agent of corporate operator JWR. The underlying violation as set forth in Citation No. 7674474, is also undisputed. That citation, which was issued at 9:45 a.m., on July 11, 2000, charges as follows:

> Float coal dust, including float coal dust deposited on rock dusted surfaces, was present, in a very substantial amount, in the No. 1 Longwall section tailgate entry. The float coal dust was deposited on the roof, ribs, floor and ribs for approximately 200 feet outby the longwall face, and for an undetermined distance inby the longwall face into the gob area. The floor, ribs and timbers were black throughout the described area and no apparent effort had been made to apply rock dust after production had started on the owl shift, 7-09-2000.

The critical issue remaining for disposition then, is whether Averette, as an agent of JWR, knew or had reason to know of the violative condition and failed to act to correct the condition before it was cited. Kenneth Cannon, an inside laborer for JWR, with 22 years of mining experience, testified that on July 11, 2000, he was acting as the alternate union safety committeeman accompanying Inspector Greer of the Department of Labor's Mine Safety and Health Administration (MSHA) on the 7 a.m. to 3 p.m. day shift. At the tailgate area of the No. 1 Longwall, at around 9:50 a.m., he observed that for over 200 feet the tailgate area was dark black in color from rib to rib. Based on this evidence and Cannon's experience, he opined that no rock dust had been applied to the area. In addition, neither he nor the inspector could find any dates, times or initials evidencing the presence of a preshift mine examination in that area for the preceding owl shift.

Cannon subsequently came upon the pod duster (a mechanical rock duster) and observed that although its unit with its air compressor were working, the lines were leaking so severely that no rock dust was reaching the tailgate. Cannon also observed that there were no piles of rock dust at the joints where it had been leaking before the inspector had instructed that it be turned on, - - the inference being that the pod duster was not capable of being used and had not been used. Cannon also observed that there were ignition sources at the tailgate area, including an electrical motor and lights along the face. Based on his experience Cannon opined, from the conditions of the tailgate area, that those conditions had been there for a while.

Averette, was the "owl" shift longwall foreman on July 11, 2000, and was responsible for conducting the preshift mine examination on that date.[1] He testified that he performed that preshift exam between 5 a.m. and 6 a.m., on July 11, 2000, and reported no hazardous conditions in the examination book. There is no dispute that his preshift exam was required to include the

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[1] The "owl" shift began at 11:00 p.m., on July 10, 2000, and ended at 7:00 or 8:00 a.m. on July 11, 2000. For a foreman, like Averette, the shift ordinarily begins at 10:00 p.m. and ends around 9:00 a.m.

cited No. 1 Longwall section tailgate entry. Averette testified that he began his preshift examination on July 11, at 5 a.m., at the tailgate area. While acknowledging that it was common practice to place the date, time and initials in the tailgate area following such an exam, he claims, but without explanation, that on this occasion he placed his initials and the date and time of his examination at the No. 134 Longwall shield located about 100 feet from the tailgate. He also maintained that he personally rock dusted 100 feet of the tailgate area by hand while he was conducting this preshift examination. He maintains that bags of rock dust had been placed there and that when he left the area it was white in color. Averette also testified however that the rock dust he used was gray in color right out of the bag, not the customary white. He claims that when he last saw the tailgate area it was white in color and that he believed it was then properly rock dusted.

I find the testimony of Kenneth Cannon to be credible and sufficient alone to establish that Mr. Averette had reason to know of the cited violative condition. From this credible evidence and the undisputed allegations in Citation No. 7674474, it is clear that substantial amounts of float coal dust were found on the roof, ribs and floor in the No. 1 Longwall section tailgate entry and for 200 feet outby the longwall face at the time the inspection party arrived at that area at approximately 9:50 a.m., on July 11, 2000. I give Mr. Cannon's opinion significant weight that, based on the amount of float coal dust, its black coloration throughout this area and the absence of any evidence of rock dust, that the cited coal dust had indeed also existed in violative amounts at the time Mr. Averette purportedly conducted his preshift examination at that area around 5 a.m., on July 11, 2000. In reaching this conclusion I have not disregarded the evidence that the longwall shear cut coal on two additional passes following Averette's purported 5 a.m. preshift examination. However, it may reasonably be inferred from the absence of any rock dust in the cited area, that rock dust had not been applied even before these additional cuts.

I also have credibility concerns with Averette's testimony. For example, while claiming that he had spread rock dust by hand that was gray in color, he also claimed that when he left that area it was white in color. In addition, Averette's claims that the pod duster and its lines were functioning are in clear contradiction to the essentially undisputed evidence that the equipment was in fact not capable of delivering rock dust to the tailgate area because of severe leakage. The fact that Averette placed his initials and the date and time of his purported examination some 100 feet away from the tailgate area while admitting that he ordinarily did so within the tailgate area, also suggests guilty knowledge and an attempt to avoid responsibility for the violative coal dust.

Within this framework of evidence I find that the Secretary has met her burden of proving that Averette knew of the existence of violative coal dust conditions at the time of his preshift examination on the morning of July 11, 2000, and that he failed to take adequate corrective action. Accordingly I find that the charges against Mr. Averette have been sustained.

In assessing a civil penalty under Section 110(i) of the Act the Commission and its judges must consider "the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent,

the effect on the operator's ability to continue in business, 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." With respect to individuals charged under Section 110(c) the criteria regarding the effect and appropriateness of a penalty can be applied by analogy. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997). In this case I find Averette's negligence to be high as this has been established as a "knowing" violation. The violation was of high gravity based on the credible evidence that the subject mine was a "gassy" mine emanating significant amounts of methane and had a history of methane ignitions. In addition, there is undisputed testimony establishing the existence of ignition sources in the vicinity of the cited float coal dust. The evidence shows that should a methane ignition or explosion occur, the float coal dust could become suspended thereby enhancing the volatility of any such explosion with the attendant likelihood of fatalities. The Respondent produced no evidence regarding his income, support obligations, ability to pay or the appropriateness of the penalty in light of his job responsibilities. See *Sunny Ridge* at 272 and *Wayne Steen*, 20 FMSHRC 381, 385 (April 1998). The Commission has previously held with respect to operators that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Stone Co.*, 19 FMSHRC 673, 677 (April 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). There does not appear to be any reason that the same presumption should not apply as well to 110(c) respondents. There is no evidence that Mr. Averette had any prior history of violations. According to the citation, adequate rock dusting was applied to the cited area and the citation was abated by 11:15 a.m., on July 11, 2000. Within this framework of evidence I find that the civil penalty of $650.00, as proposed by the Secretary, is appropriate.

ORDER

William Eugene Averette is hereby directed to pay a civil penalty of $650.00, within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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