FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 21, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-1049
	:	A.C. No. 15-17291-03512S
v.	:	
	:	Mine: #1
EBENEZER COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., Pikeville, Kentucky, for Respondent.

Before: Judge Amchan

MSHA'S smoking sweep and the instant citation

Respondent's No. 1 Mine in eastern Kentucky was one of 175 mines inspected on May 19, 1994, as part of an MSHA "smoking sweep." This "sweep" was initiated as part of MSHA'S response to two recent fatal mine explosions which the agency attributes to underground smoking. It involved the simultaneous inspection of mines in Kentucky, West Virginia and Virginia to determine whether miners were taking smoking materials underground in violation of MSHA's regulations at 30 C.F.R. ' 1702 and the Federal Mine Safety and Health Act, 30 U.S.C. ' 877(c). Another objective of the sweep was to determine whether mine operators were adequately implementing their approved smoking search programs pursuant to the regulation.

At Respondent's No. 1 Mine, MSHA Inspector Danny Bryant

discovered an unopened pack of cigarettes underground in a plastic grocery bag, which was being used as a lunch container by miner Daniel King (Tr. 49-51). King asserted that he was unaware of the presence of the cigarettes and that his wife (or girl friend) had placed them in the bag without his knowledge (Tr. 50, 57).

Bryant issued Respondent Citation No. 3376644 pursuant to section 104(a) of the Act. The citation alleged a "significant and substantial" violation of 30 C.F.R. ' 75.1702. Bryant characterized Ebenezer Coal's negligence as "moderate." He also concluded that an injury was reasonably likely to result from the violation and that such injury was likely to result in lost workdays or restricted duty (Exh. P-1).

After review by MSHA's national office, the citation was modified to allege a section 104(d)(1) order, rather than a citation. Respondent's negligence was recharacterized as "high," rather than "moderate." The likelihood of injury was recharacterized as "highly likely," the likely injury was modified to "fatal," and the number of employees affected was changed from one to ten (Tr. 40, Exh. P-2). The penalty for the modified order was specially assessed and a $2,500 civil penalty was proposed.

Respondent concedes that a violation occurred and that it was "significant and substantial" and due to moderate negligence. It takes issue with the characterization of high negligence, the conclusion that injury was "highly likely," and the amount of the proposed penalty (Tr. 79-80).

Respondent's smoking search program prior to the citation

Prior to the instant citation/order, Respondent was conducting smoking searches pursuant to a program approved by MSHA's Pikeville, Kentucky District Office on December 29, 1992 (Exh. P-7). That program required that all employees were to be searched at the mine portal immediately before going underground for smoking materials, matches, or lighters. The searches were to be conducted at least once a week at irregular intervals. Written records were required to be made

of the searches and additional searches were to be made if there was any indication weekly searches were inadequate[1].

Prior to May 19, 1994, searches were normally performed by foreman Michael Richards. On occasions when he was observed, Mr. Richards patted the miners down and searched their pockets (Tr. 56). He was also observed searching for smoking materials on mining equipment and in employees' lunch buckets left on mining equipment (Tr. 56). Smoking searches were also occasionally made by superintendent John Paul Biliter (Tr. 67). There is no indication in the record that any smoking materials were ever found underground at Respondent's mine prior to May 19, 1994 (Tr. 67, 70).

There is also no indication that Respondent did not follow its approved smoking search plan. The Secretary has suggested that the searches were performed at sufficiently regular intervals that employees might have been able to anticipate them (Tr. 60-62). Close examination of Exhibit R-1 indicates that the searches could have been more irregularly spaced, but does not provide a basis for concluding that Respondent was "highly negligent."

In the five months between December 13, 1993 and May 19, 1994, Respondent conducted 26 smoking searches. Eight were performed on a Monday, four on Tuesdays, two on Wednesdays, two on Thursdays, and ten on Fridays. From April 1, 1994 through May 13, 1994, there was a smoking search every Friday, except April 29. During that period there were only two searches conducted on days other than Fridays. Searches were conducted on April 11, 1994, a Monday, and April 28, a Thursday.

From this record, I conclude that miners could have had less reason to anticipate a search on days other than Fridays than they should have had. On the other hand, since May 19 was a Thursday, and a search had been made on Thursday, April 28, 1994, any miner taking smoking materials underground on May 19, could not be sure that he would not be searched. In conclusion, insufficient randomness in Respondent's smoking searches may support a finding of moderate negligence, but not "high" negligence.

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[1]A few days after receiving the instant citation/order, Respondent began searching its miners for smoking materials daily (Tr. 55).

The modifications of the instant citation/order were made without regard to the adequacy or inadequacy of Respondent's smoking search plan or its implementation (Tr. 31, 41). The modifications were made on the theory that if a miner carried smoking materials underground, the mine operator must have been highly negligent (Tr. 20, 23, 30-33, 40, 44-45). I am unable to draw the same inference.

There are several alternative explanations for the discovery of smoking materials in Mr. King's lunch bag. One explanation is the one advanced by the Secretary, that Mr. King knew he would not be searched on May 19, and only the unanticipated presence of MSHA proved his assumptions in that regard incorrect. Another is the explanation that Mr. King gave to the inspectors, that unbeknownst to him his wife (girl friend) placed the cigarettes in his lunch bag (Tr. 50, 57). A third explanation is that Mr. King was simply foolhardy in taking smoking materials underground since a search on Thursday, May 19, was just as likely as the one performed on Thursday, April 28. I conclude that all three explanations are equally plausible.

In summary, I find the record supports a finding of moderate negligence, rather than high negligence. Further, I find that while it was reasonably likely that Mr. King would smoke underground and contribute to an occupational injury, it was not "highly likely" as asserted by the Secretary (Tr. 12-16).

It is certainly possible for smokers to refrain from smoking for an entire workshift, even if they have a pack of cigarettes in their possession. Moreover, Mr. King, as a scoop operator, could have smoked during his shift on the surface (Tr. 57-59). On the other hand, he may well have not resisted the temptation to smoke underground, just as other miners have not done so (Tr. 19).

Citation No. 3376644 is affirmed as a "significant and substantial" violation of section 104(a) of the Act. I find that it was due to the moderate negligence of Respondent and

that it was reasonably likely to result in fatal injuries (Tr. 19).

Assessment of Civil Penalty

Considering the six penalty criteria in section 110(i) of the Act, I assess a $250 civil penalty for this violation. Respondent operates a relatively small mine which produces approximately 100,000 tons of coal annually (Tr. 58). There is no indication that a penalty even of the magnitude of the $2,500 proposal would jeopardize Ebenezer's ability to stay in business.

Good faith in quickly abating the violation was demonstrated by Respondent's implementation of daily smoking searches on May 24, 1994 (Tr. 55, Exh. R-1, p. 6). Respondent had no prior history of related violations and its prior record of MSHA violations generally (Exh. P-8) does not affect my assessment in any manner.

Given the moderate negligence and the gravity of the violation, I deem $250 an appropriate penalty. Although, Respondent followed its MSHA-approved search plan, more randomness in its searches may have provided additional incentive to miners to make certain that they did not have smoking materials with them when they went underground. Similarly, although having a pack of cigarettes does not necessarily mean one will smoke, it makes it much more likely that smoking will occur than if one does not have cigarettes.

Congress, in prohibiting the possession of any smoking materials underground when enacting the 1969 Coal Act clearly deemed the presence of any such materials to create a potential for a catastrophic explosion. Thus, even an unopened pack of cigarettes underground is a serious hazard.

In assessing a $250 penalty, I deem this case distinguishable from Mingo Logan Coal Company, Docket No. WEVA 94-247 (Judge Fauver, February 2, 1995). In that case a large operator did not pat down its miners, but simply relied on their representations that they did not have any smoking materials in their possession. Moreover, Mingo Logan was on notice that its smoking search

program may have been inadequate since it had found smoking materials underground on at least one prior occasion (slip op. at page 6). A penalty of the $1,900 magnitude assessed by Judge Fauver is not appropriate in the instant case.

ORDER

Citation No. 3376644 is affirmed as a violation of section 104(a) of the Act. A $250 civil penalty is assessed. The penalty shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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