

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, SUITE 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 23, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket NO. KENT 94-1194
Petitioner : A.C. No. 15-15592-03594 S
v. :
ALPHA MINING COMPANY, : No. 1 Mine
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1223
Petitioner : A.C. No. 15-15592-03592 M
v. :
No. 1 Mine

DEWEY HUBBARD, Employed by :
ALPHA MINING COMPANY, :
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 94-1224
Petitioner : A.C. No. 15-15592-03593 M
v. :
No. 1 Mine

ROBERT HARDIN, Employed by :
ALPHA MINING COMPANY, :
Respondent :

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
Department of Labor, Arlington, Virginia on
Bill Hayes, Esq., 2309 Cumberland Avenue,
Middlesboro, Kentucky on behalf of Respondents.

U.S.
behalf of Petitioner;

Before: Judge Melick

These consolidated civil penalty proceedings are before me pursuant to sections 105(d) and 110(g) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act" charging Alpha Mining Company (Alpha) and two of its employees, Dewey Hubbard and Robert Hardin, with violating section 317(c) of the Act and the mandatory standard at 30 C.F.R. ' 75.1702 (prohibiting smoking and the carrying of smoking materials underground). The general issue is whether Alpha and/ or the named individuals committed the violations as charged, and, if so, what is the appropriate civil penalty for such violations. Additional specific issues are addressed as noted.

Secretary v. Robert Hardin - Docket No. KENT 94-1224

Citation No. 4039258, as amended, charges a willful violation of section 317(c) of the Act and alleges that "Robert Hardin, mechanic, was observed with one empty pack of Basic cigarettes and one Basic cigarette butt in his coat pocket on the 003-0 section approximately 750 feet underground." ¹ On May 27, 1994, the citation was amended to charge that "each item of smoking material is a separate violation and will receive [sic] a separate civil penalty will be assessed [sic]". The Secretary has accordingly proposed an assessment of two \$250 penalties for the alleged violations. Section 317(c), incorporated in the standard at 30 C.F.R. ' 75.1702, provides, in relevant part, that "no person shall smoke [or] carry smoking materials, matches, or lighters underground ...". Section 110(g) of the Act provides that "[a]ny miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than \$250 for each occurrence of such violation."

Neither the original citation nor the amendment thereto charge Hardin with actually smoking underground. I find that the Secretary in this case therefore elected to proceed only under that part of Section 317(c) which proscribes the carrying of smoking materials. No consideration will therefore be given as

¹ While this citation, as well as the citation against Dewey Hubbard (No. 4039257) alleges a "significant and substantial" violation, it is readily apparent from the language of sections 104(d) and (e) of the Act that such findings are relevant only to violations against mine operators. Consistent with this view, it is noted that the Secretary has not argued in his brief that such findings should be made in these citations against the individual miners.

to whether an empty cigarette pack and cigarette butt may constitute circumstantial evidence that unlawful smoking had occurred.²

According to Inspector Stanley Sampsel of the Mine Safety and Health Administration (MSHA), on May 19, 1994, he and two other MSHA inspectors, Joseph Grubb and Ted Phillips, were assigned to conduct a special inspection for smoking materials at the Alpha No. 1 mine. Upon arrival at the mine office, Inspector Grubb secured the telephone to prevent notice of the inspection to the underground miners and Sampsel and Mine Superintendent Michael Rouk proceeded underground.

Upon arrival at the underground working section, the individual miners were directed to a central location and a search of their pockets, boots, and socks was conducted, along with a "pat-down". No smoking materials were found at this time. Each miner was then separately escorted to his work area to complete the search. Sampsel escorted maintenance man Robert Hardin to a martrip located several crosscuts out by the face area. According to Sampsel, Hardin identified a tool box and a jacket lying on the martrip as belonging to him. Sampsel found what he described as a "Basic" brand cigarette butt in a pocket of the jacket and a "Basic" brand empty cigarette pack in the martrip operator's compartment. Hardin denied that the cigarette butt belonged to him and maintained that the jacket had been worn by other miners.

At hearing, Hardin testified that, indeed, Sampsel found his jacket lying behind the seat of the "buggy" (martrip) and there was a "Basic" cigarette butt in his jacket pocket. He maintained, however, that he had not worn the jacket for two or three days, that he did not place the butt in its pocket, and that others regularly used this jacket, which remained hung outside the mine most of the time. Hardin further maintained that although he does, in fact, smoke cigarettes, he smokes "Winston" brand and not the "Basic" brand. Hardin also acknowledged that Sampsel found a wadded empty pack of "Basic" brand cigarettes in the martrip. Hardin did not specifically deny that he had placed this empty cigarette pack in the martrip but only observed that others also used the martrip.

² While the Secretary could no doubt have added these charges by a timely amended complaint pursuant to Fed R.Civ.P 15 no such amendment has been filed. In this regard compare the Secretary's amendment to Citation No. 4038467 against Alpha in which the charge "smoked or carried smoking materials" is specifically set forth and accordingly describes "with particularity the nature of the violation."

As noted, the Secretary charges in the instant citation that Hardin committed two violations by carrying two smoking materials, i.e. a cigarette butt and an empty cigarette package. The first question to be decided is whether the empty package of "Basic" brand cigarettes found in the mantrip and the alleged cigarette butt (containing only traces of tobacco product and which admittedly could not be smoked) found in the coat pocket were "smoking materials" within the meaning of section 317(c) of the Act. The term is not defined in the Act or regulations but the term "smoking material" clearly connotes a material that is capable of being smoked. The Secretary argues that, as a container that may be used to hold cigarettes and thereby facilitate smoking, an empty cigarette package constitutes a "smoking material". There is no evidence in this record, however, of any common practice of re-using empty cigarette packs to store cigarettes, especially where, as in this case, it has been crushed, wadded, possibly gnawed by vermin and discarded. Moreover, under the Secretary's theory, anything that could be used to hold or convey cigarettes, including a dinner bucket or jacket pocket, would also constitute a "smoking material". It is, of course, a basic rule of construction that a statute should not be interpreted in a manner that would lead to absurd consequences. *Sutherland Stat Const.* ' 45.12 (5th Ed.). Under the circumstances, I do not find that the empty cigarette pack at issue constituted a "smoking material" within the meaning of the cited statute and regulation.

I reach the same result with respect to the so-called cigarette butt found in Hardin's jacket pocket. Examination of the butt reveals only minute traces of what appears to be tobacco product remaining. Moreover, Inspector Sampsel acknowledged that there was insufficient tobacco remaining to enable the substance to be smoked. Accordingly, I do not find the alleged cigarette butt here cited -- one that has insufficient tobacco product to actually smoke -- to constitute a "smoking material" within the meaning of the cited law and, accordingly, the citation must be vacated. Again, it should be stated that whether possession of an empty cigarette pack and cigarette butt may provide circumstantial evidence that smoking has occurred is not an issue before me in this case since no such charges are set forth in Citation No. 4039258 or its amendment.

Secretary v. Dewey Hubbard (Docket No. K ENT 94-1223)

Citation No. 4039257, issued May 19, 1994, charges Dewey Hubbard also with a violation of Section 317(c) of the Act and alleges that: "Dewey Hubbard, Section Foreman on the 003-0 section was observed with a full pack of Marlboro cigarettes and an empty pack of Marlboro cigarettes in his dinner pail approximately 750 feet underground." This citation was also modified on May 27, 1995, to add that "[e]ach item of smoking material is a separate violation and will receive [sic] a separate civil penalty will be assessed [sic]." Accordingly, as with the charges against Hardin, the Secretary has likewise here elected not to charge Hubbard with smoking but only with carrying smoking materials.

According to Inspector Sampsel, during the search of individual miners underground,

Hubbard was directed to open his dinner bucket. One full and one empty pack of "Marlboro" brand cigarettes were found inside.⁴ Hubbard who was then the section foreman, admits that the empty and full packages of cigarettes were in his dinner bucket. For the reasons previously stated, however, I do not find that an empty package of cigarettes is in itself a "smoking material" as alleged. Accordingly, that part of the citation charging Hubbard with carrying an empty "Marlboro" brand cigarette package is vacated.

However, with respect to the charges against Hubbard for willfully carrying a full package of cigarettes in his "dinner pail" the citation is affirmed. Hubbard also acknowledges that he knew he had possession of the full pack of cigarettes when earlier that shift he opened his dinner bucket to eat. Hubbard admits that he also knew that the smoking plan required him, upon such discovery, to transport the cigarettes out of the mine by the next reliable person but maintains that there was no vehicle available to do that. In this regard, however, Hubbard's testimony that he was trying to report his possession of cigarettes to maintenance foreman Michael Roark outside the mine when the inspectors took the telephone away from Roark is directly contradicted by Roark himself. For this reason I can give Hubbard's testimony but little weight.

While Hubbard also maintains that his wife had placed the full pack of cigarettes in his dinner bucket without his knowledge, I am not persuaded by this self-serving testimony. His failure to have called a most critical witness on this issue -- his wife -- is also noteworthy. She could have explained why she placed a full pack of cigarettes in the dinner bucket that, by reasonable inference, Mr. Hubbard regularly takes underground with him.

The fact that Hubbard also carried in his dinner bucket an empty pack of the same brand of cigarettes further suggests that he willfully carried these cigarettes and, as an aggravating penalty factor, indeed, had smoked cigarettes and intended to smoke additional cigarettes underground that day. In reaching this conclusion, I have not disregarded Hubbard's purported explanation for the empty pack, i.e. that he found the empty pack lying on the mantrip earlier that day, placed it in his pocket and then placed it in his lunch box. However, under the totality of the circumstances, this explanation is also not credible.

Under the circumstances and considering the relevant criteria under section 110(i) of the Act, a willful violation of section 317(c) is affirmed with a maximum \$250 penalty.

Secretary of Labor v. Alpha Mining Co. (Docket No. KENT 94-1194)

⁴ It was stipulated at supplemental hearings that this still-sealed package contained cigarettes.

In this case the Secretary charges Alpha Mining Company (Alpha) in one "Section 104(d)(1)" citation and amendment thereto with a number of violations of the standard at 30 C.F.R.

' 75.1702 but seeks a single civil penalty of \$10,000, apparently considering these charges to constitute one violation under Section 110(a) of the Act. The citation, No. 4038467, as first issued on May 19, 1994, charges as follows:

The operator was not complying with the approved search program for smoker's articles, a full pack of Marlboros and an empty Marlboro pack, one bic lighter, 2 cigarette butts were found on the active section, smoker's articles were found in foreman's lunch box, a cigarette butt was found in mechanic's coat pocket and an empty pack in his mechanic's car. The lighter was found on the mine floor and one cigarette butt found on the mine floor.

On September 1, 1994, the citation was amended to include the following additional charges:⁴

Section I, Item B should include the language, "The mine foreman, Dewey Hubbard, smoked or carried smoking materials, including one (1) full pack of cigarettes and one (1) empty pack of cigarettes (both Marlboro brand), underground. Also, the mechanic, Robert Hardin, smoked or carried smoking materials, including one (1) cigarette (butt found) (Basic brand), and one (1) empty pack of cigarettes (Basic brand), underground. Finally, a further search of the mine revealed that persons unknown smoked or carried smoking materials including one (1) cigarette (butt found) and one (1) 'Bic' cigarette lighter underground."

In essence, the charges in the original citation were that Alpha failed to comply with its approved search program for smoking articles based on the discovery during the May 19, 1994, inspection of various alleged smoking materials, including purported cigarette butts, several empty and a full package of cigarettes and a 'Bic' cigarette lighter. In relevant part, the cited standard provides that "the operator shall institute a program approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters." The relevant approved smoking plan provides as follows:

1. Each individual miner shall be informed that smoking or carrying smoking articles into the mine is a violation of these provisions and is subject to a penalty.

⁴ In spite of these additional charges the Secretary did not concomitantly amend his pleadings to increase the amount originally proposed for a civil penalty.

2. A systematic search for smokers' articles of all persons entering the mine (including, but not limited to lunch boxes, lunch bags, tool boxes, etc.) shall be conducted at least weekly at irregular intervals.

3. In addition, spot-check searches shall be conducted when necessary to ensure that such program is being followed.

4. Responsible persons shall be designated by the operator to conduct such searches and record of the searches will be kept.

5. "No Smoking" signs shall be prominently displayed at all mine entrances.

Since there is no dispute that at least one full package of cigarettes and a functioning cigarette lighter were found in the mine, it is clear that the violation is proven. The violation was also the result of high negligence since clearly inadequate searches were conducted for smoking articles on persons entering the mine. In this regard, mechanic Robert Hardin testified that the last time he had been searched for smoking materials upon entering the underground portion of the mine neither the jacket he was wearing nor his lunch box nor shoes nor socks was searched. It was only a "pat down" and the miners were not even asked to turn out their pockets. Moreover, Foreman Hubbard admitted that when searching for smoking materials he did not actually check miner's lunch pails but merely accepted their word that no smoking materials were within. Upon this evidence alone, it is clear that a violation is proven.

Since there is some question whether the above theory of a violation was charged in the citation at bar, I note the following theory which is implicitly incorporated in the citation is also supported by a preponderance of the evidence. In this regard the cited standard requires that the program instituted by the operator must "insure" that any person entering the underground area of the mine does not carry lighters or smoking materials. Accordingly, there is liability without fault if a person in the underground area of the mine is found carrying smoking materials. For this additional reason the citation must be affirmed. Foreman Hubbard had admittedly been carrying a full package of Marlboro cigarettes underground in his dinner bucket and it may reasonably be inferred that the operable "Bic" cigarette lighter had been carried underground.

Additional violations are alleged in the amended citation in that each of the six materials was alleged to constitute evidence of either smoking and/or of carrying smoking materials. Clearly the discovery of a full package of cigarettes and a functioning "Bic" cigarette lighter is evidence that smoking materials had been carried underground.⁵ In

⁵ Based on findings in the related cases I do not find that empty cigarette packs or cigarette butts incapable of being smoked, constitute "smoking materials".

addition, when those articles are considered in conjunction with the two empty packs of cigarettes found underground, one in the same lunch bucket containing the same brand of a full pack of cigarettes and the other in close proximity to a cigarette butt of the same brand, there is clearly sufficient evidence to support a finding that smoking had also occurred underground. Accordingly, the allegation that smoking had occurred underground is also proven as charged.

The violations were also clearly "significant and substantial" and of high gravity. A "significant and substantial" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FM SHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FM SHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In *United States Steel Mining Company, Inc.*, 7 FM SHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 6 FM SHRC 1834, 1936 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.*, 6 FM SHRC 1866, 1868 (August 1984); *U.S. Steel Mining Company, Inc.*, 6 FM SHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, *Secretary of Labor v. Texasulf, Inc.*, 10 FM SHRC 498 (April 1988); *Youghioghery & Ohio Coal Company*, 9 FM SHRC 2007 (December 1987).

The evidence herein demonstrates that "smoking materials" and a lighter had, in fact, been carried underground at the Alpha No. 1 Mine. It is also reasonable to infer from the evidence that it was a common, if not accepted, practice to do so in this mine. Indeed, the section foreman himself was found to be carrying both an empty and a full pack of cigarettes in his lunch bucket without credible justification.

The testimony of Inspector Sampsel that the violations were "significant and substantial" is also essentially undisputed. He testified that there was a danger of methane ignition aggravated by a dust explosion from smoking underground. Sampsel noted that this mine had extensive old workings and was adjacent to mines which had been sealed off. He further noted that such seals have a tendency to leak explosive methane gas and can be disturbed by roof falls. He also testified that the old works cannot properly be examined and it would not be unusual to have methane leaking from such areas. Indeed, he concluded that there was a "high probability" of methane in the sealed areas and contamination from leakage from broken seals. The record also shows that Alpha had, in fact, on occasion cut into these abandoned areas.

Sampsel further noted that mining had occurred both above and below the level of the mine at issue and roof falls and heaves can cause leakage from these other seams. He observed that nine people working in the area could suffer death from burns, explosions, and/or carbon monoxide suffocation. In this regard the record also shows that at least one mine disaster, at the Grundy mine, resulted in the death of nine miners from an explosion when an individual smoked underground at the same time an abandoned working was cut into.

The violation was also the result of high operator negligence and "unwarrantable failure". Indeed, it was the agent of the operator himself, section foreman Hubbard, who I have found personally and willfully violated the law. His negligence is further apparent from his failure to properly conduct smoking searches. He admitted that when "searching" for smoking materials he did not actually check the miners' lunch pails but merely accepted their word that none were present. The negligence of its foreman is imputed to the operator. *Southern Ohio Coal Co.*, 4 FM SHRC 1459 (1982); *Rochester & Pittsburgh Coal Co.*, 13 FM SHRC 189 (1991). Moreover, the aggravated negligence herein meets the criteria for unwarrantability. See *Youghiogheny and Ohio Coal Co.*, 9 FM SHRC 2007 (1987), *Emery Mining Corp.*, 9 FM SHRC 1997 (1987).

Within this framework of evidence and considering the criteria under section 110(i) of the Act, it is further apparent that the proposed civil penalty of \$10,000 is appropriate for the violations charged in Citation No. 4038467.

ORDER

Docket No. K ENT 94- 1224 - Citation No. 4039258 is hereby vacated.

Docket No. K ENT 94- 1223 - The charges in Citation No. 4039257 alleging that Dewey Hubbard carried smoking materials are affirmed in part and vacated in part as set forth in this decision. Dewey Hubbard is hereby directed to pay a civil penalty of \$250 within 30 days of the date of this decision.

Docket No. K ENT 94- 1194 - Citation No. 4038467 is affirmed. Alpha Mining Company is hereby directed to pay a civil penalty of \$10,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

Bill Hayes, Esq., Attorney for Alpha Mining Company, P.O. Box 817, 2309 Cumberland Avenue, Middlesboro, KY 40965 (Certified Mail)

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