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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 10, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1208
Petitioner	:	A. C. No. 15-15637-03560 S
v.	:	
	:	No. 1 Mine
BROKEN HILL MINING COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1209
Petitioner	:	A. C. No. 15-15637-03559 M
v.	:	
	:	No. 1 Mine
DONALD KIDD, employed by	:	
BROKEN HILL MINING COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
Hobart W. Anderson, President, Broken Hill

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Broken Hill Mining Co., Inc. and Donald Kidd, an employee of Broken Hill, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' ' 815 and 820. The petition against the company alleges a violation of the Secretary's

mandatory health and safety standards and seeks a penalty of \$2,500.00. The petition against Mr. Kidd alleges a violation of Section 317(c) of the Act, 30 U.S.C. ' 877(c), and seeks a penalty of \$250.00. For the reasons set forth below, I modify and affirm the citation against the company and assess a penalty of \$1,000.00 and I vacate the citation against Mr. Kidd and dismiss the petition.

The cases were heard on January 18, 1995, in St. Albans, West Virginia. MSHA Inspectors Buster Stewart and Gary Gibson and MSHA Coal Mine Safety and Health Specialist Cheryl S. McGill testified for the Secretary. Donald Kidd and Charles R. Lavender, Jr. testified on behalf of Broken Hill Mining.

FACTUAL SETTING

The facts in this case are undisputed. On May 19, 1995, MSHA Inspectors Stewart, Gibson and Jimmy Brown arrived at the Broken Hill Mine No. 1 to conduct a spot inspection for smoking materials. After directing the mine employee on the surface not to announce their presence to the people in the mine, Stewart and Gibson went into the mine. On arriving at the working section, the inspectors had the mine superintendent assemble all of the miners and conduct a search for smoking materials.

When that was completed, those miners who had lunch buckets were directed to get them. Inspector Stewart accompanied Donald Kidd to the scoop Kidd operated to retrieve Kidd's lunch bucket. Kidd opened the lunch bucket in the presence of Stewart and Gibson. Inside were some keys, an ear spray, a half filled bottle of Coca Cola, some headache pills, some yellow napkins from Happy Mart and a yellow Cricket lighter.

As a result, Inspector Stewart issued Citation No. 4012941 to the company for a violation of Section 75.1702, 30 C.F.R. ' 75.1702, of the Secretary's Regulations. (Pet. Ex. 1.) The citation was subsequently modified on May 25, (Pet. Ex. 2), June 2, (Pet. Ex. 3), and September 1, 1994, (Pet. Ex. 4). As modified, it stated that:

The operator's search program approved May 16, 1991, is inadequate because Donald Kidd, the scoop operator, was allowed to carry a yellow Scripto disposable cigarette [lighter] underground. A search of the employee's lunch bucket by the mine supt. revealed the cigarette lighter in the lunch bucket. The search was conducted in the No. 5 entry.

Citation No. 4227560 was issued to Donald Kidd. It alleged a violation of Section 317(c) of the Act, and stated: "A yellow Scripto disposable butane cigarette lighter was observed in the lunch bucket of Donald Kidd a scoop operator on the 001-0 Section. The lunch bucket was opened by Mr. Kidd in my presence

and later by Mine Supt. R. B. Hughes in No. 5 entry." (Pet. Ex. 7.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 317(c) of the Act and Section 75.1702 of the Regulations are identical and provide, in pertinent part, that: "No person shall smoke, carry smoking materials, matches, or lighters underground 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." With respect to individual miners, the Act also provides in Section 110(g), 30 U.S.C. ' 820(g), that: "Any 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."

Donald Kidd

Turning first to the violation concerning Donald Kidd, I conclude that the evidence does not establish that he willfully violated the mandatory safety standard. While there are no Commission decisions defining the term "willfully," *Black's Law Dictionary* 1599 (6th ed. 1990) defines "willful" as "[p]roceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary." There is no evidence in this record to show that Kidd intentionally, knowingly or voluntarily carried a lighter into the mine or to rebut his claim that he accidentally took the lighter into the mine.

Mr. Kidd testified concerning the incident as follows:

And that particular day, when it was time to go to work, I had a bottle of Swim Ear, not nasal spray; it was Swim Ear - it's for the ears, and it's basically the same thing. Just a bottle of stuff - a screwdriver, ink pen and keys and a bottle of -- well, it wasn't Excedrin. It was an off-brand medicine for headaches.

The cigarettes, as he said, was outside in my truck, which I told them where they were inside [the

mine], after they found the lighter -- or after I showed them the lighter. And the cigarettes . . .
But it inadvertently got in the bucket.

(Tr. 178.)

Q. Did you know that lighter was in that bucket?
A. No.

(Tr. 179.)

I put my Swim Ear and my screwdriver and my keys and my medicine in the bucket. And I took the coffee jug in the office and I put the bucket on the scoop and took the coffee jug in the office, I filled it up. That was the first and only time I was in the bucket that day.

. . . .

The lighter, I do not recall ever putting the lighter in the bucket, period. To my knowledge, as I assumed and everybody does, I put the lighter with the cigarettes in the truck bed or in the seat of my truck. They found the cigarettes in the seat of my truck but no lighter.

So when I put the other stuff in my pocket, then the lighter had to be, you know, just put in there [the bucket].

. . . .

Yeah, at some point that morning I had to put the lighter in there [the bucket]. No one else did.

(Tr. 192-93.)

Inspector Stewart testified with regard to finding the lighter: "Well, Mr. Kidd told me that morning, told me when we found the lighter, that he just got all of his material out of his pockets and put it in his lunch bucket." (Tr. 59.) He further stated: "But just as I've testified, there's a good possibility that when he got his stuff out, that he didn't know that lighter was in his bucket." (Tr. 67.) Finally, he related that Mr. Kidd acted surprised when he saw the lighter in his lunch bucket. (Tr. 107.)

Concerning this violation, Inspector Gibson stated: "Well, in this situation here, at the time this occurred, I really don't

think that Mr. Kidd -- I mean, the way he acted when the lighter was found and things, he acted like he was really sincere, that he didn't know that it was there." (Tr. 118.)

It is Mr. Kidd's contention that the lighter somehow got in his lunch bucket when he emptied his pockets before entering the mine, placing his cigarettes in his truck and everything else in the lunch bucket. He maintains that he did not have occasion to open the lunch bucket, which apparently had no lunch in it anyway, until asked to do so by the inspectors. Therefore, he asserts that he did not "willfully" take the lighter into the mine. This scenario is not implausible on its face.

Against this, the Secretary has offered only the finding of the lighter and speculation that Mr. Kidd either had cigarettes secreted somewhere else in the mine or planned to go out of the mine with the lighter to smoke the cigarettes in his truck. This does not stand up to scrutiny. In the first place, the inspectors corroborate Kidd by agreeing that he looked surprised when the lighter was discovered. In the second place, if Kidd were going to go to the trouble of secreting his cigarettes in the mine, it seems logical that he would also have secreted his lighter. Similarly, if he was going to go out of the mine to smoke a cigarette, why keep his lighter in the mine.

Based on the evidence of record, I conclude that Mr. Kidd did not willfully violate the Act. Consequently, I will vacate the citation and dismiss the civil penalty petition.

Broken Hill Mining Company

I reach a different conclusion on the company's violation. The Act imposes strict liability on mine operators for violation of the mandatory standards regardless of fault. *Western Fuels-Utah v. Fed. Mine Safety & Health*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (September 1991); *Republic Steel Corporation*, 1 FMSHRC 5, 9-10 (April 1979). Therefore, "[i]f smoking materials are found underground, there is a violation of ' 75.1702 and the operator is liable without regard to fault." *Mingo Logan Coal Co.*, 17 FMSHRC ____ (Judge Fauver, February 1995). Accordingly, I conclude that Broken Hill violated the regulation.

The citation alleges that this violation was "significant and substantial." A "significant and substantial" (S&S) 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 S&S "if, based upon the particular facts surrounding that 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 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out criteria for determining whether a violation is S&S. See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The dangers of mine explosions are well known as are the propensities of an open flame in a mine for causing explosions. One has only to consider the recent Southmountain Coal Inc. and the AA&G Elmo No. 5 explosions and resulting fatalities, alluded to by Ms. McGill and believed to have been caused by smoking materials in the mine, to recognize the seriousness of this violation. Consequently, applying the *Mathies* criteria to this case, I conclude that this violation was "significant and substantial."

The citation also alleges that Broken Hill was highly negligent in permitting this violation to occur and that the violation resulted from the company's "unwarrantable failure" to comply with the regulation. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.'" [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The evidence in this case does not support findings of high negligence or "unwarrantable failure" on Broken Hill's part. Broken Hill had in effect an underground search program required

by Section 75.1702 which had been approved by MSHA. The program provided that searches would be conducted once a week at irregular intervals and that apparently was done. (Resp. Ex. A.)

There is no evidence that these searches were conducted with indifference or incompletely. Furthermore, Broken Hill's policy

that anyone caught taking smoking materials underground would be terminated indicates that it did not take its responsibilities in this area lightly. Finally, having found that the violation in this case was not willful, it cannot be inferred from the violation that the company's program was ineffectual.

Accordingly, I conclude that this violation was not the result of an "unwarrantable failure" by Broken Hill and that the company was no more than moderately negligent in this instance. The citation will be modified from a 104(d)(1) citation, 30 U.S.C. ' 814(d)(1), to a 104(a) citation, 30 U.S.C. ' 814(a).

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of \$2,500.00 for this violation. Section 110(i) of the Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining an appropriate civil penalty. In connection with these criteria, I find that Broken Hill has a lower than average history of previous violations, with no evidence of previous smoking violations; that the No. 1 mine is a small mine and Broken Hill a small operator; and that the company demonstrated good faith in abating the violation. (Pet. Exs. 5 and 6.) Broken Hill made no claim at the hearing that the penalty proposed by the Secretary was inappropriate to its size or that the penalty would adversely affect its ability to remain in business. Finally, while I am reducing the level of negligence, as I indicated earlier in the decision this is a serious violation. Taking all of this into consideration, I conclude that a penalty of \$1,000.00 is appropriate in this case.

ORDER

Citation No. 4227560 in Docket No. KENT 94-1209 is **VACATED** and the civil penalty petition is **DISMISSED**. Citation No. 4012941 in Docket No. KENT 94-1208 is **MODIFIED** from a Section 104(d)(1) to a Section 104(a) citation by deleting the

"unwarrantable failure" designation and reducing the level of negligence to "moderate." The citation is **AFFIRMED** as modified.

Broken Hill Mining Company, Inc. is **ORDERED** to pay a civil penalty of \$1,000.00 within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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