FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 15, 1995

TOPPER COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 94-944-R
	:	Citation No. 4243301; 5/19/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 9 Mine
	:	Mine ID 15-17326
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-1052
	:	A. C. No. 15-17326-03506 S
v.	:	
	:	No. 9 Mine
TOPPER COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, Pikeville, Kentucky, for Respondent.

Before: Judge Hodgdon

These cases are before me on a notice of contest and petition for assessment of civil penalty filed by Topper Coal Company, Inc. against the Secretary of Labor and by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Topper Coal, respectively, pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The company contests the issuance of Citation No. 4243301 to it on May 19, 1994. The Secretary's petition seeks a civil penalty of $8,500.00 for the violation alleged in the citation. For the reasons set forth below, I affirm the citation, as modified, and assess a penalty of $5,000.00.

The cases were heard on February 22 and 23, 1995, in Pikeville, Kentucky. MSHA Coal Mine Inspectors Howard Williams and Elmer Hall, Jr. and MSHA Coal Mine Safety and Health Specialist Cheryl S. McGill testified for the Secretary. Mr. Gary D. Fields, MSHA Coal Mine Inspector Jerry D. Abshire and MSHA Conference Litigation Representative Gerald W. McMasters

testified on behalf of Topper Coal. The parties have also filed briefs which I have considered in my disposition of these cases.

FACTUAL BACKGROUND

The facts surrounding this case are not disputed. On May 19, 1994, Inspectors Williams, Hall and Ronald Honeycutt went to Topper Coal's No. 9 Mine to conduct a spot saturation inspection for smoking articles in the mine. Inspector Hall informed Mr. Fields, President and owner of Topper Coal, that the inspectors were present to conduct an inspection, although he did not inform Mr. Fields that they were looking for smoking materials. He also instructed Mr. Fields not to call into the mine to advise the miners underground that the inspectors were coming. Hall and Honeycutt then went underground and Williams remained in the mine office with Fields.

About 15 or 20 minutes after the inspectors had gone into the mine, Mr. Fields went to the mine telephone, picked it up and, without saying anything to Williams, called into the mine and said "James, there are two federal inspectors in there. Tell the men to watch out and be careful." (Tr. 177.) On hanging up, Fields told Williams that he was afraid the men underground would not see the inspectors and run over them with a shuttle car.

As a result of this call, Inspector Williams issued the citation in question. It alleged a violation of Section 103(a) of the Act, 30 U.S.C. ' 813(a), and stated that: "Gary Fields - owner impeded a Saturation Spot Inspection (CAB) by calling underground on the mine phone notifying the miners [that] two Federal Inspectors [were] on their way inside, after being informed by Elmer Hall, Howard Williams and Ronald Honeycutt (federal inspectors) not to notify the miners underground of the inspectors' presence." (Jt. Ex. 1.)

No smoking materials were found. However, two citations for other violations were issued as a result of the inspection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 103(a) of the Act provides, as pertinent to this case, that:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of

> an inspection shall be provided to any person . . . . In carrying out the requirements of clause[ ] . . . (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four time a year . . . . The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary . . . or any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

On reading this section of the Act, it is apparent that it does not explicitly prohibit impeding or interfering with an inspection. Nevertheless, it is evident from the legislative history that Congress intended this section to give "a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under" the Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. 27 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977*, at 615 (1978).

While Section 108(a)(1)(B) of the Act, 30 U.S.C. ' 818(a)(1)(B), provides that the Secretary may seek an "injunction, restraining order, or any other appropriate order" from a United States district court whenever an operator or his agent "interferes with, hinders, or delays the Secretary or his authorized representative . . . in carrying out the provisions of this Act," it is generally accepted that such conduct is also forbidden by Section 103(a). Thus, one treatise states "[i]n addition to seeking injunctive relief, the Secretary of Labor may issue citations for interference with the conduct of an inspection." 1 *Coal Law and Regulation* ' 8.04 (1983). *See also* "103(a) Denials of Entry" I MSHA *Program Policy Manual* ' 103(a) (1988)[instructing inspectors to cite operators under Section 103(a) for being "threatened or harassed" while making an inspection].

In *Waukesha Lime and Stone Co.*, 3 FMSHRC 1702 (July 1981), the Commission held that a refusal to permit an inspection violated Section 103(a) of the Act. In so doing, it rejected the company's argument that injunctive relief under Section 108(a)(1) provided the Secretary's sole remedy when an operator engaged in

the activities set out in that section,[1] holding:

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[1] Section 108(a)(1) provides:

> The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent-
>
> (A) violates or fails or refuses to comply with any order or decision issued under this Act,
>
> (B) interferes with, hinders, or delays the Secretary or his authorized representative . . . in carrying out the provisions of this Act,
>
> (C) refuses to admit such representatives to the coal or other mine,

(cont on next page)

> (D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or

connected with, such mine,

(E) refuses to furnish any information or report requested by the Secretary . . . in furtherance of the provisions of this Act, or

(F) refuses to permit access to, and copying of, such records as the Secretary . . . determines necessary in carrying out the provisions of this Act.

> First, notwithstanding the absence of express statutory language, it is illogical to assume that Congress intended to mandate inspections and a right of entry for the Secretary's authorized representative pursuant to section 103(a), without viewing the operator's denial of entry as a dereliction of its duty under the Act. . . . Second, we reject the contention that a section 108(a)(1) injunction is the Secretary's sole remedy if an operator denies entry to his authorized representative. Rather, dual remedies exist: an administrative remedy under sections 104 and 110(a), and a civil injunctive remedy under section 108(a)(1). We believe that if Congress had intended injunctive relief to be the exclusive remedy, it would have stated so unequivocally.

Id. at 1704.

Subsequently, the Commission has continued to construe Section 103(a) broadly. In *United States Steel Corp.*, 6 FMSHRC 1423 (June 1984), the Commission held that the failure to provide an inspector transportation to the site of an accident prevented him from inspecting the scene and was, therefore, a violation of Section 103(a). *Id.* at 1431. With more significance to this case, the Commission also held that the company's insistence on the presence of a company attorney at an interview during the investigation of the accident, without specifying when the attorney would be present, combined with the failure to produce an attorney, "had the effect of unreasonably delaying the accident investigation" and that this delay "impeded" the investigation in violation of Section 103(a). *Id.* at 1433.

In *Calvin Black Enterprises*, 7 FMSHRC 1151 (August 1985), the Commission found that when inspectors were told that they were trespassing and needed written permission from the operator to inspect they were effectively prevented from entering the mine. Stating that "MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect," the Commission affirmed a violation of Section 103(a). *Id.* at 1157.

In *Sanger Rock & Sand*, 11 FMSHRC 403 (Judge Cetti, March 1989), a Commission judge found a violation of Section 103(a) when the operator refused to cooperate in an inspection by delaying in furnishing records the inspector needed to see and by calling the inspector a "liar." Just recently, another Commission judge concluded, in another case involving an

inspection for smoking materials, that calling into the mine after being instructed not to by MSHA inspectors was a violation of Section 103(a). *Cougar Coal Co.*, 17 FMSHRC 628 (Judge Amchan, April 1995).

Based on the legislative history and the case law, I conclude that the "broad right-of-entry" in Section 103(a) includes a prohibition against the operator impeding or interfering with the inspection. Consequently, I conclude that the citation in this case describes a violation of the Act.

Turning to the facts in this case, I find that Mr. Fields obstructed the inspection. As he admitted, he "thought [Hall] was just going in there and just sneak up on them [the miners underground] and just see what he could catch them doing." (Tr. 196-97.) He further admitted that he understood that the inspectors did not want him to call underground and let his men know that the inspectors were coming into the mine. (*Id.*) Knowing this, and without further questioning the inspectors or explaining to them any concerns he might have had about this plan, he proceeded to call into the mine and alert his men that "two federal inspectors" were coming into the mine. (Tr. 177.)

Fields claim that the call was made purely for safety reasons is not accepted. He did not express any such safety concerns when the inspectors initially explained to him what they wanted to do. He did not express any safety concerns to Inspector Williams when he decided to make the call. It appears that his concern for safety was an attempt to rationalize the call after he made it. Furthermore, if he was only concerned that the inspectors not be run over, he did not have to identify the people entering the mine as "federal inspectors." Finally, he stated at the hearing that when he called into the mine, he "figured they were there," that is, that the inspectors were already on the section. (Tr. 199.) If he believed that, the safety claim makes no sense, since the miners would presumably have already observed the inspectors.

Based on this evidence, I conclude that Mr. Fields impeded the inspection. Accordingly, I conclude that Topper Coal violated Section 103(a) of the Act as alleged.[2]

Significant and Substantial

[2] Respondent's arguments that the inspection was not conducted "within reasonable limits and in a reasonable manner," Resp. Br. at 9-10, has been considered and rejected as unpersuasive.

The violation in this case was declared to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), 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 (January 1984), the Commission set out four criteria that have to be met before a violation can be found to be S&S. The criteria are: (1) violation of a mandatory safety standard; (2) contribution to a safety hazard by the violation; (3) a reasonable likelihood that the hazard will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Id.* at 3-4. *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); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Rather than address this violation in terms of the *Mathies* criteria, the Secretary states that:

> It is the Secretary's position that where the operator denies or otherwise interferes with the Secretary's right of entry under section 103(a) of the Act, this violation should be presumed to be significant and substantial. The Secretary's right of entry is the mechanism by which the entire Act is enforced. If the Secretary is denied entry, directly or indirectly, he is unable to determine the number and the type of violative conditions which pose serious hazards to miners working underground and to ensure that these hazards are eliminated.

Sec. Br. at 10.

The Respondent, apparently following *Mathies*, argues that the violation is not "significant and substantial" because no smoking materials were found during the inspection and the mine does not have a history of methane liberation, "so there is no way that an explosion could have been reasonable likely to have occurred as a result of this violation." Resp. Br. at

II. The company also points out that when the inspector issued the citation in this case, he found that the violation was not "significant and substantial."

The problem with trying to assess this violation under the traditional criteria is that there is no way of knowing what the inspectors would have found if the miners had not been alerted to their presence. Since neither Mr. Fields nor the miners were aware of the specific purpose of the inspection, the fact that no smoking materials were found does not necessarily indicate that those miners who did have smoking materials somehow disposed of them. On the other hand, the logical consequence of warning underground miners that inspectors are on their way underground would be for the miners to attempt to cover-up, dispose of, or even correct any violations of which they are aware.

Although there is no evidence that that happened in this case, there is also no evidence that violations were not covered-up. Generally speaking, I find that when an inspection is interfered with in this manner, it is reasonably likely that an S&S violation would have been discovered. Therefore, I conclude that when an inspection is impeded there is a presumption that the violation is S&S.

In this case, the Respondent has not presented any evidence that would rebut such a presumption. Accordingly, I find that the violation of Section 103(a) was "significant and substantial."

Degree of Negligence

A week after the citation was issued in this case, the degree of negligence was modified from "moderate" to "reckless disregard." Moderate negligence is defined in the Regulations as: "The operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. ' 100.3(d)(Table VIII). Reckless disregard is defined as: "The operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* Reckless disregard is also the type of conduct which characterizes a finding of "unwarrantable failure" under Section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1).[3] *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

[3] Curiously, while the citation was modified from alleging a violation under Section 104(a), 30 U.S.C. ' 814(a), to allege an "unwarrantable failure" under Section 104(d)(1) when the degree of negligence was modified, it was subsequently modified again back to a Section 104(a) violation.

The Secretary argues that Mr. Fields actions constituted reckless disregard because he "deliberately disregarded the inspectors' instructions and telephoned underground personnel to warn them that inspectors were traveling to the section." Sec. Br. at 11. It is the Respondent's position that this conduct "did not constitute reckless disregard since the operator did not even know the purpose of this investigation prior to phoning underground." Resp. Br. at 11.

The fact that Mr. Fields did not know the specific purpose of the inspection does not reduce the degree of negligence in view of the fact that he did know that the inspectors did not want him to call into the mine and he understood their reason for directing him not to do so. However, the evidence does not support a finding that he exhibited a total absence of care. His concern for safety, even if expressed only in a last minute attempt to justify his actions, removes his conduct from the reckless disregard definition.

Fields' conduct is better described as that he knew of the violative condition or practice and there are no mitigating circumstances, which happens to be the definition of "high" negligence in the Regulations. 30 C.F.R. ' 100.3(d)(Table VIII). This finding is also consistent with the Secretary's modification of the citation from one under Section 104(d)(1) to one under to one under Section 104(a). Consequently, I conclude that the degree of negligence for this violation was "high" rather than "reckless disregard" and will modify the citation accordingly.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of $8,500.00 for this violation. The Respondent argues that if it did violate the Act, a penalty of $250.00 is appropriate. It is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in Section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

A computer printout of Topper Coal's violation history indicates that it was assessed 141 penalties in the two years preceding this violation, 115 of which were S&S. (Govt. Ex. 1) Although the allied papers indicate that this is a small company (135,401 production tons per year) and a small mine (29,716 production tons per year), it cannot be said that this company's violation history warrants increasing the penalty.

The parties have stipulated that "[p]ayment of a reasonable penalty will not have an adverse effect on the ability of the operator to continue in business." (Jt. Ex. 2.) Since the proposed penalty was $8,500.00 when this stipulation was entered into, I conclude that a penalty of that amount is considered reasonable and will not have an adverse effect on the company's ability to continue operating.

Once committed, this violation could not be abated. I note, however, that there is no evidence that the either the company or any of its personnel had interfered with inspections before or since this violation, nor had the company been cited for any smoking violations. (Govt. Ex. 1)

The gravity of this violation is very serious. The Secretary's right to inspect mines without obstruction or interference goes to the heart of the Mine Act and such actions cannot be permitted. Furthermore, the Respondent was highly negligent in this case and there are no factors which mitigate Mr. Fields' conduct.

Accordingly, taking all of this into consideration, including the reduction in the company's degree of negligence, I conclude that a penalty of $5,000.00 is appropriate for this violation and a company the size of Topper Coal.

ORDER

Citation No. 4243301 is MODIFIED to reduce the level of negligence from "reckless disregard" to "high" and AFFIRMED as modified. Topper Coal Company, Inc. is ORDERED to pay a civil penalty of $5,000.00 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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