

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

August 14, 1997

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. :
DEWEY HUBBARD, employed by : No. 1 Mine
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. :
ROBERT HARDIN, employed by : No. 1 Mine
ALPHA MINING COMPANY, :
Respondent :

DECISION ON REMAND

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Dept. of Labor,
Arlington, Virginia, on behalf of the Petitioner;
Bill Hayes, Esq., Middlesboro, Kentucky, on behalf of the Respondents.

Before: Judge Melick

These cases are before me upon remand by the Commission on May 12, 1997. The parties
subsequently settled the case with an agreement which reads as follows:

- 1. On May 19, 1994, Stanley Sampsel, a duly authorized representative of
the Secretary of Labor, issued Citation No. 4038467 to the Alpha Mining
Company pursuant to Section 104(d)(1) of the Mine Safety and Health Act of
1977 (hereinafter "The Act). He had found a full pack and an empty pack of
cigarettes in possession of the mine foreman, Dewey Hubbard, found a working
cigarette lighter and a cigarette butt on the mine floor and found a cigarette butt
and an empty pack of cigarettes around the work station of Robert Hardin. Alpha
Mining Company was assessed a proposed penalty in the amount of \$10,000. The
petitioner also issued one citation each, to two individuals - Robert Lee Hardin and
Dewey Hubbard - who are employees of Alpha Mining Company (Citation Nos.

4039257 and 4039258). These citations were issued pursuant to Section 110(g) of the Act because the inspector determined that the two individuals willfully violated the provisions of the Act and regulations which prohibit smoking and the carriage of smoking materials. The Secretary proposed penalties in the amount of \$500.00 per person. The mine operator and the two employees requested hearings regarding the proposed civil money penalties. The above-captioned civil penalty proceedings initiated on September 1, 1994 and were consolidated for trial. On November 22, 1994, a trial was held in Gate City, Virginia.

On May 23, 1995 the Court found that the Alpha Mining Company had violated the Act and regulations and assessed a penalty in the amount of \$10,000. With regard to Mr. Hubbard, the court found that he willfully carried a full pack of cigarettes in his lunch bucket and imposed a penalty in the amount of \$250.00. The Court concluded that Hubbard's possession of an empty package of cigarettes did not constitute a violation of 30 C.F.R. ' 75.1702. With regard to Mr. Hardin, the Court concluded that his alleged possession of a cigarette butt did not constitute the carriage of "smoking materials" in violation of 30 C.F.R. ' 75.1702. The Secretary appealed these holdings.

On May 12, 1997 The Commission remanded these cases following a decision granting the Secretary's Petition for Discretionary Review. On review the Commission ruled that cigarette butts and cigarette packs that were empty when found constitute "smoking materials." Accordingly, the carriage of these items was found to have violated ' 317 (c) of the Act. The Commission reserved for decision the issue of whether the citations properly alleged that the miners smoked as well as carried smoking materials underground. In addition, the Commission did not resolve whether the possession of multiple smoking materials constitute separate instances of violations of ' 317 (c) and C.F.R. ' 75.1702.

2. Rather than continue the litigation of these matters, the respondents and the Secretary of Labor have agreed to settle this matter. In particular, the respondents have both agreed in writing to comply with the smoking prohibitions of the regulation should they ever resume employment in the mining industry. [Attachments omitted] Respondent's counsel has represented that neither Mr. Hardin [n]or Mr. Hubbard is currently employed in the mining industry.

3. With regard to Mr. Hubbard, the Secretary has reviewed information and representation[s] of respondent's counsel that Hubbard is, and has been for approximately one year, unemployed, and that he has not worked in the mining industry since Alpha Mining operations ceased. He has also already paid a penalty in the amount of \$3500.00 with regard to a separate ' 110(c) action arising out of this inspection. Accordingly, the Secretary agrees that the prior penalty of \$250.00 (issued pursuant to ' 110(g)) is suitable for both violations and waives any additional penalty for the act of possessing the empty pack of cigarettes in addition to the act of possessing a full pack of cigarettes.

4. With regard to Mr. Hardin, the Secretary has agreed to reduce the penalty proposal from \$500.00 to \$50.00 (\$25.00 per violation) because Mr. Hardin is no longer in the mining industry, because he is now working in employment which is compensated at or near the minimum wage, and because the possession of an empty pack of cigarettes and a cigarette butt provide relatively little risk of additional injury to miners.

5. The Secretary believes that the proposed settlement is appropriate and reflects due consideration for the penalty criteria including gravity, negligence and the miners' ability to meet their financial obligations.

While the undersigned respectfully disagrees that empty cigarette packages and unsmokeable cigarette butts constitute "smoking materials" within the meaning of Section 317(c) of the Act and 30 C.F.R. ' 75.1702, the Commission has ruled otherwise. Based on the Commission's decision that the carrying of such materials may be a violation of those provisions, the proposed settlement can be approved. See Co-Op Mining Company, 2 FMSHRC 3471 (December 1980).

ORDER

Dewey Hubbard is ordered to pay a civil penalty of \$250.00, if he has not already done so, for the violations charged in Docket No. KENT 94-1223 within 30 days of this order. Robert Hardin is ordered to pay a civil penalty of \$50.00, if he has not already done so, for the violations charged in Docket No. KENT 94-1224 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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

Bill Hayes, Esq., P.O. Box 817, 2309 Cumberland Ave., Middlesboro, KY 40965 (Certified Mail)

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