FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 23, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-467 A.C. No. 15-16792-03502 HTW
v.	:	
	:	Mine: No. 4
ROCKY'S TRUCKING, Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
James E. Peterson, Pro Se, for Respondent.

Before: Judge Amchan

Issue Presented

The issue in this case is the extent, if any, that Respondent is to be held responsible for the conduct of its non-supervisory miner/truck driver in assessing a civil penalty. The Secretary has proposed a $3,000 penalty for this employee=s continued operation of his truck after the issuance of two section 104(b) failure to abate/withdrawal orders[1].

Findings of Fact

The facts in this case are established by the uncontroverted testimony of MSHA Inspector Robert Clay. On February 28, 1994, Mr. Clay conducted an inspection of the Black Thunder Limited No. 1 mine in Evarts, Kentucky (Tr. 13-14). Coal is brought from this underground mine by a conveyor and is dumped into a pit. At the pit coal trucks are filled with a front-end loader. The trucks then take the coal away from the mine to a preparation plant (Tr. 14-15).

At the pit, Inspector Clay saw four coal trucks belonging to

[1]The case also involves a $117 proposed penalty for Respondent=s failure to abate a citation regarding an inspection tag on the truck=s fire extinguisher.

independent contractors. One of them was owned by Respondent and was driven by miner Bill Martin. Clay inspected all four trucks and issued citations to Mr. Martin and to at least one other contractor (Tr. 15-17, 25-26).

Citation No. 4242348 was issued to Mr. Martin because his truck=s reverse signal alarm was inoperable. The driver=s view to the rear was limited and miners in the pit were exposed to the hazard of having the truck back into or over them. Inspector Clay required abatement of the violation by 8:00 a.m. the next morning, March 1, 1994 (Tr. 16-17, 21-23).

Mr. Martin gave no indication that he could not fix the alarm within this time period. Indeed, abatement could possibly have been achieved simply by taking the truck to a car wash and having it cleaned. If not, the alarm could have replaced in a few hours at a cost of about $50 (Tr. 18-20).

Citation No. 4242349 was issued because the tag on the fire extinguisher in Martin=s truck did not indicate that it had been inspected within the last six months as required by 30 C.F.R. '77.1110. As was the case with the reverse signal alarm, Inspector Clay required correction of this violation by 8:00 a.m. the next morning. To abate, Respondent had only to make a visual inspection of the extinguisher to determine that it was properly charged and then record the date of the inspection on the tag (Tr. 16-17, 26-28).

On March 1, 1994, Clay returned to the Black Thunder mine. He first discussed abatement of violations with the superintendent of the mine and then turned his attention to the contractors. The inspector looked at the truck of contractor Gilles Greer and determined that Greer had abated citations issued the day before regarding a broken windshield and fire extinguisher inspection (Tr. 24-26, 28-29).

Clay then saw Martin driving his truck, loaded with coal. He asked Martin to pull over so that he could determine whether the previous day=s citations had been abated. Martin refused, became verbally abusive, and stated that he did not have time Ato fool with@ Clay that day (Tr. 30).

At 1:45 in the afternoon Clay informed Martin that he was issuing two section 104(b) withdrawal orders. These were later reduced to writing as Order Nos. 4242361 and 4242363. Martin was again verbally abusive and drove off. Fifteen minutes later Clay issued Citation No. 4242362 charging Respondent with a section 104(a) violation for failing to take its truck out of service

after the issuance of the withdrawal order (Tr. 30-35). Within a few days of these incidents, Respondent sold the truck in question and at about the same time went out of business (Tr. 35-36, 52).

Is Mr. Martin=s conduct imputable to Respondent?

There is no indication that Respondent=s owner, James Peterson, knew of Mr. Martin=s conduct or that it was consistent with any instructions given by Mr. Peterson. Nevertheless, Respondent was properly cited because the Federal Mine Safety and Health Act is a strict liability statute and the conduct of a non-supervisory employee is imputed to his employer for purposes of determining whether a citation is valid, A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983).

On the other hand, the conduct and knowledge of a rank-and-file miner generally cannot be imputed to an operator for penalty purposes. However, the operator=s supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner=s violative conduct, Southern Ohio Coal Co,, 4 FMSHRC 1459, 1464-5 (August 1982).

In the instant case there is no evidence concerning the training, supervision and disciplining of Mr. Martin. Thus, there is no evidence regarding Respondent=s negligence, apart from that which the Secretary argues must be imputed to it from Martin=s behavior. The Secretary contends that Mr. Martin should be considered the agent of Respondent for penalty purposes, citing the Commission=s decisions in Rochester &

Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991) and S&H Mining, Inc., 15 FMSHRC 956 (June 1993)[2].

In the lead case, Rochester & Pittsburgh Coal, the Commission reversed the decision of the judge, who, relying on the Southern Ohio Coal decision, found the intentional misconduct of a rank-and-file employee not imputable to the operator. The employee in question failed to carry out preshift examinations required by the Act. Thus, the Commission concluded that he was Acharged with responsibility for the operation of ... part of a mine@ and therefore was the Aagent@ of the operator within the meaning of section 3(e) of the Act.

Additionally, in concluding that the rank-and-file employee was Rochester & Pittsburgh=s agent, the Commission relied on the (Second) Restatement of Agency (1958). It stated that Athe essential feature of the principal-agent relationship is that the agent has authority to represent his principal with third parties in dealings that affect the principal=s legal rights and obligations.@

[2]Also see, Mettiki Coal Corp., 13 FMSHRC 769, 772 (May 1991).

Applying this rule to the instant case, a rank-and-file miner working alone on a mine site must be deemed to have either actual or Aconstructive@ authority to abate violations in a timely fashion and to respond to withdrawal orders. I would thus conclude that Mr. Martin was Respondent=s agent in his dealings with Inspector Clay and with regard to his response to the citations and orders issued to Respondent[3]. I therefore impute his conduct to Respondent for purposes of determining its negligence and an appropriate civil penalty.

The Civil Penalty Assessment

After considering the six penalty criteria in section 110(i) of the Act, I assess a civil penalty of $720 for the operation of the truck in defiance of the withdrawals orders (Citation No. 4242362) and the failure to abate the fire extinguisher violation (Order No. 4242363). The penalty shall be paid in twelve monthly installments of $60. The first payment is due 30 days after the date of this decision.

My consideration of the penalty factors is as follows:

The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violations. This factor, by itself, would lead me to assess a much higher penalty than $720. Intentional disregard of a withdrawal order is a very rare occurrence (See Tr. 41). It must be penalized severely not only because it endangers the health and safety of miners but also because a significant penalty is

[3]In Whayne Supply Company, Docket Nos. KENT 94-518-R, KENT 94-519-R and KENT 95-556, Slip op. p. 6, n. 5 (September 7, 1995), I declined to conclude that a rank-and-file employee is the agent of a contractor simply because he was working without supervision at a mine site. Judge Fauver in U.S. Coal, Inc., 16 FMSHRC 649, 652 (March 1994-review pending), concluded that when a rank-and-file employee=s misconduct threatens the health or safety of others, his negligence is imputable to his employer for penalty purposes. Although Judge Fauver=s decision is not expressed in terms of Aagency,@ I would interpret his decision as

fn. 3 (cont.)

finding that the rank-and-file employee in that case was the agent of the operator. While there is no need for me to express agreement or disagreement with the U.S. Coal decision, I would note that Mr. Martin=s insistence of operating his vehicle without fixing the back-up alarm certainly endangered the health and safety of others.

likely to deter others from similar conduct.

The gravity of the violation. The continued operation of the truck without a reverse signal alarm was reasonably likely to result in serious injury. Mr. Martin indicated to Inspector Clay that the alarm had not been repaired (Tr. 38).

The negligence of the operator. I have found that Mr. Martin was the agent of Rocky=s Trucking. On the other hand, I have considered that Mr. Peterson, the owner of Rocky=s Trucking, knew nothing of this incident and, so far as the record indicates, did nothing to encourage it. However, it must also be noted that Mr. Martin=s behavior may have inured to the short-run benefit of Respondent. Martin may have been able to haul more coal by virtue of not taking his truck out of service for repairs and not allowing Mr. Clay to inspect it (Tr. 41, 54-55).

The size of the operator. Respondent was a very small operator and owned only two trucks. Due to this fact, I have assessed a lower penalty than I would have for a larger concern.

Respondent=s history of previous violations. There is no evidence in the record regarding violations prior to February 28, 1994. Therefore, Respondent=s history has not been a factor in assessing a penalty, except for the fact that a higher penalty would have been assessed if it had been shown to have a record of recurring similar violations.

The effect of the penalty on the operator=s ability to stay in business. This factor cannot be applied to this case since Respondent has ceased operation. I have given consideration, however, to Mr. Peterson=s representations regarding his financial condition. He receives approximately $2,000 per month in Social Security and Workers Compensation benefits (Tr. 52-54). I conclude he can afford to pay the assessed penalty in the installments which I have ordered.

ORDER

Citation No. 4242362 and Order No. 4242363 are affirmed and a $720 civil penalty is assessed for the two combined. This shall be paid in twelve monthly installments of $60 commencing within 30 days of this decision.

Arthur J. Amchan

Administrative Law Judge

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