

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 7, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 95-472
Petitioner : A.C. No. 15-17377-03506 AI5Z
v. :
: West Volunteer Mine
HOBERT VERNON GENTRY, :
Employed by Gentry Brothers :
Trucking Co., Inc., :
Respondent :

DECISION

Appearances: Edward F. Fitch, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Petitioner;
Payton F. Reynolds, Esq., Whitesburg, Kentucky for
Respondent.

Before: Judge Fauver

This is a civil penalty action under ' 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.' 801 et seq., charging Respondent, Hobart Vernon Gentry, aka Hobart Gentry, with individual liability as an agent of a corporation, Gentry Brothers Trucking, Co., Inc.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. At all relevant times Respondent was President of Gentry Brothers Trucking Co., Inc., a small independent contractor that hauled coal from the West Volunteer Mine of Andalex Resources, Inc., an open pit mine. The coal was sold or used in interstate commerce or with a substantial effect upon interstate commerce.

2. Respondent personally directed and supervised the Gentry Brothers Trucking Company and was personally aware of the defective brakes on a truck that was involved in a fatal accident on October 13, 1993.

3. Prior to the accident, Respondent knew that the brakes on the truck were defective, but he failed to remove the truck from service pending receipt of brake parts that were on order. He also knew that no record was made of the defective brakes.

4. On October 13, 1993, Ricky Thomas Corbitt, a 27 year-old miner with only two months experience hauling coal for the Gentry Brothers Trucking Company, was assigned to drive the truck.

5. The truck was heavily loaded in the pit. As Corbitt was driving up a steep ramp (about 18 degree incline) to leave the mine, the drive shaft broke. When the shaft broke, the engine no longer provided any power to the wheels. Because the brakes were defective, they could not hold the truck on the ramp and the truck rolled backward. The truck gained momentum and went out of control, moving backward at a fast rate. The driver attempted to jump from the truck but did not clear the vehicle. He was fatally struck by a part of the truck. The truck continued its runaway descent, ending in a crash landing on its side near the bottom of the ramp.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Section 110(c) of the Act provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a decision issued under this Act . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and d(d).

The Commission has interpreted the term knowingly as follows:

Knowingly, as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means

knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

We believe this interpretation is consistent with the statutory language and the remedial intent of the Coal Act.

If a person in a position to protect employee safety and health fails to act on the basis of information that gives

him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Kenny Richardson, 3 FMSHRC 8, 16 (1981) (emphasis added; footnotes and citations omitted), affirmed sub nom. Richardson v. Secretary of Labor and FMSHRC, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). Accord Roy Glenn, 6 FMSHRC 1583, 1585-1587 (1984); BethEnergy Mines, 14 FMSHRC 1232, 1245 (1992); Warren Steen Construction, 14 FMSHRC 1125, 1131 (1992). In *Kenny Richardson*, the Commission held that a finding of a knowing violation does not require a showing that the individual willfully violated the Act or regulations. Rather, the Commission held, it need only be shown that a person in a position to protect employee safety and health fail[ed] to act on the basis of information that [gave] him knowledge or reason to know of the existence of a violative condition@ 3 FMSHRC at 16.

Respondent is charged with violations of two safety standards, in 30 C.F.R. ' 77.1606(a) and 77.1605(b).

Section 1606(a) provides:

Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.

Section 1605(b) provides:

Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

Respondent had direct personal supervision of the operations of the corporation. At times he worked on the brakes of Corbitts truck himself. At the relevant time he knew that the brakes were defective and that parts were on order. Yet he failed to see that the brake defects were recorded for the driver to be aware of the actual condition of the truck and for any safety inspector to see the safety history of the vehicle.

He decided that it was unnecessary to record safety defects in the truck because he expected the driver to tell him about any violations or unsafe conditions. In reaching that decision he violated ' 77.1606(a). In light of Respondent's direct personal supervision of the business, and his personal knowledge of the brake defects and the failure to keep a record of the brake defects, I find that as an agent of the corporation he knowingly

authorized, ordered, or carried out the violation of ' 77.1606(a) within the meaning of '110(c) of the Act.

Respondent also violated ' 77.1605(b), by failing to remove the truck from service pending repair of the brakes. The brakes were highly defective and could not hold the truck on a steep incline. Respondent put the driver at severe risk in failing to remove the truck from service. I find that Respondent knowingly authorized, ordered, or carried out the violation of ' 77.1605(b) within the meaning of ' 110(c) of the Act.

The gravity associated with both violations is very high. The steepness of the incline made it obvious that operating a heavily loaded truck with defective brakes put the driver at very high risk. Failure to record the defective brakes withheld crucial information from the driver, who may have been alerted by such a record to seek protection afforded by the Act, e.g., to request his employer to assign him to another vehicle or to other duties pending repair of the defective brakes. It also withheld crucial information from any safety inspector (company, state or federal) that would have alerted him or her to inspect the vehicle immediately to see whether it was safe to operate. Finally, Respondent's failure to remove the truck from service involved very high gravity because it subjected the driver to the risk of a fatal injury.

Section 110(i) of the Act provides:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Section ' 110(i) refers to an operator. There is no dispositive case law on the application of ' 110(i) criteria to an individual in a ' 110(c) case.

The corporation that employs Respondent is a small

independent contractor engaged in hauling coal by truck.

The gravity and negligence involved in the two violations were very high. The government has not alleged an unreasonable time in abating the violations after notice. It is presumed that the operator made a good faith effort to abate the violations promptly after notice.

With respect to impact of the proposed penalties on Respondent's ability to continue in business, the record shows that Respondent has filed for both corporate bankruptcy and personal bankruptcy. I find that Respondent and the corporation have already placed themselves in financial jeopardy unrelated to any civil penalty associated with these violations. The record reflects the existence of the two bankruptcy proceedings, but there is no indication of whether either the company or Mr. Gentry will be able to recover from their current economic condition and continue in business. No relationship has been shown between the proposed penalties sought by the Secretary and the financial conditions alleged by Mr. Gentry and the corporation.

I find that it would be contrary to the purposes of ' 110(i) to reduce a penalty solely because of a pending bankruptcy petition. It appears that Congress was concerned that penalties should not be so large as to affect an operator's ability to continue a viable business. However, this does not indicate a congressional concern to give special protection to a company or individual that is defaulting on its bills to creditors and is running the business into a state of bankruptcy without any demonstrated relationship between its insolvency and civil penalties assessed under the Act.

Considering all the criteria of ' 110(i), I find that a civil penalty of \$2,500 is appropriate for the violation of 30 C.F.R. ' 1606(a) and a civil penalty of \$5,000 is appropriate for the violation of 30 C.F.R. ' 1605(b).

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent knowingly violated 30 C.F.R. ' 77.1606(a) and 77.1605(b) within the meaning of ' 110(c) of the Act, as alleged in the petition.

ORDER

WHEREFORE IT IS ORDERED that:

1. The citation and order included in the petition are AFFIRMED.

2. Respondent shall pay civil penalties of **\$7,500** within 30 days of the date of this DECISION.

William Fauver
Administrative Law Judge

Distribution:

Edward F. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203
(Certified Mail)

Payton F. Reynolds, Esq., P.O. Box 160, Whitesburg, KY 41858
(Certified Mail)

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