**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 27, 1995

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br>Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. KENT 93-63<br>A.C. No. 15-17081-03507 |
| v. | : | |
| SUNNY RIDGE MINING COMPANY,<br>Respondent | : | Docket No. KENT 93-259<br>A.C. No. 15-17081-03511 |
| | : | Docket No. KENT 93-863<br>A.C. No. 15-17081-03513 |
| | : | No. 9 Mine |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 94-453<br>A.C. No. 15-17081-03516A |
| v. | : | |
| MR. MITCH POTTER,<br>Respondent | : | No. 9 Mine |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 94-454<br>A.C. No. 15-17081-03517A |
| v. | : | |
| MR. TRACY DAMRON<br>Respondent | : | No. 9 Mine |

## DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Reed D. Anderson, Esq., Harris & Anderson, Pikeville, Kentucky, for Respondent.

Before: Judge Fauver

These are civil penalty cases under ' 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., for alleged violations of mine safety standards. Two of the charges were settled at the hearing and the rest were heard on the merits.

After the hearing, the exhibits were lost by the Post Office. The parties were requested to furnish copies of their exhibits where possible. Those received from the parties have been assembled in a replacement exhibit folder.

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

## FINDINGS OF FACT

1. Respondent Sunny Ridge Mining Company, Inc., a Kentucky corporation, is a medium-sized mine operator, producing coal for sale in or substantially affecting interstate commerce.

2. At all relevant times, Respondent Tracy Damron was foreman of the No. 9 Mine and Respondent Mitch Potter was president of Sunny Ridge Mining Company, Inc.

### Citation No. 4020202

3. This ' 104(d)(1) citation was issued by Inspector Butch Cure on August 5, 1992, charging a violation of 30 C.F.R. ' 77.405(b), which provides:

(b) No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

4. Mine No. 9, a surface coal mine, used a makeshift method to change flat rear tires on its coal dump trucks. A wooden crib was stacked close to the rear of the truck on the side that had the flat tire. The hydraulic truck bed was then raised, tilting its front end upward and lowering its back end on the crib. Further pressure to raise the truck bed exerted downward pressure on the crib and this pressure caused the rear axle and wheel to elevate. This method is illustrated in Gov't. Exh. No. 4. A miner would remove the lug nuts and take off the wheel to change the tire. To remove the wheel, the miner would put his back to the wheel (which weighed 250 to 300 pounds) and grasp it from behind his back to pull it from the lug bolts onto his back and then "walk it" to the ground. After changing the tire, the miner would use his back to lift the wheel back onto the lug bolts. He would then face the wheel and tighten the lug nuts. All of these steps were performed while the truck bed and axle were elevated. Chocks or blocks were not used to prevent the truck bed or axle from falling while the wheel was being changed.

5. On the day in question, the cited truck was loaded with 30 tons of coal when the hydraulic truck bed was raised to lift the left rear axle to change a flat tire. Chocks or blocks were not used to prevent a falling accident.

6. When Inspector Cure first noticed the truck, he was some distance away and saw a group of men standing around the truck with Foreman Tracy Damron. The truck bed was not elevated at that time. He went to the truck to talk to the foreman about other equipment. He observed that a crib was stacked behind the truck but the truck bed was not raised. The truck bed was loaded. The inspector left for another part of the mine. Later, from a distance he saw the loaded truck bed was elevated and he drove toward the truck to see what was happening. As he came closer, he saw the bed was resting on the crib, a left rear wheel was raised, and a miner was reaching in to handle the lug nuts on the wheel. There was no jack under the axle. As the inspector approached, some of the men walked away and Foreman Damron quickly had the truck bed and wheel lowered. He then got a 20-ton jack to try to lift the axle and wheel. It would not lift them. The inspector issued the citation to the foreman.

**Order No. 4020210**

7. This ' 104(d)(1) order, issued on August 18, 1992, charges a violation of 30 C.F.R. ' 77.1001, which provides:

> Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

8. Inspector Butch Cure observed loose rocks and boulders on the spoil side of the highwall in the No. 3 1/2 pit. The highwall was about 25 feet high, 200 feet long. Four pieces of equipment were operating beneath the spoil bank.

**Citation No. 4020074**

9. This ' 104(a) citation, issued on January 27, 1993, charges a violation of 30 C.F.R. ' 77.410, which requires a backup alarm on mobile equipment such as front-end loaders, forklifts, tractors, graders, and certain trucks.

10. At the hearing the parties moved to settle this charge by lowering negligence from moderate to low and reducing the penalty from $431 to $350. The settlement was approved.

**Citation No. 4228207**

11. This ' 104(a) citation, issued on February 10, 1993, charges a violation of 30 C.F.R. ' 77.1007(b), which provides:

> (b) Equipment defects affecting safety shall be corrected before the equipment is used.

12. At the hearing the parties moved to settle this charge by lowering negligence from moderate to low and reducing the penalty from $431 to $350. The settlement was approved.

**Order No. 4020075**

13. This ' 104(d)(2) order, issued on January 27, 1993, charges a violation of 30 C.F.R. ' 77.1001.

14. Inspector Billy Damron observed loose materials, including blasted rock, dirt and uprooted trees, on the highwall of the No. 2 pit. The highwall was about 65 feet high. A bulldozer was operating beneath the highwall.

## Order No. 4020076

15. This ' 104(d)(2) order, issued on January 27, 1993, charges a violation of 30 C.F.R. ' 77.1001.

16. Inspector Billy Damron observed loose rocks and loose boulders on the face and top of the highwall in the No. 1 pit. The highwall was 90 to 100 feet high. He also observed a loose boulder, loose rocks, and dirt on the spoil bank side, which was about 60 feet high. Men and equipment were operating in the pit. The inspector observed fresh tire tracks indicating that the end loader was operating parallel to the spoil bank. He also observed footprints near the bottom of the spoil bank.

## DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

## Citation No. 4020202

Section 77.405(b) provides that "No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position."

The operator allowed a miner to work on a wheel under the raised bed of a 15-ton coal dump truck, loaded with 30 tons of coal, without blocking the raised truck bed and axle.

When Inspector Cure first saw the truck, in front of a truck shop, a group of miners were standing around the truck with their foreman, Respondent Tracy Damron. The inspector approached the truck to talk to the foreman about other equipment he wanted to inspect. He noticed that the truck was loaded and a crib was stacked behind the truck. However, the truck bed was not elevated. He left the shop area to inspect other vehicles. Later, from a distance he noticed that the loaded truck bed was raised. He drove to the truck shop to see what was happening. As he approached, he saw the hydraulic bed was elevated to press on the crib and the left rear wheel was raised. A miner was reaching in to handle the lug nuts on the elevated wheel. Some of the men scattered as the inspector approached. The foreman quickly stopped the work on the wheel, had the truck bed and wheel lowered, and then got a 20-ton jack to try to raise the rear axle and wheel. It would not lift the axle. The inspector issued Citation No. 4020202 to Foreman Damron.

Foreman Damron testified there were two 20-ton jacks under the axle when the inspector saw the raised truck bed and a miner working on the wheel. I do not accept this testimony. I find that there was no jack under the axle when the inspector saw a

miner handling the lug nuts when the truck bed and wheel were raised.

The president of the company, Respondent Mitch Potter, testified concerning the company's practice of changing rear tires on coal trucks. He was not present during Inspector Cure's inspection. Mr. Potter testified that the company practice was to stack a wooden crib behind the truck, raise the truck bed to press on the crib to relieve pressure on the wheel, and use two jacks to lift the axle on the side of the flat tire. He did not know what practice or conditions were observed by Inspector Cure on the day in question.

Contrary to the practice contended by Mr. Potter, Inspector Cure observed that the hydraulic truck bed and left rear wheel were raised without using a jack. A miner was handling the lug nuts when the inspector observed the raised bed and wheel.

The miner was working "under . . . machinery or equipment" within the meaning of the regulation because the wheel he was working on was under the elevated truck bed and truck frame. If the truck bed fell the wheel may have been jarred loose and fallen on him, the truck frame may have struck him, or the tire may have crushed a foot. If he was handling the lug nuts when the truck bed fell he may have received severe hand injuries.

The violation was "significant and substantial" in that it was reasonable likely to result in serious injury if this practice of shortcutting safety devices continued in normal mining operations. Mathies Coal Co., 6 FMSHRC 1 (1984).

Because the truck was not designed to lift a wheel in the manner used by the mine operator, and jacks were available and designed for that purpose, the operator was highly negligent in shortcutting safety devices and endangering a miner. The violation was therefore "unwarrantable" within the meaning of ' 104(d)(1) of the Act. Rochester & Pittsburgh Coal Co., 13 FMSHRC 189 (1991).

In addition to citing the corporation, the Secretary charged Tracy Damron individually under ' 110(c) of the Act, which provides in part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines and

> imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

Section 3(c) of the Act defines "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine." Foreman Damron was an agent of the corporation.

The Commission has interpreted the term "knowingly" in ' 110(c) 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 [citation omitted]. We believe this interpretation is consistent with both the statutory language and the remedial nature 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.

Secretary v. Kenny Richardson, 3 FMSHRC 8,16 (1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

Foreman Damron was present while the tire was being changed in an unsafe manner in violation of 30 C.F.R.' 77.405(b). As the inspector approached the truck, some men scattered and the foreman quickly had the truck bed and wheel lowered. He then got a 20-ton jack and attempted unsuccessfully to raise the rear wheel. The foreman's effort to cover up his method of changing a tire is strong evidence of his knowledge of a violation. I find that Foreman Damron "knowingly authorized, ordered, or carried out" the violation alleged in Citation No. 4020202, within the meaning of ' 110(c) of the Act. I find that he was highly negligent.

Considering all of the criteria for civil penalties in ' 110(i) of the Act, I find that a penalty of $5,000 is appropriate for the corporation and a penalty of $2,500 is appropriate for Foreman Tracy Damron, for the violation cited in Citation No. 4020202.

**Order No. 4020210**

This order was issued under ' 104(d)(1) of the Act, charging a violation of 30 C.F.R. ' 77.1001.

On August 18, 1992, Inspector Butch Cure observed loose and unconsolidated material in the form of large and small rocks and boulders on the spoil side of the highwall in No. 3 1/2 pit. The highwall was about 25 feet high and 200 feet long.

The inspector testified that the loose material presented a hazard to the drivers of four pieces of equipment operating below the spoil bank.

Mr. Ed Brown, an engineer, testified for the operator regarding the likelihood of injury from rocks falling on the end loader operating beneath the spoil bank. He found the risk of injury to be remote if the end loader operated at a perpendicular angle to the spoil bank but increased as the angle approached a position parallel to the spoil bank.

I find that there was a reasonable likelihood that the loose material on the spoil bank would slough or roll off striking equipment or miners and causing serious injuries. The violation was thus significant and substantial.

The operator had been cited for a violation of the same standard on the same highwall less than two weeks before this violation. The same foreman, Tracy Damron, was in charge on both occasions. Upon issuing the prior citation, Inspector Cure spoke to Foreman Damron about the hazards of loose material on the highwall. I find that the foreman's disregard of the hazards on August 18, 1992, was serious and shows aggravated conduct beyond ordinary negligence. I therefore find that the violation was "unwarrantable" within the meaning of ' 104(d)(1) of the Act.

The Secretary also charged Foreman Damron with individual liability for this violation, under ' 110(c) of the Act.

Foreman Damron was aware of the hazardous conditions because he conducted a daily examination of the work site before Inspector Cure arrived. I find that the foreman knowingly authorized, ordered, or carried out the violation cited in Order No. 4020210, within the meaning of ' 110(c) of the Act.

Considering all of the criteria for civil penalties in

' 110(i) of the Act, I find that a penalty of $8,000 is appropriate for the corporation and a penalty of $3,000 is appropriate for Foreman Tracy Damron for the violation cited in Order No. 4020210.

**Order No. 4020075**

This order was issued under ' 104(d)(2) of the Act, charging a violation of 30 C.F.R. ' 77.1001.

On January 27, 1993, Inspector Billy Damron observed loose and unconsolidated material in the form of blasted rock, dirt and trees on the highwall and spoil bank in No. 2 pit. The highwall was about 65 feet high. The inspector observed a bulldozer operating beneath the highwall.

The operator had been issued 17 charges of violations of the same standard within about six months, and had been issued two charges for violating the same standard during the last inspection. The same foreman, Tracy Damron, was in charge on the previous inspection and the day that Order No. 4020075 was issued. I find that Foreman Damron's disregard of hazardous, loose materials on the highwall and spoil bank shows aggravated conduct beyond ordinary negligence. The violation on January 27, 1993, was therefore unwarrantable. The violation was reasonably likely to result in serious injury, and therefore was significant and substantial.

In addition to charging the corporation, the Secretary charged Foreman Tracy Damron individually under ' 110(c).

Foreman Damron was in charge and conducted a daily examination of the pit before the inspection. I find that he knew about the hazardous conditions. For the reasons discussed as to other violations of ' 77.1001 by Foreman Damron, above, I find that Foreman Damron knowingly authorized, ordered, or carried out the violation on January 27, 1993, within the meaning of
' 110(c).

Considering all of the criteria for civil penalties in ' 110(i), I find that a penalty of $10,000 is appropriate for the corporation and a penalty of $4,000 is appropriate for Foreman Tracy Damron for the violation cited in Order No. 4020075.

**Order No. 4020076**

This ' 104(d)(2) order was issued on the same day as Order No. 4020075.

Inspector Billy Damron observed loose, hazardous material in the form of rocks and boulders on the face and top of a highwall in No. 1 pit. The highwall was about 90 to 100 feet high. He observed a front-end loader and coal trucks operating beneath the highwall.

Inspector Damron also observed a large boulder and loose rocks and dirt on the spoil bank side, about 60 feet high. The inspector observed fresh tire tracks indicating the end loader was operating parallel to the spoil bank. He also observed miners working in the pit and footprints near the bottom of the spoil bank.

The corporation had been issued two charges of violating the same standard in the previous inspection and the same foreman, Tracy Damron, was in charge on both inspections.

I find that Foreman Damron's disregard of the hazards discovered by the inspector shows aggravated conduct beyond ordinary negligence. The violation was therefore unwarrantable within the meaning of ' 104(d) of the Act.

The violation was reasonably likely to result in serious injury, and therefore was significant and substantial.

The Secretary charged Foreman Damron individually under ' 110(c). He was in charge on January 27, 1993, and he had conducted a daily examination of the pit before the inspector arrived. Foreman Damron was also the foreman in charge when two citations were issued for violations of the same standard during the previous inspection within six months of the date when Order No. 4040076 was issued. I find that Foreman Damron knowingly authorized, ordered, or carried out the violation cited in Order No. 4020076 within the meaning of ' 110(c).

Considering all of the criteria for civil penalties in ' 110(i) of the Act, I find that a penalty of $10,000 is appropriate for the corporation and a penalty of $4,000 is appropriate for Foreman Tracy Damron for the violation cited in Order No. 4020076.

## Section 110(c) Charges Against Mitch Potter

The Secretary also charged Mitch Potter, president of the corporation, with individual liability under' 110(c) concerning the violations cited in Order Nos. 4020075 and 4020076.

Mr. Potter supervised the day-to-day operations of the corporation. He was present at Mine No. 9 on January 27, 1993, and was aware of the conditions of the highwalls involved in the two orders before the inspection. Also, Mr. Potter was aware of previous citations issued by Inspector Cure for similar violations of the same standard. I find that Mr. Potter was in a position to prevent the violations found on January 27, 1993, but failed to take action to do so. I find that he knowingly authorized, ordered, or carried out the violations charged in Order Nos. 4020075 and 4020076, within the meaning of' 110(c).

Considering all of the criteria for civil penalties in ' 110(i), I find that a civil penalty of $6,000 against Mr. Potter is appropriate for the violation charged in Order No. 4020075 and a civil penalty of $6,000 against Mr. Potter is appropriate for the violation charged in Order No. 4020076.

## CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent Sunny Ridge Mining Co., Inc., violated the safety standards as alleged in Citation Nos. 4020202, 4228207 and 4020074, and in Order Nos. 4020210, 4020075, and 4020076.

3. Respondent Tracy Damron knowingly authorized, ordered, or carried out the violations alleged in Citation No. 4020202, and in Order Nos. 4020210, 4020075, and 4020076 within the meaning ' 110(c) of the Act.

4. Respondent Mitch Potter knowingly authorized, ordered, or carried out the violations alleged in Order Nos. 4020075 and 4020076 within the meaning of ' 110(c) of the Act.

## ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent Sunny Ridge Mining Co., Inc., shall pay civil penalties of $33,700 within 30 days of the date of this Decision.

2. Respondent Tracy Damron shall pay civil penalties of $13,500 within 30 days of the date of this Decision.

3. Respondent Mitch Potter shall pay civil penalties of $12,000 within 30 days of the date of this Decision.

William Fauver
Administrative Law Judge

Distribution:

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Reed D. Anderson, Esq., Harris & Anderson, P.O. Box 279, Pikeville, KY 41502 (Certified Mail)

/lt