# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 21, 1995

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. KENT 94-1225 |
| | : | A.C. No. 15-17296-03512S |
| v. | : | |
| | : | Mine: #5 |
| COUGAR COAL COMPANY, Respondent | : | |

## DECISION

Appearances: Mark Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Link Chapman, Safety Director, Cougar Coal Company, Lovely, Kentucky, for Respondent.

Before: Judge Amchan

In the wake of at least two recent underground explosions attributed to miner smoking, MSHA performed numerous simultaneous inspections to determine the effectiveness of its efforts to prevent such tragedies. On May 19, 1994, the agency conducted a "smoking sweep" at 175 mines.

MSHA determined that to insure maximum effectiveness of these inspections, it was necessary to maintain as much secrecy as possible regarding the smoking sweep. Instructions to local MSHA offices were sent out after working hours on May 18, 1994, so that personnel performing these inspections did not know about their task until they arrived at work on the morning of May 19.

The inspectors were instructed to tell operator personnel above ground that underground personnel were not to be informed that MSHA representatives were at the site. Inspectors were also instructed not to tell operator personnel the purpose of the inspection or the reasons for their request for secrecy (Tr. 42).

The agency teams consisted of three people, two inspectors who travelled underground and another person who stayed above ground to monitor communications between operator personnel above ground and those below. Secrecy was intended to prevent miners from having an opportunity to dispose of or hide smoking materials before the arrival of the inspectors at the miners' underground work areas.

Of the 175 mines visited in this smoking sweep, the desired element of surprise was achieved at all but five (Tr. 22). Smoking materials were found at 17 of the 170 mines at which secrecy was maintained. No such items were found at the five mines where underground miners had some degree of forewarning as to the inspectors' presence (Tr. 22).

Respondent's No. 5 mine in Johnson County, Kentucky, was one of the 175 mines visited during the sweep. The inspection team at this mine included Coal Mine Inspectors Danny Tackett and Charles Moore, and Education and Training Specialist Wanda Vanhoose. Upon their arrival at the mine, the MSHA inspection team met Respondent's superintendent, James Osborn, and his son, John Osborn, who worked above ground.

Mr. Tackett's account of what transpired is as follows:

> ... we advised Mr. Osborn that we were going underground and we requested that he not inform his people underground that we were there and coming underground (Tr. 40).
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> * * * * *
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> I asked him not to notify the underground employees that we were there and coming underground. And Mr. Osborn stated that it was Company Policy that they notify the undergrc
>
> I suggested that he call Mr. Chapman, [the] safety director, or some of the other management personnel, and discuss that with them prior to letting them know that we were coming in. (Tr. 41-42).

A few minutes later Section Foreman Mike Castle called Osborn from underground and asked that he restore power to a

high-voltage cable that Respondent had been having trouble with that morning. Osborn told Castle he could not restore power because there were three federal inspectors in his office who were ready to come underground (Tr. 43). Although he said nothing about it at the time, Osborn later stated that he was concerned with the inspectors' safety (Tr. 59-60, 76).

Inspectors Tackett and Moore proceeded underground to the working section. It took them 20 minutes to reach the working section. During that period there were several phone calls between Superintendent Osborn and Respondent's personnel underground, during which Osborn inquired whether the MSHA inspectors had reached the section (Tr. 77).

When the inspectors arrived at the section, production activities were not underway. Tackett and Moore asked Foreman Castle to assemble all the miners and conduct a body search and a search of their lunch buckets for smoking materials. Castle did so and found nothing (Tr. 46-47). The inspectors searched the continuous mining machine, the roof bolting machine and the shuttle car and also found no smoking materials (Tr.58)[1].

MSHA issued Respondent Citation No. 4517561 alleging that it violated ' 103(a) of the Act in notifying the underground employees of the inspectors' presence after being asked not to do so. Cougar's negligence was characterized as "reckless disregard" and a $8,250 civil penalty was proposed for this alleged violation.

The Secretary contends that by notifying its underground employees of the inspector's presence, Respondent effectively denied him the right of entry into a coal mine granted by ' 103(a). Section 103(a) provides that authorized representatives of the Secretary shall make frequent inspections and investigations in coal or other mines for several purposes,

[1]During this inspection Tackett and Moore were only looking for violations of regulations relating to smoking and smoking materials (Tr. 59). However, if they had observed other types of violations, which they did not, they would have cited Respondent for them (Tr. 59).

including compliance with mandatory health and safety standards.

This provision also states that the Secretary shall have a right of entry to, upon, or through any coal or other mine for the purpose of making any inspection or investigation under the Act. The Secretary argues, and I agree, that this "right of entry" is broader than merely giving the Secretary a right to physically enter the mine. It includes the right to use any investigatory technique reasonably related to the discovery of violations, so long as it is employed within reasonable limits and in a reasonable manner. See Donovan v. Enterprise Foundry, Inc., 751 F.2d 30 (1st Cir. 1984).

MSHA's request or demand that surface personnel not alert underground personnel to the inspectors' presence in the smoking sweep investigations was a reasonable investigative technique which the agency was entitled to employ[2]. The prohibition against smoking and smoking materials underground and the requirement that operators develop programs to insure that smoking materials not be carried underground was enacted by Congress as part of the 1969 Coal Act, 30 U.S.C. ' 877(c). MSHA's regulatory prohibitions at 30 C.F.R. '' 75.1702 and 75.1702-1 simply track the statutory requirements.

The legislative history of the 1969 Act noted that Bureau of Mines' records indicated that there had been 28 actual and nine possible gas ignitions or explosions that were caused by smoking materials between 1952 and 1968. As a result of these

[2]I deem it unimportant that Inspector Tackett's testimony indicates that he requested, rather than demanded, that Osborn not alert underground personnel to MSHA's presence. In the context of an MSHA inspection, regardless of the words chosen, a reasonably prudent operator should deem such a "request" to also be a demand.

incidents, 38 miners were injured and 13 were killed, Section by Section Analysis accompanying Senate Report 91-411, 91st Cong. 1st Session, Legislative History of 1969 Coal Act at 51.

It was obviously very important to Congress that the government be able to take effective measures to prevent smoking-related ignitions and explosions. In light of the congressional purpose and the recent fatal explosions which MSHA believes are smoking-related, its insistence on secrecy until it arrived at the working sections was reasonable.

MSHA's right of entry includes the right to be free from interference from the mine operator that would frustrate its legitimate objectives. United States Steel Corporation, 6 FMSHRC 1423 (June 1984), Calvin Black Enterprises, 7 FMSHRC 1151 (August 1985). Thus, in United States Steel Corporation, the Commission affirmed a citation alleging a violation of ' 103 of the Act when the operator refused to provide transportation to an inspector which effectively prevented him from inspecting an accident scene.

Similarly, in Calvin Black Enterprises, the Commission affirmed a citation issued for violation of ' 103(a) when an operator refused to allow an inspection without advance written permission. Although Black involves operator conduct directly in conflict with the Act's prohibition against providing advance notice of an inspection, I conclude that it also violates ' 103(a) to interfere with MSHA's use of any reasonable inspection technique.

In summary, when Superintendent Osborn informed his underground foreman of the inspectors' presence on May 19, 1994, Respondent violated ' 103(a) of the Act. Although Osborn may have had subjective reasons for not complying with the inspectors' request, I view these reasons as being relevant to size of the civil penalty to be assessed, rather than to the question of whether the superintendent's conduct violated the Act.

Mr. Osborn may have had some concerns about the inspectors' safety. These concerns do not, however, excuse his failure to comply with the inspectors' request. Moreover, there is nothing

in the record to indicate that he explained his concerns to the inspectors prior to informing his foreman of the inspectors' presence (Tr. 59-60, 76).

From an objective standpoint, or that of a reasonably prudent person in Mr. Osborn's situation, his concerns do not appear to have been legitimate. There was a possibility that the inspectors could have been injured by the high-voltage cable when power to it was being restored. However, there were several feasible means of preventing such injury other than informing his underground foreman of the inspectors' presence.

Obvious alternatives would be to ask the inspectors to delay their trip underground until he restored power or to discuss with the inspectors a route that would avoid or minimize exposure to the cable (Tr. 94). Finally, Osborn conceded that he could have left the power off until the inspectors reached the working section (Tr. 87).

Although Respondent also cites its company policy that the section foreman must be informed before any person enters a section, a company policy does not take precedence over MSHA's statutory right of entry. In Calvin Black Enterprises, the operator could not circumvent the prohibition against advance notice by instituting an inconsistent company policy. Similarly, Respondent is not entitled to rely on a company policy to prevent MSHA from employing a reasonable investigatory technique that is encompassed in its right of entry. Moreover, Superintendent Osborn conceded that his understanding of the company policy was that it did not apply to MSHA inspectors (Tr. 91).

## Assessment of a Civil Penalty

MSHA proposed a civil penalty of $8,250 in this case. After considering the penalty assessment criteria in ' 110(i) of the Act, I conclude that this proposal is too high and that a civil penalty of $1,000 is appropriate given the facts of this case.

The evidence regarding the operator's history of previous violations is of little value in assessing a penalty. Exhibit P-7 indicates that Respondent has been cited for 30 violations between September 1992 and May 19, 1994. Nothing in this record indicates the significance of this record. Respondent has apparently never been cited for an inadequate search program for smoking materials. Thus, I find Respondent's prior violation history largely irrelevant to the size of the penalty.

The size of Respondent's business is similarly of marginal value at arriving at an appropriate penalty. Exhibit 8 indicates that Respondent produced 269,706 tons of coal in the last year for which MSHA has data. However, Beech Fork Mining Company, which controls Respondent, produced over 1,800,000 tons (Exh-8, Tr. 23). According to Table II of 30 C.F.R. ' 100.3, MSHA considers Beech Fork a medium sized operator.

There is nothing in the record that suggests the $8,250 proposed penalty would jeopardize Respondent's ability to stay in business. Similarly, the good faith rapid abatement penalty factor is irrelevant to this case. Once Mr. Osborn informed his foreman of the inspector's presence, the benefit of surprise in conducting the inspection was permanently lost.

It is difficult to assess the gravity of the violation because there is no way of knowing whether anyone had smoking materials they were able to dispose of in the 20 minutes it took the inspectors to reach the working section. There is no indication that Respondent's smoking search program was inadequate, or that anyone had ever been caught with smoking materials (Tr. 55, 83-84). However, it is always possible that a miner had such items with him underground on May 19, 1994. Given this uncertainty, I conclude gravity to be largely irrelevant in arriving at an appropriate civil penalty.

The penalty factor most relevant in assessing this penalty is Respondent's negligence, or intent, in interfering with the Secretary's right of entry. Mr. Osborn obviously did not have a specific intent to frustrate the search for smoking materials since he did not know that was the purpose of the inspectors' visit (Tr. 42, 87).

Even though the inspectors observed no violations during their trip to the working section and back (Tr. 59), forewarning of the inspectors' presence may be useful in avoiding citations for certain types of violations. It is impossible to know whether this occurred to or motivated Mr. Osborn. In any event, I do not impute any improper intent to the superintendent. It is also important to keep in mind that Osborn did not initiate the call to Foreman Castle and that he did need to respond to Castle's request for power (Tr. 43-44).

Given his discussion with the inspectors prior to receiving Mr. Castle's call and lack of objectively good reasons for not honoring their request, I believe Mr. Osborn was moderately negligent in advising Castle of the MSHA's presence at the mine. I believe his negligence, given the circumstances, warrants a

civil penalty of $1,000.

## ORDER

Citation No. 4517561 is affirmed and a civil penalty of $1,000 is assessed. This penalty shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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