

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

August 18, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-308
Petitioner	:	A. C. No. 15-07475-03560 A
v.	:	
	:	
ROGER RICHARDSON,	:	
Respondent	:	No. 1 Mine

DECISION

Appearances: Keith E. Bell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., Lexington, Kentucky, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Roger Richardson as an agent of corporate mine operator Solid Energy Mining Company (Solid Energy) with "knowingly authorizing, ordering, or carrying out" a violation on February 28, 1999, of the mandatory standard at 30 C.F.R. § 75. 370(a)(1). The general issue before me is whether Mr. Richardson indeed knowingly authorized, ordered or carried out the noted violation and, if so, what is the appropriate civil penalty to be assessed considering the relevant criteria under Section 110(i) of the Act.

Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1982), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord*, *Freeman United Coal Mining Co., v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly when he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3

FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

It is undisputed that, during relevant times, Mr. Richardson was an agent of corporate operator Solid Energy. The underlying violation as set forth in Citation No. 4495489, is also undisputed. Those charges are set forth as follows:

The operator failed to comply with the approved ventilation plan for the 003 mm bleeder system in that the coal pillars that were required to be left to control the airflow direction through the pillared area and to provide a safe travel-way for examinations have been second mined. The bleeder block in the 4th Southwest Submain starting one break outby spad 4128 and continuing outby one break from spad 3938 have been second mined. The bleeder block in the G-5 panel starting at spad 4718 and continuing inby 5 breaker have also been second mined. The second mining of these bleeder blocks requires the mine examiner to go inby pillared areas to perform weekly examinations.

The only issue remaining for disposition then is whether Richardson, as an agent of Solid Energy, knew or had reason to know of the violative condition before it was cited.

At the time of the violation, the subject underground coal mine had two portals, the Turkey Creek portal and the Long Fork Portal. The Long Fork Portal was originally developed in the 1970's and was reactivated as a separate mine in 1994 or 1995. The Turkey Creek Portal, located six miles away, was opened as a separate mine with its own Mine Safety and Health Administration (MSHA) identification number. The Turkey Creek Portal was later connected with the Long Fork portal and, in late 1995, they had a common identification number. Once connected, the portals shared one ventilation system. The relevant legal identification report filed with MSHA (Gov. Exh. No. 2) identifies the Respondent, Roger Richardson, as superintendent and as the "person at mine in charge of health and safety (superintendent or principal officer)."

During relevant times the day-to-day management and operation of the Turkey Creek Portal, with one active section, was the responsibility of mine foreman Gary Goff. At the Long Fork Portal, with two active sections, Roger Richardson was in charge. Richardson, as mine superintendent, also had the overall responsibility for common issues or problems overlapping the two portals. In this regard, even Richardson himself acknowledged that the violative conditions cited herein would have been the type of problem for which he should have been advised and for which he would have taken corrective action had he known of their existence.

The Secretary implies that, because of Richardson's position as mine superintendent, he should have known of the violative condition. The Secretary also maintains that when interviewed on March 26, 1998, at a "Part 100" closeout conference after charges were brought against Richardson, he made incriminating admissions. Richardson was unrepresented at this

conference and appeared against the advice of counsel. The interview was not recorded by tape or verbatim transcription. Some notes were apparently taken by MSHA Special Investigator Michael Belcher of the interview conducted by MSHA District Manager South and those notes were given to South who subsequently prepared a report. Neither Belcher's notes nor Mr. South were present at trial.

Testifying from his recollection and with the assistance of the "conference worksheet" prepared by South, Belcher testified that Richardson stated at this closeout conference that he learned from the mining engineer (presumably Billy Smith) several days after the fact, that Gary Goff had been mining the bleeder blocks. Richardson purportedly then told Gary Goff that this practice must be stopped but purportedly also admitted that he did not follow up on these purported orders to Goff. Belcher acknowledged that he did not know the whereabouts of his notes of the closeout conference interview. Belcher also acknowledged that Richardson was never shown these notes nor the report containing his purported statement to attest to their accuracy.

Richardson testified credibly at hearing however, that he was relating to the MSHA representatives at this closeout conference only what he was told about a meeting and conversation between Larry Robinette, the underground general mine manager, and Billy Smith, the mine engineer and the telephone conversation between Smith and Goff in the presence of Robinette. Richardson maintains that he was not a part of, nor privy to, those conversations and credibly testified that he had no knowledge before the issuance of the citation, that the bleeder blocks had been mined. Richardson's testimony is corroborated by the credible testimony of other witnesses, including Larry Robinette, Billy Smith and Gary Goff.

Robinette testified that in mid February, about two weeks before the citation was issued, he learned that the bleeder blocks were being second mined in the Turkey Creek Portal. He was present when Billy Smith, the mine engineer called Goff and told him to stop cutting the bleeder blocks. Robinette himself did not tell Richardson of the problem and did not know whether Richardson was aware of it at that time. He did not tell Richardson because Goff reported directly to him and not Richardson. Gary Goff, mine foreman at the Turkey Creek Portal, testified that he never told Richardson about cutting the bleeder blocks and did not believe Richardson had any knowledge of that fact.

Finally, Billy Smith testified that he first became aware on February 14, at a mid-month markup meeting, that the bleeder blocks had been cut. Reports of the mine map that had been transmitted to him showed that secondary mining had been done on two of the bleeder blocks. According to Smith, he then called Gary Goff at the Turkey Creek Portal and told Smith that they had no approved plans to mine the bleeder blocks and that they should stop that procedure. According to Smith, Goff agreed to tell his men and to stop the procedure. Smith later learned after the citation had been issued that additional blocks had been mined even after this conversation. Smith also testified that he had never notified Richardson of the problem before the citation was issued and, at a subsequent meeting, agreed with Richardson that he should have told Richardson at the time.

Under all the circumstances I conclude that the MSHA representatives attending the

closeout conference misunderstood Richardson's statement. There is indeed no credible evidence that Richardson in fact knew of the violative practice prior to the issuance of the citation. MSHA's failure to have recorded or transcribed Richardson's statement is most unfortunate and has caused unwarranted hardship to Richardson. In this case MSHA failed to even follow its customary past practice of summarizing a witness statement in writing and having the cooperating witness then sign and attest to its accuracy. In any event, the Secretary has failed to sustain of her burden of proving that Richardson knew or had reason to know of the cited violative condition prior to the issuance of the citation.

ORDER

Docket No. KENT 98-308 is dismissed.

Gary Melick
Administrative Law Judge

Distribution:

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

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, 415 Second Street, P.O. Box 351, Pikeville, KY 41502 (Certified Mail)

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